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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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Assistant Clerk
Shelley Lucas Edwards

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Director
Leslie Hollowell Davis[14]
Jaye E. Bingham-Hinch[15]

Assistant Director
David Alan Lagos

Staff Attorneys
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Michael W. Rodgers
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ADAM BICKLEY, PLAINTIFF
v.
FREDERIC (A.K.A FRED) FORDIN AND MILLENIUM 3 AUTOMOTIVE CONSULTANTS, LLC, AND ASR PRO, LLC, DEFENDANTS

No. COA17-185

Filed 20 February 2018

1. Unfair Trade Practices—directed verdict—repurchase of interest in closely held company from shareholder

The trial court did not err by granting directed verdict for defendants (majority shareholder and closely held corporations) on an unfair and deceptive trade practices (UDTP) claim based on defendant shareholder's representations about defendant company to induce plaintiff shareholder to sell back his 10% interest in the company. The repurchase of an interest in a closely held company from a shareholder does not fall within the scope of the UDTP Act, N.C.G.S. § 75-1.1.

2. Fraud—elements—repurchase of interest in corporation

The trial court did not err in an action concerning the repurchase of a 10% interest in a closely held company from plaintiff shareholder by declining to grant directed verdict in favor of defendants (majority shareholder and corporations) on plaintiff's claim for fraud. Considered in the light most favorable to plaintiff, evidence suggested that defendant shareholder threatened to bankrupt the company, even though he had no intention of doing so, in order to force plaintiff to sell his interest in the company, and that plaintiff's drug conviction may not have discouraged a potential investor.

3. Fraud—constructive—breach of fiduciary duty—repurchase of interest in corporation

The trial court did not err in an action concerning the repurchase of a 10% interest in a closely held company from plaintiff shareholder by declining to grant directed verdict in favor of defendants (majority shareholder and corporations) on plaintiff's claims for constructive fraud and breach of fiduciary duty. Plaintiff presented evidence that defendant majority shareholder ran the business and controlled its finances but failed to disclose any details of the business's financial situation when he asked plaintiff to sell back his shares; further, plaintiff presented evidence that the company did have value greater than zero at the time of defendant's demand.

4. Jury—verdict—compromise verdict—average of what plaintiff and defendant sought

Even though the jury's award of $505,000 to plaintiff was the average of what plaintiff sought and what defendant offered, the dollar amount of the jury's award, standing alone, was not enough to establish an unlawful compromise verdict.

Appeal by Defendants and cross-appeal by Plaintiff from order and final judgment entered 22 August 2016 by Judge G. Wayne Abernathy in Wake County Superior Court. Heard in the Court of Appeals 24 August 2017.

The Farrell Law Group, P.C., by Richard W. Farrell, for the Plaintiff-Appellee/Cross Appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and K. Edward Greene, for the Defendants-Appellants/Cross Appellees.

DILLON, Judge.

Both parties appeal from the order and final judgment of the trial court, awarding Plaintiff $550,762.20.

I. Background

In 2003, Defendant Frederic Fordin formed Millenium 3 Automotive Consultants, LLC ("M3 LLC"). M3 LLC's primary asset was its ongoing development of software called "ASR Pro," which was intended to be marketed to the used car dealership industry. At all relevant times, Defendant Fordin was the majority owner and managing member of M3 LLC.

In 2006, Plaintiff Adam Bickley purchased a 10% interest in M3 LLC for $50,000. Shortly thereafter, however, Plaintiff was sentenced to serve two years in prison after pleading guilty to drug charges.

In October 2008, Defendant Fordin approached Plaintiff, expressing his concern that the conviction would adversely affect M3 LLC's prospects of becoming viable. Defendant Fordin offered to repurchase Plaintiff's 10% interest in M3 LLC for $50,000 in the form of a promissory note. Defendant Fordin drafted a written repurchase agreement (the "2008 Agreement"), telling Plaintiff that "he would bankrupt the company if [Mr. Bickley] didn't sign [the agreement]." Mr. Bickley signed the agreement in October 2008.

In December 2009, Mr. Fordin formed a new company, Defendant ASR Pro, LLC, ("ASRP LLC") and arranged for ASRP LLC to purchase the ASR Pro software from M3 LLC. Every member of M3 LLC was given a minority stake in ASRP LLC.

In 2014, ASRP LLC sold the ASR Pro software to an independent company for approximately $14 million.

In December 2015, Plaintiff filed a complaint seeking damages from Defendants based on Defendant Fordin's actions in procuring Plaintiff's signature on the 2008 Agreement.

The trial court granted Defendants' motion for a directed verdict on Plaintiff's claim for unfair and deceptive trade practice ("UDTP"), but ruled that, as a matter of law, M3 LLC had breached its contract to pay Mr. Bickley $50,000 for his 10% interest in the company. The jury found in favor of Plaintiff on his other claims for fraud, constructive fraud, and breach of fiduciary duty, and awarded $505,000 in damages. The jury declined to award punitive damages.

In its order and final judgment, the trial court awarded Plaintiff a total of $550,762.20. The trial court denied Plaintiff's motion for attorneys' fees. Both parties appealed.

II. Analysis

Defendants contend that the trial court erred in failing to grant directed verdict in their favor on Mr. Bickley's claims for fraud, constructive fraud, and breach of fiduciary duty.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. If there is evidence to support each

> element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied. . . . Whether [a party is] entitled to a directed verdict [] is a question of law. We review questions of law *de novo*.

Green v. Freeman, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (internal marks and citations omitted). Guided by our standard of review, we address each of the parties' arguments in turn.

A. Plaintiff's Appeal

[1] On appeal, Plaintiff challenges the trial court's grant of directed verdict for the Defendants on his UDTP claim, a claim based on Defendant Fordin's representations concerning M3 LLC to induce Plaintiff to sell back his 10% interest in the company. We conclude that the trial court did not err. Specifically, as explained below, the repurchase of an interest in a closely held company from a shareholder does not fall within the scope of the UDTP Act.

The UDTP Act provides, in relevant part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1 (2015). Our Supreme Court has observed that the history of the Act indicates that the General Assembly was targeting "unfair and deceptive interactions *between* market participants." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010) (emphasis added). For instance, our Supreme Court has explained:

> Essentially, the General Assembly indicated through its original statement of purpose that the Act was designed to achieve fairness in dealings between individual market participants. To accomplish this goal, the General Assembly explained that the Act would regulate two types of interactions in the business setting: (1) *interactions between businesses*, and (2) *interactions between businesses and consumers*.

Id. (emphasis added); *see also Bhatti v. Buckland*, 328 N.C. 240, 245-46, 400 S.E.2d 440, 443-44 (1991).

Therefore, as our Supreme Court has observed, "the General Assembly did not intend for the Act's protections to extend to a business's *internal* operations." *White*, 364 N.C. at 53, 691 S.E.2d at 680 (emphasis added). "[T]he Act is not focused on the internal conduct of

individuals within a single market participant, that is, within a single business." *Id.*

> As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the Act. As the foregoing indicates, [our Supreme] Court has previously determined that the General Assembly did not intend for the Act to intrude into the internal operations of a single market participant.

Id.

Here, as in *Thompson*, the bad acts as alleged "did not occur in . . . dealings with [other market participants]." *Id.* Rather, the transaction which forms the basis of Plaintiff's claim under the Act is more appropriately classified as internal conduct between two owners of a single business, M3 LLC. As such, being a transaction confined to M3 LLC, and not involving any other market participant, we hold that the transaction whereby Plaintiff agreed to sell back his 10% interest falls outside the scope of the UDTP Act.

As an alternative reason for our holding, we believe that this transaction is analogous to a securities transaction, which our Supreme Court has repeatedly explained does not fall within the scope of the UDTP Act. *See HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). Specifically, our Supreme Court reasoned as follows:

> Issuance and redemption of securities are not in this sense business activities. . . . Subsequent transfer of securities merely works a change in ownership of the security itself. Again, this is not a business activity of the issuing enterprise. Similarly, retirement of the security by the issuing enterprise simply removes the security from the capital structure. Like issuance and transfer of the security, retirement is not a business activity which the issuing enterprise was organized to conduct.
>
> Securities transactions are related to the creation, transfer, or retirement of capital. Unlike regular purchase and sale of goods, or whatever else the enterprise was organized to do, they are not "business activities" as that term is used in the [UDTP] Act. They are not, therefore, "in or affecting commerce," even under a reasonably broad interpretation of the legislative intent underlying these terms.

Id.

In the present case, it is unclear whether Plaintiff's 10% interest in M3 LLC was technically a "security." *See* N.C. Gen. Stat. § 25-8-103(c) (2015) (stating that an interest in a limited liability company is not a security unless certain other criteria are met). Notwithstanding, we believe that the reasoning by our Supreme Court in the quote above supports our conclusion that the transaction whereby Plaintiff agreed to sell back his 10% interest in M3 LLC does not fall within the scope of the UDTP Act.

Accordingly, we conclude that the trial court properly granted directed verdict for Defendants on Plaintiff's UDTP claim.

B. Defendants' Cross-Appeal

Defendants contend that the trial court erred in failing to grant Defendants' motions for directed verdict on Plaintiff's fraud claim, constructive fraud claim, and claim for breach of fiduciary duty. These three issues were ultimately submitted to the jury and formed the basis of the jury's verdict.

In considering these claims, we are only concerned with whether, when considered in the light most favorable to Plaintiff, there was enough evidence of each element to warrant submission of the claim to the jury. *See Green*, 367 N.C. at 140-41, 749 S.E.2d at 267. We must accept Plaintiff's evidence as true, and resolve all contradictions, conflicts, and inconsistencies in the evidence in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). Evidence offered by a defendant, when favorable to the plaintiff, is to be considered as well. *Godwin v. Johnson Cotton Co.*, 238 N.C. 627, 629, 78 S.E.2d 772, 773 (1953). And "[w]here the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 669-70, 231 S.E.2d 678, 680 (1977).

For the reasons stated below, we hold that the trial court properly denied Defendants' directed verdict motion as to these claims.

1. Fraud

[2] In regard to Plaintiff's fraud claim, Defendants contend that Plaintiff failed to offer any evidence that Defendant Fordin (1) made a false representation, (2) had any intent to deceive, or (3) that Plaintiff was harmed by Defendant Fordin's representation.

At trial, Plaintiff testified that when Defendant Fordin approached him with the request that he sell his 10% interest in M3 LLC, Defendant

Fordin stated that the value of his shares was "zero dollars" and that Defendant Fordin "would bankrupt the company" if Plaintiff refused to sell. Defendant Fordin contradicted this version of events, testifying that he had no intention of bankrupting the company; rather, he was concerned that the government would seize M3 LLC's assets and he had a potential investor who refused to buy in to M3 LLC unless Plaintiff was no longer part of the organization, due to Plaintiff's criminal drug conviction.

Considered in the light most favorable to Plaintiff, this evidence suggests that Defendant Fordin threatened to bankrupt M3 LLC, although he had no intention of actually doing so, in order to force Plaintiff to relinquish his interest in the company.

Defendants also contend that there is no evidence that Plaintiff was harmed by Defendant Fordin's representations because Mr. Fordin presented evidence that if Plaintiff had remained a shareholder of M3 LLC, the prospective investor would not have invested in the company and the software would not have ultimately been sold for $14 million – rather, Defendants contend that "Mr. Fordin would simply have been forced to dissolve the company and pay existing creditors." However, this is contradicted by Defendant Fordin's testimony that he had no intent to "bankrupt" M3 LLC, Defendants' own evidence that Plaintiff had left the company more than eighteen (18) months before the potential investor bought into M3 LLC, and that Defendant Fordin never disclosed that Plaintiff had been an investor in the company, even in his official report to a CPA in 2010 while preparing tax returns. It was the jury's responsibility to weigh the credibility of all of the testimony and evidence presented at trial. *See Manganello*, 291 N.C. at 669-70, 231 S.E.2d at 680. Thus, we conclude that the trial court properly denied Defendant's motion for directed verdict on the issue of fraud.

2. Constructive Fraud and Breach of Fiduciary Duty

[3] "Constructive fraud differs from actual fraud in that it is based on a confidential relationship rather than a specific misrepresentation." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (internal marks omitted). In order to maintain a claim for constructive fraud, a plaintiff must show that "[he] and defendants were in a relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which defendant[s] [are] alleged to have taken advantage of [their] position of trust to the hurt of [the] plaintiff." *Id.* (internal marks omitted).

"In North Carolina, it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citing *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951)).

> Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do so constitutes fraud. Such a relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. Intent to deceive is not an essential element of such constructive fraud.

Link v. Link, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971) (internal marks and citations omitted).

Here, Plaintiff presented evidence that Defendant Fordin owned a controlling interest in M3 LLC and essentially ran the business. *See id.* at 193, 179 S.E.2d at 704 (discussing the responsibility of a president or manager of a corporation to disclose information of its value when stock is being transferred). Plaintiff also presented evidence that Defendant Fordin controlled the finances of the company, failed to keep detailed records of M3 LLC's finances, and failed to disclose any specific details of M3 LLC's financial situation at the time he requested that Plaintiff sell back his shares in M3 LLC. While Defendant Fordin certainly was not required to disclose that the stock had any value if it in fact did not, Plaintiff presented evidence from which a jury could infer that M3 LLC's value was greater than zero; specifically, that in 2008, M3 LLC's profits had increased drastically despite the fact that Defendant Fordin had increased his personal salary draw from $60,000 to $180,000.

Defendants have maintained that there is no evidence that M3 LLC had any value at the time of the 2008 Agreement; however, this conflict in the evidence is again for the jury to resolve. *See id.* Accordingly, it was not error for the trial court to deny Defendants' motion for directed verdict on the issues of constructive fraud and breach of fiduciary duty.

C. Verdict

[4] Defendants challenge the amount of the jury's verdict, alleging that it is an invalid "compromise verdict" because the jury did not consider

the evidence and the instructions from the trial court in arriving at the dollar amount of damages. We disagree.

"A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court." *City of Burlington v. Staley*, 77 N.C. App. 175, 178, 334 S.E.2d 446, 450 (1985). Defendants request a new trial arguing no evidence supports the jury's calculation of damages of $505,000 because this figure is the numerical average between what the Plaintiff sought and Defendant offered. Mr. Fordin conceded he owed approximately $70,000 on his contract with Plaintiff. Plaintiff's forensic accountant testified, that if Plaintiff remained with the company, Plaintiff would have likely received close to $940,000. Defendants contend the jury simply split the difference between those two numbers instead of awarding a sum based upon the evidence. The $505,000 verdict equals the average of $70,000 and $940,000.

Under North Carolina law, the dollar amount of the verdict alone is insufficient to establish an unlawful compromise verdict. *Piedmont Triad Reg'l Water Auth. v. Lamb*, 150 N.C. App. 594, 598, 564 S.E.2d 71, 74 (2002). Because a juror cannot give testimony to impeach a verdict, establishing a quotient verdict is difficult to prove. *See* N.C. R. Evid. 606(b). Furthermore, the presumption of regularity attaches to judicial acts, including verdicts. Without other evidence to rebut this presumption, this Court presumes the jury followed its instructions. *See generally State v. Elkerson*, 304 N.C. 658, 664, 285 S.E.2d 784, 789 (1982).

Defendant cites one case where the Supreme Court found an improper verdict based on a series of multiple verdicts each representing 30% of the damage amount requested. *Daniel v. Belhaven*, 189 N.C. 181, 126 S.E. 421 (1925). The jury in this case "adopted a general rule to give each plaintiff thirty per cent. [sic] of the amount each claimed in his complaint." *Id.* at 182, 126 S.E. at 422. This was evidenced by a note in the verdict sheet's margin where a juror wrote, "The jury agrees that each man shall be paid 30 per cent. of his claim." *Id.* at 182, 126 S.E.2d at 421. Here, the North Carolina Supreme Court found the jurors were not "governed by the proper exercise of judgment under the fixed rules of law," since the verdict was "arbitrary" and was not a valid consideration "in light of the evidence." *Id.* at 182, 126 S.E.2d at 422.

Defendants also cite *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983). In that case, a former employee sued his former employer for the employer's alleged misrepresentation that the company pension plan was still in effect, which induced the employee

to stay with the company and forgo salary increases and bonuses. *Id.* at 606, 306 S.E.2d at 521. The trial court instructed the jury on two different measures of damages. *Id.* at 615, 306 S.E.2d at 526. The trial court also instructed the jury to choose only one of those measures of damages, but not both or a combination of both. *Id.* at 615, 306 S.E.2d at 526. The first measure was the "difference in the value of plaintiff's services during the time that he worked under the fraudulent inducement and the price he was actually paid for his services because of the deceit." *Id.* at 615, 306 S.E.2d at 526. The second measure of damages was the benefit of the bargain. *Id.* at 615, 306 S.E.2d at 526. The benefit of the bargain damages equaled "the difference between the amount that would have been distributed to plaintiff had continuous contributions been made to the plan and the amount which was actually distributed to him." *Id.* at 615, 306 S.E.2d at 526. This Court determined the trial court erroneously submitted the first measure of damages to the jury. *Id.* at 615, 306 S.E.2d at 526. This Court reasoned:

> What plaintiff lost as a result of the misrepresentations was the amount of the contributions which supposedly were being made. To allow plaintiff to recover the difference between the value of his services and his salary at the Company would be to allow him a windfall and would be contrary to the underlying principles of compensatory damages.

Id. at 615-16, 306 S.E.2d at 526.

In the current action, neither party, nor the trial court, gave the jury any specific instructions regarding damages. Rather the trial court gave the jury general instructions on damages:[1]

> As you know, we are - - we are trying a case in which the Plaintiff seeks to recover money damages resulting from the diversion of the Plaintiff's equity interest in M3 today.
>
> . . . .
>
> Seven: What amount is the Plaintiff entitled to recover from the Defendant as damages? If you answered issue two yes, answer issue seven. If you answered issue three yes and four no, answer issue seven. If you answered issue five yes and answered six no, answer issue seven. Otherwise, stop and inform the Bailiff.

1. The damages issue was issue #7.

. . . .

I will discuss these issues one at a time and explain the law which you should consider as you deliberate upon your verdict.

. . . .

Six, that the Plaintiff suffered damages proximately caused by the Defendant's false representations or concealment. Proximate cause is a cause that's a natural and continuous sequence producing the person's damage and is a cause that any reasonable and prudent person couldn't have seen, would probably produce such damage or some similar injurious results. There may be more than one proximate cause of damage, therefore the Plaintiff need not prove that the Defendants' false representation or concealment was the sole proximate cause of the Plaintiff's damages. The Plaintiff must prove, by the greater weight of the evidence, only that the Defendants' false representation or concealment was a proximate cause.

. . . .

The next issue is the damage issue. It reads as follows: What amount is the Plaintiff entitled to recover from the Defendant as damages, exclusive of the contract damages? If you answer issue two yes, answer - - answer issue seven. Issue seven is the damage issue. If you answer issue three yes and four no, answer issue seven. If you answer issue five yes and issue six no, answer the issue seven. Otherwise, stop and inform the Bailiff.

. . . .

Now, members of the jury, you've heard the evidence and the argument of counsel. If your recollection of the evidence differs from that of the attorneys, you are, as I told you, to be guided exclusively by your recollection. It is your duty to recall the evidence (inaudible) your attention or not.

You should consider all the evidence, the arguments, contingents, and positions urged by the attorneys and any other contingents that arises from the evidence.

Our review of the record indicates the jury received no special instruction from the trial court on how to measure damages. Rather, the jury was to weigh the evidence and compensate Plaintiff accordingly. The better practice would have been for the parties to ask for a special instruction regarding the benefit of the bargain or restitution damages. This way, the jury would have a better understanding of the remedies available to Plaintiff.

Furthermore, this Court has held "whether plaintiff's [damages] calculation is correct or not is irrelevant since the jury, as the trier of fact, may award damages based on the evidence they find credible and may disregard the evidence they did not find credible." *Dafford v. JP Steakhouse LLC*, 210 N.C. App. 678, 687, 709 S.E.2d 402, 409 (2011). The jury found Defendants liable for fraud, fraud in the inducement, constructive fraud, and breach of fiduciary duty. Defendants show the jury's verdict represents the average of two sums presented to the jury during trial. However, the jury's single sum alone, without more, under our case law, is insufficient for Defendants to demonstrate that the award of $505,000 to Plaintiff by the jury was an improper exercise of jury discretion and contrary to law.

III. Conclusion

We find no error in the rulings of the trial court on the parties' respective motions for directed verdict. In addition, we find no error in the form or amount of the jury's verdict. Accordingly, we conclude that the parties had a fair trial, free from prejudicial error.

NO ERROR.

Judges HUNTER, JR., and ARROWOOD concur.

THE ESTATE OF EDUARDO ROBERTO RIVAS BY AND THROUGH ADMINISTRATOR MILETSY SOTO AND MILETSY SOTO INDIVIDUALLY, PLAINTIFFS

v.

FRED SMITH CONSTRUCTION, INC., DEFENDANT

No. COA16-1187

Filed 20 February 2018

1. Discovery—summary judgment—wrong entity sued—expiration of statute of limitations—alter ego relationship

The trial court did not abuse its discretion in a case arising from a car accident on a newly constructed road by granting summary judgment in favor of defendant construction company and denying plaintiffs' N.C.G.S. § 1A-1, Rule 56(f) motion to conduct discovery where plaintiffs sued the wrong entity and failed to correct the error before expiration of the statute of limitations. Plaintiffs' evidence was insufficient to create a genuine issue of material fact regarding an alleged alter ego relationship between defendant company and the proper party.

2. Pleadings—motion to amend complaint—proper party—alter ego—mere instrumentality—new party—expiration of statute of limitations

The trial court did not abuse its discretion by granting summary judgment in favor of defendant and denying plaintiffs' N.C.G.S. § 1A-1, Rule 15 motion to amend their complaint to include the proper name of defendant company on the grounds of alter ego and mere instrumentality. Amending the complaint to add the proper company would have amounted to adding a new party and would have been futile since the statute of limitations had expired.

Appeal by plaintiffs from order entered on 27 June 2016 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals on 19 April 2017.

Poyner Spruill, LLP, by Cynthia L. Van Horne, and the Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiffs-appellants.

Dean & Gibson, PLLC, by Michael G. Gibson and Michael R. Haigler, for defendant-appellee.

BERGER, Judge.

The Estate of Eduardo Roberto Rivas, by and through Miletsy Soto as administrator and individually, ("Plaintiffs") appeal from a June 27, 2016 order granting summary judgment in favor of Fred Smith Construction, Inc. ("Defendant"). Plaintiffs argue the trial court erred by granting Defendant's motion and denying their motions under N.C. Gen. Stat. § 1A-1, Rule 56(f) and Rule 15. We disagree.

Factual and Procedural Background

In March 2012, the State of North Carolina Department of Transportation ("NCDOT") awarded Contract No. C202996 ("Smith Project") to "FSC II LLC DBA FRED SMITH COMPANY" for 11.26 miles of road construction beginning at the Chatham County line on US-1 to US-64. The Smith Project was completed that same year.

In the early morning hours on November 27, 2013, Eduardo Roberto Rivas ("Rivas") hydroplaned off of US-1 in Cary, North Carolina. Upon exiting his vehicle to inspect for damage, Rivas was fatally struck by an oncoming vehicle that hydroplaned at the same location. Cary Police Department's Accident Reconstruction concluded neither vehicle was negligently or carelessly operated at the time of the accident.

Plaintiffs filed a complaint in the Wake County Superior Court against Defendant for negligence, breach of contract, third-party beneficiary claims, and punitive damages. On April 6, 2016, Defendant filed a motion for summary judgment pursuant to Rule 56 asserting it was incorrectly named as a party, and the Smith Project was performed in accordance with NCDOT standards. Plaintiffs filed a memorandum in opposition to Defendant's motion for summary judgement and requested leave from the trial court to amend their complaint and to allow further discovery. The trial court granted Defendant's motion for summary judgment and dismissed Plaintiffs' claims with prejudice. Plaintiffs timely filed Notice of Appeal.

Analysis

On appeal, Plaintiffs argue the trial court erred in granting Defendant's motion under Rule 56 and denying their motions under Rule 56(f) and Rule 15. Specifically, Plaintiffs assert that there existed a genuine issue of material fact as to whether Defendant was a mere instrumentality of a third party, and that Plaintiffs should be permitted to amend their complaint after the statute of limitations had run to name the correct entity as a party to the suit. We disagree.

I. Defendant's Rule 56 Motion

[1] "Our standard of review of an appeal from summary judgment is de novo . . . ." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "[S]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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 Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (citing N.C. Gen. Stat. § 1A-1, Rule 56(c)).

"The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Id.* (citation and quotation marks omitted). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.' " *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). In determining that there are no genuine issues of material fact, "[i]t is not the trial court's role to resolve conflicts in the evidence." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 413, 618 S.E.2d 858, 862 (2005) (citation omitted). Rather, the court's role is only to determine whether such issues exist. *Id.* (citation omitted).

In the case *sub judice*, Defendant submitted a memorandum in support of summary judgment with attached affidavits and exhibits to the trial court. Defendants argued at the motion hearing that Plaintiffs had sued the wrong entity, noting that Defendant answered the complaint prior to expiration of the statute of limitations. Said answer specifically denied being the company that had built the section of the roadway in question.

Plaintiffs submitted a memorandum with an affidavit and also argued at the motion hearing that Defendant was part of an overlapping structure of corporations that operate as alter egos and mere instrumentalities of each other, and that further discovery would be necessary to resolve this issue. Specifically, Plaintiffs argued that the two entities, FSC II and Defendant, shared a business address, overlapping personnel, and common ownership by a third entity. However, Plaintiffs failed to offer substantive evidence to create a disputed issue of material fact to withstand summary judgment.

To prove an alter ego relationship between corporate entities, a claimant must establish three things:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Fischer Inv. Capital, Inc. v. Catawba Dev. Corp., 200 N.C. App. 644, 650, 689 S.E.2d 143, 147 (2009) (citation omitted). Plaintiffs contended that the following evidence was sufficient to create a disputed issue of material fact regarding the alter ego relationship:

(1) Defendant, which is owned by Construction Partners, Inc., in turn owns FSC II, a limited liability company;

(2) Defendant has no employees and earns no revenue;

(3) Defendant was created by Construction Partners, Inc. in 2011 to serve as the legal owner of FSC II for tax and operating purposes;

(4) FSC II does business as Fred Smith Company, and Defendant, as legal owner of FSC II, also has the right to do business as Fred Smith Company;

(5) FSC II's sole member manager also serves as registered agent for Defendant; and

(6) FSC II and Defendant share the same business address, contrary to the deposition testimony by witnesses for Defendant.

Plaintiffs' evidence was insufficient to create a genuine issue of material fact regarding the alleged alter ego relationship. Instead, Plaintiffs' evidence merely gives rise to conjecture and speculation that Defendant and its affiliate are alter egos of one another. Plaintiffs contend the evidence presented is sufficient to withstand a motion for summary judgment in this regard, relying on prior decisions by this Court. However, these decisions are distinguishable both factually and procedurally from the case *sub judice* and are not applicable as precedent.

See Timber Integrated Invs., LLC v. Welch, 225 N.C. App. 641, 653, 737 S.E.2d 809, 818 (2013) (reversing summary judgment because the trial court refused to review material evidence offered at the summary judgment hearing); *see also Monteau v. Reis Trucking & Constr., Inc.*, 147 N.C. App. 121, 127, 553 S.E.2d 709, 713 (2001) (reversing summary judgment where plaintiff submitted evidence that corporate defendant was undercapitalized, commingled funds with individual owners, failed to meet payroll, and failed to keep formal financial records).

Plaintiffs argued in an oral 56(f) motion that it would be premature to grant summary judgment at that juncture in the proceeding. Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, *the court may* refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f) (2017) (emphasis added). Because discovery is used to disclose "any relevant unprivileged materials and information, . . . motions for summary judgment generally should not be decided until all parties are prepared to present their contentions on all issues raised." *Ussery v. Taylor*, 156 N.C. App. 684, 686, 577 S.E.2d 159, 161 (2003) (citations omitted). Nevertheless, the trial court's decision to grant or deny summary judgment before the completion of discovery will only be reversed upon a showing of a manifest abuse of discretion. *See Evans v. Appert*, 91 N.C. App. 362, 367-68, 372 S.E.2d 94, 97, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("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.") Therefore, the trial court's decision to disallow further discovery is reviewed under an abuse of discretion standard.

Here, nine months and twenty-four days elapsed from the filing of Plaintiffs' Complaint to the trial court's order for summary judgment. During this time, Defendant produced affidavits, corporate records, and depositions from Alan Palmer ("Palmer") and F. Jule Smith, III ("Jule Smith"). The trial court inquired: "[W]hat do you believe the evidence that you are looking for is going to show? Defense counsel says that

. . . your evidence is not going to show anything different than what the discovery already shows now." Plaintiffs' counsel stated that it spoke directly to the existence of a genuine dispute of material fact, such as potential overlapping officers or financial situations.

Regardless of whether outstanding discovery requests existed at the time summary judgment was ordered, Plaintiffs failed to meet their burden of showing the trial court abused its discretion by granting summary judgment. Defendant produced sufficient information that Plaintiffs had named the wrong entity, and failed to amend or otherwise correct the error in the complaint. The information set forth in discovery included affidavits, articles of incorporation, and depositions sufficient for the trial court to make a reasoned ruling on Plaintiffs' and Defendant's motions. Even if Plaintiffs' arguments are persuasive, we find no abuse of discretion on behalf of the trial court's decision to deny Plaintiffs' Rule 56(f) motion.

Furthermore, we hold that there was no genuine issue of material fact before the trial court regarding Defendant's liability. Plaintiffs acknowledged that they sued the wrong legal entity. Thus, Defendant was entitled to judgment as a matter of law. The trial court did not err when granting Defendant's Rule 56 motion.

II. Plaintiffs' Rule 15 Motion

[2] Plaintiffs contend the trial court erred by denying their Rule 15 motion to amend their complaint to include the proper name of Defendant on the grounds of alter ego and mere instrumentality, despite the statute of limitations having expired. We disagree.

Rule 15 provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2017).

> Generally, Rule 15 is construed liberally to allow amendments where the opposing party will not be materially prejudiced. . . . [O]ur standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of

> discretion. However, proper reasons for denying a motion to amend include undue delay by the moving party[,] . . . unfair prejudice to the nonmoving party[,] . . . bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Delta Env. Consultants of N.C. v. Wysong & Miles Co., 132 N.C. App. 160, 165-66, 510 S.E.2d 690, 694 (citations omitted), *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

"Our Supreme Court has stated that 'substitution in the case of a misnomer is not considered substitution of new parties, but a correction in the description of the party or parties actually served.' " *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App. 28, 34, 450 S.E.2d 24, 28 (1994) (brackets omitted) (quoting *Blue Ridge Electric Membership Corporation v. Grannis Bros. Inc.*, 231 N.C. 716, 720, 58 S.E.2d 748, 751 (1950)), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). "A misnomer is a 'mistake in name; giving an incorrect name to the person in accusation, indictment, pleading, deed, or other instrument.' " *Pierce v. Johnson*, 154 N.C. App. 34, 39, 571 S.E.2d 661, 665 (2002) (brackets omitted) (quoting Black's Law Dictionary (6th ed. 1990)). If "the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, . . . the misnomer or misdescription may be corrected by amendment at any stage of the suit." *Franklin*, 117 N.C. App. at 34, 450 S.E.2d at 28 (citation omitted). "However, if the amendment amounts to a substitution or entire change of parties, . . . the amendment will not be allowed." *Id.* (citation and quotation marks omitted). Accordingly, an attempt to amend a complaint to include a "separate and distinct corporation" at the time the cause of action accrues amounts to adding a new party rather than correcting a misnomer. *See id.* at 35, 450 S.E.2d at 28. Substantive mistakes, such as naming a wrong corporate defendant, are potentially fatal to actions. *Id.*

Rule 15 allows for the relation-back doctrine to apply when amending a pleading to assert *claims*, but it does not apply to *parties* after the statute of limitations expires. *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 726-27, 620 S.E.2d 312, 315 (2005) (emphasis added) (citation omitted). *See also* N.C. Gen. Stat. § 1A-1, Rule 15(c) (2017) ("A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed . . . ."). "If the effect of the amendment is to substitute for the defendant a *new party*, or add *another party*, such amendment amounts to a new and

independent cause of action and *cannot be permitted when the statute of limitations has run*." *Bailey*, 173 N.C. App. at 726, 620 S.E.2d at 315 (emphasis added) (citation omitted).

Here, Plaintiffs sought to amend their complaint to add FSC II, d/b/a Fred Smith Company, after the statute of limitations had expired. Plaintiffs filed their complaint on September 3, 2015, and the statute of limitations ran on November 27, 2015, twenty-two days after Defendant had denied being the correct company in their answer in response to Plaintiffs' complaint. Plaintiffs requested to amend their complaint by leave of the trial court more than six months later by oral motion on June 5, 2016.

In the case *sub judice*, the statute of limitations expired 191 days before Plaintiffs moved to amend. Accordingly, amending the complaint to add FSC II, d/b/a Fred Smith Company, would amount to adding a new party and would be futile since the statute of limitations had expired, thus the trial court did not abuse its discretion by denying Plaintiff's Rule 15 motion.

Conclusion

The trial court did not err in granting Defendant's motion for summary judgment, and we affirm the trial court's denial of Plaintiffs' Rule 56(f) motion and Rule 15 motion to amend their complaint.

AFFIRMED.

Judges ELMORE and INMAN concur.

IN RE S.G.V.S.

[258 N.C. App. 21 (2018)]

IN THE MATTER OF S.G.V.S. AND D.D.R.S.

No. COA17-903

Filed 20 February 2018

Termination of Parental Rights—motion to re-open—parent not present at termination hearing—attending criminal trial in another county

The trial court abused its discretion in a termination of parental rights case by denying respondent-mother's motion to re-open the evidence where respondent-mother missed the termination hearing in order to attend her trial for second-degree trespassing in another county. The trial court was aware that respondent's criminal matter was already scheduled in an equal level court for 18 January 2017 but nonetheless scheduled her return date for her termination hearing for that same date. The calendaring of criminal cases is controlled by the district attorney, not defendants or their attorneys, and the trial court's refusal to grant respondent's motion resulted from a misapprehension of law and amounted to a substantial miscarriage of justice.

Appeal by respondent from orders entered 10 February 2017 and 17 May 2017 by Judge Kristina L. Earwood in Haywood County District Court. Heard in the Court of Appeals 1 February 2018.

Assistant Agency Attorney Jordan R. Israel for petitioner-appellee Haywood County Department of Health and Human Services.

Edward Eldred for respondent-appellant mother.

Parker Poe Adams & Bernstein LLP, by Ashley A. Edwards, and Womble Carlyle Sandridge & Rice, LLP, by Hunter S. Edwards, for guardian ad litem.

TYSON, Judge.

Respondent, the mother of the juveniles S.G.V.S. and D.D.R.S., appeals from orders terminating her parental rights and denying her motion to re-open the evidence pursuant to Rule 59. We reverse and remand.

I. Background

On 16 April 2015, three-year-old S.G.V.S. walked unaccompanied into a gas station. S.G.V.S. was carrying a bag with diapers, wipes, and a phone, and she had a bruise on her nose. Respondent was located and met with social workers from the Haywood County Department of Health and Human Services ("DHHS") and the police at her home. Respondent reported that she had locked the door and pushed furniture in front of it to prevent S.G.V.S. from leaving the home, but S.G.V.S. had pushed a recliner in front of the door and gotten out. Respondent entered into a safety plan, and DHHS installed door and window alarms, locks, and other items to secure the home.

On 17 April 2015, sometime before 2 a.m., S.G.V.S. was again found walking alone in the street. Her two-year-old brother, D.D.R.S., was also found crying in the middle of the street. Respondent was charged with misdemeanor child abuse, and DHHS took 12-hour emergency custody of the juveniles.

On 17 April 2015, DHHS filed petitions alleging S.G.V.S. and D.D.R.S. were abused, neglected, and dependent juveniles. DHHS alleged Respondent had an extensive history with Child Protective Services, noting her prior issues included drug abuse, domestic violence, mental instability, and improper supervision. Two of Respondent's older children were in the guardianship of their maternal grandparents. Respondent's other two children were in the custody of their respective fathers.

On 30 June 2015, the trial court adjudicated S.G.V.S. and D.D.R.S. to be neglected and dependent juveniles. The trial court established a permanent plan of reunification. After the initial six-month review hearing, the trial court adopted concurrent permanent plans of guardianship and reunification on 6 January 2016.

A permanency planning review was held on 9 and 10 August 2016. The trial court determined that further reunification efforts would be unsuccessful and inconsistent with the juveniles' health and safety. In an order filed 9 September 2016, the court modified the permanent plan to concurrent plans of adoption and legal guardianship. By notice filed 26 September 2016, Respondent properly reserved her right to appeal this issue.

DHHS filed petitions to terminate Respondent's parental rights ("TPR") on 7 October 2016. The TPR hearing began on 13 December 2016. During the hearing, a foster care social worker testified that Respondent had a pending criminal charge of second-degree trespassing

in Buncombe County, and her trial was calendared for 18 January 2017. When it became apparent that there was not enough time remaining to complete the hearing that day, the court and counsel agreed the hearing would be continued until 18 January 2017. The court's written order on the continuance indicates the hearing would be continued to "January 18 & 19, 2017."

At the outset of the termination hearing on 18 January 2017, Respondent's attorney was present and moved to continue the hearing until the following day. She asserted Respondent was present and awaiting trial in Buncombe County District Court on the trespassing charge. The trial court denied counsel's motion, insisting Respondent "had time to go to Buncombe County and get her case continued this morning and be here." The trial court conducted the remainder of the hearing, hearing DHHS' remaining evidence without Respondent present. Respondent's attorney offered no evidence.

At the conclusion of the adjudicatory stage, the court announced in open court it would find the grounds of neglect and dependency existed for termination. At the conclusion of the best interest testimony offered by DHHS, Respondent's counsel again requested the matter be held open so that her client could appear and testify. The trial court also denied this motion.

On 10 February 2017, prior to entry of the court's written termination order, Respondent filed a Rule 59(a)(1) motion to re-open the evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 59 (2017). Respondent's motion included the following statement:

> The Respondent Mother attended her criminal court date in Buncombe County on January 18, 2017, and was found guilty of second degree trespass and given 3 days time served. The matter had been on at least 6 times prior, all parties and witnesses were present on that date, it was marked for trial and in fact went to trial at approximately 4:00pm on that date. The Court in that matter was not going to allow the Respondent Mother to continue the matter any further, nor was that Court going to allow her to leave that Court to attend her TPR hearing in Haywood County DHHS Court. Undersigned counsel has verified this information with the Respondent Mother's criminal attorney in that matter[.]

Respondent cited North Carolina Rule of Civil Procedure, Rule 59(a)(1) and asserted she had a right to present evidence at the termination

hearing, and argued the trial court should re-open the case to allow her to present evidence in the interest of fairness and equity.

Later on 10 February 2017, the written order was filed, with its conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). In the disposition order filed the same day, the court concluded termination was in the juveniles' best interests and terminated Respondent's parental rights.

On 17 May 2017, the trial court entered an order denying Respondent's motion to re-open the evidence. The court found Respondent had been advised by her attorney in the courtroom on 13 December 2016 that she would need to have her Buncombe County criminal matter continued so she could be present for the termination hearing. The court further found it had "heard no evidence that the Respondent Mother could not physically attend the TPR hearing regarding her children, just that she chose to attend criminal court regarding her misdemeanor charge, rather than the TPR hearing regarding her children." Respondent appeals.

II. Issue

Respondent's sole argument on appeal is that the trial court abused its discretion by denying her motion to re-open the evidence.

III. Standard of Review

Whether to re-open a case to admit additional evidence after the parties have rested generally rests within the trial court's discretion. *In re A.B.*, 239 N.C. App. 157, 171, 768 S.E.2d 573, 581 (2015).

> [W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted).

"Reversal is warranted where a trial court acts under a misapprehension of the law." *In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015). "[W]here it appears that the judge below has ruled upon matter before him upon a misapprehension of the law, the cause will be remanded . . . for further hearing in the true legal light." *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960) (citation and internal quotation marks omitted).

IV. Analysis

A. "Fundamental Liberty Interest"

Respondent asserts she was denied a fair trial because she had a right to present "her side of the story" at the termination and best interests hearing through sworn testimony.

Our Supreme Court has recognized that a parent's "right to retain custody of their child and to determine the care and supervision suitable for their child, is a 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (citing *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)).

"Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual." *In re Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994) (citations omitted), *aff'd*, 341 N.C. 196, 458 S.E.2d 921 (1995), *cert. denied*, 516 U.S. 1047, 133 L. Ed. 2d 663 (1996).

Pursuant to Rule 59(a)(1), a new trial may be granted due to "any irregularity by which any party was prevented from having a fair trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(1). The trial court has both the discretion and authority to "re-open the case and admit additional testimony after the conclusion of the evidence and even after argument of counsel." *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 710 (1940) (citations omitted). A trial court "may even re-open the evidence weeks after holding the original hearing or, when the ends of justice require[.]" *In re B.S.O.*, 225 N.C. App. 541, 543, 740 S.E.2d 483, 484 (2013) (citations and internal quotation marks omitted).

This Court has held that while due process does not provide a parent with an absolute right to be present at a termination hearing, *In re Murphy*, 105 N.C. App. 651, 654, 414 S.E.2d 396, 398, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992), the magnitude of "the private interests affected by the proceeding, clearly weighs in favor of a parent's presence at the hearing." *In re Quevedo*, 106 N.C. App. 574, 580, 419 S.E.2d 158, 160 (1992).

At the hearing on Respondent's motion to re-open the evidence, the trial court asked why Respondent did not call her attorney "and say I need you to move it, I need you to do something?"

Respondent answered that she had called her criminal defense attorney and asked him to seek a continuance in her criminal matter.

She told the court that she thought she "had two days on our [TPR] court date." Although the court's written order on the continuance indicates the hearing would be continued to "January 18 & 19, 2017[,]" the trial court responded that "was your mistake, not mine, because I made a very valid—I mean, a very—I told you it would be two o'clock that day."

The trial court insisted that the TPR hearing "took precedence over" the Respondent's previously calendared trial in criminal court. Respondent informed the court that if she had left her criminal court hearing, she would have been arrested for failure to appear. *See* N.C. Gen. Stat. § 15A-543 (2017) (any person released on bail who willfully fails to appear before any court or judicial official is subject to the criminal penalty of arrest for a Class 1 felony if the violator was released in connection with a felony charge or a Class 2 misdemeanor if the violator was released in connection with a misdemeanor charge.).

The 13 December 2016 transcript is made part of the record on appeal and shows the trial court was aware that Respondent was previously scheduled to appear for criminal court on 18 January 2017 in Buncombe County, prior to setting 18 January 2017 as the return date for her termination hearing. The transcript also reflects the court offered to DHHS to hold the remainder of the TPR hearing on either 18 January 2017 at 2 p.m. or 19 January 2017 at 9 a.m. The record clearly shows the trial judge was aware of Respondent's previously scheduled criminal matter in an equal level court, but expected Respondent to obtain a continuance of that case so that she could appear at the termination hearing, in preference thereof.

An appellate court should not disturb an order made under the discretionary power of Rule 59, unless the reviewing court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). Here, the trial court found no evidence showed Respondent could not attend the termination hearing, and denied her motion to re-open the evidence. The trial court's order denying the motion to re-open the evidence states Respondent "chose" to attend her criminal trial rather than attend the termination hearing. We disagree. No evidence in the record supports this statement.

B. Calendaring Criminal Cases

In North Carolina, the calendaring of cases in criminal court is controlled by the district attorney, not by Respondent or her criminal defense attorney. *See* N.C. Gen. Stat. § 7A-61 (2017) ("The district attorney shall prepare the trial dockets[.]"). No showing supports the trial

court's assertion that Respondent could or would have been allowed a continuance of her previously scheduled criminal trial, if she had so requested. The only choice available to Respondent on the face of this record was between attending her previously scheduled and pending criminal trial in Buncombe County and missing the termination hearing in Haywood County, or attending the termination hearing and facing a new criminal charge of failure to appear. *See* N.C. Gen. Stat. § 15A-543.

As noted above, "[t]he 'Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.' " *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L.Ed.2d 49, 56-57 (2000)). This due process requires the courts "insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected [parental] rights of an individual." *In re Lamm*, 116 N.C. App. at 385, 448 S.E.2d at 128 (citations omitted).

We review the record before us and the magnitude of the interests at stake in terminating Respondent's parental rights to her two children. The trial court's refusal to continue the hearing to a different day and denial of the Rule 59 motion to allow Respondent to attend and participate results from a misapprehension of the law and is an unreasonable and substantial miscarriage of justice. *Capps*, 253 N.C. at 22, 116 S.E.2d at 141 (citation and internal quotation marks omitted); *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. We reverse the trial court's order and remand this matter to district court for a new hearing to allow Respondent to be present and for additional evidence to be presented and taken. *See id.*

V. Conclusion

The district attorney, not Respondent or her attorney, controlled whether her pending criminal case would be continued. Respondent's Rule 59(a)(1) motion to re-open contains a verification by her Haywood County counsel, an officer of the court, that Respondent's counsel in the criminal case had confirmed no further continuance was available and Respondent was not free to leave the Buncombe County court on 18 January to "attend the TPR hearing in Haywood County DSS Court." The order denying Respondent's motion to re-open the evidence and the underlying orders appealed from terminating Respondent's parental rights are reversed.

The case is remanded to the district court to allow Respondent to be present at the termination and best interests hearing, to assist her

counsel with the direct and cross-examination of witnesses, to testify on her own behalf, and to present any other evidence in the adjudication and disposition stages of the hearing on DHHS' motion to terminate her parental rights. *It is so ordered.*

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

MICHAEL LESTER AND PEGGY LOUANN BOWEN, PLAINTIFFS
v.
RACHEL GALAMBOS, DEFENDANT

No. COA17-83

Filed 20 February 2018

Easements—easement implied by prior use—temporal requirements

The trial court erred in an action involving a property dispute by granting summary judgment in favor of defendant based on the erroneous conclusion that defendant had an easement implied by prior use over a portion of plaintiffs' property, where the alleged easement did not meet the temporal requirements. The case was remanded to the trial court for a determination concerning the existence of an easement by grant.

Appeal by Plaintiffs from order entered 1 July 2015 by Judge Carl R. Fox in Franklin County Superior Court. Heard in the Court of Appeals 17 May 2017.

Farris & Farris, PA, by Rhyan A. Breen, for plaintiffs-appellants.

Perry & Brandt, Attorneys at Law, by Michael K. Perry and Trevor D. Brandt, for defendant-appellee.

MURPHY, Judge.

Michael Lester and Peggy Louann Bowen (collectively, "Plaintiffs") and Rachel Galambos ("Defendant") dispute whether an easement exists over a portion of Plaintiffs' property. "[C]ourts will find the existence of an easement by implication under certain circumstances[,]"

including when an easement may be implied from prior existing use. *Knott v. Washington Hous. Auth. of the City of Washington*, N.C., 70 N.C. App. 95, 97, 318 S.E.2d 861, 862 (1984) (citation omitted). The use which gives rise to an implied easement "must have been so long continued and obvious as to show it was meant to be permanent" at the time of the severance. *Wiggins v. Short*, 122 N.C. App. 322, 329, 469 S.E.2d 571, 577 (1996).

On appeal, Plaintiffs contend the trial court erred by: (1) denying their motion for summary judgment; (2) granting Defendant's motion for summary judgment; and (3) finding the existence of an easement implied by prior use. We agree, because as a matter of law, an easement implied by prior use does not exist. Thus, the order allowing Defendant's motion for summary judgment and denying Plaintiffs' motion for summary judgment is in error. We remand to the trial court for further proceedings concerning whether an easement by grant exists.

I. Background

A. Ownership of the Land

Osprey Hills is a small subdivision in Franklin County, comprised of a series of properties that line either side of an unimproved gravel road called Osprey Hills Drive. Osprey Hills Drive is a private road that generally runs north-south and allows property owners within the Osprey Hills subdivision to access Highway 98 to the north. Osprey Hills Drive is the only means of ingress and egress to-and-from the subdivision, and it is built atop a 45-foot-wide private access easement. At its southern end, the gravel road terminates at one of the subdivision's several properties, 235 Osprey Hills Drive ("Tract 6").

From 1996 to 2004, Tract 6 belonged to Charles and Laurie Roy (collectively, "the Roys") as part of a larger property they purchased in 1996. In 1998, the Roys granted a deed of trust to Don E. Fuquay, Trustee, for the benefit of Green Tree Financial Servicing, Lender, on Tract 6. Pursuant to the terms of the Deed of Trust, the Roys gave up their right to convey an easement over any portion of the property without prior written consent from the lender.

The Roys began developing a portion of the property into the Osprey Hills subdivision in 1998, and they sold other portions of the property as individual tracts of land. Although several of the tracts of land were traditional home-sites, generally rectangular in nature with one of the four sides bordering the private road, two tracts were notably irregular. The first, Tract 6, was purchased by Plaintiffs at a 2004 foreclosure sale

arising out of the 1998 Deed of Trust. The second, 165 Osprey Hills Drive ("Tract 1A"), was purchased by Ann Caron ("Caron") in 2002. In 2002, there were no residential structures on Tract 1A, but by 2014, when Caron sold Tract 1A to Defendant, she had built a house on the southwestern portion of the property.

B. Lay of the Land

By way of orientation, when driving south on Osprey Hills Drive from the highway, there are approximately 1-acre tracts on the left before reaching the roughly 150-foot portion of Tract 1A that borders the road. Continuing straight, a driver then passes another approximately 1-acre tract on the left ("Tract 3") before encountering a narrow, finger-like portion of Tract 6 ahead, where Osprey Hills Drive terminates.

The finger-like portion of Tract 6 extends from the body of the tract towards Osprey Hills Drive and contains Plaintiffs' gravel driveway. It extends from the northern edge of Tract 6 to the southern end of Osprey Hills Drive, abutting the southwestern corner of Tract 3, and borders part of Tract 1A, which surrounds Tract 3 on its north, east, and south. The only portion of Tract 1A that borders the private road is on the northern side of Tract 3. Tract 1A borders a narrow strip of Tract 6, on which the private road turns into Plaintiffs' driveway, on the southern side of Tract 3.

C. The Use of the Land

When the Roys conveyed the undeveloped land that formed Tract 1A to Caron in 2002, its northwestern portion abutted Osprey Hills Drive, as it still does. As a result, Caron had access to her property immediately upon ownership. However, between 2002 and 2004, a portion of the fence that separated the southwestern portion of Tract 1A from the finger-like portion of Tract 6 was removed, and Caron built a home and a driveway on the southwestern portion of Tract 1A. Caron's driveway led to Tract 6's driveway through the break in the fence. During this time, Caron used the portion of Tract 6's driveway now in dispute to access Osprey Hills Drive rather than using the northwestern portion of Tract 1A that abutted Osprey Hills Drive.

When Plaintiffs purchased Tract 6 in 2004, they notified Caron that she was using their property to access her own property. However, due to Caron's age and health, Plaintiffs gave Caron permissive use of their property until she moved. Plaintiffs continued to use the finger-like portion of Tract 6 as their driveway, and also parked implements and planted a grape vine on their side of the fence.

In preparation for selling her house, Caron removed the remainder of the fence that separated Tract 1A from Plaintiffs' property. Plaintiffs began to store implements and vehicles where the fence had been in order to demarcate their property line. Before Defendant purchased Tract 1A, Plaintiffs advised Defendant that they would not extend the permissive use of their driveway to her as they had to Caron. Accordingly, Defendant was able to negotiate an approximately 8% reduction in the purchase price of Tract 1A from Caron in anticipation of litigation. After Defendant purchased Tract 1A, Plaintiffs continued to store implements and equipment where the fence had been. Defendant moved into her house on Tract 1A on 24 July 2014 and had one of Plaintiffs' vehicles towed that evening for blocking her alleged right of way.

D. The Existence of an Easement

The survey maps included in the record on appeal clearly delineate the relevant property boundaries, with one exception; a map filed by Caron in 2003 with the Register of Deeds purports to show an easement benefitting Tract 1A over Tract 6.

After the Roys encumbered Tract 6 with the 1998 Deed of Trust, they recorded a land survey in Map Book 1998, Page 79, while developing Osprey Hills. The survey depicts Osprey Hills Drive terminating at the northern border of Tract 6, with a specific notation that the narrow, finger-like portion of Tract 6 contains an "existing gravel driveway."

Three years later, the Roys recorded Map Book 2001, Page 200.[1] It depicts several dashed lines crossing Osprey Hills Drive but, unlike the other map books in the record, does not provide a legend explaining the significance of these lines. Even if a reader were to use the same legend applied in the other map book pages in the record to interpret the dashed lines, Map Book 2001, Page 200 fails to indicate a change to the boundary of Tract 6 or the existence of an easement over Tract 6, and Tract 6 was still subject to the 1998 Deed of Trust.

Caron registered a survey map approximately one month after purchasing Tract 1A. The survey, Map Book 2003, Page 10, of the Franklin County registry, states in relevant part, "THERE IS SOME QUESTION AS TO WEATHER [sic] OR NOT THE PRIVATE ACCESS EASEMENT

1. In Map Book 2001, Page 200, the Roys created Tract 10 by subtracting 0.689 acres from Tract 1A. However, when deeding Tract 1A to Caron, the Roys referred to the tract they previously recorded in "Book of Maps 1998, Page 133, Franklin County Registry" and specifically noted that Tract 10 was included in the approximately 20 acres they sold as Tract 1A.

RECORDED IN MAP BOOK 1998 PG 79 WAS EXTENDED TO [what became Tract 1A] WITH THE RECORDING OF MAP BOOK 2001 PG 200[.] CONTACT ATTORNEYS FOR DETERMINATION OF ANY ISSUES OF TITLE[.]"

None of the map books in Plaintiffs' chain of title discuss or indicate the existence of an easement across Tract 6 benefitting Tract 1A.

E. Litigation

Plaintiffs filed a complaint on 8 September 2014, seeking declaratory judgment in regard to the existence of the alleged easement over the portion of Tract 6 that extends in front of the southwestern portion of Tract 1A. Defendant filed an answer and counterclaim for declaratory judgment. Defendant and Plaintiffs both moved for summary judgment, and the motions were heard on 1 June 2015. After the hearing, the trial court entered an order granting Defendant's motion for summary judgment and denying Plaintiffs' motion for summary judgment. In doing so, the trial court determined that an easement implied by prior use did in fact exist over Plaintiffs' property.[2] Plaintiffs gave timely notice of appeal.

II. Standard of Review

"[The] standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "[A]n issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion[.]" *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (internal citations and quotation marks omitted). "[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Id.* at 579, 573 S.E.2d at 124 (citation and quotation marks omitted). When considering a motion for summary judgment, relevant evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 579, 573 S.E.2d at 124 (citation omitted).

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2. Defendant's answer and counterclaim included a private nuisance claim; however, neither party moved for summary judgment on that claim, and, thus, the trial court made no ruling as to that claim in its order allowing Defendant's motion for summary judgment and denying Plaintiffs' motion for summary judgment. This claim was resolved per an order entered 7 October 2016 and is not a part of this appeal.

III. Analysis

An easement is a non-possessory right to make limited use of land owned by another without taking a part thereof. *Adelman v. Gantt*, ___ N.C. App. ___, ___, 795 S.E.2d 798, 803 (2016) (quoting *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972)). Although there are multiple types of easements, three are at issue in this case: (1) easements implied by prior use; (2) easements by grant; and (3) prescriptive easements. Plaintiffs allege the affidavits and maps filed in connection with this action show that no easement of any kind existed and therefore they were entitled to summary judgment as a matter of law.

The trial court granted Defendant's motion for summary judgment and denied Plaintiffs' motion for summary judgment based on its conclusion that an easement implied by prior use exists over Tract 6 for the benefit of Tract 1A, and, therefore, it never considered the other methods of establishing an easement. Thus, while we agree with Plaintiffs that an easement implied by prior use does not exist, the trial court never reached the issue of whether an easement by grant exists. We therefore remand for the trial court's consideration of this remaining issue.[3]

"An easement implied from prior use is generally established by proof: (1) that there was common ownership of the dominant and servient parcels and a transfer which separate[d] that ownership; (2) that, before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and (3) that the claimed easement [was] 'necessary' to the use and enjoyment of the claimant's land." *Knott*, 70 N.C. App. at 98, 318 S.E.2d at 863. "The burden of establishing an easement is upon the party asserting a right to go upon lands to which he does not have title." *Wiggins*, 122 N.C. App. at 329-30, 469 S.E.2d at 577 (citation omitted). Further, in support of a motion for summary judgment, "[s]imply restating the statutory language in affidavit form is inadequate [proof]." *United Cmty. Bank (Georgia) v. Wolfe*, 369 N.C. 555, 560, 799 S.E.2d 269, 273 (2017).

We first note that whether there was common ownership of the dominant and servient parcels and a transfer which separated that ownership is not at issue in the present case. Both the dominant and servient estates were once under the Roys' common ownership. The severance occurred at the time of the Deed of Trust in 1998 when the Roys could no longer change the property or convey an easement.

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3. We need not remand for the trial court to consider whether a prescriptive easement exists because Defendant conceded it did not at the summary judgment hearing.

In regard to the second element necessary to establish the existence of an easement by prior use, that, prior to the transfer, "the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent[,]" *Knott*, 70 N.C. App. at 98, 318 S.E.2d at 863, "where one conveys a part of his estate, he impliedly grants all of those apparent or visible [appurtenant] easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed . . . ." *Wiggins*, 122 N.C. App. at 328, 469 S.E.2d at 576 (quoting *Carmon v. Dick*, 170 N.C. 305, 306-07, 87 S.E. 224, 225 (1915)). However, the use which gives rise to an implied easement "must have been so long-continued and obvious as to show it was meant to be permanent" at the time of the severance. *Wiggins* at 329, 469 S.E.2d at 577. The "shortest time heretofore recognized as sufficient to imply an easement is thirteen years." *CDC Pineville, LLC v. UDRT of North Carolina, LLC*, 174 N.C. App. 644, 654, 622 S.E.2d 512, 519 (2005) (quoting *Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 144, 461 S.E.2d 17, 23 (1995)). However, "[t]he majority of cases finding an easement by prior use were cases with a use in excess of 30 years." *Id.* at 654, 622 S.E.2d at 519-20 (citing *Spruill v. Nixon*, 238 N.C. 523, 78 S.E.2d 323 (1953) (at least 35 years); *Biggers v. Evangelist*, 71 N.C. App. 35, 321 S.E.2d 524 (1984), *disc. review denied*, 313 N.C. 327, 329 S.E.2d 384 (1985) (30 years); *McGee*, 32 N.C. App. 726, 233 S.E.2d 675 (1977) (60 years); *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 170 S.E.2d 509 (1969) (42 years)).

In the instant case, Defendant offered an affidavit by the former common owner, Mr. Charles Roy ("Mr. Roy"), in an attempt to show apparent, continuous, and permanent use. In this affidavit, Mr. Roy states that he drove over Tract 6 to access what became Tract 1A during the period during which he owned both properties (1996-2002). Mr. Roy does not, however, specify: (1) the frequency of this use, (2) which specific portion of either property was used and/or benefitted, or (3) how such use would be obvious to a third party. Mr. Roy then offers, without elaboration, that his use of Tract 6 to benefit what became Tract 1A "was apparent, continuous, and permanent." The record shows a lack of continuous and permanent use, as the Roys only owned Tract 6 for two years before the property was bound by the terms of the Deed of Trust, preventing the establishment of an easement. Even if the entire period in which the Roys owned Tract 6 was considered, it was only six years before Tract 1A was sold to Caron and, at the time, a fence separated the two tracts. Furthermore, there was no evidence to suggest that the purported use was visible or apparent at the time of the severance.

Though there was common ownership followed by a separation of the properties, there is no genuine issue of material fact that the use was not so long-continued and obvious as to show it was meant to be permanent. Therefore, the trial court erred by concluding that Defendant has an easement implied by prior use over the portion of Plaintiffs' property. As the alleged easement did not meet the temporal requirements, we need not address whether the alleged easement was necessary.

IV. Conclusion

We reverse the trial court with respect to the determination that Defendant has an easement implied by prior use over Plaintiffs' property. Consequently, we must vacate the order allowing Defendant's motion for summary judgment and denying Plaintiffs' motion for summary judgment, and remand to the trial court for further proceedings concerning whether there is a genuine issue of material fact as to the existence of an easement by grant.

REVERSED IN PART AND REMANDED.

Judges HUNTER, JR. and DAVIS concur.

DAWSON F. NECKLES, EMPLOYEE, PLAINTIFF
v.
HARRIS TEETER, EMPLOYER, AND TRAVELERS, CARRIER, DEFENDANTS

No. COA16-569-2

Filed 20 February 2018

Workers' Compensation—temporary total disability benefits—sufficiency of findings of fact—effect of compensable injury on ability to earn wages

Where the Industrial Commission in a workers' compensation case awarded plaintiff continued medical compensation for his injury but concluded that he was not entitled to temporary total disability benefits because he "failed to meet his burden of showing that it would be futile for him to look for work," the Court of Appeals reconsidered the appeal in light of *Wilkes v. City of Greenville*, 369 N.C. 730 (2017), and held that the Commission failed to make necessary findings regarding the effect of plaintiff's compensable injury on his ability to earn wages.

Appeal by plaintiff from opinion and award entered 27 January 2016 by the Full Commission of the North Carolina Industrial Commission. Originally heard in the Court of Appeals 1 November 2016, with opinion issued 30 December 2016. On 8 June 2017, the Supreme Court allowed defendants' petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of *Wilkes v. City of Greenville*, 369 N.C. 730, 799 S.E.2d 838 (2017), *superseded on other grounds by* 2017 N.C. Sess. Laws 2017-124.

Campbell & Associates, by Bradley H. Smith, for plaintiff-appellant.

Golding, Holden & Pope, LLP, by C. Preston Armstrong IV, for defendant-appellees.

CALABRIA, Judge.

Dawson F. Neckles ("plaintiff") timely appealed from an opinion and award of the North Carolina Industrial Commission ("the Commission") determining that he was no longer entitled to temporary total disability benefits. On 30 December 2016, this Court filed an unpublished opinion reversing the Commission's opinion and award. *See Neckles v. Harris Teeter*, __ N.C. App. __, 795 S.E.2d 289, 2016 WL 7984225 (2016) (unpublished). Harris Teeter and its insurance carrier, Travelers Indemnity, (collectively, "defendants") subsequently filed a petition for discretionary review ("PDR") with the North Carolina Supreme Court. On 8 June 2017, the Supreme Court allowed defendants' PDR for the limited purpose of remanding the case to this Court for reconsideration in light of the Supreme Court's decision in *Wilkes v. City of Greenville*, 369 N.C. 730, 799 S.E.2d 838 (2017), *superseded on other grounds by* 2017 N.C. Sess. Laws 2017-124. Upon reconsideration, we reverse the Commission's opinion and award and remand for additional findings.

I. Background

Plaintiff was 68 years old at the time of the Commission's hearing. In 1989, plaintiff moved to the United States from Grenada. Since his arrival, plaintiff has worked for various employers as a meat cutter, and he began working in that role for Harris Teeter in 2007. According to the job description, a meat cutter is required to lift and move up to 100 pounds on a regular basis and must be able to reach from 6 to 72 inches. The position also occasionally requires climbing, balancing, stooping, kneeling, or crouching.

On 30 June 2009, plaintiff injured his right hip, lower back, and right extremities while attempting to move a box of meat to the top of

a stack. An MRI of plaintiff's lower back revealed a pars fracture or spondylolysis at L5, multilevel disc bulging, and spinal and foraminal stenosis. Defendants filed a Form 60 admitting that plaintiff had suffered a compensable injury and initiated payments of temporary total disability.

On 26 January 2010, plaintiff participated in a functional capacity evaluation, which determined that he was unable to return to his job as a meat cutter but was capable of performing functions in the "light physical demand" category. On 8 February 2010, plaintiff's doctor found that he had obtained maximum medical improvement. However, plaintiff' continued to experience pain and weakness in his lower back and right leg. Over the next few years, he required further medical treatment and intermittent use of a cane in order to walk.

At defendants' request, on 15 September 2011, plaintiff met with John Kobelsky ("Mr. Kobelsky"), a vocational rehabilitation specialist, to assess plaintiff's "current vocational potential." Mr. Kobelsky determined that it would be "difficult" to place plaintiff in the open job market on a full-time basis, due to factors including his work history, limited transferrable skills, age, and lack of computer knowledge. As a result, Mr. Kobelsky decided not to perform additional testing or complete a transferrable skills analysis for plaintiff.

On 25 June 2014, defendants filed a Form 33 alleging that "[p]laintiff is no longer disabled" and requesting a hearing. Plaintiff responded that he remained disabled, and he sought an order compelling defendants to pay for all related medical compensation. Following a hearing, on 16 July 2015, Deputy Commissioner Bradley W. Houser entered an opinion and award determining that plaintiff was entitled to continued payment of temporary total disability benefits and all related medical expenses incurred as a result of his 30 June 2009 workplace injury. The deputy commissioner found that "[b]ased upon the preponderance of the evidence in view of the entire record, . . . a job search by plaintiff . . . would be futile based on his age, education, work experience, work restrictions for his compensable back injury, unrelated health conditions, and difficulty communicating." After defendants appealed, on 27 January 2016, the Full Commission entered an opinion and award reversing, in part, the deputy commissioner's decision. The Commission awarded plaintiff continued medical compensation for his injury. However, the Commission concluded that plaintiff was not entitled to temporary total disability benefits because he "failed to meet his burden of showing that it would be futile for him to look for work." Plaintiff timely appealed to this Court.

In an unpublished opinion filed on 30 December 2016, we reversed the Commission's opinion and award. Relying heavily on our Court's decision in *Wilkes v. City of Greenville*, 243 N.C. App. 491, 777 S.E.2d 282 (2015), we held that plaintiff had met his burden of proving disability under the so-called "futility method" set forth in *Russell v. Lowe's Prod. Distrib'n*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). *See Neckles*, __ N.C. App. at __, 2016 WL 7984225 at *5 (concluding that "[p]laintiff produced ample evidence that seeking employment would be a 'meaningless exercise' because of his age; education level; communication barriers; limited vocational training and experience; chronic health conditions; and compensable workplace injury"). Defendants timely appealed by filing a PDR with the North Carolina Supreme Court. On 8 June 2017, the Court allowed defendants' PDR for the limited purpose of remanding to this Court for reconsideration of our holding in light of the Supreme Court's decision in *Wilkes v. City of Greenville*, 369 N.C. 730, 799 S.E.2d 838 (2017), *superseded on other grounds by* 2017 N.C. Sess. Laws 2017-124.

II. *Wilkes v. City of Greenville*

In *Wilkes*, the Supreme Court modified and affirmed our Court's decision on the issue of disability. Relying on *Russell*, our Court held that although the *Wilkes* plaintiff was capable of some work, he had nevertheless "demonstrated the futility of engaging in a job search" due to preexisting conditions including his age, "intellectual limitations," and limited work experience. 243 N.C. App. at 503, 777 S.E.2d at 291. The Supreme Court, however, emphasized that it "has not adopted *Russell*" and cautioned that the case was inapposite to *Wilkes*, since "the issue in *Russell* was 'whether an injured employee seeking an award of total disability . . . who is *unemployed*, *medically able to work*, *and possesses no preexisting limitations which would render him unemployable*,' presented sufficient evidence that he was unable to find work." *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849 (quoting *Russell*, 108 N.C. App. at 764-65, 425 S.E.2d at 456-57).

The Supreme Court reiterated that "in determining loss of wage-earning capacity, the Commission must take into account age, education, and prior work experience as well as other preexisting and coexisting conditions." *Id.* Once the plaintiff meets his burden of establishing disability, the burden shifts to the defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Id.* (citation and quotation marks omitted). However, if the plaintiff "shows total incapacity for work, taking into account his work-related conditions

combined with the other factors noted above, he is not required to also show that a job search would be futile." *Id.* at 746, 799 S.E.2d at 849.

Despite awarding the *Wilkes* plaintiff medical compensation, "the Commission made no related findings on how [his] compensable tinnitus and any related symptoms may have affected his ability to engage in wage-earning activities." *Id.* at 747-48, 799 S.E.2d at 850. Accordingly, the Supreme Court remanded the case to the Commission with instructions "to take additional evidence if necessary and to make specific findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable tinnitus in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity." *Id.* at 748, 799 S.E.2d at 850.

III. Reconsideration of *Neckles v. Harris Teeter*

Upon reconsideration of our original opinion, we conclude that the Commission failed to make necessary findings regarding the effect of plaintiff's compensable injury on his ability to earn wages. The Commission awarded plaintiff continued medical compensation for his 30 June 2009 injury, finding in relevant part:

> 27. Based on the preponderance of the evidence in view of the entire record, including the testimony of Dr. VanDerNoord, on 30 June 2009, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer resulting in a symptomatic pars fracture at L5, as well as the aggravation of pre-existing, asymptomatic degenerative disc disease of the lumbar spine. Although plaintiff appears to have undergone an MRI of his spine in 2007, plaintiff did not recall having undergone the MRI, and there is no evidence indicating why plaintiff underwent the 2007 MRI or what if any symptoms he experienced in his low back or lower extremities prior to the incident that is the subject of this claim. Furthermore, plaintiff was able to work in a physically demanding job with defendant-employer for approximately two years before the 30 June 2009 incident.
>
> 28. The treatment plaintiff has received to date has been reasonably necessary to effect a cure and provide relief, and lessen plaintiff's period of disability. Furthermore, plaintiff is entitled to further medical treatment as is reasonably necessary [to] effect a cure, provide relief from his 30 June 2009 work-related injury.

However, the Commission determined that plaintiff was not entitled to temporary total disability benefits after 25 June 2014, the date defendants filed their Form 33 *Request that Claim be Assigned for Hearing*, because plaintiff failed to prove the futility of seeking employment. The Commission concluded as a matter of law that:

> 10. In the instant case, plaintiff has failed to meet his burden of showing that he continues to be disabled as a result of his 30 June 2009 injury by accident. Neither orthopedic expert indicated that plaintiff was medically disabled from all work since he was determined by Dr. VanDerNoord to have reached [maximum medical improvement] on 8 February 2010. Plaintiff has not worked for any employer since 30 June 2009, and provided no evidence that he has sought new employment. Furthermore, vocational rehabilitation professional, Mr. Kobelsky, testified merely that it would be "difficult" to place plaintiff in a job and acknowledged that the 30 pound lifting restriction assigned by Dr. Broom would open up numerous jobs to plaintiff. . . . [A] plaintiff is not required to present medical evidence or expert vocational testimony in order to meet his burden of proving that it would be futile to seek employment. In the instant case, there is expert vocational testimony that it would be "difficult," not "futile," for plaintiff to seek employment. Accordingly, the Full Commission concludes that plaintiff has failed to meet his burden of showing that it would be futile for him to look for work.

(internal citations omitted).

In our original opinion, we concluded that the Commission had erroneously limited its determination of futility to the portion of Mr. Kobelsky's testimony that it would be "difficult," rather than "futile," for plaintiff to find a job. *Neckles*, __ N.C. App. at __, 2016 WL 7984225 at *4. However, in *Wilkes*, the Supreme Court explained that if the plaintiff "shows total incapacity for work, . . . *he is not required to also show that a job search would be futile*." 369 N.C. at 746, 799 S.E.2d at 849 (emphasis added). Rather, once the plaintiff establishes disability, the burden shifts to the defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Id.* at 745, 799 S.E.2d at 849.

Plaintiff has numerous physical and vocational limitations, including "his work history, limited transferrable skills, age, . . . lack of computer knowledge[,]" and "chronic health problems which include angina, poorly controlled diabetes, and gout[.]" As we observed in our original opinion, these limitations are documented in the Commission's findings of fact but not reflected in its ultimate determination of disability. *Neckles*, __ N.C. App. at __, 2016 WL 7984225 at *4. However, plaintiff also experiences additional communication barriers not addressed by the Commission's findings. At the hearing, counsel had to continuously repeat questions and move closer to accommodate plaintiff's hearing difficulties, and the transcript includes frequent notations of "inaudible" or "unintelligible" throughout plaintiff's testimony, "[d]ue to the witness' heavy accent." Moreover, even assuming, as stated in Conclusion of Law #10, that the 30-pound lifting restriction ordered by plaintiff's doctors "would open up numerous jobs" to him, the Commission nevertheless failed to make any findings regarding *plaintiff's ability to obtain one*. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 441, 342 S.E.2d 798, 808 (1986) (explaining that "[i]f preexisting conditions such as the employee's age, education and work experience are such that an injury causes the employee a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the actual incapacity he or she suffers, and not for the degree of disability which would be suffered by someone younger or who possesses superior education or work experience").

"[T]he Commission must make specific findings that address the crucial questions of fact upon which plaintiff's right to compensation depends." *Wilkes*, 369 N.C. at 746, 799 S.E.2d at 849 (citation and quotation marks omitted). "Yet, having found credible evidence of plaintiff's [lower back injury], the Commission made no related findings on how plaintiff's compensable [lower back injury] and any related symptoms may have affected his ability to engage in wage-earning activities." *Id.* at 747-48, 799 S.E.2d at 850. Accordingly, we reverse the opinion and award and remand "to the Commission to take additional evidence if necessary and to make specific findings addressing plaintiff's wage-earning capacity, considering plaintiff's compensable [injury] in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity." *Id.* at 748, 799 S.E.2d at 850.

REVERSED AND REMANDED.

Judges BRYANT and DILLON concur.

ELIZABETH SHEARIN AND THE ESTATE OF CHEKERIA RENAE REID BY THE ADMINISTRATRIX, ELIZABETH SHEARIN, PLAINTIFFS
v.
OSCAR REID, DEFENDANT

No. COA17-514

Filed 20 February 2018

1. Judges—association with attorney—motion to recuse denied

The trial court did not err by denying plaintiff's motion to recuse the trial court judge where plaintiff alleged that the judge had shown hostility toward her attorney during the trial, that defendant's attorney had worked to elect the trial court judge, and that defendant's attorney and his wife had a social relationship with the judge. Plaintiff presented no evidence of actual bias or an inability of the judge to be impartial.

2. Evidence—motion in limine—exclusion of proceeds from wrongful death suit—no prejudice

There was no prejudice in an action seeking a declaratory judgment that defendant had lost his right to intestate succession in the granting of a motion in limine to exclude mention of potential distributions from a wrongful death lawsuit. Although defendant argued that the ruling limited her ability to argue that defendant was motivated by greed, defendant was able to mention greed as a motivating factor during his final argument to the jury.

3. Evidence—motion in limine—exclusion of expert economist

In an action seeking a declaratory judgment that defendant had lost his right to intestate succession in the estate of his daughter by virtue of his willful abandonment of her, the trial court did not err by granting a motion in limine to exclude testimony from an expert economist about the cost of raising a child during the relevant time period. Although plaintiff contended that the testimony would assist the jury in determining whether defendant's child support payments were adequate, the existence of child support orders would likely have resulted in the testimony confusing or misleading the jury.

4. Appeal and Error—failure to argue in brief—issue abandoned

The question of whether a motion in limine was properly granted was abandoned on appeal where there was no actual argument in the brief concerning why the ruling was erroneous or how plaintiff was prejudiced by it.

5. Trials—jury instructions—legislative intent

The trial court did not abuse its discretion in an action involving intestate succession and abandonment of a minor by allegedly paying insufficient support where the court refused to give the portion of a requested instruction on legislative intent. The jury was properly informed as to the substance of N.C.G.S. § 31A-2; moreover, plaintiff did not direct the Court of Appeals to any legal authority for the proposition that a trial court commits error by declining to instruct on legislative intent.

6. Trials—jury instructions—earlier order—issue preclusion—instruction denied

The trial court did not err in a case involving the alleged neglect of a minor by failing to provide sufficient child support where the court did not give a requested instruction on the effect of a prior order about the amount that defendant could pay in child support. There was no attempt to re-litigate issues already decided because the issue actually adjudicated in the prior order was an increase in defendant's child support obligation and the prior order cannot logically be construed as an adjudication that a subsequent failure to pay the amount owed was willful. Moreover, defendant's entire child support file was entered into evidence, the jury heard defendant's testimony, and the jury had the opportunity to consider all of the relevant evidence and come to its own conclusion.

Appeal by plaintiffs from order entered 24 October 2016 by Judge Patrice A. Hinnant in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2017.

Gray Newell Thomas, LLP, by Angela Newell Gray, and Gray Legal Group, LLP, by Mark Gray, for plaintiffs-appellants.

Frazier Hill & Fury, R.L.L.P., by Torin L. Fury, and R. Steve Bowden & Associates, P.C., by R. Steve Bowden, for defendant-appellee.

DAVIS, Judge.

Elizabeth Shearin and the Estate of Chekeria Renae Reid (collectively "Shearin") brought this action seeking a declaratory judgment that defendant Oscar Reid lost his right to intestate succession in the estate of his deceased daughter by virtue of his willful abandonment of her care and maintenance as provided for in N.C. Gen. Stat. § 31A-2.

Following the jury's verdict in favor of Reid, Shearin filed a motion to set aside the verdict and for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, which was denied. On appeal, Shearin argues that the trial court erred by (1) denying her motion for recusal; (2) granting Reid's motions *in limine*; and (3) failing to give certain jury instructions requested by Shearin. After a thorough review of the record and applicable law, we affirm.

Factual and Procedural Background

Elizabeth Shearin and Oscar Reid were never married but had a child together. Their daughter, Chekeria, was born in 1992. The couple separated shortly after Chekeria's birth.

On 19 December 2003, Reid signed a Voluntary Support Agreement and Order (the "Support Order") requiring him to pay child support for Chekeria. Under the terms of the Support Order, Reid was required to pay $79.00 per month in child support beginning 1 January 2004. The Support Order was modified by an order dated 8 November 2005[1] to increase his monthly child support obligation to $123.00. Because he was in arrears with respect to his child support obligations when his daughter reached the age of eighteen, Reid continued to make child support payments until he completed his payment obligations in July 2014. Chekeria was killed in a car accident on 31 March 2015 when she was twenty-two years old.

On 18 September 2015, Shearin filed a civil action against Reid in Guilford County Superior Court seeking a declaratory judgment that he had "willfully abandoned his duty to provide reasonable and adequate support" for his daughter and thus had "lost all rights to intestate succession in any part of [Chekeria's] estate" or to "recover any and all wrongful death proceeds." Reid filed an answer on 15 October 2015 alleging that he had consistently made child support payments following the entry of the Support Order and was entitled to "an immediate distribution of fifty percent . . . of all gross proceeds received by the [e]state in this matter."

The case was set for trial beginning on 1 August 2016 before the Honorable Patrice A. Hinnant. On that date, Shearin filed a motion to recuse Judge Hinnant on the grounds that she had "expressed prejudice against the Plaintiff and her counsel and that she has previously expressed . . . an opinion as to the merits of the case, casting doubt on

1. The parties refer to this order in their briefs as the "October 27, 2005" order, presumably because that is the date on which the hearing leading to the entry of the order took place.

her ability to be impartial." Shearin's motion further alleged that Reid's counsel "may have played a significant role in her campaign which reasonably questions [Judge Hinnant's] impartiality." That same day, a hearing was held on various pre-trial matters, including Shearin's motion to recuse. Following the arguments of counsel, the trial court denied the recusal motion.

The court then addressed three motions *in limine* made by Reid. In his first motion, Reid sought to exclude any mention at trial of potential proceeds or distributions from a wrongful death lawsuit related to Chekeria's death. In support of the motion, Reid argued that the central issue in the case was whether he had abandoned his daughter and that the potential distribution of wrongful death proceeds was irrelevant to the issue of abandonment. The trial court initially reserved ruling on this motion but ultimately granted it during trial.

Reid's second motion *in limine* requested the exclusion of expert testimony from an economist offered by Shearin regarding the average cost of raising a child born in 1992. Reid contended that such testimony would not assist the jury in determining the issue of abandonment because he had paid child support pursuant to the North Carolina Child Support Guidelines. Reid further argued that "[i]t would confuse the jury for an economist to come in and try to explain why that was inadequate." The trial court granted this motion.

In his final motion *in limine*, Reid sought to exclude the use during trial of (1) the phrase "adequate maintenance" as it pertained to his child support payments; and (2) the term "deadbeat dad." The trial court also granted this motion.

A jury trial was held beginning on 2 August 2016. On 5 August 2016, the jury reached the following verdict:

> ISSUE NUMBER 1:
>
> Did the respondent, Oscar Reid, willfully abandon the care and maintenance of his child, Chekeria Renae Reid?
>
> ANSWER: Yes
>
> ISSUE NUMBER 2:
>
> If you should so find, then did the respondent resume and continue his care and maintenance at least one year prior to the 18th birthday of the child?
>
> ANSWER: Yes

Based on the jury's verdict, the trial court entered a judgment on 12 August 2016 stating that Reid possessed the right to intestate succession in Chekeria's estate. Shearin filed a motion for a new trial on 18 August 2016. On 19 September 2016, Shearin also filed a renewed motion to recuse Judge Hinnant. In addition to restating the grounds set out in her initial recusal motion, Shearin alleged in the renewed motion that "the Judge and her mother celebrate[ ] the Christmas holiday at defense counsel's home on a regular basis" and that "the Judge and defense counsel's wife belong to the same social club and sorority." On 24 October 2016, the trial court entered an order denying Shearin's post-trial motions. Shearin filed a notice of appeal on 18 November 2016.

Analysis

Shearin contends in this appeal that the trial court committed reversible error in denying her motion under Rule 59 for a new trial and her renewed motion to recuse Judge Hinnant. However, Shearin has appealed only from the trial court's 24 October 2016 order on her post-trial motions and has not appealed from the underlying 12 August 2016 judgment entered by the court following the jury's verdict. Thus, only the trial court's 24 October 2016 order is presently before us in this appeal. *See Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review." (citation omitted)).

Rule 59 states, in pertinent part, as follows:

> (a) **Grounds.** — A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. R. Civ. P. 59(a).

A motion for a new trial pursuant to Rule 59 is generally addressed to the sound discretion of the trial court. *Harrell v. Sagebrush of N.C., LLC*, 191 N.C. App. 381, 384, 663 S.E.2d 444, 446 (2008), *disc. review denied*, 363 N.C. 652, 684 S.E.2d 889 (2009). Appellate review of the trial court's ruling on a Rule 59 motion "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. Moreover, "an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

I. Motion to Recuse

[1] Shearin first argues that the trial court erred in denying her motion to recuse. Specifically, she contends that Judge Hinnant was unable to rule impartially in her case and should have either recused herself or referred Shearin's recusal motion to another judge for disposition.

Canon 3C of the North Carolina Code of Judicial Conduct provides, in pertinent part, as follows:

> (1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

> (a) The judge has a personal bias or prejudice concerning a party. . . .

Code of Judicial Conduct, Canon 3C(1)(a).

The burden of proof "is on the party moving for recusal to demonstrate objectively that grounds for disqualification actually exist." *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) (quotation marks and citation omitted). This burden may be met by a showing of "substantial evidence that there exists such a personal bias, prejudice, or interest on the part of the judge that he would be unable to rule impartially, or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially." *Harrington v. Wall*, 212 N.C. App. 25, 28, 710 S.E.2d 364, 367 (quotation marks and citation omitted).

This Court has held that evidence of a strained professional relationship between a trial judge and an attorney does not — without more — require recusal. *Id.* at 34-35, 710 S.E.2d at 370-71. In *Harrington*, the defendant alleged that the trial judge "appeared to have developed a strong personal animosity" towards defense counsel stemming from the attorney's conduct during a recent judicial campaign. *Id.* at 34, 710 S.E.2d at 370 (quotation marks and brackets omitted). We noted that "[o]ther than the allegations set forth in Defendant's verified motion to recuse, Defendant presented no actual evidence supporting his contention that [the trial judge] harbored a personal animosity towards [defense counsel]." *Id.* This Court concluded that the defense attorney and trial judge "had a professional relationship which was, at worst, strained by the actions and demands [defense counsel] made during her previous campaign, as well as during the proceedings, and which did not warrant recusal." *Id.* at 35, 710 S.E.2d at 370-71.

Here, Shearin asserts both that Judge Hinnant displayed hostility toward her attorney during trial and that Reid's attorney served as chairman of a political action committee that worked to elect Judge Hinnant. With regard to the former assertion, she points to an exchange during a pre-trial conference in which Judge Hinnant cautioned Shearin's attorney that if he was unable to "curb enthusiasm or to follow the rules of the Court," then Judge Hinnant reserved the options of either stopping the trial or contacting the State Bar. We find the analysis in *Harrington* to be instructive in the present case. Shearin has presented no evidence of actual bias or an inability on the part of Judge Hinnant to be impartial.

Regarding Shearin's assertions of Judge Hinnant's alleged bias in favor of Reid's counsel because of his assistance in her campaign, Reid's

counsel responded by arguing that "based on that criteria, [I] could never practice law in these courtrooms and the surrounding counties." We are satisfied that the mere fact that Reid's counsel may have participated in Judge Hinnant's campaign was insufficient to require her recusal in this case.[2] Thus, because we conclude that Shearin failed to present substantial evidence of bias or prejudice on the part of Judge Hinnant such that "a reasonable person would question whether [she] could rule impartially," *id.* at 28, 710 S.E.2d at 367 (citation omitted), we hold that the trial court properly denied Shearin's pre-trial motion to recuse.

We likewise find no merit in Shearin's renewed motion to recuse filed on 19 September 2016. In this renewed motion, Shearin further alleged that Judge Hinnant and her mother regularly celebrated the Christmas holiday at the home of Reid's attorney and that she belonged "to the same social club and sorority" as the wife of Reid's counsel. Shearin contends that these new allegations, taken together with the allegations in her original motion, were sufficient to require Judge Hinnant's recusal. We disagree. Shearin has failed to put forth evidence of actual bias or circumstances such that a reasonable person would question Judge Hinnant's ability to rule impartially. Accordingly, the court did not err in denying Shearin's renewed motion to recuse.[3]

II. Motions *in Limine*

A. First Motion *in Limine*

[2] Shearin argues that the trial court erred in granting Reid's first motion *in limine*, which sought the exclusion of any mention of potential proceeds or distributions from a wrongful death lawsuit related to Chekeria's death. She contends that the trial court's ruling was prejudicial in that it limited her ability to argue at trial that Reid was "motivated by greed in an attempt to get an undeserved and unearned windfall share in his daughter's estate."

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial; its determination

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2. Indeed, Judge Hinnant informed counsel at the hearing on this motion that in "the campaign for this particular position . . . the Court was unopposed[.]"

3. On 1 November 2016, Shearin filed a document captioned "Notice of Objection to the Order." She attached as exhibits to this document three photographs purportedly depicting Judge Hinnant interacting with Reid's counsel and his family members at a social gathering. These photographs were submitted after the trial court's denial of Shearin's post-trial motions. Moreover, no attempt was made to authenticate or provide context for the photographs. Therefore, we do not consider them.

will not be reversed absent a showing of an abuse of the trial court's discretion." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (citation omitted). In our review, "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation omitted).

During the pre-trial hearing, the following exchange occurred between the trial court and Reid's counsel:

> [THE COURT]: I believe raising the issue of entitlement to the recovery . . . much like in a personal injury claim, I would think, and that you're restricted from referring to insurance coverage and the extent of the liability that is available for payment. Is that --
>
> . . . .
>
> [REID'S COUNSEL]: Judge, this is why this was made. The issue involving the wrongful death of this child, the amount of money recovered, who is to get the money. How it's going to be distributed has nothing to do with whether this man abandoned his child. This comes into existence when she's 22 years old, when she dies. Whether or not he's abandoned this child has already happened. . . . The question of abandonment is the issue, not how much the wrongful proceeds -- how much the proceeds were in a wrongful death case, who is going to get it, and what the distribution's going to be is all irrelevant.
>
> . . . .
>
> [THE COURT]: The proclivity of the Court is to allow [the motion *in limine*] in the sense that there will not be made any mention of an amount or what has happened to any money that might have already been recovered, in much the same way that it would be an issue of him trying to get to the money.

Although Shearin's counsel made no direct mention of wrongful death proceeds during his closing argument, we note that he was permitted to make the following statement during his final argument to the jury: "This is Oscar Reid exercising American greed and trying to portray himself as something and get something far more than he was willing to give."

Thus, Shearin's counsel was not prevented from arguing greed as a motivating factor behind Reid's conduct. Therefore, even assuming

— without deciding — that the trial court's ruling on Reid's motion *in limine* constituted error, Shearin has failed to show that any such error was sufficiently prejudicial so as to warrant a new trial. *See In re Chasse*, 116 N.C. App. 52, 60, 446 S.E.2d 855, 859 (1994) ("An error in the exclusion of evidence . . . is not ground for a new hearing unless the exclusion amounted to the denial of a substantial right. To show that he was denied such a right, an appellant must show that the error prejudiced him and that it is likely that a different result would have ensued had the error not been committed." (internal citations omitted)).

B. Second Motion *in Limine*

[3] Shearin also challenges the trial court's granting of Reid's second motion *in limine* seeking to exclude the expert testimony of an economist from the University of North Carolina at Greensboro. Shearin sought to elicit testimony from the economist that would "assist the trier of fact with what the cost of raising a child born in 1992 would be."

The admissibility of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence, which states, in pertinent part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand or 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. R. Evid. 702(a).

In the present case, the ultimate issue to be determined by the jury was whether Reid had abandoned Chekeria for purposes of N.C. Gen. Stat. § 31A-2 and, if so, whether he resumed his support of her one year or more prior to her death. N.C. Gen. Stat. § 31A-2 provides as follows:

> Any parent who has willfully abandoned the care and maintenance of his or her child shall lose all right to intestate

> succession in any part of the child's estate and all right to administer the estate of the child, except —
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

N.C. Gen. Stat. § 31A-2 (2017).

At the pre-trial hearing, Reid argued that because he paid child support for Chekeria according to the North Carolina Child Support Guidelines, any testimony from an economist as to the average cost of raising a child would only confuse the jury. Citing our Supreme Court's opinion in *In re Estate of Lunsford*, 359 N.C. 382, 610 S.E.2d 366 (2005), Shearin contended in response that her economist would assist the jury in determining whether Reid's child support payments were "adequate." The trial court granted Reid's motion.

In *Lunsford*, a father seeking to inherit from the estate of his deceased daughter lost custody of the child pursuant to a divorce decree that did not require him to pay child support. *Id.* at 391, 610 S.E.2d at 372. The father argued that even if it was determined that he had abandoned his child, he was nevertheless entitled to inherit from her estate pursuant to N.C. Gen. Stat. § 31A-2(2) because he had been deprived of custody by "order of a court of competent jurisdiction" and had "substantially complied with all orders of the court requiring contribution to the support of the child." *Id.* at 386, 610 S.E.2d at 369 (quotation marks and citation omitted).

Our Supreme Court ruled that N.C. Gen. Stat. § 31A-2(2) was inapplicable based on the facts of *Lunsford* because "[b]y its express language . . . the statutory exception may not be invoked where a court order has not required the payment of child support." *Id.* at 392, 610 S.E.2d at 372 (quotation marks and brackets omitted). The Court further stated that in cases that do not involve the payment of child support pursuant to a court order, the abandonment issue must be determined by examining whether the parent "voluntarily provide[d] *adequate* care and maintenance for purposes of N.C.G.S. § 31A-2." *Id.* at 393, 610 S.E.2d at 373 (quotation marks omitted and emphasis added).

We believe that Shearin's reliance on *Lunsford* is misplaced. *Lunsford* concerned a scenario in which a court order existed that deprived a parent of custody but did not require the payment of child support. *Id.* at 391, 610 S.E.2d at 372. The present case presents the opposite situation. Here, although Reid was required to pay child support, he was not deprived of the custody of his daughter pursuant to a court order. Thus, because Reid was never deprived of the custody of Chekeria, subsection (2) of N.C. Gen. Stat. § 31A-2 is inapplicable. Indeed, Reid argued at trial that he was entitled to the exception contained in subsection (1) of the statute because he resumed his care and maintenance of Chekeria more than one year prior to her death by making child support payments.

Nevertheless, the Supreme Court's analysis in *Lunsford* is instructive. The Court stated that "a parent who limits his role in his child's life to the parameters set out by a court has not shirked his responsibility to that child" and that "a parent should not be penalized for his or her failure to exceed the terms of a judicial child support order." *Id.* at 392-393, 610 S.E.2d at 373 (quotation marks, brackets, and citation omitted). Furthermore, this Court has held that "[c]hild support set consistent with the [North Carolina Child Support Guidelines] is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001) (quotation marks and citation omitted).

Therefore, given the existence of the child support orders, the testimony of Shearin's expert witness regarding the cost of raising a child born in 1992 would likely have confused or misled the jury. As such, we conclude the trial court did not abuse its discretion in excluding this testimony. *See State v. McGrady*, 368 N.C. 880, 895, 787 S.E.2d 1, 12 (2016) (upholding trial court's ruling excluding expert testimony because it "would not assist the jury as required by Rule 702(a)").

C. Third Motion *in Limine*

[4] In addition, Shearin contends that the trial court improperly granted Reid's third motion *in limine* to exclude use of the phrase "adequate maintenance" as it pertained to Reid's child support payments and to exclude all references to the term "deadbeat dad." However, Shearin makes no actual argument in her appellate brief as to *why* the trial court's ruling on this motion was erroneous or how she was prejudiced by it. Instead, her brief merely states that "it is difficult to glean the substance and basis for the court's granting of the defendant's motion."

North Carolina Rule of Appellate Procedure 28(b)(6) provides, in relevant part, that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Thus, we deem Shearin's assertion of error regarding the trial court's ruling on Reid's third motion *in limine* to be abandoned.

III. Jury Instructions

A. First Requested Jury Instruction

[5] Shearin next contends that the trial court erred in denying her first proposed jury instruction, which included a discussion of the legislative intent underlying N.C. Gen. Stat. § 31A-2 and was submitted by her to the trial court in writing on 3 August 2016. She also argues that the court erred in denying her alternative request at the charge conference that her counsel be permitted to argue the legislative intent of N.C. Gen. Stat. § 31A-2 to the jury during his closing argument.

As a general proposition, a requested jury instruction should be given when "(1) the requested instruction was a correct statement of the law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274 (citation omitted), *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation omitted).

Here, the specific instruction requested by Shearin regarding N.C. Gen. Stat. § 31A-2 was virtually identical to the instruction actually given to the jury except for the following additional language requested by her that the trial court declined to include:

> The legislative intent behind N.C.G.S. § 31A-2 was both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza. The General Assembly has demonstrated its unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession.

We do not believe that the trial court abused its discretion in refusing to include this additional language — taken from our Supreme Court's

opinion in *McKinney v. Richitelli*, 357 N.C. 483, 489, 492, 586 S.E.2d 258, 263, 265 (2003) — in its instructions. Based on the instruction the trial court actually gave, the jury was properly informed as to the substance of N.C. Gen. Stat. § 31A-2. Moreover, Shearin has failed to direct us to any legal authority supporting the proposition that a trial court commits reversible error by declining to instruct the jury on the legislative intent behind a statute. Therefore, we cannot say that Judge Hinnant abused her discretion in denying Shearin's requested jury instruction on this issue.[4]

B. Second Requested Jury Instruction

[6] Finally, Shearin asserts that the trial court improperly denied her request that the court instruct the jury "to accept as conclusive" the 8 November 2005 order that found Reid had the ability to pay $123.00 per month in child support. Shearin's requested instruction stated, in pertinent part, as follows:

> [T]he Plaintiff respectfully request[s] that the Court instructs [sic] the jury to accept as conclusive that the Court entered an Order on [November 8], 2005, and that the Defendant, Oscar T. Reid, was found to have the "ability to pay" child support in the amount of $123.00, and has willfully failed to comply with the orders of the Court, and that the doctrines of res judicata and collateral estoppel (or issues [sic] preclusion) precludes Oscar T. Reid from re-litigating the issues regarding his "ability to pay" which was decided in the prior proceeding.

"Under the doctrine of collateral estoppel, or issue preclusion, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties[.]" *Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (quotation marks and citation omitted). The party asserting collateral estoppel must show that "the earlier suit resulted in a final judgment on the merits" and that "the issue in question was identical to an issue actually litigated and necessary to the judgment[.]" *Id.* (quotation marks and citation omitted). We have emphasized that "[a] very close examination of matters

4. No legal authority is cited in Shearin's brief to support her alternative contention that the trial court erred in denying her counsel's request to quote the language from *McKinney* regarding legislative intent during his closing argument. Instead, her brief merely states that the request was denied "without sufficient explanation." Therefore, we deem this argument abandoned pursuant to Appellate Rule 28(b)(6).

actually litigated must be made in order to determine if the underlying issues are in fact identical; if they are not identical, then the doctrine of collateral estoppel does not apply." *Id.* (quotation marks, brackets, and citation omitted).

We note that the trial court did take judicial notice of the fact that Reid's child support was paid pursuant to a voluntary support agreement, instructing the jury as follows:

> [THE COURT]: The Court has taken judicial notice that the child support was paid pursuant to a voluntary support agreement calculated pursuant to the North Carolina child support guidelines and a court order. The law provides that the Court may take judicial notice of certain facts that are so well-known or well-documented that they are not subject to reasonable dispute. When the Court takes judicial notice of a fact, neither party is required to offer proof as to such a fact. Therefore, you will accept as conclusive that the child support was paid pursuant to a voluntary support agreement and court order.

The only issue actually adjudicated by the 8 November 2005 order was the increase in Reid's child support obligation to a monthly amount of $123.00 as of that date. At trial, Reid never disputed that he was required to pay this monthly amount following the entry of that order. However, the 8 November 2005 order cannot logically be construed as an adjudication that any *subsequent* failure by Reid to pay the full amount owed in a given month was willful. Therefore, because Reid was not attempting to relitigate issues actually decided in the 8 November 2005 order, principles of collateral estoppel did not require the trial court to give Shearin's requested instruction.

Moreover, Reid's entire child support file — including the 8 November 2005 order — was entered into evidence. Thus, the contents of that order were before the jury. A chart detailing Reid's level of compliance with his child support obligations was also entered into evidence.

In addition, the jury was able to hear Reid's own testimony concerning fluctuations in his employment status as well as his explanation for his failure to make full payments each month. His testimony on this subject included the following:

> [REID'S COUNSEL]: Now during this time -- and you're working at Cracker Barrel and all these jobs -- did you ever come down to the child support office personally and pay money?

[REID]: No, I didn't.

[REID'S COUNSEL]: How was your money paid?

[REID]: Out of my check.

[REID'S COUNSEL]: Was it deducted, like taxes?

[REID]: Yes. They got theirs before I got mine.

[REID'S COUNSEL]: All right. Why did you want to do that?

[REID]: So they can be taken care of.

[REID'S COUNSEL]: All right. Did you ever have the opportunity to say well, I didn't work as many hours this week, can you not take the money out?

[REID]: I did not.

[REID'S COUNSEL]: Would your hours on your jobs fluctuate --

[REID]: They did.

[REID'S COUNSEL]: For the type of work you did?

[REID]: They did.

. . . .

[REID'S COUNSEL]: In your file, is [sic] 14 jobs listed?

[REID]: Yes, sir.

. . . .

[REID'S COUNSEL]: Now at this point, when you work, money's coming out of your check?

[REID]: Yes.

[REID'S COUNSEL]: Did you ever try to have the payroll deduction stopped?

[REID]: No.[5]

Thus, the jury had the opportunity to consider all of the relevant evidence on this issue and come to its own conclusion regarding Reid's

5. We note that the trial transcript does not indicate that Shearin ever objected to this testimony.

compliance with his child support obligations. Accordingly, we cannot say that the trial court reversibly erred in declining to give Shearin's requested jury instruction regarding the effect of the 8 November 2005 order.

Conclusion

For the reasons stated above, we conclude that Shearin has failed to demonstrate her entitlement to relief under Rule 59. Therefore, we affirm the trial court's 24 October 2016 order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
MICHAEL TEON BROWN

No. COA17-209

Filed 20 February 2018

1. Evidence—hearsay—exception—past recollection recorded—written statements

The trial court did not err in a double first-degree murder case by allowing two prior written statements, made at a police station nearly three years before trial, to be read to the jury as substantive evidence where the statements were admissible as a past recollection recorded hearsay exception under N.C.G.S. § 8C-1, Rule 803(5). The State established that the statements correctly reflected the witnesses' prior knowledge of the matters recorded therein, and that each witness had an insufficient recollection of the matters recorded in his statement.

2. Evidence—illustrative—videotaped witness statement—failure to argue—failure to cite legal authority

The trial court did not err in a double first-degree murder case by allowing the jury to view a witness's videotaped statement as illustrative evidence where the jury did not consider the videotaped statement as substantive evidence and defendant failed to submit a cohesive argument or cite to legal authority on appeal.

Appeal by defendant from judgment entered 2 August 2016 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 20 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

ELMORE, Judge.

Michael Teon Brown ("defendant") appeals from judgment entered upon jury verdicts finding him guilty of two counts of first-degree murder. On appeal, defendant challenges the admission of several out-of-court statements made by two of the State's witnesses. Specifically, defendant contends the trial court erred by allowing two prior written statements to be read to the jury as substantive evidence, and by allowing the jury to view one witness's videotaped statement as illustrative evidence, because all three statements constituted inadmissible hearsay. After careful review, we conclude that defendant received a fair trial, free from error.

I.

On 6 January 2014, a grand jury returned two indictments charging defendant with the murders of his child's mother, Jessica Liriano, as well as Jessica's boyfriend, Jerron McGirt. The evidence tended to show that the victims had been fatally shot with a .45 caliber handgun outside of their Durham home at approximately 7:00 a.m. on 16 December 2013. No physical evidence was found directly linking defendant to the crime scene; thus, the State's case relied primarily on the testimony of multiple witnesses, including defendant's two brothers, Reginald and Antonio Brown.

The murder charges against defendant were joined for trial, which began on 25 July 2016 — nearly three years after the relevant events occurred. Defendant elected not to testify or offer any evidence at trial, while the State called Reginald and Antonio as witnesses on 27 July 2016.

Reginald's Testimony

On direct examination, Reginald testified that defendant, who lived in Hartsville, South Carolina, drove to Reginald's home in Cheraw, South Carolina, on the morning of 16 December 2013. Reginald testified defendant informed him upon arrival that Jessica and her boyfriend had been murdered. The following exchange then took place between Reginald and the State:

Q. What did [defendant] tell you that morning?

A. He came and told me that he seen that, what happened up here [in Durham], on the internet.

. . . .

Q. The only thing that -- you're telling us right now the only thing that he said to you was something about the murder that he saw on the internet?

A. Yes.

. . . .

Q. Did you ask him if he knew anything about it?

A. Yes.

Q. And what did he say?

A. He told me that he did it. And he came out with a beer bottle in his hand, with beer, and acted like he was drinking all night.

Q. So when he told you -- when you asked him about it, what did he tell you?

A. He told me he was the one that did it. But –

. . . .

Q. What else did he tell you about it?

A. That was it.

Following this exchange, Reginald testified that either Antonio or the brothers' mother called the police on the night of 16 December 2013; that Reginald, Antonio, and their mother went to the Cheraw Police Department sometime after the phone call was made; and that Reginald spoke with an investigator there and gave him a detailed, handwritten statement regarding what defendant had told Reginald about the murders. Reginald also confirmed that both audio and video from his interview with the investigator had been recorded and stored in DVD format.

Reginald's Out-of-Court Statements

As to Reginald's written statement, the State established that Reginald recognized the document based on his handwriting and signature; that it was dated 17 December 2013; and that it did not appear to have been changed or manipulated in any way since Reginald last saw it. The State then moved to admit Reginald's statement into evidence, prompting defendant to request that the court give a limiting instruction that "the statement is admitted only to the extent it corroborates or impeaches the witness's testimony." The court replied simply, "It's

his statement," with no further discussion on the matter. At the State's request, Reginald proceeded to read his written statement aloud to the jury.

> My name is Reginald Brown. I'm here to tell that my brother did a crime. He told me that he killed someone in the North Carolina area on December 16 at that morning. He told me that he used a .45 handgun. Also he told me that -- that he waited -- waited till the kids got on the bus to kill them. He was wearing a black hoodie, black pants, black shoes. He also told me not to tell anyone. He was driving a Chevy Caprice. He told me that he killed his baby mama -- mother and her boyfriend. He told me that he was waiting under some box.

After Reginald finished reading and again confirmed that he had written the statement, the State immediately moved on to address Reginald's videotaped interview. The State established that Reginald recognized the DVD as a recording he had previously watched in its entirety; that his initials appeared on the face of the disk; that it contained his interview with the investigator; and that it fairly and accurately captured his conversation with the investigator. The following dialogue then took place in the presence of the jury:

> [THE STATE]: Your Honor, I move to introduce and publish [the DVD].
>
> THE COURT: [The DVD] is admitted for illustration.
>
> [DEFENDANT]: Your Honor, I would again object under the hearsay rule and I would object that this is being offered to prove the truth of the matter asserted. I'd ask [for] a limiting instruction.
>
> THE COURT: All right. It is overruled. Ladies and gentlemen, this [DVD] is being admitted for illustrative purposes. That means it's being admitted for the limited purpose of illustrating the defendant's -- excuse me -- illustrating the witness's testimony under oath at this trial. If you believe that this earlier matter for illustrative purposes was made, you may consider it, but only for the limited purpose of deciding whether it illustrates his testimony at this trial and not for any other purpose. Thank you, ladies and gentlemen.
>
> [DEFENDANT]: Just for clarity, Your Honor. I believe you're denying it. I would ask [that] a limiting instruction

be given that they only be allowed to consider this to the extent it corroborates or impeaches his testimony.

THE COURT: I'll stick with my instruction. Thank you, sir.

The State proceeded to play the DVD for the jury. Consistent with his written statement, Reginald stated in his recorded interview that defendant had told Reginald he had killed Jessica and her boyfriend with a .45 caliber handgun, after waiting under a box on her porch until her older children left for school, but he added that defendant had left for Durham around 1:00 a.m. on 16 December 2013, and that defendant had actually shown Reginald the gun used in the murders. When the investigator asked him about the gun, Reginald repeatedly claimed that the brothers' cousin, Lorenzo Brown, now had the gun. As he had indicated in his testimony, Reginald stated in his recorded interview that "[defendant] never really got down to the details about why he did it. He just said he really did it."

On cross-examination, Reginald testified that he never saw defendant with a gun. Reginald's testimony ended with the following exchange on redirect examination by the State:

Q. When you talked to [the investigator] and when you wrote your statement, you were trying to give him all the information that you had?

A. That was all the information that I had that I wrote down.

Q. And what you told him?

A. Yeah. No, the information I wrote down, that's . . . the information that my brother had told me.

Q. Okay.

A. The stuff I didn't write down was not true.

Antonio's Testimony

On direct examination, Antonio stated that he drove to Reginald's home around 10:00 a.m. on 16 December 2013, and that defendant was still there when he arrived. Antonio testified that defendant told him that Jessica and her boyfriend had been murdered, but that defendant did not "say anything about having a role in that." The following exchange then took place between Antonio and the State:

Q. Okay. Are you saying that your brother didn't describe his role in [the murders] to you?

A. He -- he was saying -- he was saying it was stuff like -- what happened down here, but he -- I wrote in my statement, but what he saying -- that what he said, I just -- I just telling y'all 'cause I was scared. I didn't want to be an accessory or nothing.

Q. What made you think that you would be an accessory of something?

A. 'Cause if I didn't told, I probably would have been in jail.

Antonio further testified that he then drove defendant, who Antonio thought was too drunk to drive, to their cousin Lorenzo's home in Hartsville so that defendant could buy marijuana. When asked, "[Defendant] didn't say he had to take something back to Lorenzo?," Antonio replied, "No. 'Cause I spoke with Lorenzo . . . and I tried to see what was the situation about the whole gun thing. He wouldn't tell me nothing. All he said was that [defendant] bought weed from him."

Antonio's Out-of-Court Statement

After Antonio denied that defendant had told him he was returning something to Lorenzo, the following exchange took place between Antonio and the State:

Q. You mentioned -- you mentioned your [written] statement before. If you said something different in your statement that you wrote --

A. That was about three years ago. I really -- I really can't think of it back then.

Q. Well, do you think you would have remembered things the day after they happened more clearly than you do today?

A. Huh-uh. I be having a lot of stuff going on.

Q. Okay.

A. I can read what I said in that statement.

Antonio then confirmed that his mother had called the police department on 16 December 2013; that he later went to the Cheraw Police Department, where he spoke to an investigator; and that he had given the investigator a written statement. Relevant excerpts from this portion of Antonio's testimony include the following:

Q. And did you tell [the investigator] what you knew?

A. Yeah, I told him what -- yeah, what [defendant] told me. [Defendant] be saying all kinds of stuff when he drunk and stuff so I took it serious and went and told 'cause I ain't trying to be in trouble or nothing.

Q. Because you didn't want to be in trouble, you were trying to tell [the investigator] everything that you knew?

A. Yeah. Everything that I knew that what he said on the statement.

The State approached Antonio with an exhibit and established that Antonio recognized it as his written statement based on his handwriting and signature; that it was dated 17 December 2013; and that it did not appear to have been changed or altered in any way. The State then moved to admit Antonio's statement into evidence, prompting defendant to again "object just to the extent it's offered to prove the truth of the matter asserted and ask for a limiting instruction."

The trial court excused the jury following defendant's objection. Outside of the jury's presence, defendant argued that both Reginald and Antonio's written statements were hearsay, because they were not made while the witnesses were testifying at trial, and that the State had failed to lay a proper foundation for admission of the statements under the hearsay exception for recorded recollections. Specifically, defendant asserted that the State had failed to establish that either witness had an insufficient recollection of what defendant told him on 16 December 2013, as each witness had testified to what defendant told him that day, and neither witness had claimed in his testimony to not remember what defendant said. Defendant also argued that the State was improperly impeaching its own witness by introducing a prior statement that the State knew to be inconsistent with the witness's testimony.

In response to defendant's arguments, the court made the following oral findings of fact and legal conclusions regarding the witnesses' testimony and the various out-of-court statements: (1) that defendant's out-of-court statement to Reginald — that "[defendant] told [Reginald] that he did it" — was admissible via Reginald's testimony as a statement of a party-opponent; (2) that defendant's more detailed out-of-court statements were recorded in Reginald and Antonio's written statements at a time when defendant's statements were fresh in the witnesses' memories; (3) that based on both witnesses' testimonies — particularly Antonio's testimony that three years had passed and he has "a lot of stuff going on" — the witnesses had an insufficient recollection of what

they wrote down for the investigator on 17 December 2013; (4) that the witnesses testified that they did, in fact, write down for the investigator what defendant said on 16 December 2013; (5) that this was "a case of a witness who's talking about events three years later," not of the State impeaching its own witness; and (6) that both written statements — presuming they constitute hearsay, which the court questioned — fit within the hearsay exception for recorded recollections under Rule 803(5) of the Rules of Evidence. The court then overruled defendant's objection, denied his request for a limiting instruction, and allowed Antonio's written statement to be read to the jury.

In his written statement, Antonio indicated that defendant told Antonio, "I killed both of them. . . . my baby mama and her boyfriend"; that defendant "showed [Antonio] on the internet that he killed them"; that defendant said, "I was waiting on the porch for three hours until she put her kids on the bus and I shot them"; and that defendant "got [Antonio] to take to him to Hartsville to bring [their] cousin Lorenzo Brown back the gun he killed the two people with."

On cross-examination, Antonio testified that he never saw a gun. Antonio's testimony ended with the following exchange on redirect examination by the State:

> Q. . . . [I]s is fair to say that you'd do what you could to help your brother out?
>
> A. You say I do what I -- yeah. I'm saying -- but this stuff I wrote, though, he was drunk. I just telling you what -- yeah, I wouldn't -- I wouldn't lie for him or nothing, but yeah.
>
> Q. So what you wrote in your statement is what you heard [defendant] say on the 16th?
>
> A. Yeah. When he was drunk and stuff, what he say.

Additional Evidence

Additional evidence presented at trial tended to show the following:

Durham police officers responding to the crime scene on the morning of 16 December 2013 canvassed the neighborhood for witnesses. Several of Jessica's neighbors reported hearing gunshots around the time the high school bus came, which was before 7:00 a.m.

Investigators recovered eight latent fingerprint lifts and collected swabs for DNA testing from the crime scene. None of the fingerprints

matched those of defendant, Jessica, or her boyfriend, and none of the DNA profiles matched that of defendant.

With the aid of a metal detector, investigators recovered seven spent .45 caliber shell casings from Jessica's front yard.

On 31 December 2013, Hartsville police officers apprehended defendant's cousin, Lorenzo Brown, and retrieved a .45 caliber handgun from his person.

A forensic firearms analyst compared the markings of test shell casings from the handgun retrieved from Lorenzo to six of the seven spent shell casings collected from the crime scene. In the analyst's expert opinion, the markings matched.

Outcome at Trial

Before the State rested, defendant renewed his objection to Reginald and Antonio's written statements being admitted as substantive evidence, while the State requested that Reginald's videotaped statement be admitted for both illustrative and substantive purposes. The trial court reiterated that the two written statements were admissible as recorded recollections under Rule 803(5) of the Rules of Evidence; instructed the State that it could read the statements to the jury, but could not provide the jury with physical copies of the statements; and denied defendant's request for a limiting instruction. As to Reginald's videotaped statement, the court again deemed the recorded interview to be illustrative evidence, and it denied the State's request that the statement also be admitted for substantive purposes.

During the charge conference, the court indicated that it would instruct the jury on "photographs and videos as illustrative evidence" as well as "impeachment or corroboration by prior statement." The court subsequently instructed the jury that "[p]hotographs and video, specifically the video of Reginald Brown, were introduced into evidence in this case for the purpose of illustrating and explaining the testimony of a witness or witnesses. These photographs and videos may not be considered by you for any other purpose." The court also instructed the jury that

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict with or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe the earlier statement was made, and that it

> conflicts with or is consistent with the testimony of the witness at this trial, you may consider this and all other facts and circumstances bearing upon the witness's truthfulness in deciding whether to believe or disbelieve the witness's testimony.

On 2 August 2016, the jury returned verdicts finding defendant guilty of two counts of first-degree murder, and he was sentenced to life imprisonment without parole for each. Defendant entered notice of appeal in open court.

II.

On appeal, defendant contends that the trial court violated the evidentiary rule against hearsay by admitting Reginald and Antonio's prior written statements as substantive evidence, and by admitting Reginald's videotaped statement as illustrative evidence.[1] Defendant argues that these erroneously-admitted statements served as the "linchpin" of the State's case against him, and that a reasonable possibility exists that the jury would have reached a different result had the statements been excluded. For these reasons, defendant asserts that his convictions must be reversed and his case remanded for a new trial.

Each assignment of error is addressed in turn.

Admission of Prior Written Statements

[1] Defendant first contends that the two prior written statements should not have been read to the jury because the State failed to lay a proper foundation for admission pursuant to the recorded recollections exception to the rule against hearsay under Rule 803(5) of the Rules of Evidence. We disagree.

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 [in that statement]." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015) (emphasis added). "Hearsay is not admissible except as provided by statute or by [the evidentiary] rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). Rule 801(d), for example, provides that a defendant's own out-of-court statement is admissible when offered against him at trial, while Rule 803 sets forth numerous exceptions to the rule

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1. Defendant also asserts that the trial court erred in denying his request for a limiting instruction as to the evidence in question, and that such an error deprived defendant of his constitutional rights to due process and a fair trial. Because defendant fails to address this issue in his brief, it is deemed abandoned on appeal. *See* N.C. R. App. P. 28(b)(6).

against hearsay when certain conditions are met. N.C. Gen. Stat. §§ 8C-1, Rules 801(d), 803 (2015).

Initially, we must note that defendant is correct in maintaining that the two prior statements at issue here constituted hearsay. Regardless of the fact that the declarants, Reginald and Antonio, were witnesses testifying at trial, their written statements were not made *while* testifying at trial; rather, they were made at a police department in South Carolina nearly three years prior to trial. Thus, the statements were inadmissible as substantive evidence — that is, for their truth value — unless they fit within an exception to the rule against hearsay.

Rule 803 of the Rules of Evidence provides that one type of out-of-court statement, labeled a "recorded recollection," is admissible as an exception to the rule against hearsay. Specifically, Rule 803(5) allows a memorandum or record of an event to be read into evidence where (1) the witness once had knowledge about the matters he recorded, (2) the witness now has insufficient recollection to enable him to testify fully and accurately about those matters, and (3) the record was made or adopted by the witness at a time when the matters were fresh in his memory and reflected his knowledge correctly. N.C. Gen. Stat. § 8C-1, Rule 803(5). "The rule applies in an instance where a witness is unable to remember the events which were recorded, but the witness recalls having made the entry at a time when the fact was fresh in her memory, and the witness knew she recorded it correctly." *State v. Spinks*, 136 N.C. App. 153, 158–59, 523 S.E.2d 129, 133 (1999) (holding that witness's recorded statement should not have been read into evidence where witness did not write statement herself, and testified, "I didn't even read it. I just signed this piece of paper.").

"We review *de novo* the trial court's determination of whether an out-of-court statement is admissible pursuant to N.C. R. Evid. Rule 803." *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515 (2009). Thus, whether a prior written statement is admissible as substantive evidence under Rule 803(5)'s hearsay exception for recorded recollections is a question of law that is reviewed by this Court as if we were considering the issue for the first time. However, a trial court's findings of fact are binding on appeal when supported by any competent evidence. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 167 (1991).

Here, although the trial court initially questioned whether the prior written statements constituted hearsay, it concluded that the statements were nevertheless admissible pursuant to the hearsay exception for recorded recollections under Rule 803(5). As to Rule 803(5)'s

foundational requirements, the court found that on 17 December 2013, when the matters were still fresh in their memories, the witnesses wrote down what defendant told them on 16 December 2013. The court also found that based on their testimonies as well as the substantial amount of time that had passed since they recorded their statements, the witnesses had insufficient recollections as to the matters they recorded. Pursuant to the additional provisions of Rule 803(5), the court allowed the statements to be read into evidence, but it denied the State's attempt to distribute physical copies of the statements to the jury.

In asserting that the trial court erred in admitting the statements as recorded recollections under Rule 803(5), defendant contends for the first time on appeal that the State failed to establish that the written statements correctly reflected the witnesses' prior knowledge of the matters recorded therein. Defendant maintains his argument that the State also failed to establish that the witnesses had insufficient recollections about the matters recorded, while he abandons his objection at trial to the extent that it was based on improper impeachment by the State.

As to defendant's argument regarding the accuracy of the prior written statements, we first note that defendant did not lodge an objection at trial on that particular basis. *See* N.C. R. App. P. 10(a)(1); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount . . . ."). Nevertheless, even a cursory review of the record on appeal reveals that defendant's contention is meritless.

Prior to reading his statement, each witness testified on direct examination that he recalled giving a written statement to the investigator; that he recognized the document presented by the State as being that statement; that he recognized his own handwriting and signature on that statement; and that the statement, dated 17 December 2013, did not appear to have been changed or manipulated in any way. Additionally, after Reginald read his statement, the State specifically asked him, "Was that the statement you wrote?," to which he responded, "Yes, sir." Reginald further testified, on redirect, that he wrote down all the information that he had at that time, and that the information he wrote down was what defendant had told him. Similarly, Antonio testified on direct examination that he tried to write down everything that he knew defendant had said. After he read his statement, Antonio confirmed on redirect that what he wrote in his statement was what he heard defendant say on 16 December 2013.

Based on the foregoing testimony, we conclude that the State properly established that the written statements correctly reflected the witnesses' prior knowledge of the matters recorded therein, and defendant's argument to the contrary is overruled.

Defendant also contends that the State failed to establish that Reginald and Antonio had insufficient recollections about the matters recorded in their prior statements. He argues that neither witness testified to not remembering what defendant told him on 16 December 2013, which defendant asserts is a necessary component of Rule 803(5)'s foundational requirements. We disagree.

Rule 803(5) requires only that a witness's recollection be insufficient "to enable him to testify *fully and accurately*" about the matters he previously recorded. N.C. Gen. Stat. § 8C-1, Rule 803(5) (emphasis added). In determining if a witness's recollection is sufficiently exhausted for purposes of Rule 803(5), the relevant inquiry is "whether the witness is using the memorandum as a testimonial crutch for something *beyond* his recall." *State v. York*, 347 N.C. 79, 89, 489 S.E.2d 380, 386 (1997) (emphasis added).

The testimonies of both Reginald and Antonio leading up to the introduction of their prior written statements show that this evidence was necessary "as a testimonial crutch for something beyond [their] recall." *Id.* Each witness established that he wrote his statement on 17 December 2013 — nearly three years prior to trial. On direct examination, Reginald could not recall numerous details surrounding the events of that date, including what time defendant came to his home on the morning of 16 December 2013, which family member initially called the police, which police department had been called, and exactly what day he spoke to an investigator at the Cheraw Police Department. Although Reginald testified that "[defendant] told me that he did it" and "[defendant] told me he was the one that did it," it is apparent that he was unable to testify fully and accurately regarding that conversation, while Antonio explicitly testified that his statement was written "about three years ago" and he "really can't think of it back then."

Based on the foregoing testimony, the trial court found that each witness had an insufficient recollection of the matters recorded in his statement. The trial court's findings were based on competent evidence and support the conclusion that the prior written statements fit within the hearsay exception for recorded recollections. Accordingly, defendant's argument that the State failed to lay a proper foundation for admissibility under Rule 803(5) is overruled.

Admission of Videotaped Statement

[2] Despite the fact that it was not admitted as substantive evidence, defendant argues that the trial court erred by admitting Reginald's videotaped statement as illustrative evidence because — like the two prior written statements — the videotaped statement constituted inadmissible hearsay. We disagree.

On appeal, defendant fails to distinguish his argument regarding the videotaped statement from his argument regarding the written statements, ignoring the fact that the trial court twice issued a limiting instruction as to the former. Specifically, the court instructed the jury during trial that the DVD was being admitted for the limited, non-hearsay purpose of illustrating Reginald's testimony. At the end of trial, the court again instructed the jury that the videotaped statement may not be considered for any purpose other than illustration, and that the prior statements of witnesses in general should not be considered "as evidence of the truth of what was said" in those statements. Thus, because the videotaped statement was not admitted for substantive purposes, defendant cannot rely solely on his hearsay argument as to the prior written statements in contending that the court likewise erred in admitting Reginald's videotaped statement.

"We have long held that a jury is presumed to follow the instructions given to it by the trial court." *State v. Hyatt*, 355 N.C. 642, 663, 566 S.E.2d 61, 75 (2002). Further, "the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct." *Beaman v. Southern Ry. Co.*, 238 N.C. 418, 420, 78 S.E.2d 182, 184 (1953) (citations and quotation marks omitted). Because we presume that the jury did not consider the videotaped statement as substantive evidence, and because defendant has failed to submit a cohesive argument or to cite to any legal authority for the proposition that the trial court erred in admitting the DVD for the limited, non-hearsay purpose of illustrating Reginald's testimony, defendant's assignment of error is overruled.

III.

Because the two prior written statements were properly read to the jury pursuant to the hearsay exception for recorded recollections under Rule 803(5), and because defendant has failed to allege an independent argument regarding the admissibility of the videotaped statement as illustrative evidence, we hold that the trial court did not err in admitting the out-of-court statements into evidence. We also note that defendant did not challenge Reginald's testimony that "[defendant] told [him] that he did it" and "[defendant] told [him] he was the one that did it," which

the trial court properly allowed as an admission of a party opponent pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d). For the reasons stated herein, we conclude that defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and TYSON concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTONIO BULLOCK, DEFENDANT

No. COA15-731-2

Filed 20 February 2018

1. Search and Seizure—motion to suppress—drugs—prolonged traffic stop—knowing, willing, and voluntary consent

The trial court did not err in a drug trafficking case by denying defendant's motion to suppress evidence obtained during a traffic stop where the stop was lawfully extended and the search of the vehicle did not exceed the scope of Defendant's knowing, willing, and voluntary consent. The officer explained to defendant that he needed to wait for a second officer to search the vehicle, and defendant did not revoke his consent.

2. Criminal Law—guilty plea—maximum punishment calculation error—no prejudicial error

The trial court erred in accepting defendant's guilty plea to drug trafficking charges where a calculation error did not affect the maximum punishment that defendant received as a result of his plea and defendant failed to show how the result of the case would have been different if he had been informed of the correct potential maximum punishment.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgment entered 30 July 2014 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 17 November 2015. By opinion issued 10 May 2016, a divided panel of this Court reversed the decision of the trial court denying

Defendant's motion to suppress evidence. Upon review granted by the Supreme Court and by opinion dated 3 November 2017, the Supreme Court of North Carolina reversed and remanded the case to the Court of Appeals to consider Defendant's remaining arguments.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

MURPHY, Judge.

After remand by our Supreme Court, Michael Antonio Bullock ("Defendant") has two issues to be considered on appeal. Defendant first argues that the trial court erred in denying his motion to suppress because his consent to search the rental car he was driving was not voluntary due to the stop's excessive scope and duration. Specifically, Defendant argues the stop was prolonged because of questioning by Officer John McDonough ("Officer McDonough") and due to the delay in waiting for a second officer. Defendant also argues that the trial court committed prejudicial error by accepting his guilty plea without informing him of the maximum possible sentence he could receive, in violation of N.C.G.S. § 15A-1022(a)(6). A detailed statement of the facts related to the traffic stop and Defendant's motion to suppress are stated in this Court's opinion at *State v. Bullock*, ___ N.C. App. ___, 785 S.E.2d 746 (2016), *writ allowed*, 369 N.C. 37, 786 S.E.2d 927 (2016), and *rev'd*, ___ N.C. ___, 805 S.E.2d 671 (2017)(194A16). To the extent Defendant's remaining arguments rely on independent facts, they will be stated and analyzed separately.

MOTION TO SUPPRESS

[1] On 27 November 2012, Defendant was pulled over by Officer McDonough, a K 9 handler with the Durham Police Department. Officer McDonough activated his emergency equipment and initiated a traffic stop after witnessing Defendant exceed the speed limit and commit other traffic infractions. After routine questioning, Officer McDonough asked Defendant to step out of the vehicle and for permission to search Defendant. Defendant consented. After searching Defendant, Officer McDonough placed Defendant in his car and ran database checks on Defendant's license. Officer McDonough continued to ask Defendant questions while waiting for the checks to finish.

Officer McDonough asked Defendant if there were any guns or drugs in the car and for consent to search the vehicle. Defendant responded that he did not want Officer McDonough to search "my shit" (hereinafter Defendant's "property"). Officer McDonough then asked what kind of property Defendant had in the vehicle, to which Defendant replied that his property included a bag and two hoodies. Defendant then said that Officer McDonough could search the car, but not his property. After which, Officer McDonough called for backup explaining that he could not search the car without another officer present. Defendant asked what would happen if he revoked his consent, and Officer McDonough replied that he would use his dog to sniff around the vehicle. Defendant responded, "that's okay."

A second officer arrived three to five minutes after the call for backup, and Defendant's unopened bag was removed from the vehicle. Officer McDonough began to search Defendant's vehicle. During the search, Defendant was seated in Officer McDonough's patrol car with the window rolled down. Officer McDonough then brought his K-9 to the vehicle and it did not alert to any narcotics. The K-9 next sniffed the bag and indicated to Officer McDonough that there were narcotics in the bag.

Defendant argues that the trial court erred in denying his motion to suppress because his consent was not voluntary due to the prolonging of the traffic stop by Officer McDonough and by waiting for a second officer to arrive. Our review is limited by Defendant's brief "to issues defined clearly and supported by arguments and authorities." *State v. Roache*, 358 N.C. 243, 299, 595 S.E.2d 381, 417 (2004) (citation omitted); *see* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

Review of a motion to suppress is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation and quotation marks omitted).

I. Prolonging of the Traffic Stop

Defendant's argument challenges conclusion of law 2.

> That none of defendant's Constitutional rights, either Federal or State, have been violated in the method or procedure by which the traffic stop of defendant's vehicle was extended, the vehicle was searched, and defendant was seized and arrested on 27 November 2012.

The Supreme Court of the United States has held that a traffic stop is limited by "the time needed to handle the matter for which the stop was made . . . ." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015). The trial court's conclusion that the stop was not unlawfully prolonged was confirmed by our Supreme Court in *State v. Bullock*, ___ N.C. ___, 805 S.E.2d 671 (2017) (194A16). The Supreme Court held that the initiation of the traffic stop to be lawful based on Officer McDonough's observations of Defendant's traffic violations. *Id.* at ___, 805 S.E.2d at 676. The Supreme Court held that Officer McDonough lawfully frisked Defendant without prolonging the stop. *Id.* at ___, 805 S.E.2d at 677. The Supreme Court also held that Officer McDonough's database checks on Defendant's license constitutionally extended the traffic stop. *Id.* Further, the Supreme Court held that Officer McDonough's conversation during the lawful stop were sufficient to form reasonable suspicion which authorized him to use his dog to sniff Defendant's vehicle and bag. *Id.* at ___, 805 S.E.2d at 678. Because all parts of the stop were lawfully extended, the trial court did not err in determining Defendant's consent to search his vehicle was voluntary.

Defendant's argument also challenges conclusion of law 5.

> That defendant gave knowing, willing, and voluntary consent to search the vehicle. That at no point after giving his consent did defendant revoke his consent to search the vehicle.

Consent given without coercion, "freely, intelligently, and voluntarily" allows an officer to reasonably search a vehicle anywhere that might contain contraband. *State v. Baublitz, Jr.*, 172 N.C. App. 801, 807-08, 616 S.E.2d 615, 620 (2005) (citation and quotation marks omitted). "A warrantless search supported by consent is lawful only to the extent that it is conducted within the spatial and temporal scope of the consent." *Id.* at 808, 616 S.E.2d at 620. "The temporal scope of a consent to a search is a question of fact to be determined in light of all the circumstances."

State v. Williams, 67 N.C. App. 519, 521, 313 S.E.2d 236, 237 (1984) (citation omitted).

We hold that the evidence before the trial court supports the finding that Officer McDonough's search of the vehicle did not exceed the scope of Defendant's consent, and that Defendant's consent was knowing, willing, and voluntary. Officer McDonough explained to Defendant that he needed to wait for a second Officer to search his vehicle, and Defendant never revoked his consent. The only limitation that Defendant placed on Officer McDonough was to not search his property. Therefore, the trial court did not err in determining that Defendant's consent was voluntary.

DEFENDANT'S GUILTY PLEA

[2] Pursuant to a plea agreement with the State, Defendant pleaded guilty to trafficking in heroin by possession of 28 grams or more, trafficking in heroin by transportation of 28 grams or more, and possession of a controlled substance with the intent to sell a Schedule I controlled substance (heroin). The trial court correctly informed Defendant that each trafficking charge carried a potential maximum punishment of 279 months but erroneously informed Defendant that the possession charge carried a potential maximum punishment of 24 months. The trial court told Defendant that he faced a total potential maximum punishment of 582 months. The transcript of plea contained the same erroneous information regarding the total potential maximum punishments. The trial court accepted Defendant's plea, and Defendant's pursuant convictions were consolidated into one active sentence for trafficking in heroin by possession of 28 grams or more to 225 to 279 months.

Defendant petitioned this Court for a writ of certiorari on 10 August 2015, which was dismissed on 10 May 2016 "as moot per opinion." In order to comply with the Supreme Court's mandate and given the law of the case, we hold that the Supreme Court's opinion negated the prior mootness determination by our Court, and we independently exercise our authority to grant the writ of certiorari in order to review the judgment dated 30 July 2014.

Defendant and the State acknowledge that the potential maximum sentence for a class H felony is 39 months. *See* N.C.G.S. §§ 15A-1340.17(c)-(d). The transcript of plea also reflects this 15 month error. The total potential maximum punishment that Defendant actually faced was 597 months, not 582 months as stated by the trial court and indicated on the transcript of plea. As a result, Defendant argues that the trial court violated N.C.G.S. § 15A-1022(a)(6) which states that a trial court may not accept a guilty plea from a defendant without addressing

him personally and "[i]nforming 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.G.S. § 15A-1022(a)(6) (2017).

"Our Courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of G.S. § 15A-1022. Even when a violation occurs, there must be prejudice before a plea will be set aside." *State v. Reynolds*, 218 N.C. App. 433, 435, 721 S.E.2d 333, 335 (2012) (citation omitted). Errors resulting from a statutory violation require a showing of prejudice to a defendant. *State v. McLaughlin*, 320 N.C. 564, 568, 359 S.E.2d 768, 771 (1987) ("We agree that the trial judge erred as defendant contends by not adhering to the requirements of the statute, but we find no error of constitutional dimension and hold that a new trial is unnecessary because there is no showing that the error prejudiced defendant.").

> 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.G.S. § 15A-1443(a) (2017).

Defendant argues that this sentencing error was prejudicial and points to *State v. Reynolds* in support of his argument. In *Reynolds*, a defendant accepted a plea deal with a maximum sentence of 168 months. *Reynolds*, 218 N.C. App. at 434, 721 S.E.2d at 334. The defendant was subsequently sentenced to 135 to 171 months in prison. *Id.* Because defendant's sentence carried an additional three months of potential imprisonment due to attaining habitual felon status, this Court held that the voluntariness of the guilty plea was called into question and vacated defendant's convictions. *Id.* at 438, 721 S.E.2d at 336.

Here, Defendant's reliance on *Reynolds* is misplaced and fails to recognize a critical distinction. In contrast to *Reynolds*, Defendant faced no additional time of imprisonment as a result of this error. Per agreement, Defendant's charges were consolidated into one sentence with a mandatory minimum and maximum punishment as set out in the applicable version of N.C.G.S. § 90-95(h)(4)(c). As a result, the trial court's calculation error did not affect the maximum punishment that Defendant received

as a result of his plea. Further, Defendant fails to make an argument as to how the result of this case would have been different if Defendant had been informed of the correct potential maximum punishment. It would be a miscarriage of justice for us to accept that Defendant would have backed out of his agreement if Defendant knew that the total potential maximum punishment was 15 months longer on a charge that was being consolidated into his trafficking conviction. *Reynolds* did not create a per se rule requiring reversal. Reversal was appropriate in *Reynolds*, because "Defendant had been misinformed as to the maximum sentence he would receive as a result of his guilty plea." *Id.* at 437, 721 S.E.2d at 335-36. Here, Defendant has failed to show prejudice, and the trial court did not commit prejudicial error by accepting Defendant's voluntary guilty plea.

CONCLUSION

For the reasons stated above, we hold that the trial court did not err by denying Defendant's motion to suppress and did not commit prejudicial error in accepting Defendant's guilty plea.

AFFIRMED IN PART AND NO PREJUDICIAL ERROR IN PART.

Judge BRYANT concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
JONATHAN EUGENE DIXON

No. COA17-962

Filed 20 February 2018

Child Abuse, Dependency, and Neglect—criminal child abuse—intentionally inflicting serious bodily injury—severity of injury

The State did not present sufficient evidence of child abuse intentionally inflicting serious bodily injury where the child victim's leg was broken by defendant, her surgical scars were already fading by the time of trial, her leg had stopped hurting long before trial, and she was cleared to engage in normal activities within nine months of

her injury. While the severity of the child's injuries did not support a conviction for child abuse intentionally inflicting serious *bodily* injury, there was sufficient evidence to support a conviction for the lesser offense of intentional child abuse resulting in serious *physical* injury. The Court of Appeals remanded the case for resentencing on the lesser offense.

Appeal by defendant from judgment entered 23 March 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Anne Bleyman for defendant-appellant.

TYSON, Judge.

Jonathan Eugene Dixon ("Defendant") appeals from judgment entered upon a jury's conviction of child abuse intentionally inflicting serious bodily injury. The State presented insufficient evidence of Defendant's intentional infliction of serious bodily injury. We reverse and remand for re-sentencing on intentional child abuse inflicting serious physical injury.

I. Background

Defendant was indicted on one count of felony child abuse intentionally inflicting serious bodily injury on 10 February 2014. At trial, the State's evidence tended to show: Defendant lived in a house in Shelby, North Carolina, with his two daughters, ages four and six, his girlfriend Lee Webb, and her son and daughter. Lee's sister, Jennifer Webb, was also staying in the house.

On 25 January 2014, the adults awoke after Defendant's oldest daughter, CW, had cut her little sister's hair. Defendant and Lee began to argue. Lee and Jennifer left the house with Lee's daughter, and went to a friend's home. Lee, Jennifer, and their friend went out around lunchtime. Prior to their return, Defendant rode his bicycle over to the friend's house, and stated he had fallen on CW and she was hurt.

CW was transported to the emergency room at Cleveland Regional Hospital by ambulance just before 3:00 a.m. on 26 January 2014. Her leg had been stabilized in traction by EMS personnel. Defendant told one of

the hospital's admitting nurses that he was trying to put CW back to bed about 2:30 a.m., but she was fighting him. Defendant stated CW kicked him, he tripped and fell on her, and he heard her leg "pop."

The nurses noted CW's upper leg was misshaped, CW was very upset, crying, and clearly in pain, which increased with movement of the injured leg. The nurses also noted bruising around CW's nose, on her forehead and abdomen, and scrapes on her face.

CW first stated she had run into a wall. She then she told the nurses she had woken up hungry because she had not eaten any food the day before. Defendant tried to put her back to bed, but she kicked him and he "pushed her legs together until her leg popped."

Shelby Police Officer Josh Hendrick went to Cleveland Regional Hospital at 2:54 a.m. on 26 January 2014 to investigate the circumstances of CW's broken leg. Defendant stated he fell on top of CW and heard her leg pop. When questioned about CW's bruises, Defendant stated her head had wedged between the headboard and the mattress during the struggle.

CW was transferred to Levine Children's Hospital ("Levine"). Dr. Bryant Allen was working that evening, and testified CW presented with a femur fracture in traction, and her pain was being managed by morphine. CW's medical chart indicated Defendant told doctors that during the struggle with CW, she had hit her head, he fell "backwards and forwards onto her leg," and he "felt a pop and looked down at her leg and it looked funny." CW had surgery on the same day she was admitted to Levine, to properly set the fracture and place titanium rods on either side of the bone to assist with proper healing. The titanium rods were removed once the bone had healed sufficiently, between June and September 2014.

Dr. Allen described a femur fracture as an "incredibly painful experience" that requires "significant doses of pain medication and appropriate traction" to control the pain. Dr. Allen was concerned the injury was not accidental, as a great deal of force is required to break the femur. He testified that an accidental fall onto a child "is typically not enough force" to break the bone.

Dr. Mark Mancuso, a pediatric radiologist at Levine, reviewed CW's x-rays, which were taken at her admission and over the course of her treatment. He described CW's fracture as a spiral fracture, which was unusual in a child of CW's age. He stated that most fractures of this type require a great deal of force and occur when a leg has been forcibly

twisted. Dr. Mancuso testified it took between five to eight months for CW's leg to fully heal.

Dr. Toni Tildon was CW's attending physician at Levine. Defendant told Dr. Tildon he had fallen on CW as he was pulling her out from under the headboard by her legs. CW also told Dr. Tildon that Defendant had fallen on her. Dr. Tildon testified femur fractures are incredibly painful, and the pain would continue as the bone healed for several weeks or months. Dr. Tildon testified CW would not suffer any permanent bone distortion, but would probably have life-long scars from her surgery.

CW wore a cast on her leg for two or three weeks, and required the use of a wheelchair and a walker in the early stages of her recovery. CW did not return to kindergarten that year, and repeated that grade the next year. By September 2014, the rods had been removed and CW was cleared to engage in normal activities.

At trial, three years after the incident occurred, CW testified she had kicked Defendant in the stomach, and he had pulled on her leg with one hand. CW stated she heard and felt her leg "pop" and then her leg hurt "a lot." At the time of trial, CW's scars had healed and she was engaging in unrestricted activities, such as playing basketball and soccer, and jumping on the trampoline.

The defense presented no evidence. The trial court instructed the jury on both child abuse intentionally inflicting serious bodily injury under N.C. Gen. Stat. § 14-318.4(a3) and child abuse intentionally inflicting serious physical injury under N.C. Gen. Stat. § 14-318.4(a).

On 23 March 2017, the jury returned a verdict and found Defendant guilty of child abuse intentionally inflicting serious bodily injury. The trial court entered judgment and sentenced Defendant to an active prison term of 125 to 162 months. Defendant entered notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies with this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issue

Defendant's sole issue on appeal is whether the trial court erred in denying his motion to dismiss. Defendant argues the State presented insufficient evidence to submit the charge of child abuse intentionally inflicting serious bodily injury to the jury.

IV. Serious Bodily Injury

A. Standard of Review

This Court reviews the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The State must present sufficient and substantial evidence of each essential element of the offense and that the defendant was the perpetrator of the offense. *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). When ruling upon Defendant's motion to dismiss: "[t]he evidence must be viewed in the light most favorable to the State." *State v. Wilson*, 181 N.C. App. 540, 542, 640 S.E.2d 403, 405 (2007) (citation omitted).

B. Serious Bodily Injury v. Serious Physical Injury

North Carolina classifies several offenses as felony child abuse under N.C. Gen. Stat. § 14-318.4 (2017). Subsection (a) provides that

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class D felony, except as otherwise provided in subsection (a3) of this section.

N.C. Gen. Stat. § 14-318.4(a). "Serious physical injury" is defined in the statute as "[p]hysical injury that causes great pain and suffering." N.C. Gen. Stat. § 14-318.4(d)(2).

Defendant was charged under subsection (a3):

> [a] parent . . . of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child . . . is guilty of a Class B2 felony.

N.C. Gen. Stat. § 14-318.4(a3). The statute defines "serious bodily injury" as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1).

Defendant had no prior convictions or record points. As a prior record level I, a class B2 felony has a presumptive sentencing range of 125 to 157 months, and Defendant was sentenced without aggravating or mitigating factors to 125 to 162 months. A Class D felony carries a presumptive sentencing range of 51 to 64 months, for an offender with no prior record.

This differentiation and escalation of prison terms of the offenses is observed from the evolution of section 14-318.4. Prior to 1999, the statute did not include subsection (a3), and parents who "intentionally inflict[ed] any *serious physical injury* upon or to the child or who intentionally commit[ted] an assault upon the child which result[ed] in any *serious physical injury* to the child [were] guilty of a Class E felony." N.C. Gen. Stat. § 14-318.4(a) (1993) (emphasis supplied).

In 1999, the North Carolina General Assembly proposed in House Bill 160 to increase the penalty for more egregious instances of child abuse. 1999 N.C. Sess. Laws 451. The first version of the bill mandated a harsher penalty if the injury to the child was permanent. H.B. 160, Edition 1, Reg. Sess. (N.C. 2017) ("If a person commits an offense under subsection (a) of this section, and the serious physical injury is a permanent and debilitating injury, then the person is guilty of a Class C felony."). The final version contained the language codified in the current statute and punishes this offense as "a Class B2 felony." *See* N.C. Gen. Stat. § 14-318.4(a3), (d)(1) (2017).

The case law since 1999 has attempted to differentiate between felony child abuse that results in "serious physical injury" and "serious bodily injury." In cases where the charge for child abuse inflicting "serious bodily injury" was upheld, the children tend to be very young, and present with injuries that would appear to be life-threatening, prolonged, or permanent. *See*, *e.g.*, *State v. Chapman*, 154 N.C. App. 441, 572 S.E.2d 243 (2002) (two-year-old child, presented with blunt abdominal trauma which led to severe, life-threatening toxic shock due to perforated intestines); *State v. Wilson*, 181 N.C. App. 540, 640 S.E.2d 403 (2007) (two-year-old child, presented with extensive burns along backside and a blood clot in the brain, which could result in life-long medical issues); *State v. Parker*, 185 N.C. App. 437, 651 S.E.2d 377 (2007) (one-month-old child, presented with severe brain damage and extensive fractures, and who remained in a vegetative state at time of trial); *State v. Mosher*, 235 N.C. App. 513, 761 S.E.2d 204 (2014) (two-year-old child, presented with burns over 44% of her body, which required hospitalization for two months).

In contrast, the cases where a defendant was charged with felony child abuse inflicting "serious physical injury" tend to involve older children, with less permanent or life-threatening injuries. *See*, *e.g.*, *State v. Williams*, 154 N.C. App. 176, 571 S.E.2d 619 (2002) (eight-year-old child, struck on buttocks with a board, which resulted in a large bruise and open wound and required twelve to fourteen days to recover); *State v. Lowe*, 154 N.C. App. 607, 572 S.E.2d 850 (2002) (nine-year-old child, struck on the head with a pool stick); *State v. Williams*, 184 N.C. App. 351, 646 S.E.2d 613 (2007) (nine-year-old child, beaten with a belt for extended period of time, which resulted in extensive bruising, swelling, and pain for over a week).

This Court's analysis in *State v. Bohannon*, __ N.C. App. __, 786 S.E.2d 781 (2016), further illuminates the distinction between child abuse inflicting or resulting in "serious physical injury" and "serious bodily injury." The three-month-old child was brought to the emergency room and presented with significant bruising from his face to his chest. *Id.* at __, 786 S.E.2d at 784. Diagnostic scans revealed the child had "buckle fractures" to both of his tibias, which, according to expert medical testimony, are often caused by significant twisting of the bones. *Id.* The scans also revealed hemorrhaging in the brain. *Id.* The child was admitted to the hospital for orthopedic surgery and general observation, and remained hospitalized for two days. *Id.*

The defendant in *Bohannon* was initially charged and indicted with three counts of felony child abuse inflicting "serious physical injury" for the bruising, fractured legs, and the brain hematoma. The State subsequently charged him with felony child abuse inflicting "serious bodily injury" for the resulting brain hemorrhaging. *Id.* at __, 786 S.E.2d at 785. The jury returned verdicts finding the defendant guilty of two counts of felony child abuse inflicting serious physical injury, for the broken tibias and the bruising, and one count of felony child abuse inflicting serious bodily injury for the brain hemorrhage. *Id.*

The defendant appealed the trial court's denial of his motion to dismiss the charge of serious bodily injury for insufficient evidence. *Id.* The defendant argued that since the child did not suffer acute consequences as a result of the brain hemorrhage, the "brain injury never presented a substantial risk of death." *Id.* at __, 786 S.E.2d at 786. This Court recognized no case law defines "serious bodily injury" or "substantial risk of death" in the cases involving felony child abuse, but found "the age and particular vulnerability of a minor victim must factor into this analysis." *Id.*

Although the child did not have immediate life-threatening consequences upon his admission to the hospital, he would have to be monitored for dangerous side effects from the brain hemorrhage that may appear down the road. *Id.* at __. 786 S.E.2d at 787. Because the bleeding in the brain had the potential to be life-threatening, based on uncontroverted expert medical testimony, and that risk of death was created when the child suffered the brain injury, this Court held there was sufficient evidence of serious bodily injury to send the charge to the jury. *Id.*

These comparative case interpretations of the statute show the legislative intent for adding subsection (a3) as "a Class B2 felony" was to substantially increase punishment for the more egregious instances of child abuse. All child abuse is abhorrent. However, the history and intent of the statute as amended shows the charge of intentionally inflicting "serious bodily injury" is reserved for those more egregious cases where a child suffers "permanent or protracted" injuries or is placed at "substantial risk of death." N.C. Gen. Stat. § 14-318.4(d)(1).

C. Sufficiency of the Evidence

The State argues sufficient evidence was presented of Defendant intentionally inflicting serious bodily injury on CW to justify submitting that charge to the jury. The State asserts the evidence shows CW suffered disfigurement, extreme pain, and loss of the use of a limb for a protracted period of time. The State argues the cases of *State v. Downs* and *State v. Williams* support its assertion that CW suffered disfigurement due to the scars that remain from the surgery to place and remove the titanium rods in her leg.

In *State v. Downs*, this Court determined the permanent loss of a tooth in an assault qualified as "permanent disfigurement" to support sending a charge of serious bodily injury to the jury. 179 N.C. App. 860, 861-62, 635 S.E.2d 518, 520 (2006). In *State v. Williams*, this Court found a scar over the victim's eye that resulted from an assault and subsequent lingering infection "amount[ed] to permanent disfigurement." 201 N.C. App. 161, 169, 689 S.E.2d 412, 416 (2009).

This Court has more recently held that "the presence of a minor scar or other mild disfigurement alone cannot be sufficient to support a finding of serious bodily injury." *State v. Williams*, __ N.C. App. __, __, 804 S.E.2d 570, 579 (2017) (citation and internal quotation marks omitted). We reject the State's assertion that the presence of a scar is a bright-line indication to support a charge of serious bodily injury. *Id.*

In this case, CW's scars result from surgery. By the time of trial, CW's surgical scars had healed and she was engaged in unrestricted physical activities. The appearance of faded surgical scars on the leg should tend to be less disfiguring than a scar resulting from blunt impact to the face and compounded by a lingering infection. *See Williams*, 201 N.C. App. at 169, 689 S.E.2d at 416.

CW testified her scars were already fading. Further, the State's expert physician testified there should be no permanent disfiguration, or any loss or impairment of function of the leg due to the scars. Under these facts, the scars on CW's leg are not sufficient evidence of permanent disfigurement to elevate Defendant's child abuse to intentionally inflicting serious bodily injury. *See Williams*, __ N.C. App. at __, 804 S.E.2d at 579.

The State also asserts CW suffered extreme pain and loss of use of her leg for a period of time, which supports sending the charge of serious bodily injury to the jury. However, the State offers no support for these assertions. As stated in the statute, to be considered "serious bodily injury," it is not enough for the victim to suffer extreme pain, but rather "a permanent or protracted condition that causes extreme pain." N.C. Gen. Stat. § 14-318.4(d)(1).

Child abuse inflicting "serious physical injury" is "[p]hysical injury that causes great pain and suffering." N.C. Gen. Stat. § 14-318.4(d)(2). CW testified her leg had stopped hurting long before trial. CW was cleared to engage in normal activities within nine months of her injury.

Unlike in *Bohannon*, where the injury created "a substantial risk of death," the injuries to CW did not cause "serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ," or result "in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4 (d)(1); *see Bohannon*, __ N.C. App. at __, 786 S.E.2d at 781. As no testimony or other evidence was presented that CW was ever at risk of death due to her injury, the outcome of her injury is determinative of whether she suffered a "serious bodily injury."

Relying upon the established precedents of felony child abuse in the cases above, the State presented insufficient evidence to submit the charge of felony child abuse inflicting serious bodily injury to the jury. However, the evidence submitted in the light most favorable to the State was sufficient to submit and support a conviction of intentional child abuse resulting in serious physical injury.

V. Conclusion

Defendant does not dispute he inflicted physical injury upon his child. He does not argue the injury was unintentional. He disputes the severity of the injury to support a conviction for felony child abuse intentionally inflicting serious bodily injury. Other than as discussed above, this Court has refused to create a bright-line differentiation between "serious physical injury" and "serious bodily injury" as it pertains to felony child abuse and instead it reviews cases on a fact-specific basis.

Comparing the facts of this case to others sustaining felony child abuse intentionally inflicting serious bodily injury, the evidence presented does not sustain the heightened charge. The State did not present sufficient evidence to overcome Defendant's motion to dismiss. Defendant's sentence of felony child abuse intentionally inflicting serious bodily injury is reversed.

The State presented sufficient evidence to support a conviction of felony child abuse inflicting serious physical injury. We remand this matter to the trial court for re-sentencing on the lesser offense of felony child abuse inflicting serious physical injury. *It is so ordered.*

REVERSED AND REMANDED FOR RE-SENTENCING.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
KENNETH WAYNE GREEN, JR., DEFENDANT

No. COA17-39

Filed 20 February 2018

Motor Vehicles—driving motor vehicle while license revoked—jury instruction—knowledge of license revocation

The trial court erred in a driving a motor vehicle while license revoked case by refusing to instruct the jury that a defendant must have knowledge of his license revocation to be found guilty, where defendant introduced evidence that he had not received actual notice of his license's revocation from the Department of Motor Vehicles. The error was prejudicial because there was a reasonable possibility that a jury, properly instructed, would have acquitted defendant.

Appeal by Defendant from judgment entered 5 August 2016 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Meghan Adelle Jones, for defendant-appellant.

MURPHY, Judge.

Kenneth Wayne Green, Jr. ("Defendant") appeals his conviction for driving a motor vehicle while his license was revoked ("DWLR") in violation of N.C.G.S. § 20-28(a). On appeal, Defendant assigns error to the trial court's refusal to instruct the jury that a defendant must have knowledge of his license revocation to be found guilty of DWLR. After careful review, we hold that, because Defendant introduced evidence that he had not received actual notice of his license's revocation from the Department of Motor Vehicles, the trial court was required to instruct the jury that it could find Defendant guilty only if he had knowledge of this revocation. We vacate Defendant's conviction and grant a new trial.

BACKGROUND

Defendant was driving on Old Statesville Road in Charlotte on 26 August 2015. Officer William Howard ("Officer Howard"), with the Charlotte-Mecklenburg Police Department, was on patrol in the area and pulled Defendant over because his vehicle's registration tag had expired. Officer Howard cited Defendant for driving while displaying an expired registration tag in violation of N.C.G.S. § 20-111(1) and for DWLR in violation of N.C.G.S. § 20-28(a). The Defendant's license was previously revoked for driving while impaired.

Defendant's trial was bifurcated at his request. The first phase tried the DWLR and driving with an expired registration tag charges, and the second phase determined whether or not Defendant's license revocation was an impaired driving revocation pursuant to N.C.G.S. § 20-28(a1). During the first phase, the State entered a certified copy of Defendant's driving record into evidence. This record indicated that his license was suspended from 25 July 2015 through 25 July 2016.[1] The driving record

1. The portions of Defendant's driving record containing the cause of his license's revocation (impaired driving) were redacted in the first phase.

also included copies of four dated letters from the Department of Motor Vehicles ("DMV") addressed to Defendant which stated that his license had been suspended. However, Defendant testified that he had never received any of these letters and was unaware that his license had been suspended. He opined that his father, Kenneth Wayne Green Sr., might have received and opened the letters because he lived at the same address as Defendant.

At the charge conference, the trial court proposed using a modified version of pattern jury instruction 271.10 for the DWLR charge. The unmodified version of 271.10 reads:

> For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant drove a motor vehicle. Second, that he drove the motor vehicle on a highway. And Third, that at the time he was driving the motor vehicle, his driver's license was [suspended] [revoked]. *The defendant must have had knowledge of the revocation at the time he was driving the motor vehicle.*
>
> In order for you to find that notice of the [suspension] [revocation] was given, of which the defendant had knowledge, [the State must prove beyond a reasonable doubt that notice of the [suspension] [revocation] was personally delivered to the defendant [the State must prove beyond a reasonable doubt that the defendant surrendered his license to (name official) of the (name court) (name date) [the State must prove three things beyond a reasonable doubt:
>
> First, that notice was deposited in the United States mail at least four days before the alleged driving of a motor vehicle by the defendant. Second, that the notice was mailed in an envelope with postage prepaid. And Third, that the envelope was addressed to the defendant at his address as shown by the records of the Department of Motor Vehicles.
>
> Proof beyond a reasonable doubt that the State complied with the three requirements of the notice provisions permits, but does not compel you to find that defendant received the notice and thereby acquired knowledge of the [suspension] [revocation]. The State must prove the essential elements of the charge, including the defendant's

> knowledge of the [suspension] [revocation], from the evidence beyond a reasonable doubt.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant drove a motor vehicle on a highway, while his driver's license was [suspended] [revoked]; and that the defendant knew on that date that his license was [suspended] [revoked] because [notice of the [suspension] [revocation] was personally delivered to the defendant] [the defendant surrendered his license to (name official) of the (name court) on (name date)] [at least four days before the alleged offense the Department of Motor Vehicles deposited notice of the [suspension] [revocation] in the United States mail in an envelope with postage prepaid and addressed to the defendant at his address as shown by the records of the Department] then it would by [sic] your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I. Crim. 271.10 (2001).

The trial court suggested removing the following language from the pattern jury instruction–*the defendant must have had knowledge of the revocation at the time he was driving the motor vehicle*. Defendant objected, but the trial court overruled the objection and instructed the jury on the DWLR charge as follows.

> The defendant has been charged with driving a motor vehicle on a highway while his driver's license was suspended or revoked. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant drove a motor vehicle. Second, that he drove the motor vehicle on a highway. And third, that at the time he was driving the motor vehicle his driver's license was suspended or revoked. In order for you to find notice of a suspension or revocation was given, the State must prove three things beyond a reasonable doubt. First, that notice was deposited in the United States mail at least four days before the alleged driving of a motor vehicle by the defendant. Second, that the notice was mailed in an envelope with postage prepaid. And third, that the envelope was addressed to the

> defendant at his address as shown by the records of the Department of Motor Vehicles. And so if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a motor vehicle on a highway, while his driver's license was suspended or revoked, at least four days before -- and that at least four days before the alleged offense the Department of Motor Vehicles deposited notice of the suspension or revocation in the U. S. Mail, in an envelope with postage prepaid, and addressed to the defendant at his address as shown by the records of the Department, then it would be your duty to return a verdict of guilty.

The jury found Defendant guilty of DWLR.

During the trial's second phase, an unredacted version of Defendant's driving record was admitted into evidence which showed that his license had been revoked for driving while impaired. The State rested, Defendant introduced no additional evidence, and the trial court submitted the question of whether Defendant's license had been revoked on the basis of an impaired driving revocation to the jury. The jury was instructed as follows.

> Do you find from the evidence beyond a reasonable doubt that at the time the defendant was driving while license revoked (*sic*) the defendant's license was revoked based on an impaired driving revocation?
>
> The law states that a revocation is an impaired driving revocation if it is based on a person's refusal of a chemical analysis. The State bears the burden of proving that fact beyond a reasonable doubt.

The jury answered affirmatively, and the trial court entered a suspended sentence of 120 days imprisonment and 18 months of supervised probation. Defendant gave notice of appeal in open court.

ANALYSIS

Defendant's only argument on appeal contends that the jury instructions did not require the jury to find every element of DWLR, specifically that an individual must have "knowledge" of his license revocation. Rather, the instructions given only included the elements necessary to create a rebuttable presumption in favor of the State that a defendant had received notice of his license revocation and thereby acquired knowledge of it. We agree.

Arguments challenging a trial court's decisions regarding jury instructions are reviewed de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "A trial court must instruct jurors on every element of the charged offense." *State v. Snyder*, 343 N.C. 61, 68, 468 S.E.2d 221, 225 (1996). A conviction for DWLR under N.C.G.S. § 20-28(a) requires the State to prove beyond a reasonable doubt that (1) a defendant operated a motor vehicle (2) on a public highway (3) while his driver's license was revoked. *State v. Atwood*, 290 N.C. 266, 271, 225 S.E.2d 543, 545 (1976). "The State must also prove the defendant had actual or constructive knowledge of the . . . revocation in order for there to be a conviction under this statute." *State v. Cruz*, 173 N.C. App. 689, 697, 620 S.E.2d 251, 256 (2005)(citing *Atwood*, at 271, 620 S.E.2d at 545) (internal quotations omitted). If the State presents evidence that the DMV mailed notice of a defendant's license revocation to the address on file for the defendant in compliance with N.C.G.S. § 20-48 at least four days before the DWLR offense, a "prima facie presumption that the defendant received the notice, thereby acquiring knowledge of his license revocation" is raised. *Atwood*, at 271, 225 S.E.2d at 545. However, a "defendant is not . . . denied the right to rebut this presumption," *id.*, at 271, 225 S.E.2d at 545, and if the defendant presents "*some* evidence of failure of defendant to receive the notice or *some* other evidence sufficient to raise the issue . . . the trial court must . . . instruct the jury that guilty knowledge by the defendant is necessary to convict[.]" *State v. Chester*, 30 N.C. App. 224, 227-228, 226 S.E.2d 524, 526-527 (1976) (emphasis added).

Here, the State provided evidence that notice of Defendant's driver's license revocation had been mailed in accordance with N.C.G.S. § 20-48 to the address on file for Defendant at least four days before the offense was committed. This evidence was sufficient to establish the presumption that Defendant had notice and knowledge of his revocation. To rebut the presumption, *Chester* required Defendant to produce "*some* evidence of failure of defendant to receive the notice or *some* other evidence sufficient to raise the issue." *Chester*, at 227-228, 226 S.E.2d at 526-527. Defendant did precisely that: he testified that he did not receive the notice from the DMV and offered evidence to explain why the mailed notification might not have reached him. His evidence suggested that, because of his shared name and address with his father, he never received actual notice of his license's revocation. This evidence, which the jury was free to believe or disbelieve, clears the low bar that *Chester* and *Cruz* set out. Defendant was therefore entitled to an instruction consistent with Pattern Jury Instruction 271.10 that informed the jury that "the defendant must have had knowledge of the revocation at the

time he was driving the motor vehicle." *See* N.C.P.I. Crim. 271.10 (2001). The trial court erred by refusing to provide it.

Turning to the issue of whether or not the error was prejudicial so as to require a new trial, we hold that it was. An error in jury instructions is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443 (2017). The burden of showing prejudicial error is on the defendant, *id.*, and when this burden is met, a new trial is a proper remedy. *See State v. Castaneda*, 196 N.C. App. 109, 118, 674 S.E.2d 707, 713 (2009) (citations omitted); *see also* N.C.G.S. § 15A-1447(a) (2017) ("If the appellate court finds that there has been reversible error which denied the defendant a fair trial conducted in accordance with law, it must grant the defendant a new trial.").

Lack of knowledge of his license revocation was Defendant's only defense to the DWLR charge. He did not dispute that his license had been revoked or that he was driving on a public road when he was stopped. Like the defendant in *State v. Chester*, who received a new trial due to an error in jury instructions, Defendant here offered some evidence that he did not receive notice and had no knowledge that his license had been revoked. Therefore, there is a reasonable possibility that a jury, properly instructed, would have acquitted him on this charge and there must be a new trial. *See Chester*, at 228, 226 S.E.2d at 527 ("Since in the case before us the defendant offered evidence that he did not receive notice and had no knowledge that his license had been suspended and the court did not charge the jury that it could find the defendant guilty only if he knew of the license suspension, we find error, and there must be a [new trial.]").

CONCLUSION

The trial court failed to instruct the jury on every essential element of DWLR, and this error was prejudicial to Defendant. We vacate Defendant's conviction for DWLR and remand the case for a new trial.

NEW TRIAL.

Judges HUNTER, JR. and DAVIS concur.

STATE v. HILLARD

[258 N.C. App. 94 (2018)]

STATE OF NORTH CAROLINA
v.
ERIC E. HILLARD

No. COA17-437

Filed 20 February 2018

Sentencing—restitution award—unsworn statements and documentation

The trial court did not abuse its discretion in an animal cruelty prosecution by awarding restitution where the amount was supported by sufficient evidence and the trial court properly considered defendant's ability to pay. It is not necessary that a witness be sworn during such hearings, and defendant waived any argument by not objecting and declining a question from the court about whether he wanted the witnesses sworn.

Appeal by defendant from order entered 26 October 2016 by Judge Christopher W. Bragg in Rowan County Superior Court. Heard in the Court of Appeals 13 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew O. Furuseth, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant.

ELMORE, Judge.

Eric E. Hillard ("defendant") pled no contest to one count of misdemeanor cruelty to animals. On appeal, defendant argues that the trial court erred by imposing a $10,693.43 restitution award because that amount was not supported by sufficient competent evidence regarding injuries and damages that arose directly and proximately out of the offense committed by defendant. Defendant also contends that the trial court abused its discretion by ordering restitution without regard for defendant's ability to pay the amount ordered.

Because there was sufficient competent evidence to support the amount of restitution ordered by the trial court, and because the trial court properly considered defendant's financial circumstances and found the restitution award to be within his ability to pay, we hold that the trial court neither erred nor abused its discretion in imposing a $10,693.43 restitution award.

I.

On 7 February 2014, defendant shot Carl and Karen Haussmann's 3-year-old beagle in the neck with a .22 rifle, leaving the dog paralyzed after surgery failed to restore his mobility. Defendant had no prior history with or connection to the Haussmanns, who kept all of their animals contained within a five-foot-tall fence surrounding their property. No motive whatsoever was offered to explain why defendant approached the Haussmann's backyard that morning and shot their dog through their fence.

Based on the incident with the Haussmann's dog, defendant was indicted on 9 February 2015 on one count of felony cruelty to animals. His case came on for trial on 24 October 2016. Pursuant to a plea arrangement with the State, defendant entered a no-contest plea to one count of misdemeanor cruelty to animals on 25 October 2016. The trial court accepted defendant's plea and proceeded to the sentencing portion of the hearing.

At the outset of the sentencing hearing, the State indicated that the Haussmanns had provided an itemized worksheet of their expenses arising from the incident ("the expense worksheet"). The expense worksheet was accompanied by supporting documentation that included surgery bills, veterinary bills, letters, and receipts for supplies and other necessaries purchased since the incident. The trial court stood at ease while defendant reviewed the information provided.

In addition to the expense worksheet and supporting documentation, the Haussmanns had previously submitted written victim impact statements. Both Mr. and Mrs. Haussmann were present at the sentencing hearing and requested to make oral statements as well. The trial court asked defendant if he planned to cross-examine the Haussmanns, in which case the trial court would have them sworn, but defendant stated that he did not think he needed to do so. The trial court then addressed the Haussmanns directly, explaining that he had read their written statements and inviting each of them to be heard. Mrs. Haussmann first described how she had altered her daily routine to accommodate the dog's special needs, elaborated on the figures presented in the expense worksheet, and explained that she could not bring herself to "put down" the dog simply because he had become an inconvenience. Mr. Haussmann added that the expense worksheet was accurate, but that the total amount of damages had likely been underreported.

Following the oral victim impact statements, defendant was sworn and testified regarding his financial circumstances. Defendant was

49 years old at the time of the hearing and lived with his mother in the home she owned. He had various health issues related to diabetes and several orthopedic surgeries, and he claimed to owe "hundreds of thousands" of dollars in medical bills, but he was not making any payments on those bills. Defendant previously worked in car sales, but he had not been employed full-time since 2012. He owned a riding lawn mower and regularly mowed two yards, for which he earned approximately $180.00 per month, and had collected scrap metal for additional income in the past. Defendant received financial assistance from his mother, including free housing, utilities, and food, and he had a 16-year-old son whose mother helped provide for that young man as well. Defendant estimated that he had the ability to pay $50.00 per month in restitution.

The trial court reviewed the evidence overnight and announced the next day that in determining the amount of restitution to be paid, it had considered the expense worksheet, supporting documentation, and all matters pertaining to defendant's financial resources and abilities. The trial court also addressed defendant directly, stating that "while you have a limited capacity to earn money, you do have that capacity to earn money, and you've not been declared disabled at this point in time." The trial court then ordered defendant to pay $10,693.43 in restitution and serve 60 months of probation, with payments at that rate amounting to $178.22 per month. The trial court went on to inform defendant that his probation could be extended for a total of 96 months, which would lower the payments to $111.39 per month. Defendant gave notice of appeal in open court.

II.

On appeal, defendant assigns error to both the amount of restitution ordered by the trial court as well as the trial court's assessment of his ability to pay that amount. Each assignment of error is addressed in turn.

A. Amount of Restitution

Defendant first contends that the trial court erred by ordering him to pay $10,693.43 in restitution because that amount was not supported by sufficient competent evidence. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1340.34, the trial court is authorized to order restitution "for any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c) (2015). "A trial court's award of restitution must be supported by competent evidence in the record." *State v. Clifton*,

125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997). Whether the amount of restitution recommended by the trial court is supported by competent evidence adduced at trial or sentencing is reviewed by an appellate court *de novo*. *State v. Wilson*, 340 N.C. 720, 726-27, 459 S.E.2d 192, 196 (1995). However, the award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005). Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal. *Id.*

Here, the State provided written victim impact statements to the trial court during the sentencing hearing. The trial court also heard oral victim impact statements from the Haussmanns and received an itemized worksheet of expenses as well as supporting documentation, including veterinary bills and receipts.

On appeal, defendant argues these unsworn statements and documentation constitute incompetent evidence that was insufficient to support the restitution award. Notably, defendant never objected to this evidence at the sentencing hearing. Defendant was specifically asked by the trial court if he wanted the Haussmans to be sworn and cross-examined, but he declined the request. Defendant has thus waived any argument concerning the unsworn statements for appellate review. *See State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000) (upholding an aggravating factor where it was supported by an unsworn victim impact statement).

Notwithstanding the fact that defendant failed to object to the evidence offered at the sentencing hearing, it is well-settled that the requirement that a witness be sworn does not apply during such hearings. *Id.* (citing N.C. Gen. Stat. § 15A-1334(b) (2015) ("Formal rules of evidence do not apply at the [sentencing] hearing.")). Thus, the written victim impact statements, together with the oral victim impact statements, expense worksheet, and accompanying documentation, constitute sufficient competent evidence to support the restitution award. Accordingly, the trial court committed no error as to the amount awarded, and defendant's argument to the contrary is overruled.

B. Ability to Pay

In his second assignment of error, defendant contends the trial court abused its discretion by ordering restitution without regard for his ability to pay the amount ordered. We disagree.

> In determining the amount of restitution to be made, the court shall take into consideration the resources of

> the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of facts or conclusions of law on these matters. . . .

N.C. Gen. Stat. § 15A-1340.36(a) (2015). Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion. *State v. Carter*, 186 N.C. App. 680, 652 S.E.2d 72, 2007 WL 3256885, at *2 (2007) (unpublished).

Here, the trial court properly considered defendant's financial resources and ability to pay restitution pursuant to the requirements of N.C. Gen. Stat. § 15A-1340.36(a). Specifically, defendant testified regarding his employment history, assets, dependents, medical bills, and the support he receives from his mother and others. While defendant argues on appeal that the trial court "ignored" certain portions of his testimony, nothing in the record suggests the court did not take each factor of N.C. Gen. Stat. § 15A-1340.36(a) into consideration when determining that defendant had the ability to pay the restitution award. Thus, the trial court did not abuse its discretion, and defendant's second assignment of error is overruled.

III.

Because the amount of restitution imposed by the trial court was supported by sufficient competent evidence, and because the trial court properly considered defendant's financial resources and ability to pay that amount, the trial court neither erred nor abused its discretion in imposing a $10,693.43 restitution award. Accordingly, the order of the trial court is hereby:

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

STATE v. JACKSON

[258 N.C. App. 99 (2018)]

STATE OF NORTH CAROLINA
v.
ISAAC TYRONE JACKSON, JR.

No. COA16-1141

Filed 20 February 2018

Criminal Law—discovery—murder trial—supplemental rebuttal expert testimony—disclosure during trial

The trial court did not abuse its discretion in a murder case by allowing the State to elicit testimony, first disclosed to the defense during trial, from a supplemental rebuttal expert, where the State sought the testimony in direct response to its untimely receipt (right before jury selection) of a primary defense expert's final report, which differed from that expert's previously furnished report. The defense had the opportunity to examine the expert during a voir dire examination; the trial court limited the expert's rebuttal testimony and the use of her report; the defense was furnished all required discovery eight days before the expert testified; and defendant never moved for a continuance or requested additional time to prepare.

Appeal by defendant from judgment entered 25 June 2015 by Judge Charles W. Gilchrist in Lee County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Jarvis John Edgerton, IV, for defendant.

ELMORE, Judge.

Isaac Tyrone Jackson, Jr. (defendant) appeals from a judgment sentencing him to life imprisonment without parole after he was convicted by a jury of first-degree premeditated murder for the shooting death of his ex-girlfriend, Shamekia Griffin. The sole issue on appeal is whether the trial court erred by allowing the State to elicit testimony from a supplemental rebuttal expert, Nicole Wolfe, M.D., that the State first disclosed to the defense during trial, in alleged violation of N.C. Gen. Stat. § 15A-903(a)(2)'s pre-trial expert witness disclosure requirements.

Although the State did not disclose Dr. Wolfe, her opinion, nor her expert report before trial, we hold that defendant failed to demonstrate

the trial court abused its discretion in allowing the State to elicit her limited expert rebuttal testimony. The State explained it sought Dr. Wolfe in direct response to its untimely receipt, right before jury selection, of a primary defense expert's final report, which differed from that expert's previously furnished report. Dr. Wolfe was a supplemental rebuttal witness, not the State's sole rebuttal witness, nor a primary expert introducing new evidence. Defendant was able to fully examine Dr. Wolfe and the basis for her opinion during a *voir dire* examination held eight days before her trial testimony. The trial court set parameters limiting Dr. Wolfe's testimony. And defendant received the required discovery eight full days before Dr. Wolfe testified, four days of which no court was held, providing the defense an opportunity to prepare against her rebuttal testimony. Finally, although the defense moved to continue its expert's *voir dire* examination based on the State's alleged untimely discovery disclosures, it never moved for a continuance of trial or requested more time to prepare for Dr. Wolfe's rebuttal. On this record, we hold that defendant has failed to demonstrate that the trial court abused its discretion in allowing Dr. Wolfe's limited rebuttal testimony and, therefore, that defendant received a fair trial, free of error.

I. Background

The State's trial evidence indicated that, on 19 November 2010, defendant premeditatedly and deliberately shot and killed Shamekia in front of one of their fifteen-year-old sons in an act of domestic violence. Defendant and Shamekia had a long relationship history together and started dating in 1995, when they were around sixteen years old. About three years later, they became parents to twin boys and, after defendant's sister kicked him out of her apartment for selling drugs, defendant moved into Shamekia's apartment. In 2002, defendant was arrested on federal drug charges, later convicted of trafficking cocaine, and served around eight years in federal prison. A few years into his prison sentence, defendant and Shamekia's relationship began to deteriorate. Shamekia eventually stopped visiting defendant in 2007 and their relationship became "distanced." In July 2010, after discovering he had been approved for release to a halfway house that October, defendant attempted to reconcile his relationship with Shamekia. They discussed defendant being a better father to their children, obtaining a legitimate job, and not returning to selling drugs.

A few weeks after defendant's release to the halfway house in October 2010, however, he returned to drug dealing. When Shamekia found out defendant returned to hanging around with the friends he used to sell drugs with, she confronted him about his promise not to deal

drugs, which caused arguments. Defendant continued hanging out with his friends, and they began making remarks about Shamekia having seen other men. When Shamekia confronted defendant about selling drugs, defendant accused her of cheating on him. These arguments continued for several days and progressed in intensity. Shamekia eventually told defendant: "[P]lease don't contact me anymore." By 18 November 2010, Shamekia stopped responding to his accusations. That day, defendant called and texted Shamekia repeatedly until about 3:00 a.m.

On the morning of 19 November 2010, defendant called Shamekia and attempted to visit her at work, but Shamekia refused. Around 3:00 p.m., defendant called Shamekia again. They continued to argue about defendant allegedly lying about not returning to dealing drugs and Shamekia allegedly lying about having seen other people. After the conversation ended, defendant called Shamekia multiple times but was unable to reach her. Around 6:00 p.m., defendant asked his cousin to give him a ride to Shamekia's mother's house in an attempt to locate Shamekia. After Shamekia's mother told defendant everything was fine and instructed him to return to the halfway house, defendant and his cousin left. Around 8:00 p.m., defendant asked a borrow a gun from his cousin and asked his cousin to drive him Shamekia's house. Shamekia's car was not in the driveway, so defendant asked his cousin to drop him off at a nearby McDonalds. After he ate, defendant called his cousin again, and he picked him up. A short time later, defendant requested to borrow his cousin's car. Defendant then drove around, calling Shamekia and looking for her. Defendant had called Shamekia nearly forty times that day.

Eventually, defendant spotted Shamekia's car driving through the McDonald's drive-thru with one of their sons, and he called her. Shamekia answered but immediately gave the phone to her son. Defendant asked whether Shamekia was with a man, and their son replied: "No." Unbeknownst to Shamekia or their son, defendant followed Shamekia's car back to her house and parked nearby.

After Shamekia and their son went inside and ate, defendant called Shamekia again. Shamekia answered, and defendant demanded to know why she had been refusing to answer his calls. Shamekia accused him of lying about drug dealing; defendant accused her of lying about cheating on him. After their conversation ended, defendant walked toward Shamekia's house and called her again. Shamekia answered and replied "yeah" and then immediately hung up. Defendant then proceeded to enter Shamekia's house at around 8:41 p.m. and fatally shoot her five times in front of their son.

On 13 December 2010, defendant was indicted for first-degree premeditated murder. On 17 December 2010, defendant filed a "Request for Voluntary Discovery," seeking all information discoverable under N.C. Gen. Stat. § 15A-903. On 6 September 2013, the State disclosed its proposed expert witness list, which did not include Dr. Wolfe. On 18 September 2013, the defense alerted the State it might present a diminished-capacity defense.

On 16 February 2015, three months before trial, the defense disclosed Dan Chartier, Ph.D. and Moira Artigues, M.D. as its primary expert witnesses. Chartier, a psychologist, was later tendered as an expert in administering a controversial diagnostic tool called a qualitative electroencephalograph (qEEG). While an electroencephalograph (EEG) measures electrical patterns on the brain that reflect cortical activity, qEEG qualitatively measures a patient's EEG data by comparing it to databases of other patients' EEG data for statistical analysis. A patient's qEEG results are typically processed into topographical "brain maps" reflecting the comparative cortical activity, which the defense argued can provide diagnostic value in identifying relative brain functioning impairment.

The defense furnished Chartier's *curriculum vitae*, a first draft of Chartier's expert report containing his interpretative conclusions of defendant's qEEG results, and notice that Chartier would rely on qEEG to support his opinion that, at the time of the shooting, defendant was incapable of forming the specific intent to kill required for a first-degree premeditated murder conviction. According to Chartier, defendant's qEEG results showed significantly diminished electrical activity in his frontal and central cortex, the brain centers responsible for governing "decision-making, reasoning[,] and impulse control." Based on these results, Chartier opined that defendant suffered from "left hemisphere and frontal lobe dysfunction," a mental disorder not recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM).

At a pretrial hearing on 12 March, defendant's motion under N.C. Gen. Stat. § 15A-903(a)(2) for the State to disclose all of its experts was heard. That day, the State disclosed Julia Messer Ph.D., a forensic psychologist who had previously examined defendant's capacity to stand trial, as the only expert it forecast calling to rebut a diminished-capacity defense. At the conclusion of the hearing, the trial court ordered that "all expert opinions be disclosed . . . within a reasonable time" and that, "[t]o the extent that there is a motion in limine, that's reserved for the trial judge. If there is some question about not being disclosed, that's for the trial judge to decide whether to allow that evidence."

On 17 April, immediately before jury selection, the defense furnished Chartier's final report. In that report, Chartier's ultimate conclusions and opinion remained the same—that is, defendant's qEEG results indicated he lacked the mental capacity to form the specific intent to kill—but Chartier appeared to have conducted further qEEG analysis, and the black-and-white brain maps included in Chartier's first report were now illustrated in color, enhancing their visual impact.

On 26 May, immediately after jury selection but before empanelment, the State informed the defense and the trial court that it had been "digesting, reviewing and consulting on" Chartier's final report, and first alerted the defense it was filing a *motion in limine* to contest the admissibility of Chartier's testimony regarding the qEEG testing on *Daubert* grounds.

On 28 May, the State began its case-in-chief. On 1 June, outside the presence of the jury, the State first disclosed it intended to call Dr. Nicole Wolfe, a forensic psychiatrist, to testify at Chartier's *voir dire* examination in rebuttal. The State furnished Dr. Wolfe's *curriculum vitae*, and disclosed that it intended to elicit opinion testimony from Dr. Wolfe aimed at discounting the diagnostic utility of qEEG. The defense objected on timeliness grounds, arguing that the State failed to disclose Dr. Wolfe on any pre-trial expert witness lists, had just furnished her *curriculum vitae*, and had not yet furnished her report. The State explained that it only sought Dr. Wolfe in response to Chartier's final April report that was untimely furnished right before jury selection, which the State argued contained "marked differences" from Chartier's first February report.

On Wednesday 3 June, after the State rested its case-in-chief, the trial court requested copies of Chartier's and Dr. Wolfe's reports in preparation for Chartier's *voir dire* examination scheduled the next day. Defense counsel furnished Chartier's reports, but the State advised that, due to the short notice and scheduling issues, it was unable to meet with Dr. Wolfe until the preceding Friday, and it had not yet received her report. Around 4:45 p.m., immediately upon receipt, the State brought Dr. Wolfe's report to one of defendant's trial counsel's offices. Dr. Wolfe's report was a 55-page PowerPoint presentation that contained multiple peer-reviewed journal articles purportedly discounting qEEG's diagnostic utility.

On Thursday 4 June, over defendant's request for a continuance based on the State's untimely discovery disclosures relating to Dr. Wolfe, Chartier's scheduled *voir dire* examination was held. After Chartier was

examined, the trial court allowed Dr. Wolfe to testify in rebuttal. After the hearing, the trial court denied the State's *Daubert* motion entirely, ruling that Chartier's expert opinion testimony and the contested qEEG evidence was admissible. In response, the State requested for the first time that Dr. Wolfe be allowed to testify as a supplemental rebuttal expert witness at trial.

After a lengthy discussion on the propriety of allowing the State to elicit Dr. Wolfe's testimony, the trial court ruled that Dr. Wolfe be allowed to testify in rebuttal within certain parameters:

> THE COURT: . . . I'm going to let Doctor Wolfe testify. I think generally she can qualify as a forensic psychiatrist. I think she can talk about whether she relies on QEEG, what she knows about the general practice in her field, about similar experts relying upon that methodology, and she can state generally why, in her opinion, it's not a reliable methodology for a forensic psychiatrist to rely upon. Now, you know, beyond that basis, she is not an expert in the administration of QEEG. . . .

The trial court further elaborated:

> THE COURT: The main point is that, as I understand it, the [State] does not intend to elicit testimony that [Dr. Wolfe] gleaned from these various articles that she testified about during the hearing before the Court on QEEG. She can testify about her general area of expertise in forensic psychiatry, whether or not she relies on the test, her knowledge about whether other forensic psychiatrists generally rely upon the test, and why it is or is not relied upon. In other words, if [Dr. Wolfe] doesn't rely upon it, it's her understanding generally in the field forensic psychiatrists don't rely upon it because there are questions about its validity. . . . That's within her field of expertise to say that. She is not an expert in administering QEEG. . . . [T]estimony about the administration of [QEEG] and interpretation of the results of the type that's talked about in the PowerPoint, that would not be a proper area for [Dr. Wolfe] to testify to. . . .

Additionally, the trial court prohibited the State from introducing Dr. Wolfe's full report, limiting its admission to only a few slides that it required the State to select and furnish to the defense at that time.

On Friday 5 June, the defense began its case-in-chief and called defendant to testify before the jury. Defendant testified in relevant part that while he remembered everything leading up to and after the shooting, his emotions were running so high because he believed that Shamekia had just admitted to cheating on him, that he did not remember actually shooting her. But after his memory returned, he saw Shamekia lying dead on the floor, realized he was holding a gun, and conceded that he believed he must have shot and killed her.

No court was held on the following Monday or Tuesday. On Wednesday 10 June, the case resumed, and the defense called Chartier to testify. According to Chartier, defendant's qEEG results revealed notable statistical deviations of electrical activity in the frontal and central temporal cortical regions of his brain, particularly in an area "involved in the control of emotions" and "significantly" in the area controlling language ability, which might manifest in "misinterpret[ing] the actions or behavior of others." Based on these results, Chartier opined that defendant suffered from "left hemisphere and frontal lobe dysfunction." He further opined:

> Based on these consistent, combined findings from the multiple analyses of [defendant]'s EEG data, it is apparent to a high degree of neuropsychological certainty that this unfortunate gentleman suffers with significant neuro-cognitive deficits that are consistent . . . with[ ] impaired reasoning, judgment, decision-making and impulse control.

Chartier also opined that these neurocognitive deficiencies would be more pronounced when someone is stressed, emotional, or upset.

On Thursday 11 June, after Chartier's testimony, the defense called Dr. Artigues, tendered as an expert in general and forensic psychiatry, to testify. Dr. Artigues performed a forensic psychiatric evaluation on defendant. Based on his interview with defendant and his review of defendant's medical history and records, including Chartier's qEEG report, Dr. Artigues diagnosed defendant with "personality disorder with borderline dependent and antisocial traits and with frontal lobe syndrome." Dr. Artigues conceded that frontal lobe syndrome is not recognized as a medical diagnosis in the DSM, and that he relied on his review of Chartier's qEEG report for this part of his diagnosis. According to Dr. Artigues, defendant's "ability to plan was seriously impaired, if not completely wiped out" and he could not "weigh the consequences of harming Shamekia in a rational way" at the time he shot her. Dr. Artigues opined

that he "d[id] not believe [defendant] could form the specific intent to kill at the time of the shooting."

On Friday 12 June, after the defense rested, the State called Dr. Wolfe, over defendant's objection, and Messer to testify in rebuttal. Dr. Wolfe, a forensic psychiatrist, testified in relevant part that, after having examined peer-reviewed journal articles while researching the diagnostic utility of qEEG, her practice of not using qEEG as a diagnostic tool has not changed. Dr. Wolfe testified that neither she nor any psychiatrist she had worked with at any facility used qEEG for psychiatric diagnostic purposes. According to Dr. Wolfe, qEEG was not helpful "with assisting in a psychiatric diagnosis." She explained that "electrical brain wave activities" as recorded in an EEG have no "particularly defined appearance," and that psychiatric diagnoses tend to consist of a combination of multiple different issues, meaning a patient typically does not have just one diagnosis. Thus, Dr. Wolfe explained, while having a patient's EEG results might be useful in limited circumstances when combined with other diagnostic tools, such as an MRI; standing alone, EEG results are "not useful to [her] clinically at all" and, "in general, [q]EEG is not helpful for diagnosis."

Messer, a forensic psychologist, had previously performed a court-ordered competency evaluation on defendant and had concluded that he was competent to stand trial. Messer testified that defendant suffered from no mental disorder she could identify that would account for his stated inability to remember the shooting. Messer explained that based on her psychological examination, defendant "demonstrated an ability to form intent, make rational decisions[,] and carry out actions" and, therefore, opined that defendant was capable at the time of the shooting to form the requisite specific intent to kill. Messer also discounted the defense experts' reliance on qEEG to support their opinions, testifying that neither she nor any psychiatrists or psychologists she works with uses qEEG diagnostically.

After the presentation of evidence, the jury convicted defendant of first-degree premeditated murder, and the trial court sentenced defendant to life in prison without parole. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court violated N.C. Gen. Stat. § 15A-903(a)(2)'s statutory mandates when it allowed Dr. Wolfe's expert rebuttal testimony on the ground that the State violated that statute's discovery requirements relating to expert witness disclosures. We hold that the trial court did not abuse its discretion in allowing Dr. Wolfe's limited rebuttal testimony.

A. Review Standard

As an initial matter, the parties dispute the proper appellate review standard. The State argues that the typical abuse-of-discretion review standard applies to defendant's allegation that the trial court erred in allowing the State to call Dr. Wolfe as an expert witness. Defendant argues that, under *State v. Davis*, 368 N.C. 794, 785 S.E.2d 312 (2016), *de novo* review is proper because N.C. Gen. Stat. § 15A-903(a)(2) imposes a statutory mandate. Defendant misconstrues *Davis*. Abuse-of-discretion review properly applies here.

In *Davis*, after "not[ing] that usually determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court," 368 N.C. at 797, 785 S.E.2d at 314 (citation, brackets, and internal quotation marks omitted), our Supreme Court reviewed *de novo* a challenge to the application of N.C. Gen. Stat. § 15A-903(a)(2) when addressing "whether the trial court erred in admitting the opinion testimony of [the State's expert witnesses]." *Id.* (internal quotation marks omitted). The *Davis* Court, however, applied *de novo* review not because N.C. Gen. Stat. § 15A-903(a)(2) imposes statutory mandates, but because determining whether the State's experts' testimonies constituted "expert[ ] opinion[s]" under N.C. Gen. Stat. § 15A-903(a)(2) was a "question . . . of statutory interpretation[.]" *Id.* at 797–98, 785 S.E.2d at 315; *see also id.* at 798, 785 S.E.2d at 315 ("The central question here is whether the State's expert witnesses gave opinion testimony so as to trigger the discovery requirements under section 15A-903(a)(2).").

Here, contrarily, the central question is not whether Dr. Wolfe gave discoverable expert opinion testimony that triggered application of N.C. Gen. Stat. § 15A-903(a)(2), but whether the State violated that discovery statute by failing timely to disclose discovery related to Dr. Wolfe. Unlike in *Davis*, addressing the central issue raised here does not require that we interpret N.C. Gen. Stat. § 15A-903(a)(2), and thus the "usual[ ]" abuse-of-discretion review standard applies. *Davis*, 368 N.C. at 797, 785 S.E.2d at 314.

Under abuse-of-discretion review, "[t]he trial court may be reversed . . . only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cook*, 362 N.C. 285, 295, 661 S.E.2d 874, 880 (2008) (citation and quotation marks omitted).

B. Discussion

Defendant contends the State, within a reasonable time before trial, failed to disclose its intent to call Dr. Wolfe as an expert, or the nature of Dr. Wolfe's opinion testimony, in violation of N.C. Gen. Stat. § 15A-903(a)(2).

"[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (citation and quotation marks omitted). N.C. Gen. Stat. § 15A-903(a)(2) (2015) imposes expert witness disclosure requirements on the State and provides in pertinent part:

> (a) Upon motion of the defendant, the court must order:
>
> . . . .
>
> (2) *The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial.* Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. *The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.*

(Emphasis added.) Additionally, once the State has provided discovery under this statute it maintains a continuing duty to disclose additional discovery. N.C. Gen. Stat. § 15A-907 (2015).

Our review of the record reveals, and defendant has failed to demonstrate otherwise, the trial court did not abuse its discretion in allowing Dr. Wolfe's limited rebuttal testimony, even though the State first disclosed her as an expert at trial.

As early as February 2015, the defense knew it was introducing qEEG evidence to support its diminished-capacity defense in part, and that the State intended to call an expert witness to rebut that defense. Although the defense furnished Chartier's first qEEG report at that time, it did not furnish Chartier's final qEEG report until right before jury selection on 17 April. On 26 May, the State explained that, after it had time to review and consult on Chartier's final April report, it was filing a motion *in limine* on *Daubert* grounds to contest the admissibility of Chartier's expert opinion testimony relating to the qEEG testing.

On 1 June, the State disclosed that it intended to call Dr. Wolfe to testify at Chartier's *voir dire* examination to rebut the diagnostic utility of qEEG and furnished her *curriculum vitae*. After defendant objected

on untimely disclosure grounds, the State explained it only sought Dr. Wolfe "in response to [Chartier's final] report [the State] received on the Friday before jury selection began in this case." According to the State, Chartier's final report contained two additional pages of analysis, enhanced the brain mapping images with color, and contained "marked differences" from his first report. Chartier later admitted that his April report was "absolutely different" from his February report and that "further analysis had been done at that point." The trial court was in the best position to determine the extent to which those reports differed, such that the State might not have reasonably forecast calling Dr. Wolfe in rebuttal until after it had time to review and consult on Chartier's final report.

On the morning of 4 June, the defense was able to review Dr. Wolfe's report, and after Chartier's *voir dire* examination, it was afforded the opportunity to fully examine Dr. Wolfe, her credentials, and the basis for her opinion. After the trial court ruled to allow Dr. Wolfe's rebuttal testimony, it set parameters limiting her testimony and restricting the use of her report to only a few slides that it required the State to identify and furnish to the defense that day. Although the State did not disclose its intent to call Dr. Wolfe in rebuttal at trial until after Chartier's *voir dire* examination and its *Daubert* motion was denied, Dr. Wolfe did not actually testify until 12 June.

Defendant received all required discovery eight days before Dr. Wolfe testified in rebuttal at trial, and no court was held on four of those days. The State's disclosures were thus made in time for effective use at trial. *Cf. State v. Jackson*, 340 N.C. 301, 317, 457 S.E.2d 862, 872 (1995) (concluding that the trial court granting a four-day continuance "afforded the defense opportunity to meet [previously undisclosed lay opinion testimonial] evidence"). Further, the State did not call Dr. Wolfe to introduce entirely new evidence, but to rebut the qEEG evidence defendant had intended months earlier to introduce. Defendant thus cannot complain that he was "unfair[ly] surprise[d] by the introduction of evidence he [could]not anticipate." *Davis*, 368 N.C. at 798, 785 S.E.2d at 315 (citation and quotation marks omitted).

Moreover, although the defense attempted to move for a continuance before Chartier's *voir dire* examination on untimely discovery disclosure grounds, the defense never moved for a continuance after the trial court ruled to allow Dr. Wolfe to testify in rebuttal at trial. *Cf. State v. Herrera*, 195 N.C. App. 181, 199, 672 S.E.2d 71, 83 (2009) ("[A]ssuming, *arguendo*, that the State did violate the discovery statute provisions, . . . we conclude the trial court did not abuse its discretion in allowing this

testimony *especially when defendant did not request a recess or continuance to address this newly disclosed evidence.*" (emphasis added)). Nor did the defense indicate that it had inadequate time to prepare effectively to develop meaningful impeachment or rebuttal evidence for Dr. Wolfe's cross-examination. *Cf. State v. McCail*, 150 N.C. App. 643, 652, 565 S.E.2d 96, 102 (2002) ("There is no indication that defense counsel's receipt at that time (1) prevented development of important impeachment evidence or (2) resulted in ineffective cross-examination of any witnesses or representation of defendant."). Accordingly, defendant has failed to demonstrate that the trial court abused its discretion in allowing Dr. Wolfe's limited rebuttal testimony.

III. Conclusion

Defendant's allegation that the trial court erred by allowing Dr. Wolfe to testify in rebuttal due to the State's alleged discovery disclosure violations raised no issue requiring we interpret N.C. Gen. Stat. § 15A-903(a)(2). Accordingly, unlike in *Davis*, the usual abuse-of-discretion standard applies to the question presented here.

Although the State failed to disclose, within a reasonable time before trial, Dr. Wolfe as a rebuttal expert witness, her opinion, or her report, the State explained it only sought Dr. Wolfe in response to Chartier's untimely furnished final report, which it believed differed significantly from his first report. The trial court was in the best position to determine whether Chartier's reports differed such that the State would not have reasonably forecast calling Dr. Wolfe to rebut Chartier's expert testimony or the qEEG evidence until after the State had time to review Chartier's final report. Additionally, the defense was afforded the opportunity to fully examine Dr. Wolfe at Chartier's *voir dire* examination; the trial court limited Dr. Wolfe's rebuttal testimony and the use of her report; the defense was furnished all required discovery eight days before Dr. Wolfe testified, and no court was held on four of those days; and defendant never moved for a continuance of trial or requested additional time to prepare for Dr. Wolfe's rebuttal testimony.

On this record, defendant has failed to demonstrate that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision. Accordingly, we hold that the trial court did not abuse its discretion in allowing Dr. Wolfe's limited rebuttal testimony and, therefore, that defendant received a fair trial, free of error.

NO ERROR.

Judges DIETZ and INMAN concur.

STATE v. KRIDER

[258 N.C. App. 111 (2018)]

STATE OF NORTH CAROLINA
v.
JERMEL TORON KRIDER

No. COA17-272

Filed 20 February 2018

Probation and Parole—probation revocation—absconding

The trial court erred by revoking defendant's probation for willfully absconding from supervision. The State filed a written report alleging violations before defendant's probation expired, but the hearing was held after defendant's case expired. Of the violations in the written report, absconding authorized the trial court to revoke defendant's probation. However, the State's evidence was not sufficient to support absconding in that the probation officer reported only that he spoke to an elderly black female at defendant's address who said that defendant didn't live there. The probation officer did not establish her identity or whether she lived at that address, and did not revisit the house.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 3 October 2016 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison Angell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

CALABRIA, Judge.

Jermel Toron Krider ("defendant") appeals from the trial court's judgment revoking his probation and activating his suspended sentence. After careful review, we conclude that the State presented insufficient evidence to support a finding of willful absconding pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a) (2017). As a result, the trial court lacked jurisdiction to revoke defendant's probation after his probationary term expired. Accordingly, we vacate the trial court's judgment revoking defendant's probation.

I. Background

On 2 April 2015, defendant pleaded guilty to possession of cocaine in Iredell County District Court. The district court, having jurisdiction to accept his guilty plea to a Class I felony, sentenced defendant to 6-17 months in the custody of the North Carolina Division of Adult Correction, suspended his sentence, and placed defendant on 12 months of supervised probation. As a term of his probation, defendant was ordered to obtain substance abuse treatment, in addition to complying with all of the regular conditions of probation pursuant to N.C. Gen. Stat. § 15A-1343(b).

On 14 December 2015, defendant's probation officer ("Officer Thomas") visited his reported address. However, defendant was not present, and an unidentified woman advised Officer Thomas that "he didn't live there." As a result, on 21 December 2015, Officer Thomas filed a report alleging that defendant had willfully violated his probation by: (1) absconding on 14 December 2015; (2) testing positive for marijuana on 18 August 2015; (3) failing to report to his probation officer on 4 November 2015; (4)-(5) being in arrears as to his case and supervision fees; and (6) failing to obtain court-ordered substance abuse treatment. An arrest warrant was issued based on the absconding allegation. On 4 February 2016, defendant was arrested for violating his probation. Officer Thomas continued to supervise defendant until his probation expired on 2 April 2016.

On 3 October 2016, a probation violation hearing was held in Iredell County Superior Court. Defendant denied the alleged violations, contending that he "substantially complied with [the] terms of his probation." However, Officer Thomas recommended revocation, "[b]ecause he absconded probation and his whereabouts were unknown for two months." Following testimony from both parties, the trial court found that defendant willfully violated the conditions alleged, revoked his probation, and activated his suspended sentence. Defendant appeals.

II. Analysis

On appeal, defendant contends that the trial court erred by revoking his probation based on its finding that he willfully absconded from supervision. We agree.

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without

> lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citations and quotation marks omitted). However, "when a trial court's determination relies on statutory interpretation, our review is *de novo* because those matters of statutory interpretation necessarily present questions of law." *State v. Johnson*, __ N.C. App. __, __, 783 S.E.2d 21, 24 (2016) (citation and quotation marks omitted).

Once a defendant's probationary term expires, the trial court must comply with N.C. Gen. Stat. § 15A-1344(f) in order to "extend, modify, or revoke" the defendant's probation. The statute provides, in pertinent part:

> The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C. Gen. Stat. § 15A-1344(f)(1)-(3). This statute is jurisdictional. *See State v. Moore*, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015) (explaining that "other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term"); *State v. High*, 230 N.C. App. 330, 337, 750 S.E.2d 9, 14 (2013) (holding that the trial court lacked jurisdiction over the defendant because the State's violation reports did not bear a time stamp evincing that they were filed within the probationary period).

Furthermore, for violations occurring on or after 1 December 2011, the trial court may only revoke a defendant's probation where the

defendant (1) commits a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition after previously serving two periods of confinement in response to violations ("CRV") pursuant to N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a). For all other violations, the trial court may either modify the conditions of the defendant's probation or impose a 90-day period of CRV. *Id.*

In the instant case, defendant's probation expired on 2 April 2016. The violation hearing was held more than six months later, on 3 October 2016. However, on 21 December 2015, the State filed a written report alleging six violations of defendant's probation. Therefore, the State timely "indicat[ed] its intent to conduct a hearing on one or more violations" of defendant's probation, as required by N.C. Gen. Stat. § 15A-1344(f)(1). The violation report indicated that defendant had not previously served any periods of CRV as allowed by N.C. Gen. Stat. § 15A-1344(d2), and the State did not allege that defendant committed a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1). Accordingly, pursuant to N.C. Gen. Stat. § 15A-1344(a), the trial court was only authorized to revoke defendant's probation for a violation of N.C. Gen. Stat. § 15A-1343(b)(3a).

The State alleged the following with regard to absconding:

> 1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that,
>
>   THE DEFENDANT ABSCONDED SUPERVISION ON 12/14/15 BY MAKING HIS WHEREABOUTS UNKNOWN TO THIS OFFICER. ON OR ABOUT 12/14/15, THE OFFICER WAS ADVISED THAT THE OFFENDER DID NO LONGER RESIDE AT THE RESIDENCE GIVEN. THE DEFENDANT HAS . . . AVOIDED SUPERVISION AND MADE HIMSELF UNAVAILABLE FOR SUPERVISION; THEREFORE ABSCONDING SUPERVISION.

The State's allegations and supporting evidence are very similar to that which we rejected in *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015). In *Williams*, the State filed a report alleging that the defendant had violated seven conditions of his probation, including:

> 1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT IS NOT REPORTING AS INSTRUCTED OR PROVIDING THE PROBATION OFFICER WITH A VALID ADDRESS AT THIS TIME. THE DEFENDANT IS ALSO LEAVING THE STATE WITHOUT PERMISSION. DUE TO THE DEFENDANT KNOWINGLY AVOIDING THE PROBATION OFFICER AND NOT MAKING HIS TRUE WHEREABOUTS KNOWN THE DEFENDANT HAS ABSCONDED SUPERVISION.

243 N.C. App. at 200-01, 776 S.E.2d at 743. In support of this allegation, the probation officer testified that when she visited the defendant's residence, a woman informed her that the defendant had "never really lived at the address." *Id.* at 198, 776 S.E.2d at 742. In addition, the officer testified that the defendant had failed to attend multiple scheduled appointments; was traveling "back and forth from North Carolina to New Jersey" without permission; and "wasn't making himself available for supervision," although the officer acknowledged that she had phone contact with the defendant during his unauthorized trips to New Jersey. *Id.* at 198-99, 776 S.E.2d at 742.

On appeal, we held that the evidence was insufficient to support a finding of willful absconding under N.C. Gen. Stat. § 15A-1343(b)(3a) and reversed the revocation of the defendant's probation. *Id.* at 205, 776 S.E.2d at 746. While "[t]he evidence was clearly sufficient to find violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3), . . . N.C. Gen. Stat. § 15A-1344(a) does not authorize revocation based upon violations of those conditions," unless the requirements of N.C. Gen. Stat. § 15A-1344(d2) have been met. *Id.*; *see also* N.C. Gen. Stat. §§ 15A-1343(b)(2)-(3) (requiring, as regular conditions of probation, that a defendant must "[r]emain within the jurisdiction of the court unless granted written permission to leave" and "[r]eport as directed . . . to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment").

Officer Thomas experienced a situation that was similar to the officer in *Williams*. Officer Thomas testified that when he visited defendant's reported address on 14 December 2015, an "elderly black female" informed him that defendant "didn't live there." *Cf. Williams*, 243 N.C.

App. at 198, 776 S.E.2d at 742. The State failed to present evidence regarding the identity of the person who greeted Officer Thomas, or her relationship to defendant. However, Officer Thomas testified that after speaking with her, he never attempted to contact defendant again, "[b]ecause when we w[ere] told . . . that he didn't live at the residence, no reason for us to go back out there." Nevertheless, Officer Thomas also testified that when defendant contacted him following his absconding arrest, he met defendant "at the residence." Officer Thomas subsequently had "regular contact" with defendant until his case expired on 2 April 2016. During that time, defendant completed substance abuse treatment, held seasonal employment, and made payments toward his arrears.

"Under this Court's precedents, [defendant's] actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), . . . do not rise to 'absconding supervision' in violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Johnson*, __ N.C. App. at __, 783 S.E.2d at 25. We are unable to meaningfully distinguish this case from *Williams*, and we are bound by our Court's decision. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

The dissent contends that the instant case is analogous to *State v. Trent*, __ N.C. App. __, 803 S.E.2d 224, *temp. stay allowed*, __ N.C. __, 802 S.E.2d 725 (2017). As in this case, the *Trent* defendant was not at home when his supervising officer made an unscheduled visit on 24 April 2016. __ N.C. App. at __, 803 S.E.2d at 226. However, the defendant's "very upset" wife told the officer that the defendant had taken her car and bank card without permission when he left the residence the previous day. *Id.* According to the defendant's wife, "it was [his] 'normal pattern . . . to go out and be gone for days on drugs.' " *Id.* "These allegations prompted [the officer's] second unscheduled visit less than two weeks later[,]" on 5 May 2016. *Id.* at __, 803 S.E.2d at 231. Since the defendant still had not returned and his wife "did not know where he was[,]" the officer filed violation reports for absconding. *Id.*

At the violation hearing, the defendant testified that contrary to his wife's allegations, he was actually in Raleigh on an eight-day painting job during the officer's visits to his residence. *Id.* at __, 803 S.E.2d at 230. Nevertheless, the defendant admitted that "[e]ven after learning about [the officer's] unscheduled visits during his travels, [he] still did not contact her to correct any allegedly inaccurate information that [his wife] may have communicated." *Id.* at __, 803 S.E.2d at 232. Instead, the

defendant "went to stay at his mother's house 'for a couple days' until he was arrested in Greensboro on 9 May 2016." *Id.*

The instant case is distinguishable from *Trent*, where the probation officer gleaned information about the defendant's whereabouts from *his wife*. Here, Officer Thomas testified only that he spoke with an "elderly black female" at defendant's reported address. The State failed to establish the woman's identity, or whether she even lived at the residence. Furthermore, unlike in *Trent*, Officer Thomas did not revisit defendant's residence or otherwise attempt to verify the unidentified woman's allegations. *Contra id.* at __, 803 S.E.2d at 231.

The dissent contends that "[a]s in *Trent*, through the exercise of logic and reason, the trial court could have considered [d]efendant was not in contact with his probation officer for two months" in finding that he absconded from supervision. (*Murphy, J., dissenting*, at 4). However, unlike *Trent*, there was no evidence that defendant was even aware of Officer Thomas's unannounced visit until after his arrest. *Contra id.* at __, 803 S.E.2d at 232. A trial court may only revoke probation where the defendant "abscond[s] by *willfully* avoiding supervision or by *willfully* making the defendant's whereabouts unknown to the supervising officer[.]" N.C. Gen. Stat. § 15A-1343(b)(3a) (emphasis added). Here, there was no evidence of willfulness.

Moreover, at the violation hearing, defendant testified that he attempted to contact Officer Thomas "[p]lenty of times":

> [DEFENDANT:] I called, called in the morning, I'm coming – notified to come. I called. He never in his office. Ring, ring. He never answer. I leave voice mail, call. He never answer or call me back.
>
> [DEFENSE COUNSEL:] Okay.
>
> A. I come by a few times and never – he never there. A few times I came but never signed my name on the line that was on my behalf, but rest of the times I come and call, he never there. I ain't never heard from him.

Although the State argues on appeal that defendant's testimony was "not credible," at the hearing, the State failed to cross-examine defendant or to impeach his testimony by recalling Officer Thomas to the witness stand. *Cf. Trent*, __ N.C. App. at __, 803 S.E.2d at 231 ("Despite defendant's accusation that [his wife] misinformed [his probation officer] in his absence, during cross-examination by the State, defendant admitted that he failed to contact [the officer] even after he returned from Raleigh[.]").

We agree with the dissent that the State is never required to cross-examine a defendant, and that "the demeanor of the witness on the stand is always in evidence." (*Dissent* at 4). Nevertheless, despite the "informal or summary" nature of probation hearings, the State bears the burden of presenting sufficient evidence "to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). In the instant case, the State failed to carry its burden. *Williams*, not *Trent*, is controlling here. As in *Williams*, we conclude that the evidence in this case does not support a violation of N.C. Gen. Stat. § 15A-1343(b)(3a). 243 N.C. App. at 205, 776 S.E.2d at 746; *accord State v. Brown*, __ N.C. App. __, 791 S.E.2d 662 (2016) (unpublished).

Here, however, the trial court's decision was not only an abuse of discretion but also an error that deprived the court of jurisdiction to revoke defendant's probation. The violation hearing was conducted after defendant's case expired, and "other than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Before defendant's probation expired, the State filed a written report alleging violations of six conditions of defendant's probation. N.C. Gen. Stat. § 15A-1344(f)(1). However, of the six violations alleged, the trial court was only authorized to revoke defendant's probation for absconding. N.C. Gen. Stat. § 15A-1344(a). Since the State's evidence was insufficient to support that allegation, we conclude that the trial court lacked jurisdiction to revoke defendant's probation after his case expired.

"Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation and quotation marks omitted). "If the court was without authority, its judgment . . . is void and of no effect." *Id.* Therefore, we vacate the trial court's judgment revoking defendant's probation.

VACATED.

Judge ZACHARY concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority's determination that the trial court lacked jurisdiction to revoke Defendant's probation and the mandate to vacate the judgment revoking Defendant's probation.

Abuse of Discretion

As an initial matter, the trial court did not abuse its discretion by revoking Defendant's probation.

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 227 (2017) (citation and quotation marks omitted).

We review the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). "Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 227 (citation and quotation marks omitted).

Here, Defendant argues the State's evidence was insufficient to support the conclusion that he violated N.C.G.S. § 15A-1343(b)(3a) (2015). Under this statute, as a regular condition of probation, a defendant must "[n]ot abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C.G.S. § 15A-1343 (b)(3a). As the Majority explains, citing to *State v. Williams*, 243 N.C. App. 198, 205, 776 S.E.2d 741, 745 (2015) and *State v. Johnson*, ___ N.C. App. ___, ___, 783 S.E.2d 21, 26 (2016), our case law has made it clear that violations of §§ 15A-1343(b)(2) and (3) are insufficient to establish the revocable violation of absconding under § 15A-1343(b)(3a).

N.C.G.S. § 15A-1343(b)(3) requires, as a regular condition of probation, that a defendant:

> [r]eport as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

In *Williams*, we held the evidence presented at the probation hearing was insufficient to support a finding of willful absconding where, without more, the evidence showed a defendant failed to show up to meetings and had been outside the state without permission, although he had been communicating with the probation officer via phone. *Williams*, 243 N.C. App. at 198-99, 776 S.E.2d at 742. In *Johnson*, emphasizing the defendant's whereabouts were never "unknown" because defendant was on electronic monitoring, we held that a defendant who informed his probation officer he would not attend an office visit, and then subsequently failed to report to that meeting does not, without more, violate (b)(3a) when those same actions violate (b)(3). *Johnson*, ___ N.C. App. at ___, 783 S.E.2d at 26-27.

Here, in concluding it is bound by *Williams* and *Johnson* to determine that the evidence in the instant case only evidences a violation of (b)(3), and does not constitute a violation of (b)(3a), the Majority overlooks key facts that distinguish this case. Unlike *Williams* and *Johnson*, the evidence showed that Defendant's "whereabouts were unknown for two months[,]" and during that time Defendant did not communicate with the probation officer. Therefore, this case is more like *State v. Trent*, ___ N.C. App. ___, 803 S.E.2d 224 (2017), where we distinguished *Williams* and *Johnson*, determining a trial court did not abuse its discretion by finding a defendant violated (b)(3a) because the probation officer "did not have the benefit of tracking defendant's movements" as in *Johnson* and had "absolutely no means of contacting defendant" unlike in *Williams*. *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 231 (internal citations omitted); *see also State v. Hurley*, ___ N.C. App. ___, 805 S.E.2d 563, slip op. at 6-7 (October 17, 2017) (unpublished) (explaining how *Trent* distinguished *Williams* and *Johnson*). While Defendant provided self-serving testimony at the revocation hearing, the trial court was in the proper position to weigh and reject any or all of Defendant's self-serving testimony. The Majority takes into account the State's failure to cross-examine or attempt impeachment of Defendant, however, the demeanor of the witness on the stand is always in evidence. *State v. Mullis*,

233 N.C. 542, 544, 64 S.E.2d 656, 657 (1951). There is no requirement that the State attempt to cross-examine or impeach the Defendant and disregard of the Defendant's testimony does not demonstrate an abuse of discretion. Therefore, the record does not support a conclusion that the trial court abused its discretion in ruling that Defendant had absconded on probation. As in *Trent*, through the exercise of logic and reason, the trial court could have considered Defendant was not in contact with his probation officer for two months, his whereabouts were unknown, and he was not subject to the supervision of the State. Our decision is not controlled by *Williams* and *Johnson* and it was within the trial court's discretion to find that Defendant violated N.C.G.S. § 15A-1343(b)(3a).

Jurisdiction

While the Majority's holding rests on *Williams* and *Johnson*, it also raises an additional jurisdictional issue, stating that the trial court lacked jurisdiction to revoke Defendant's probation because the violation hearing was conducted after the Defendant's case expired. We review de novo whether a trial court had subject matter jurisdiction to revoke a defendant's probation. *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted).

> Pursuant to N.C.G.S. § 15A-1344(f) (2015), a trial court may extend, modify, or revoke a defendant's probation after the expiration of the probationary term only if several conditions are met, including findings by the trial court that prior to the expiration of the probation period a probation violation had occurred and a written probation violation report had been filed. Also the trial court must find good cause for the extension, modification, or revocation.

State v. Moore, 240 N.C. App. 461, 463, 771 S.E.2d 766, 767 (2015)(alterations omitted) (citing N.C.G.S. § 15A-1344(f)). As the Majority notes, Defendant's hearing took place after the expiration of his probationary term. However, the written violation reports were filed prior to the expiration of the probation period, and the trial court found that a probation violation occurred prior to the expiration of the probationary period. Moreover, the trial court found good cause for the revocation. Thus, the fact that the hearing took place after the expiration of the probationary period did not deprive the trial court of jurisdiction.

Mandate

Finally, assuming *arguendo* that the State failed to present sufficient evidence of Defendant's absconding probation, the proper mandate is

not to Vacate the judgment of the trial court, but to Reverse and Remand as we did in *Williams*. *Williams*, 243 N.C. App. at 206, 776 S.E.2d at 746. Here, the trial court found Defendant violated the terms and conditions of his probation as alleged in "[p]aragraph(s) 1-6 of the Violation Report . . . dated [21 December 2015]". At a minimum, it is proper to allow the trial judge the opportunity to enter an appropriate judgment based on the remaining violations.

Conclusion

Under these facts, we are not bound by *Williams* and *Johnson*, and the timing of the hearing does not present a jurisdictional bar. The trial court did not abuse its discretion in finding that Defendant violated N.C.G.S. § 15A-1343(b)(3a) or in revoking his probation. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
COREY DONTA LEE, DEFENDANT

No. COA17-513

Filed 20 February 2018

Criminal Law—self-defense—aggressor instruction

The trial court did not err in an assault prosecution by instructing the jury that defendant could not receive the benefit of self-defense if he was the aggressor. There was conflicting evidence about the sequence of events leading to defendant shooting the victim, and it is the province of the jury to resolve any conflict in the evidence.

Appeal by Defendant from judgment entered 31 January 2017 by Judge Jesse Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

Corey Donta Lee ("Defendant") appeals from a judgment following a jury verdict convicting him of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, Defendant argues that the trial court erred by instructing the jury that he could not receive the benefit of self-defense if he were the aggressor. After careful review, we hold that Defendant has failed to demonstrate error.

Background and Procedural History

This case arises from a shooting on the lawn of a Charlotte home on 15 March 2015. The State's evidence at trial tended to show the following:

Defendant and Tierra Gray ("Gray") began dating in high school. Over the course of their eight-year relationship, Defendant and Gray had three children together. Defendant and Gray introduced Gray's mother, Angela Murray ("Murray"), to Floyd Long ("Long"), and the two began dating. Defendant, Gray, Murray, and Long were close friends for years.

Several incidents before March 2015 deteriorated Defendant's relationship with Long. On one occasion, Defendant informed Gray that Long had bragged about Murray's sexual prowess. Gray relayed Defendant's comment to her mother, creating "bad blood" between Defendant and Long. On another occasion, Defendant and Murray argued over Defendant's treatment of Murray's son-in-law, and family members had to physically restrain Defendant from fighting Murray. Murray told Long about the encounter. On several occasions over the years, Defendant and Gray frequently fought and Defendant assaulted Gray. After fighting with Defendant, Gray commonly called her mother in tears, and Murray overheard her daughter's conversations with Defendant. Family members called the police several times to report Defendant's physical abuse. Defendant and Long's friendship ended when Long expressed his disapproval of how Defendant treated Gray, and Defendant was not receptive.

By March of 2015, after eight years of dating, Defendant and Gray ended their relationship. Gray and her children moved into Murray's house in Charlotte.

On the evening of 15 March 2015, Gray was out on a date with another man. Murray was at home. Just after midnight, Defendant drove to Murray's home in a rental car, hoping to see Gray. He did not exit his car but rather remained in the driveway, sending text messages to Gray on his phone. Approximately ten minutes after Defendant parked, Long arrived at Murray's house in a minivan and parked next to Defendant in

the driveway. Long assumed that the rental car in the driveway belonged to Gray's new boyfriend.

Long exited the minivan and approached Murray's front door. When Murray came to her door, she noticed Defendant sitting in the rental car outside and froze. Long approached Defendant's vehicle and asked him to step outside to "talk and get this handled[.]" Long then stepped into the middle of the yard to give Defendant space to exit his vehicle. Long testified that Defendant told him, "nah, I got something else for you," and started shooting. Defendant shot Long three times in rapid succession, with one bullet hitting his upper thigh, one bullet lodging half an inch under his heart, and one bullet piercing his abdomen.

After the shooting, Defendant fled in his vehicle. Approximately one hour later, Defendant posted on Facebook, "just shot a bitch-ass nigga." Two days later, after learning a warrant had been issued for his arrest, Defendant surrendered himself to police.

On 30 March 2015, Defendant was indicted on one count of attempted first degree murder. On 7 November 2016, Defendant was again indicted on a charge of attempted first degree murder, and also indicted on the additional charge of assault with a deadly weapon with intent to kill inflicting serious injury.

The case came on for trial at the 23 January 2017 Session of the Mecklenburg County Superior Court, the Honorable Jesse B. Caldwell, III, presiding. Defense counsel argued that Defendant shot Long in self-defense.

Defendant testified in his own defense and gave the following account, which conflicted with the State's evidence: after meeting Murray at her front door, Long angrily approached Defendant's car, stating "remember that shit with you and [Murray]? We're going to handle that shit real quick." Long then walked over to his van, opened the trunk, and began moving things around. Defendant believed Long was going to get a pistol. Long then walked back around to Defendant's car and aggressively told Defendant "don't reach for that gun." Defendant fired three shots at Long until Long was no longer approaching Defendant. Defendant acknowledged that he did not see Long with a pistol that night and had never seen Long with a gun.

During the charge conference after the close of evidence and before counsel's arguments and the trial court's instructions to the jury, defense counsel objected to the inclusion of the aggressor doctrine in the pattern jury instruction for self-defense. Defense counsel argued that because

Long had approached Defendant's vehicle before Defendant said anything to him, Long, rather than Defendant, initiated the fight. The prosecutor contended that because the State's evidence showed only that Long told Defendant to step out of his vehicle, it was a question for the jury to determine whether Defendant or Long was the aggressor. The trial court overruled Defendant's objection and instructed jurors, in pertinent part:

> Members of the jury, furthermore, self-defense is justified only if the defendant was not the aggressor. . . . justification for defensive force is not present if the person who used defensive force voluntarily entered into the fight or, in other words, initially provoked the use of force against himself. If one uses abusive language towards one's opponent, which, considering all of the circumstances is calculated and intended to bring on a fight, then one enters a fight voluntarily. However, if the defendant was the aggressor, the defendant would be justifying in using defensive force if the defendant thereafter attempted to abandon the fight and gave notice to the defendant's opponent that the defendant was doing so.
>
> In other words, a person who uses defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.
>
> A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely caused death or serious bodily harm was the only way to escape the danger.

The jury found Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to fifty-three months to seventy-six months imprisonment. He appealed in open court.

Analysis

Defendant argues that the trial court erred by instructing the jury that he could not receive the benefit of self-defense if he were the aggressor. We disagree.

A trial court's jury instructions challenged at trial are reviewed *de novo* on appeal. *State v. Hope*, 223 N.C. App. 468, 471, 737 S.E.2d 108, 111 (2012). Under *de novo* review, this Court considers the matter anew and is free to substitute its judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

A trial court's jury instructions should be "a correct statement of the law and . . . supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (internal quotation marks and citations omitted); N.C. Gen. Stat. § 15A–1443(a) (2015).[1]

The aggressor doctrine provides that a defendant may not receive the benefit of self-defense if he was the aggressor. *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016). An individual is the aggressor if he or she " 'aggressively and willingly enters into a fight without legal excuse or provocation.' " *State v. Potter*, 295 N.C. 126, 144, 244 S.E.2d 397, 409 (1978) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). Further, " '[a] person is entitled under the law of self-defense to harm another only if he is without fault in provoking, engaging in, or continuing a difficulty with another.' " *State v. Effler*, 207 N.C. App. 91, 98, 698 S.E.2d 547, 552 (2010) (internal quotation marks and citations omitted). "[W]here the evidence does not indicate that the defendant was the aggressor, the trial court should not instruct on that element of self-defense." *State v. Jenkins*, 202 N.C. App. 291, 297, 688 S.E.2d 101, 105 (2010).

North Carolina law does not require that a defendant instigate a fight to be considered an aggressor. Rather, even if his opponent starts a

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1. Defendant contends that this alleged error violated his rights under the United States Constitution and, thus, the proper standard for assessing prejudice is the following: "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. § 15A-1443(b) (2015). Because we hold that the trial court did not err in instructing the jury on the aggressor doctrine, we need not address this contention.

fight, a defendant who provokes, engages in, or continues an argument which leads to serious injury or death may be found to be the aggressor. *State v. Cannon*, 341 N.C. 79, 82, 459 S.E.2d 238, 241 (1995) (holding that a jury could find that the defendant was the aggressor where the defendant shot the unarmed victim, even though the victim initiated the fight and threatened to kill defendant); *State v. Freeman*, 275 N.C. 662, 669, 170 S.E.2d 461, 466 (1969) (holding that while the victim started the altercation, the "defendant had become and remained the aggressor" when he pursued the fleeing victim); *State v. Church*, 229 N.C. 718, 722, 51 S.E.2d 345, 348 (1949) (holding that while the victim started the fight, the defendant pursued it; thus, the defendant was the aggressor and not entitled to a self-defense instruction). "When there is conflicting evidence as to which party was the aggressor, the jury, as the finders of fact, are [sic] entitled to determine which of the parties, if either, is the aggressor." *State v. Lee*, __ N.C. App. __, __,789 S.E.2d 679, 688 (2016), *review allowed*, __ N.C. __,796 S.E.2d 790 (2017) (internal quotation marks and citation omitted).

Critical to our analysis is the difference between the standard of review of a trial court's decision to instruct jurors on self-defense at all and the standard of review of the trial court's decision to include the aggressor instruction within the self-defense instruction. When reviewing a trial court's denial of a defendant's request for a self-defense instruction, the appellate court must consider the evidence in the light most favorable to the defendant. *See State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) ("In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant." (citation omitted)). By contrast, when reviewing a trial court's denial of a defendant's request to exclude the aggressor instruction from the jury instruction on self-defense, the appellate court does not consider the evidence in a light favorable to the defendant, as it is the province of the jury to resolve any conflict in the evidence in that regard. *See*, *e.g.*, *State v. Terry*, 329 N.C. 191, 199, 404 S.E.2d 658, 662-63 (1991) (holding that "[a]lthough defendant's evidence does not support the aggressor instruction, the State's evidence supports it. By instructing jurors on the aggressor qualification, the trial court allowed the triers of fact to determine which testimony to believe[]"); *State v. Hoyle*, 57 N.C. App. 288, 293-94, 291 S.E.2d 273, 276 (1982) (holding that the trial court properly instructed the jury on the aggressor doctrine "based upon the above evidence by the State tending to show that defendant was the aggressor[]"). In *State v. Joyner*, 54 N.C. App. 129, 135, 282 S.E.2d 520, 524 (1981), this Court held that when a defendant's evidence tended to show he acted in self-defense, "the trial

judge was obligated to instruct on self-defense but because the State's evidence tended to show that defendant was the aggressor, he properly instructed further that self-defense would be an excuse only if defendant was not the aggressor."

Here, the State's evidence tended to show that Defendant was the aggressor in his encounter with Long. Long testified that on the night of the shooting, he told Defendant to step out of his car so they could "talk" and "get it handled[;]" however, he did not threaten Defendant, touch Defendant's car, or approach Defendant. Long was unarmed. After speaking with Defendant, Long testified that he stepped into the yard to allow Defendant to exit his car, only to be shot by Defendant. Although Defendant's testimony materially differed from the State's evidence, the jury, as the finder of fact, was duty bound to weigh the credibility of the witnesses. *Lee*, __ N.C. App. at __,789 S.E.2d at 688.

The cases cited by Defendant are distinguishable, as none included any evidence from which a jury could find that the defendant was the aggressor. *See*, *e.g. State v. Washington*, 234 N.C. 531, 534, 67 S.E.2d 498, 500 (1951) (holding the aggressor instruction was error when the deceased assaulted the defendant with his fist, knocking her down an embankment, struck her with a stick, and dragged her away from a crowd while stating his intention to take her out of sight and kill her); *State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268 (1985) (holding that it was error for the trial court to instruct the jury on entering a fight voluntarily when "there is no evidence from which the jury could find that defendant voluntarily entered a fight with the deceased[]"). In contrast, here, there was conflicting evidence about the sequence of events leading to Defendant shooting Long, and the evidence was sufficient to support a jury finding that Defendant was the aggressor, therefore barring the defense of self-defense.

Conclusion

The record contained sufficient evidence to support a jury finding that Defendant was the aggressor in the altercation with Long. Therefore, the trial court did not err by instructing the jury on the aggressor doctrine.

NO ERROR.

Judges ELMORE and DIETZ concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY FREDERICK LEONARD, DEFENDANT

No. COA17-266

Filed 20 February 2018

Sentencing—voluntary manslaughter—extraordinary mitigating circumstances—participation of victim—support of family

The trial court did not abuse its discretion when sentencing defendant for voluntary manslaughter by finding no extraordinary mitigating circumstances, where the consent and participation of the victim, or the support of one's family, can only be an extraordinary mitigating factor under N.C.G.S. § 15A-1340.13(g) if its quality and nature is substantially greater than the normal case.

Appeal by Defendant from judgment entered 23 September 2016 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

MURPHY, Judge.

Timothy Frederick Leonard ("Defendant") was convicted of voluntary manslaughter in the death of his wife, Danielle Rae Newell ("Newell"), and received an active sentence on 23 September 2016. He appeals his sentence contending that the trial court failed to find extraordinary mitigating circumstances during his sentencing hearing due to an erroneous view of North Carolina law. After careful review, we find that the trial court accurately understood the law and properly exercised its discretion. Thus, we affirm Defendant's active sentence.

BACKGROUND

Newell and Defendant met each other in 1991 and were married about a decade later. They were "two peas in a pod" and "loved each other very much." Neither spouse was in any way violent or abusive to the other prior to Newell's death. Newell suffered from migraine

headaches for her entire life, but in 2005 they became more frequent and severe; she was experiencing debilitating migraines on a daily basis. Her migraines were sometimes triggered and exacerbated by light, sound, or other stimuli, so she often remained in bed, in darkness, wearing noise cancelling headphones. She lost the ability to work, drive, leave the house, and socialize. Newell tried a number of treatments and medications for her migraines which carried serious side effects, but none were able to stop or alleviate her migraines. During this time, Defendant was Newell's primary caretaker, and in 2015, Newell was determined to be totally disabled.

For many years, Defendant and Newell lived together at a house on Lake Norman owned by a friend. However, in 2015, the friend sold the Lake Norman house, and they had to move. Defendant and Newell found a house in Charlotte located in the "NODA" neighborhood. Shortly after moving there, it became apparent that the new setting was exacerbating Newell's migraines. Neighbors ran a noisy gas generator at all times, the house did not have working heating for several days, and neighborhood dogs barked frequently.

Then, in December 2015, Newell became so distressed that she repeatedly smashed her forehead into a doorjamb. She told Defendant that if he did not help her commit suicide she would do it without him. Prior to this event, Newell had expressed some intent to commit suicide. For example, she had discussed being drowned in a tub at the Lake Norman house. In 2013, Newell became so depressed and suicidal that Defendant and Newell's mother had her involuntarily committed at Presbyterian Hospital. While Newell did not fear death, she worried that if she attempted suicide by herself she might only end up in a vegetative state. Defendant was "exhausted" and "couldn't do it anymore," and it was at this point he agreed to help Newell end her life.

The couple rented a hotel room in Cornelius for the night of 8 December 2015 and went to a hardware store, where they bought a rubber hose and duct tape. Defendant was uncertain in his ability to follow through with the plan, so he went to a restaurant near the hotel and drank a great deal of alcohol. While Defendant was drinking, Newell was at the hotel writing notes to her friends and family. After getting angry at Defendant for not helping her kill herself, she drank a full bottle of Ambien, which left her unconscious for about 24 hours. When she came to, she and Defendant agreed to carry out the plan. Defendant then bound Newell's wrists and ankles with duct tape and drowned her in the hotel room's bathtub. He immediately drove back to the Charlotte house

and attempted to commit suicide by rerouting his vehicle's exhaust into the passenger compartment with a rubber hose.

After his suicide attempt, Defendant was hospitalized in Kings Mountain, where he told the police what happened at the hotel. Defendant was then held in detention for nearly seven months before being put on pre-trial release. Upon release he moved in with Newell's mother in Asheville.

Defendant was initially charged with first degree murder, but he pleaded guilty to the lesser included charge of voluntary manslaughter in violation of N.C.G.S. § 14-18. Defendant's plea agreement provided that:

> The [D]efendant shall plead guilty to voluntary manslaughter and the State proposes a sentence of 51-74 months active. The State's position is that the defendant may argue for and the Court in its discretion may impose an intermediate sentence pursuant to the Extraordinary Mitigation statute (N.C.G.S. 15A-1340.13).

Defendant's Sentence

The legislature has promulgated a sentencing grid which requires an active sentence for voluntary manslaughter unless there is a finding of extraordinary mitigating circumstances in accordance with N.C.G.S. § 15A-1340.13(g). During his sentencing hearing, Defendant requested that the trial court find extraordinary mitigating circumstances. He presented evidence, including testimony from a forensic psychiatrist and from Newell's mother, who stated that she did not feel that it was appropriate to imprison Defendant. Letters from Newell's other relatives were also submitted, which tended to show that Defendant and Newell were under severe distress and the killing of Newell was "an act of love."

In its judgment, the trial court found ten of the mitigating factors described in N.C.G.S. § 15A-1340.16(e). They also found that two non-statutory mitigating factors were present: (1) "Defendant had no history of violent behavior;" and (2) "Defendant has the full support of members of the decedent's family, none of whom wish to see him incarcerated." The State presented no evidence and no aggravating factors were found. However, the trial court did not find that any of the mitigating factors rose to the quality of an extraordinary mitigating factor. Accordingly, it found no extraordinary mitigation and ordered an active sentence of 38 to 58 months, which is the shortest sentence possible within the statutory mitigated range. Defendant gave notice of appeal in open court.

ANALYSIS

Sentencing decisions, including the trial court's failure to find extraordinary mitigating circumstances, are reviewed under an abuse of discretion standard. *State v. Williams*, 227 N.C. App. 209, 218, 741 S.E.2d 486, 491 (2013). Thus, the finding of the trial court may only be overturned if it is "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 218, 741 S.E.2d at 491.

Voluntary Manslaughter is a Class D felony. N.C.G.S. § 14-18 (2017). As such, it entails a mandatory active sentence, even for an offender such as the Defendant with no prior criminal record in the mitigated range. N.C.G.S. § 15A-1340.17 (2017). When an active sentence is required, the trial court may only order an intermediate sentence if (1) extraordinary mitigating factors exist, (2) the mitigating factors substantially outweigh any aggravating factors, and (3)"[i]t would be a manifest injustice to impose an active punishment." N.C.G.S. § 15A-1340.13(g) (2017) (Dispositional Deviation for Extraordinary Mitigation). Merely finding a large number of statutory mitigating factors is not sufficient. *State v. Melvin*, 188 N.C. App. 827, 831, 656 S.E.2d 701, 703 (2008). Rather, "[t]he trial court must look to the quality and nature of the factor to determine whether it is an extraordinary factor in mitigation." *Id.*

Defendant pleaded guilty to voluntary manslaughter, a crime requiring a mandatory active sentence unless the trial court finds extraordinary mitigation. On appeal, he argues that the trial court acted under an erroneous belief that it did not have discretion to consider a mitigating factor extraordinary if that factor was one of the factors enumerated in N.C.G.S. § 15A-1340.16(e). In other words, because a victim's "consent" to the crime is listed in the mitigation statute, the trial court believed that Newell's consent to her own death by drowning, regardless of its significance, could never be considered an extraordinary mitigating factor.

While it is undisputed that a number of mitigating factors existed and that no aggravating factors did, the sentencing hearing transcript makes plain that the trial court understood the extraordinary mitigation statute and exercised proper discretion within its confines. *See* N.C.G.S. § 15A-1340.13(g) (2017).

> An extraordinary mitigating factor is defined to be of a kind *significantly greater than in a normal case*, not the quantity, again, but in terms of merit. In this case, the statutory mitigating factors and the non-statutory mitigating factors are contemplated by the statute. Therefore, I think

> it's difficult to know the basis for the significant, *greater than in a normal case*, are present in a normal case. The mitigating factors outweigh any factors in aggravation, so with regard to the first prong on the test I can't find that they are significantly *greater than are present in a normal case.*

Defendant's brief cites this portion of the transcript to support his argument that the trial court misunderstood the law. His argument, however, overlooks several legally accurate statements made by the trial court about extraordinary mitigation. On multiple occasions, the trial court described an extraordinary factor as one "greater than in a normal case." Additionally, the trial court correctly stated that "[t]he quality of the factors, not the quantity, is the prime consideration of the Court." These statements by the trial court convey exactly what the law says: the consent and participation of the victim, or the support of one's family, can only be an extraordinary mitigating factor if its quality and nature is substantially greater than the normal case.

CONCLUSION

The law gives the trial court broad discretion to determine whether extraordinary mitigating factors exist. While we recognize that a number of mitigating factors were present here, we conclude that the trial court correctly understood the law and applied it reasonably to the unusual and tragic facts of this case. Therefore, the trial court's determination that none of those factors were extraordinary was an appropriate exercise of its discretion. Accordingly, we find no error and affirm the judgment.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KELLA MELTON

No. COA17-921

Filed 20 February 2018

Probation and Parole—probation revocation—absconding—willfulness

The trial court abused its discretion by revoking defendant's probation where there was insufficient evidence to establish defendant's willful violation by absconding pursuant to N.C.G.S. § 15A-1343(b)(3a). The trial court should have limited its consideration of the evidence to the dates alleged in the violation reports. The State's evidence during the relevant time period only included that defendant failed to attend scheduled meetings and that the probation officer was unable to reach defendant after just two days of attempts and of leaving messages with defendant's relatives.

Appeal by defendant from judgments entered 8 February 2017 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 24 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

ARROWOOD, Judge.

Kella Melton ("defendant") appeals from judgments revoking her probation and activating her suspended sentences. On appeal, defendant argues that the trial court abused its discretion in revoking her probation. For the reasons stated herein, we reverse the trial court's judgments.

I. Background

On 14 July 2015 in Rutherford County Superior Court, defendant was given a suspended sentence based on a conviction for possession of methamphetamine and simple possession of a Class IV controlled substance in case number 14 CR 53301. This sentence was modified to an active sentence on 18 December 2015.

On 31 May 2016 in Rutherford County Superior Court, defendant pleaded no contest to identity theft, four counts of obtaining property by false pretenses, and three counts of uttering a forged endorsement in case numbers 15 CRS 52149, 52446-48, and 16 CRS 344. The trial court sentenced defendant to consecutive sentences of 13 to 25 months, 7 to 18 months, and 7 to 18 months, but suspended the sentences and placed defendant on 30 months of supervised probation.

On 4 November 2016, defendant's probation officer, Officer Tiffany Nelson, swore out probation violation reports, relating to defendant's probation for 14 CR 53301, 15 CRS 52149, 52446-48, and 16 CRS 344, alleging that, on or about 2 November 2016, defendant willfully violated her probation by absconding in violation of N.C. Gen. Stat. § 15A-1343(b)(3a) (2017), failing to report to her supervising officer as directed in violation of § 15A-1343(b)(3), and being in arrears towards her court indebtedness in violation of § 15A-1343(b)(9). As a result of the violation reports, defendant was arrested on 9 December 2016. Defendant did not meet with Officer Nelson again until 17 January 2017.

The matter came on for hearing on 8 February 2017. At the hearing, Officer Nelson testified that defendant failed to report for scheduled meetings with her on 2 August 2016, 4 October 2016, 12 October 2016, 28 October 2016, and 2 November 2016. Prior to defendant's failure to attend the 28 October and 2 November 2016 meetings, defendant met with Officer Nelson on 26 October 2016.[1] Officer Nelson testified that, when defendant failed to appear for the 2 November 2016 meeting, she attempted to contact defendant numerous times by phone and by visiting defendant's address. Defendant's phone was disconnected, and she was not present at the address. Officer Nelson also called and left messages with defendant's parents, asking for defendant to call her. On cross-examination, however, she was unable to identify with any specificity when she made the contacts, and she testified she did not have written record of these contacts with her at the hearing. At the close of the State's evidence, defendant moved to dismiss for insufficient evidence of absconding. The motion was denied. Defendant offered evidence through defendant's testimony.

At the close of all evidence, the trial court found that defendant violated her probation by absconding, failing to report to her scheduled

1. Although defendant testified she met with Officer Nelson on 28 October 2016 at the hearing, the trial court found as fact, and defendant did not challenge on appeal, that defendant and Officer Nelson did not meet on 28 October 2016. However, on appeal, defendant claims for the first time that the scheduled 28 October 2016 appointment actually occurred on 26 October 2016.

appointments with her probation officer, and failing to adequately pay the funds due on her probation. The trial court also found that each violation in and of itself was a sufficient basis upon which to revoke probation. Defendant's probation was revoked, and the trial court activated her sentences in 14 CR 53301, 15 CRS 52149, 52446-48, and 16 CRS 344.

On 10 February 2017, defendant gave notice of appeal. Subsequently, on 2 March 2017, the trial court issued an order stating that probation was revoked in error with regard to case number 14 CR 53301 because the sentence in that case had previously been modified to an active sentence on 18 December 2015. Therefore, only the probation revocations involving 15 CRS 52149, 52446-48, and 16 CRS 344 are at issue in this appeal.

II. Discussion

Defendant argues that the trial court abused its discretion by revoking her probation because there was insufficient evidence to support a finding that she absconded under N.C. Gen. Stat. § 15A-1343(b)(3a) as alleged by the violation reports. We agree.

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). When the State presents "competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012) (citation and quotation marks omitted).

We review a trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Miller*, 205 N.C. App. 291, 293, 695 S.E.2d 149, 150 (2010) (citation omitted). A trial court abuses its discretion "when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citation and quotation marks omitted).

A trial court may only revoke a defendant's probation in circumstances where the defendant: (1) commits a new criminal offense, in

violation of N.C. Gen. Stat. § 15A-1343(b)(1), (2) absconds by willfully avoiding supervision or by willfully making her whereabouts unknown to the supervising probation officer, in violation of § 15A-1343(b)(3a), or (3) violates any condition of probation after previously serving two periods of confinement in response to violations, pursuant to § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a) (2017).

We first consider defendant's argument that the trial court erred by making an oral finding that defendant absconded from 2 November 2016 until she was arrested on 9 December 2016, instead of limiting its consideration of the evidence to the dates alleged in the violation reports. Specifically, defendant claims that considering evidence up until her arrest was in error because the violation reports only specifically allege that defendant absconded from "on or about" 2 November 2016 to the date the reports were filed, 4 November 2016. We agree.

In order to provide a defendant with notice of the allegations against him, as required by N.C. Gen. Stat. § 15A-1345(e), probation violation reports must contain a statement of the specific violations alleged. *See State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017) (quoting *State v. Hubbard*, 198 N.C. App. 154, 159, 678 S.E.2d 390, 394 (2009)). However, we note that, after making the contested oral finding, the trial judge entered written judgments finding defendant violated her probation by absconding from supervision, as alleged in the violation reports, which the judgments incorporated by reference. Because the written findings are more favorable to defendant than those announced from the bench, we consider the written judgments as reflective of the trial court's will. *See State v. Morston*, 336 N.C. 381, 410, 445 S.E.2d 1, 17 (1994).

Therefore, we review for whether there was sufficient evidence to support a finding that defendant absconded in violation of N.C. Gen. Stat. § 15A-1343(b)(3a) based on the dates alleged in the violation reports—on or about 2 November to 4 November 2016. For the reasons that follow, the evidence was insufficient to support such a finding.

Prior to our Legislature's enactment of the Justice Reinvestment Act of 2011 ("JRA"), the term "abscond" was not defined by statute. *State v. Williams*, 243 N.C. App. 198, 205, 776 S.E.2d 741, 746 (2015) (citations omitted). Instead, our case law used the term to refer to instances where a defendant failed to remain in the court's jurisdiction or failed to report to a probation officer as directed. *See*, *e.g.*, *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013). Presently, "abscond" is defined by statute, and a defendant on supervised probation only absconds when he "willfully avoid[s] supervision" or "willfully mak[es]

[his] whereabouts unknown to [his] supervising probation officer[.]" N.C. Gen. Stat. § 15A-1343(b)(3a). This change was in line with the JRA's purpose to be "part of a national criminal justice reform effort" which, among other changes, "made it more difficult to revoke offenders' probation and send them to prison." *State v. Johnson*, 246 N.C. App. 139, 143, 783 S.E.2d 21, 26 (2016). Under the statutory definition set out in § 15A-1343(b)(3a), we have held that a defendant absconds when he willfully makes his whereabouts unknown to his probation officer, and the probation officer is unable to contact the defendant. *See State v. Trent*, ___ N.C. App. ___, ___, 803 S.E.2d 224, 232, *temporary stay allowed*, 370 N.C. 78, 802 S.E.2d 725 (2017).

Here, the State presented evidence of the alleged violations through Officer Nelson's testimony. Officer Nelson testified that defendant absconded a week after the 26 October 2016 meeting because she failed to attend the 28 October and 2 November meetings, and did not contact Officer Nelson thereafter, even though the officer attempted to call and visit defendant multiple times over the course of two days, and called and left messages with defendant's parents for defendant to call her. However, on cross-examination, Officer Nelson could not support her testimony with records:

> Q: You made how many phone calls trying to find her?
>
> [Officer Nelson]: Numerous.
>
> Q: One, two, three, four?
>
> [Officer Nelson]: More than four.
>
> Q: You went back to the residence, correct?
>
> [Officer Nelson]: Yes.
>
> Q: What times and dates?
>
> [Officer Nelson]: I don't have that information with me.
>
> . . . .
>
> Q: What numbers did you call?
>
> [Officer Nelson]: Her primary number is her cell phone, and her secondary number is for her mother's home phone.
>
> . . . .
>
> Q: . . . . Do you recall the number of times and dates that you made calls to those numbers?

> [Officer Nelson]: I don't have that information with me at this time.

After the State offered its evidence, defendant testified that she did not willfully abscond because at the time of the alleged violation: her cell phone was missing, she was not at home when the officer visited, Officer Nelson left no messages at the home, her parents told her that Officer Nelson had not come by or called her, and she "had just [seen] [Officer Nelson] at the end of October[,]" so it did not otherwise occur to her to contact Officer Nelson.

The case the State relies on to support its argument that the trial court did not err in its determination that defendant absconded, *State v. Trent*, ___ N.C. App. ___, 803 S.E.2d 224, *temporary stay allowed*, 370 N.C. 78, 802 S.E.2d 725 (2017), is notably distinct from the case at bar. In *Trent*, we held the trial court did not abuse its discretion by determining the defendant violated N.C. Gen. Stat. § 15A-1343(b)(3a) when: the defendant's probation officer was unable to locate him at home on 24 April 2016 or 5 May 2016, the defendant's wife told the probation officer that the defendant had not been home from 24 April to 5 May 2016, the probation officer had "absolutely no means of contacting" the defendant, and the defendant admitted at his revocation hearing that he did not attempt to contact his probation officer, even though he knew his probation officer was looking for him. *Id.* at ___, 803 S.E.2d at 231.

Here, unlike in *Trent*, where the defendant admitted he knew his probation officer attempted to contact him, the State failed to present competent evidence that defendant's failure to contact Officer Nelson from 2 November to 4 November 2016 was willful. Although Officer Nelson testified that she attempted to call and visit defendant, and left messages with defendant's parents for defendant to contact her, there was no showing that a message was given to defendant or, more generally, that defendant knew Officer Nelson was attempting to contact her. Thus, although there was competent evidence that Officer Nelson attempted to contact defendant, there was insufficient evidence that defendant willfully refused to make herself available for supervision from 2 November to 4 November 2016 (the only time period we can consider under the violation report and the court's written finding).

We note that, as explained in *Trent* and emphasized by the State on appeal, defendant had a duty to keep her probation officer apprised of her whereabouts. *Trent*, ___ N.C. App. at ___, 803 S.E.2d at 232. However, this duty does not relieve the State of its burden to provide competent evidence that defendant refused to make herself available

for supervision. Where, as here, the State's evidence only includes that a defendant failed to attend scheduled meetings, and the probation officer is unable to reach a defendant after merely two days of attempts, only leaving messages with a defendant's relatives, the evidence is insufficient to reasonably satisfy a trial judge that defendant willfully failed to keep her probation officer informed of her whereabouts.

We are not unsympathetic to the probation officer's situation. It is clear that defendant is far from a model probationer and should be held accountable for her failures to comply. However, under the JRA, our Legislature has expressed a clear intent that activation of probationary sentences should only be used as a last resort and after the use of the other tools available such as two "quick dips" pursuant to N.C. Gen. Stat. § 15A-1344(d2). *See Moore*, 370 N.C. at 343, 807 S.E.2d at 554 (explaining that the JRA amended the law to decrease the conditions whose violation would land a probationer back in prison to carry out the JRA's purpose "to reduce prison populations and spending on corrections and then to reinvest the savings in community-based programs") (citation and internal quotation marks omitted). In the present case it does not appear that even with defendant's lack of compliance she has been subjected to any such intermediate punishment. Given this fact, when considered together with the two-day period between the missed appointments and the absconding allegation, and the fact that the probation officer could not testify with any specificity and did not have records regarding her attempts to locate defendant during that two-day period, we are compelled to find that this case does not support a judgment of revocation.

There was insufficient competent evidence to establish defendant's willful violation of N.C. Gen. Stat. § 15A-1343(b)(3a). Therefore, the trial court abused its discretion by revoking defendant's probation based on § 15A-1343(b)(3a). The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

STATE v. SIMMONS

[258 N.C. App. 141 (2018)]

STATE OF NORTH CAROLINA
v.
WALTER COLUMBUS SIMMONS

No. COA16-1065-2

Filed 20 February 2018

Appeal and Error—preservation of issues—sufficiency of indictment—special pleading—non-jurisdictional—failure to object

The Court of Appeals reconsidered its prior decision in an aggravated felony death by vehicle (AFDV) and felony hit and run (FHR) case in light of *State v. Brice*, 370 N.C. 244 (2017), and concluded that defendant's challenge to the sufficiency of the AFDV indictment based on the State's noncompliance with the special pleading requirement of N.C.G.S. § 15A-928 did not implicate jurisdiction, and therefore his failure to object below waived appellate review of the issue. The case was remanded for the limited purpose of correcting a clerical error to reflect that defendant pled guilty to FHR.

On certiorari review of judgment entered 16 May 2016 by Judge A. Moses Massey in Surry County Superior Court. Originally heard in the Court of Appeals 5 April 2017. By opinion issued 15 August 2017, a unanimous panel of this Court vacated in part the judgment of the trial court and remanded with instructions to enter a modified judgment. By order dated 11 December 2017, the Supreme Court of North Carolina remanded the case to the Court of Appeals for reconsideration in light of its decision in *State v. Brice*, ___ N.C. ___, 806 S.E.2d 32 (2017), *rev'g* ___ N.C. App. ___, 786 S.E.2d 812 (2016).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

ELMORE, Judge.

On 16 May 2016, Walter Columbus Simmons (defendant) pled guilty to aggravated felony death by vehicle (AFDV) and felony hit and run (FHR). The judgment, however, inaccurately reflected that defendant pled guilty to felony serious injury by vehicle instead of FHR. Defendant later petitioned this Court to issue a writ of *certiorari* to review issues

pertaining to his guilty plea. *See State v. Simmons*, No. 16-1065, slip op. at 3 (N.C. App. Aug. 15, 2017) (unpublished). We deemed meritorious only one of those issues, a jurisdictional challenge to the sufficiency of the AFDV indictment, and the State conceded that indictment was fatally defective under the authority of this Court's decision in *State v. Brice*, ___ N.C. App. ___, 786 S.E.2d 812 (2016), *rev'd*, ___ N.C. ___, 806 S.E.2d 32 (2017). *Id.* slip op. at 4. Accordingly, we allowed in part defendant's petition for the limited purpose of reviewing that sole issue and addressing the clerical error regarding the offenses to which defendant pled guilty. *Id.* slip op. at 4–5.

In *Brice*, this Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement—that is, when a prior conviction or convictions constitute an element of a greater offense, that prior conviction or those convictions must be listed on a special indictment or information, or in a separate count—constituted a fatal jurisdictional defect. ___ N.C. App. at ___, 786 S.E.2d at 815 (citing *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. rev. improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003), *and overruled by Brice*, ___ N.C. at ___ n.4, 806 S.E.2d at 40 n.4). The *Brice* panel thus vacated the defendant's habitual misdemeanor larceny conviction and remanded for entry of a judgment and resentencing on the lesser offense of misdemeanor larceny. *Id.* Here, the State similarly violated N.C. Gen. Stat. § 15A-928 by including a prior conviction of driving while impaired, an element of AFDV, on defendant's AFDV indictment. *Simmons*, slip op. at 4. Accordingly, under *Brice*, we vacated defendant's AFDV conviction and remanded for entry of a judgment and resentencing on the lesser offense of felony death by vehicle (FDV). *Id.* slip op. at 4. We also instructed the trial court on remand to correct a clerical error in its judgment. *Id.* slip op. at 5 ("Although the plea arrangement and plea hearing transcript reflect that defendant pled guilty to FHR, see N.C. Gen. Stat. § 20-166(a) (2015), the judgment reflects that he pled guilty to felony serious injury by vehicle, *see* N.C. Gen. Stat. § 20-141.4(a3) (2015).").

On 28 August 2017, the State filed a petition for a writ of *supersedeas* and a motion for a temporary stay with the Supreme Court of North Carolina. On 15 September 2017, the State filed a petition for discretionary review. On 28 September 2017, defendant filed a response to the State's petition for discretionary review and a conditional request for discretionary review of an additional issue. On 7 December 2017, our Supreme Court dissolved the temporary stay, denied the State's petition for a writ of *supersedeas*, denied defendant's conditional petition for discretionary review, and allowed the State's petition for discretionary

review for the limited purpose of remanding the case to this Court for reconsideration of our decision in *Simmons* in light of its decision in *State v. Brice*, ___ N.C. ___, 806 S.E.2d 32 (2017), *rev'g* ___ N.C. App. ___, 786 S.E.2d 812 (2016).

On remand, after reviewing *Brice*, we conclude that defendant's alleged AFDV indictment error under N.C. Gen. Stat. § 15A-928 no longer implicates jurisdiction and, therefore, defendant has waived his right to appellate review of this issue by failing to object below. Accordingly, we modify our prior decision in *Simmons* and sustain the trial court's judgment and sentence with respect to the AFDV conviction. We remand for the limited purpose of instructing the trial court to correct the clerical error in its judgment by reflecting that defendant pled guilty to FHR.

I. Analysis

In *Brice*, this Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement constituted a fatal jurisdictional defect. ___ N.C. App. at ___, 786 S.E.2d at 815 (citation omitted). We thus vacated the defendant's conviction for habitual misdemeanor larceny and remanded for entry of a judgment and sentence on misdemeanor larceny. *Id.*

On discretionary review, by written opinion filed 3 November 2017, our Supreme Court held that the State's failure to comply with N.C. Gen. Stat. § 15A-928's special-pleading requirement did not implicate the trial court's jurisdiction. *Brice*, ___ N.C. at ___, 806 S.E.2d at 38. Thus, as the defendant failed to object below to the State's N.C. Gen. Stat. § 15A-928 noncompliance, she was not entitled to raise that non-jurisdictional issue for the first time on appeal. *Id.* at ___, 806 S.E.2d at 39–40. Accordingly, our Supreme Court reversed our decision in *Brice*, deemed the defendant's N.C. Gen. Stat. § 15A-928 issue waived, and remanded with instructions to reinstate the trial court's prior judgment. *Id.*

In reconsideration of our decision, we are bound by our Supreme Court's holdings in *Brice*. As the preservation issue in this case is indistinguishable from *Brice*, we hold that because defendant failed to object below to the State's noncompliance with N.C. Gen. Stat. § 15A-928's special-pleading requirement, he "is not entitled to seek relief based upon that indictment-related deficiency for the first time on appeal." *Id.* at ___, 806 S.E.2d at 40 (footnote omitted). Accordingly, under *Brice*, we deem this issue unpreserved for appellate review and thus hold the trial court's prior judgment should be reinstated. We remand this case for the limited purpose of instructing the trial court to correct the clerical error in its judgment to reflect accurately that defendant pled guilty to FHR.

II. Conclusion

After reconsideration of our prior decision in light of *Brice*, we conclude that defendant's failure to object below to the State's noncompliance with N.C. Gen. Stat. § 15A-928 waived his right to appellate review of this issue. Therefore, we hold that the trial court's prior judgment be reinstated. We remand for the limited purpose of instructing the trial court to correct the clerical error in its judgment by accurately reflecting that defendant pled guilty to FHR.

REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges INMAN and BERGER concur.

STATE OF NORTH CAROLINA
v.
JAMES DOUGLAS TRIPLETT

No. COA13-1289-2

Filed 20 February 2018

Constitutional Law—right to remain silent—use of post-arrest silence—voluntarily talked with officers after arrest

The Court of Appeals rejected defendant's argument that the trial court erred in his murder trial by allowing the State to use his post-arrest exercise of his right to remain silent against him. There was no record evidence that defendant was given *Miranda* warnings or that he invoked his Fifth Amendment right to remain silent—in fact, he chose *not* to remain silent by talking with the officers.

Appeal by Defendant from judgment entered 18 February 2013 by Judge Edgar B. Gregory in Superior Court, Wilkes County. Originally heard in the Court of Appeals 9 April 2014, and opinion filed 2 September 2014. The Supreme Court of North Carolina reversed and remanded to this Court for consideration of the remaining issue on appeal and for additional proceedings, if necessary.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John H. Watters, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant.

McGEE, Chief Judge.

James Douglas Triplett ("Defendant") appealed from a judgment entered after a jury found him guilty of robbery with a dangerous weapon, second-degree burglary, and first-degree felony murder. The trial court arrested judgment on Defendant's convictions for robbery with a dangerous weapon and second-degree burglary, and entered a judgment on the first-degree murder conviction. Defendant originally argued that the trial court erred by: (1) preventing Defendant from cross-examining his sister with a recording of a voicemail message in order to attack her credibility, and (2) allowing the State to use Defendant's silence against him. Defendant's first argument was addressed by this Court in a 2 September 2014 opinion that held Defendant was entitled to a new trial based on Defendant's first argument and, thus, it was not necessary to decide on Defendant's second argument. *State v. Triplett*, 236 N.C. App. 192, 762 S.E.2d 632 (2014). On discretionary review, our Supreme Court reversed the decision of this Court and remanded the case to this Court for consideration of Defendant's second argument. *State v. Triplett*, 368 N.C. 172, 775 S.E.2d 805 (2015).

Defendant now argues the trial court erred in allowing "the State to use [Defendant's] post-arrest exercise of his right to [remain silent] against him." We disagree.

Under both the Fifth Amendment to the United States Constitution, incorporated through the Fourteenth Amendment, and Article I, Section 23 of the North Carolina Constitution, any criminal defendant has the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980). *Miranda* requires that before any person in custody is subjected to interrogation, that person must be informed in clear and unequivocal terms that they have the right to remain silent. *Miranda*, 384 U.S. at 467-68. Once a defendant receives *Miranda* warnings and chooses to exercise the right to remain silent, the defendant's subsequent silence "cannot be used against him to impeach an explanation subsequently offered at trial." *State v. Westbrooks*, 345 N.C. 43, 63, 478 S.E.2d 483, 495 (1996) (citing *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976)). This protection arises because of an implicit assurance in *Miranda* that a defendant will not be penalized for exercising his constitutional right to remain silent. *Doyle*, 426 U.S. at 617-18, 49 L. Ed. 2d at 91.

However, in order for a defendant to enjoy the protections of the Fifth Amendment, or Article I, Section 23 of the North Carolina Constitution, he must actually invoke this right, either expressly or by implication. A

defendant expressly invokes his right to silence by stating that choice. A defendant invokes his right by implication when he has been advised of his rights pursuant to *Miranda* and chooses through his silence to claim his constitutional protections against self-incrimination:

> Thus, although the State does not suggest petitioners' silence could be used as evidence of guilt, it contends that the need to present to the jury all information relevant to the truth of petitioners' exculpatory story fully justifies the cross-examination that is at issue.
>
> Despite the importance of cross-examination, we have concluded that the *Miranda* decision compels rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights, require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. Ohio, 426 U.S. 610, 617–18, 49 L. Ed. 2d 91 (1976) (citations and footnotes omitted).[1]

In the present case, this Court does not have to consider whether the State violated the Fifth Amendment by its questions and remarks at trial. Defendant's argument in the present case fails for the same reason as did the defendant's argument in *State v. Alkano*, 119 N.C. App. 256, 458 S.E.2d 258 (1995):

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1. The question of what constitutes "immediately" in order to satisfy *Miranda* and *Doyle* is not raised in this case, and we do not address it.

> [D]efendant contends that the in-court testimony of the officers concerning defendant's pre-*Miranda*, post-arrest lack of explanation or statement violated his constitutional right to remain silent. The problem with defendant's argument, here, is that defendant did *not* choose to remain silent.

Id. at 260, 458 S.E.2d at 261. The record evidence before us in the present case also indicates that Defendant did not choose to remain silent. The uncontradicted evidence presented by the State indicates that Defendant voluntarily talked with officers after his arrest.

Further, Defendant acknowledges both that the record does not indicate when or how Defendant received *Miranda* warnings, nor does the record indicate that Defendant ever invoked his right to remain silent, either pre- or post-*Miranda* warnings.[2] In Defendant's reply brief he, for the first time, argues that this Court should presume that Defendant received *Miranda* warnings concurrent with his arrest, and that the allegedly improper statements concerning Defendant's "silence" referred to Defendant's "silence" after he had received *Miranda* warnings. First, Defendant may not use his reply brief to make new arguments on appeal. "[A] reply brief is not an avenue to correct the deficiencies contained in the original brief. *See* N.C. R. App. P. 28(b)(6)[.]" *State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014) (citation omitted). Second, Defendant does not include citation to any authority that stands for this principle, and we have found none. Third, it is the duty of Defendant, as the appellant, to insure the record is complete and to include all evidence necessary for this Court to conduct appellate review. " 'This Court . . . is bound by the record as certified and can judicially know only what appears of record.' 'It is the appellant's duty and responsibility to see that the record is in proper form and complete.' " *State v. Brown*, 142 N.C. App. 491, 492–93, 543 S.E.2d 192, 193 (2001) (citations omitted). Finally,

> Defendant's [constitutional] argument . . . rests upon proof that police gave him the *Miranda* warnings at the time of arrest, thereby assuring him that his silence would not be used against him. The burden of demonstrating error rests

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2. In fact, Defendant does not direct us to any record evidence that Defendant ever received *Miranda* warnings, and we have found none. Though it is likely that Defendant was explained his *Miranda* rights at some point in time, hopefully concurrent with his arrest, we may not presume facts not in the record on appeal. *State v. Brown*, 142 N.C. App. 491, 492–93, 543 S.E.2d 192, 193 (2001).

> upon the appealing party. In the case before us, defendant has failed to show that he was given *Miranda* warnings and therefore he has not met his burden of proving a denial of [his constitutional rights].

State v. McGinnis, 70 N.C. App. 421, 423–24, 320 S.E.2d 297, 300 (1984); *see also Fletcher v. Weir*, 455 U.S. 603, 605–06, 71 L. Ed. 2d 490 (1982) (citation omitted) ("The significant difference between [*Fletcher v. Weir*] and *Doyle* is that the record does not indicate that respondent Weir received any *Miranda* warnings during the period in which he remained silent immediately after his arrest. The majority of the Court of Appeals recognized the difference, but sought to extend *Doyle* to cover Weir's situation by stating that '[w]e think an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent.' We think that this broadening of *Doyle* is unsupported by the reasoning of that case and contrary to our post-*Doyle* decisions.").

As there is no record evidence that Defendant was given *Miranda* warnings, or that he at any time specifically invoked his Fifth Amendment right to remain silent, Defendant cannot demonstrate that his Fifth Amendment right to remain silent was improperly used against him at trial. This Court in *Alkano* cited with approval the following reasoning from *United States v. Agee*, 597 F.2d 350 (3rd Cir.):

> *"Silence" at the time of arrest is the critical element of the Fifth Amendment right on which Agee relies.* . . . The Supreme Court has described that right as "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' " The rationale which the Supreme Court adopted for its decision in *Doyle* was that it is fundamentally unfair for the prosecution to impose a penalty at trial on a defendant who has exercised that right by choosing to remain silent. . . . *Doyle* can have no application to a case in which the defendant did not exercise his right to remain silent. . . . *Agee did not exercise his right to remain silent regarding the facts of the incident.*

Alkano, 119 N.C. App. at 261, 458 S.E.2d at 262 (quoting *Agee*, 597 F.2d at 354–56) (emphasis added in *Alkano*). This Court then concluded:

> The fact remains that defendant did not remain silent. Rather, he made several inculpatory statements which he then chose to explain by testifying at trial.
>
> The prosecutor's questions to the officers concerning defendant's lack of explanation did not violate defendant's

> rights against self-incrimination under either the United States or North Carolina Constitutions.

Alkano, 119 N.C. App. at 262, 458 S.E.2d at 262.

We likewise hold that, because there is no record evidence that Defendant invoked his right to remain silent, and indeed, Defendant chose not to remain silent by talking to officers following his arrest, "[t]he prosecutor's questions to the officers concerning defendant's lack of explanation did not violate defendant's rights against self-incrimination under either the United States or North Carolina Constitutions." *Id.*

We note that we would reach the same outcome even assuming *arguendo* we had evidence that Defendant received *Miranda* warnings prior to speaking with the officers in this case:

> When the defendant chooses to speak *voluntarily* after receiving *Miranda* warnings . . . the rule in *Doyle* is not triggered. "Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." Once the defendant speaks voluntarily, cross-examination on those statements is permissible if it "merely inquires into prior inconsistent statements." Cross-examination can properly be made into why, if the defendant's trial testimony regarding his alibi is true, he did not include in his earlier statement the relevant information disclosed at trial.

State v. Fair, 354 N.C. 131, 156, 557 S.E.2d 500, 518–19 (2001) (citations omitted).

NO ERROR.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DOMINIQUE RASHEED WELDON, DEFENDANT

No. COA17-748

Filed 20 February 2018

1. Identification of Defendants—officer's testimony—no encounters with defendant

The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by allowing an officer who had had no actual encounters with defendant to identify defendant from a surveillance video. The officer recognized defendant's face and a brace on defendant's leg, as well as his limp; the officer had seen defendant in the area and defendant had been pointed out due to his reputation. Moreover, defendant altered his appearance between the shooting and trial, so that the officer was better qualified than the jury to identify defendant.

2. Evidence—character—relevant to other purpose

An officer's testimony that defendant had a notorious reputation in the community was relevant to the circumstances under which the officer had become familiar with defendant and to responding to a challenge to the officer's identification of defendant.

3. Evidence—character—drug surveillance operation—no plain error

There was no plain error in a prosecution for possession of a firearm by a felon where an officer testified that he was familiar with defendant from a drug surveillance operation. The inclusion of this detail did not add to the reliability of the officer's ability to identify defendant; however, defendant did not object at trial and there was other evidence presented by the State strong enough to support the jury's verdict.

4. Evidence—probative value—admission not prejudicial

In a prosecution for possession of a firearm by a felon, the prejudicial effect of evidence that an officer had seen defendant during a drug surveillance operation and knew defendant from his reputation in the community did not outweigh its probative value where the crucial issue was the identity of an individual in a surveillance video.

5. Sentencing—prior federal offense—substantial similarity—any error harmless

Any error by the trial court when sentencing defendant for possession of a firearm by a felon was harmless where defendant argued that the State did not present evidence of substantial similarity between the state offense and a prior federal offense. To the extent that the State fails to meet its burden at sentencing, the error is harmless if the record contains sufficient information for the appellate court to determine that the federal offense is substantially similar to the state offense. The Court of Appeals had already determined substantial similarity.

Appeal by defendant from judgment entered 24 March 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Dominique Rasheed Weldon ("defendant") appeals from judgment entered on his conviction for possession of a firearm by a felon. Defendant argues that the trial court erred when it (1) admitted lay opinion testimony identifying defendant in a surveillance video, (2) permitted testimony in violation of Rules 404(b) and 403 of the North Carolina Rules of Evidence, and (3) determined that defendant's prior federal conviction of unlawful possession of a firearm was substantially similar to his current North Carolina conviction. For the reasons explained herein, we find no error.

I. Background

A Wake County grand jury indicted defendant for possession of a firearm by a felon on 4 May 2015, for habitual felon status on 21 July 2015, and for assault with a deadly weapon with intent to kill on 7 March 2016. The case was tried before a jury beginning on 21 March 2016. The relevant facts are as follows.

On 23 March 2015, defendant was shot near Martin Street in Raleigh. The Raleigh Police Department responded to the shooting and found a 9-millimeter shell casing at the scene. Defendant was transported to the

hospital where Detective Bill Nordstrom attempted to interview him. Detective Nordstrom testified that defendant "wasn't too cooperative" and that "He gave a very brief statement and told us that he didn't really need the police assistance." Defendant was released from the hospital that same day.

Ten days later, on 2 April 2015, the Raleigh Police Department responded to another shooting outside some storefronts on Martin Street. Officer K. A. Thompson found six .40 caliber shell casings at the scene of the 2 April 2015 shooting. Officer Thompson also found four 9-millimeter shell casings in the parking lot across the street.

Officer Thompson contacted one of the storefront property owners in order to obtain the owner's video surveillance footage of the shooting. The surveillance video shows an individual shooting a .40 caliber handgun at another individual across the street, where the four 9-millimeter shell casings were found. State Crime Lab Technician Dana Quirindongo testified that the 9-millimeter shell casings from the 23 March 2015 shooting were fired from the same 9-millimeter firearm involved in the 2 April 2015 shooting.

When Officer Thompson viewed the surveillance video of the 2 April 2015 shooting, he identified defendant as the shooter. Officer Thompson testified that he had gotten to know defendant while patrolling his "beat" over the years. Officer Thompson first met defendant in 2008, and continued to have occasional encounters with him. In particular, Officer Thompson testified that he saw defendant just a few days after he was shot on 23 March 2015, about seven or eight days before the 2 April 2015 shooting, and that defendant was limping at the time. When asked how he was able to identify defendant in the 2 April 2015 surveillance video, Officer Thompson responded that he "saw in the video, especially a side profile of, of [defendant's] face and hair and clothing that he's wearing. I immediately recognized him by who he is, and then also he was limping." Officer Thompson testified that he was 100 percent certain that the individual in the surveillance footage was defendant.

Officer R. S. Williams also viewed the video surveillance footage. Officer Williams testified that, while he had never had any direct contact with defendant, he knew who defendant was from his "reputation on the street[.]" Officer Williams testified that he was 100 percent certain that defendant was the individual firing the .40-caliber handgun in the surveillance video.

Quentin Singletary worked at the self-service laundry in the area of the shooting. Mr. Singletary testified that he knew defendant because

defendant would come into the laundry and that they would talk nearly every day. Mr. Singletary saw defendant when he came into the laundry on the morning of 2 April 2015. When Mr. Singletary heard the shots being fired later that day, he locked himself inside the laundry until police officers knocked on the door. Mr. Singletary let the officers in and the officers showed him the surveillance footage. Mr. Singletary identified defendant as the person shooting in the video and testified that defendant was wearing the same clothing in the video as Mr. Singletary had seen him wearing earlier that morning. Mr. Singletary also testified that defendant was limping when he saw him the morning of the 2 April 2015 shooting, and that he observed the same limp in the surveillance footage.

On 24 March 2016, the jury found defendant guilty of possession of a firearm by a convicted felon and assault with a deadly weapon with intent to kill. However, at defendant's sentencing, after having already denied defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill, the trial court reopened the issue and dismissed that conviction on the grounds that the indictment was fatally defective for failing to name a victim. Defendant's conviction of possession of a firearm by a felon remained. Defendant stipulated to being a habitual felon.

Defendant was designated as a prior record Level II for sentencing. Defendant had a prior federal conviction in 2010 for unlawful possession of a firearm. On the prior record level worksheet, defendant was given one point because all of the elements in the present charge of possession of a firearm by a convicted felon were present in a prior conviction. This point elevated defendant's sentencing level from a Level I to a Level II for purposes of sentencing as a habitual felon. Defendant was sentenced to 83 to 112 months' imprisonment. Defendant gave oral notice of appeal in open court.

On appeal, defendant argues (1) that the trial court abused its discretion in allowing Officer Williams to testify as to defendant's identity in the surveillance video, (2) that the trial court committed plain error when it allowed Officer Williams to testify as to the reputation and prior bad acts of defendant, and (3) that the trial court committed reversible error when it determined that defendant's current offense of possession of a firearm by a felon was substantially similar to his prior federal conviction. After careful review, we find no error.

II. Officer Williams's Identification Testimony

[1] Defendant first argues that the trial court abused its discretion by allowing Officer Williams to testify as to defendant's identity in the

surveillance video. Defendant maintains that, because Officer Williams's familiarity with defendant was based solely on what others had told him, he was in no better position than the jury to identify defendant in the surveillance footage. We do not find this argument persuasive.

A. Standard of Review

A trial court's ruling on the admissibility of lay opinion testimony is reviewed for abuse of discretion. *State v. Belk*, 201 N.C. App. 412, 417, 689 S.E.2d 439, 442 (2009) (citation omitted). A trial court abuses its discretion if the "ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009), *cert. denied*, 562 U.S. 864, 178 L. Ed. 2d 90 (2010) (citation and quotation marks omitted). Where the testimony at issue is the identification of a defendant as the individual depicted in surveillance footage, "we must uphold the admission of [the] lay opinion testimony if there was a rational basis for concluding that [the witness] 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 (citation omitted).

B. Lay Opinion Identification Testimony

Admissible lay opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2016). "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). "The essential question in determining the admissibility of opinion evidence is whether the witness, through study and experience, has acquired such skill that he is better qualified than the jury to form an opinion as to the subject matter to which his testimony applies." *State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976), *cert. denied*, 429 U.S. 1123, 51 L. Ed. 2d 573 (1977), (citing *State v. Mitchell*, 283 N.C. 462, 196 S.E.2d 736 (1973)) (other citations omitted).

These same principles apply in the context of lay opinion testimony regarding the identification of a defendant as the person depicted in a surveillance video. *See e.g.*, *Belk*, 201 N.C. App. at 414-15, 689 S.E.2d at 441. Opinion testimony identifying a criminal defendant in a videotape is admissible " '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.' " *Id.* at 415, 689 S.E.2d at 441 (quoting *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354-55, *disc. review denied*, 363 N.C. 375, 679 S.E.2d 135-36 (2009) (internal quotation marks and citation omitted)). However, the testimony is inadmissible if the jury is "as well qualified as the witness to draw the inference[] and conclusion[]" that the person shown in the surveillance footage is the defendant. "*Fulton*, 299 N.C. at 494, 263 S.E.2d at 610 (citation omitted). In determining the admissibility of lay opinion identification testimony, we have held that the following factors are relevant:

> "(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 [video] was taken or when the defendant was dressed in a manner similar to the individual depicted in the [video]; (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."

Belk, 201 N.C. App. at 415, 689 S.E.2d at 441 (quoting *United States v. Dixon*, 413 F.3d 540, 545 (6th Cir. 2005) (internal citation omitted)) (other citations omitted). We have also noted that " '[l]ay opinion identification testimony is more likely to be admissible where the surveillance [video] . . . shows only a partial view of the subject.' " *Id.* at 416, 689 S.E.2d at 442 (quoting *Dixon*, 413 F.3d at 545 (internal citations omitted)) (alteration omitted).

C. Analysis

Defendant argues that the trial court abused its discretion in allowing Officer Williams to identify defendant as the shooter in the surveillance footage because "Officer Williams had never had any actual encounters with [defendant]; he had only seen him in the community and heard from others who he was." Accordingly, defendant asserts that Officer Williams "was in no better position than the jury to" identify defendant in the video.

At trial, Officer Williams testified that when he viewed the 2 April 2015 surveillance footage, he recognized the shooter in the video as defendant with "a hundred percent" certainty. While Officer Williams never "had a one-on-one discussion" with defendant, he testified that he "had seen him in the area and . . . knew who he was." Officer Williams testified that he was familiar with defendant's identity because defendant had been pointed out to him on numerous occasions due to defendant's

"reputation" in the area, and that he had observed defendant "very frequently" in the area for "at least a good two months" before defendant was shot on 23 March 2015. The day after defendant was shot, Officer Williams saw defendant coming out of a house that he was surveilling. Officer Williams stated that he was able to identify that individual as defendant because he "recognized his face," and because he had a brace on his leg and "was limping pretty bad." We conclude that these encounters would have sufficiently allowed Officer Williams to acquire the requisite familiarity with defendant's appearance so as to qualify him to testify on the subject matter of defendant's identity. The trial court did not abuse its discretion in so concluding.

Moreover, defendant had altered his appearance significantly between 2 April 2015 and the date of trial. At trial, the evidence established that the length and style of defendant's hair was distinctive during the period that Officer Williams became familiar with defendant, matching that of the individual shown in the 2 April 2015 surveillance footage. However, defendant had a shaved head at trial. Thus, by the time of trial, the jury was unable to perceive the distinguishing nature of defendant's hair at the time of the shooting. *Cf. Belk*, 201 N.C. App. at 417, 689 S.E.2d at 442 (lay witness identification inadmissible where there was "no evidence that [the] [d]efendant altered his appearance between the time of the incident and the trial"). Accordingly, in that defendant had changed his appearance since the 2 April 2015 surveillance video, not only was Officer Williams qualified to identity defendant in the video, but he was "*better* qualified than the jury" to do so. *Phifer*, 290 N.C. at 213, 225 S.E.2d at 793 (emphasis added).

Because Officer Williams was familiar with defendant's appearance, and because defendant had altered that appearance by the time of his trial, we conclude that the trial court did not abuse its discretion when it allowed Officer Williams to testify that, in his opinion, defendant was the individual depicted shooting a weapon in the 2 April 2015 surveillance video.

III. Character Evidence

[2] Defendant argues next that the trial court erred when it allowed Officer Williams to testify (1) that he saw defendant coming out of a house that he was investigating for illicit drugs, and (2) that defendant had a reputation for causing problems in the area. This testimony, defendant maintains, served no purpose other than to show defendant's propensity for committing the crimes of which he was accused, and therefore was inadmissible character evidence under Rule 404(b) of the

North Carolina Rules of Evidence. Although defendant did not object to the admission of this testimony at trial, he contends that the trial court's admission of the testimony amounted to plain error. We disagree.

A. Standard of Review

"We review *de novo* the legal conclusion that . . . evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Whether evidence admissible under Rule 404(b) should nevertheless be excluded under Rule 403 "is a matter within the sound discretion of the trial court and [the court's] ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *State v. Everhardt*, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989) (citation and quotation marks omitted). A defendant alleging plain error has the additional burden of establishing "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) (citing *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991)).

B. Rule 404(b)

Rule 404(b) of the North Carolina Rules of Evidence provides, in pertinent part, that:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2016). Stated differently, "Rule 404(b) is a rule of inclusion of relevant evidence with but one exception, that is, the evidence must be excluded if its *only* probative value is to show that [the] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Moore*, 335 N.C. 567, 595, 440 S.E.2d 797, 813 (1994) (citation omitted) (emphasis added).

When asked whether he had seen defendant after the 23 March 2015 shooting, Officer Williams testified:

> I saw him, I believe it was the day after he was shot. I was dealing with a complaint about [a] house on Blatent Court. It was a drug complaint that I got from the citizens. While investigating that I saw the defendant come out of the house and get into the vehicle.

On cross-examination, in an attempt to discredit Officer Williams's familiarity with defendant, the following exchange took place:

> Q. So you had never sort of had a face-to-face talk or encounter [with defendant], is that safe to say?
>
> A. Not that I can recall. There might have been an instant here and there but I can't recall.
>
> Q. Can you recall how long you even knew of [defendant] prior to this April 2nd, 2015 date?
>
> A. The reputation on the street is how I first beg[a]n associating with the defendant. I had heard his name being talked about on [the] street with people on the street. [Defendant] had got a reputation for causing a lot of issues in the area so I knew who he was. People had already told me who he was. I'd never had any actual direct encounters with him, but knowing who he was I'd seen him in the area.

Defendant maintains that this testimony had no purpose other than to show that defendant had a propensity for committing the crimes with which he was charged, and was not relevant to prove defendant's identity, motive, opportunity, intent, preparation, plan, or knowledge. However, the Rule 404(b) list "of other purposes is nonexclusive, and thus evidence not falling within these categories may be admissible." *Everhardt*, 96 N.C. App. at 17, 384 S.E.2d at 572 (citing *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986)). "Rule 404(b) permits admission of extrinsic conduct evidence so long as the evidence is relevant for some purpose other than to prove the defendant has the propensity to commit the act for which he is being tried." *Id.* at 17-18, 384 S.E.2d at 572.

The transcript in the instant case reflects that the challenged portions of Officer Williams's testimony were relevant in that they established Officer Williams's familiarity with defendant's appearance. This provided the basis for Officer Williams's ability to identify the defendant as the individual depicted in the surveillance footage. The fact that defendant had a notorious reputation in the community explained why he had been pointed out to Officer Williams on numerous occasions, why Officer Williams would have paid particular attention to him, and why he was memorable to Officer Williams. In addition, the fact that Officer Williams observed defendant during an unrelated investigation showed that Officer Williams had a particular incentive to observe defendant in detail. Accordingly, as Officer Williams's testimony explained the circumstances under which he had become familiar with defendant over

the course of two months, his testimony was relevant for a purpose other than to establish defendant's character. Thus, Officer Williams's testimony was not impermissible character evidence under Rule 404(b), and the trial court did not err by failing to exclude it.

[3] We note, however, that while Officer Williams's observation of defendant during a surveillance assignment was relevant in order to demonstrate the basis of his familiarity with defendant's appearance, the same cannot be said for the fact that the surveillance operation was in response to "a drug complaint." The inclusion of this detail did not add to the reliability of Officer Williams's ability to identify defendant. Nonetheless, in absence of defendant's objection at trial to this testimony, we are limited to a plain error review of the issue.

A showing of plain error requires that the error be " 'a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' " or one that " 'had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (internal quotation marks omitted)). " 'The plain error rule is always to be applied cautiously and only in the exceptional case[.]' " *Id.* (alterations omitted).

In the present case, a review of the evidence reveals that the inclusion of this phrase did not amount to plain error. Notwithstanding the character implications of the admission of testimony that defendant was seen exiting a house that was being investigated in response to "a drug complaint," the State presented the testimony of three witnesses familiar with defendant who identified him as the individual shooting a weapon in the surveillance video. This testimony was strong enough to have supported the jury's verdict on its own. The jury was also shown defendant's distinctive hair style and told about his limp, which were both clearly visible in the surveillance footage. Moreover, the jury was presented with the circumstantial evidence of the 23 March 2015 shooting, in which defendant was shot with the same firearm that was found across the street after the 2 April 2015 shooting. Thus, the trial court's failure to exclude from the jury's consideration the fact that Officer Williams's surveillance was for "a drug complaint" did not have a probable impact on the jury's finding that defendant was guilty. Accordingly, defendant cannot establish plain error.

C. Rule 403

[4] As to the remaining relevant portions of Officer Williams's testimony, while not in violation of Rule 404(b), the testimony must nevertheless be

excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2016). Rule 403 is a balancing test that falls within the sound discretion of the trial court. *Everhardt*, 96 N.C. App. at 18, 384 S.E.2d at 572.

Here, the probative value of the testimony that Officer Williams observed defendant closely during a surveillance assignment, and that he knew who defendant was because of defendant's reputation in the community, was significant. While this testimony certainly would have had some prejudicial impact on the jury, we conclude that, as the identity of the individual in the surveillance video was the crucial issue in the case, the probative value of this information was significant, and was not substantially outweighed by any undue prejudice. Accordingly, the trial court did not abuse its discretion by permitting this testimony.

IV. "Substantial Similarity" of Out-of-State Offense

[5] Lastly, defendant argues that the trial court erred when it found that his prior federal conviction of unlawful possession of a firearm was substantially similar to his current North Carolina conviction of possession of a firearm by a felon because the State failed to present any evidence of substantial similarity between the two offenses. However, because the trial court's finding was, in fact, correct, we conclude that any such error was harmless.

A. Standard of Review

"The trial court's determination of a defendant's prior record level is a conclusion of law, which this Court reviews *de novo* on appeal." *State v. Threadgill*, 227 N.C. App. 175, 178, 741 S.E.2d 677, 679-80, *disc. review denied*, 367 N.C. 223, 747 S.E.2d 539 (2013) (citations omitted). However, whether a particular out-of-state conviction is substantially similar to a particular North Carolina offense is subject to harmless error review. *State v. Riley*, ___ N.C. App. ___, ___, 802 S.E.2d 494, 498 (2017); *State v. Bohler*, 198 N.C. App. 631, 637-38, 681 S.E.2d 801, 806-07 (2009), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010).

B. Discussion

Before sentencing a criminal defendant, the trial court must first determine the defendant's prior record level. N.C. Gen. Stat. § 15A-1340.13(b) (2016). "The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions[.]" N.C. Gen. Stat. § 15A-1340.14(a) (2016). For example, a prior offense that is classified as a Class G felony is assigned four prior record level points. N.C. Gen. Stat. § 15A-1340.14(3)

(2016). A defendant with four prior record level points is considered a Prior Record Level II for sentencing. N.C. Gen. Stat. § 15A-1340.14(c)(2) (2016). The defendant's prior record level determines the applicable sentencing range. N.C. Gen. Stat. § 15A-1340.13(b) (2016). In addition to assigning points to each of the defendant's prior convictions based on the classification of that conviction, the trial court must assign an extra point "[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level[.]" N.C. Gen. Stat. § 15A-1340.14(b)(6) (2016).

In the instant case, defendant has not presented, and we are unable to find, any statutory or case law describing the standard for determining whether "all the elements of the present offense are included in any prior offense" under Section 1340.14(b)(6) where the prior conviction is an out-of-state offense. However, under Section 1340.14(e), "a conviction occurring in a jurisdiction other than North Carolina is classified" according to the North Carolina offense to which it is "substantially similar." N.C. Gen. Stat. § 15A-1340.14(e) (2016). Section 1340.14(e) does not explicitly provide that the "substantially similar" analysis is applicable to an out-of-state offense for purposes of assigning one extra prior record level point under Section 1340.14(b)(6). Nonetheless, the determination of whether an out-of-state offense is "substantially similar" to a North Carolina offense pursuant to Section 1340.14(e) "requires a comparison of [the] respective elements" of the two offenses. *Riley*, ___ N.C. App. at ___, 802 S.E.2d at 498 (citing *State v. Burgess*, 216 N.C. App. 54, 57, 715 S.E.2d 867, 870 (2011)). Accordingly, we conclude that a finding that an out-of-state offense is substantially similar to a North Carolina offense is sufficient for a finding that the elements of the present offense are included in any prior conviction under Section 1340.14(b)(6) where the pertinent prior conviction is an out-of-state offense.

The burden is on the State to establish by a preponderance of the evidence that the elements of a defendant's prior out-of-state offense are substantially similar to those of his present North Carolina offense. *See Burgess*, 216 N.C. App. at 57-58, 715 S.E.2d at 870; N.C. Gen. Stat. § 15A-1340.14(e) (2016). The State "may establish the elements of the out-of-state offense by producing evidence of the applicable statute, including printed copies thereof." *Riley*, ___ N.C. App. at ___, 802 S.E.2d at 498 (citing *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998)).

Here, defendant was assigned one additional record point because all of the elements of his conviction of possession of a firearm by a felon were present in a prior conviction. **[R p 28]** That point elevated

defendant's sentencing level from Level I to Level II for purposes of sentencing as a habitual felon. While defendant stipulated that he had a prior federal conviction in 2010 for unlawful possession of a firearm pursuant to 18 U.S.C. § 922(g)(1), there is no indication that the State presented copies of the relevant 2010 federal statute to the trial court in order to establish that the 2010 federal offense was substantially similar to defendant's current North Carolina conviction of possession of a firearm by a felon under N.C. Gen. Stat. § 14-415.1(a). There is also no evidence in the record that the trial court did in fact review copies of the applicable 2010 federal statute to determine whether it was substantially similar to the North Carolina statute. However, to the extent that the State fails to meet its burden of proof at sentencing, if "[t]he record contains sufficient information for this Court to determine that the federal offense of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), is substantially similar to the North Carolina offense of possession of a firearm by a felon, N.C. Gen. Stat. § 14-415.1," the resulting error is harmless, and the defendant is not entitled to a new sentencing hearing. *Riley*, ___ N.C. App. at ___, 802 S.E.2d at 495.

In *State v. Riley*, the defendant argued that the State failed to establish that his prior federal conviction of unlawful possession of a firearm pursuant to 18 U.S.C. § 922(g)(1) was substantially similar to his present North Carolina conviction of possession of a firearm by a felon. In *Riley*, "there [was] no evidence that the version of § 922(g)(1) relied upon by the trial court was the same version under which [the] defendant was convicted, or if it was the most recent version, that the statute remained unchanged since [the] defendant's conviction." *Riley*, ___ N.C. App. at ___, 802 S.E.2d at 498. Nevertheless, upon examining the elements of the two offenses, this Court was able "to determine that [the] defendant's prior conviction in federal court was substantially similar" to the North Carolina crime of possession of a firearm by a felon. *Id.* Holding that the error was not harmless, we explained:

> Pursuant to 18 U.S.C. § 922(g)(1), it is unlawful "for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm." 18 U.S.C. § 922(g)(1) (2015). The federal offense of being a felon in possession of a firearm requires proof that (1) the defendant had been convicted of a crime punishable by more than one year in prison, (2) the defendant possessed (3) a firearm, and (4) the possession was in or affecting commerce.

Pursuant to N.C. Gen. Stat. § 14-415.1(a), it is unlawful in North Carolina "for any person who has been convicted of a felony to . . . possess . . . any firearm." N.C. Gen. Stat. § 14-415.1(a) (2015). The state offense of possession of a firearm by a felon requires proof that (1) the defendant had been convicted of a felony and (2) thereafter possessed (3) a firearm. . . .

There are two notable differences between the offenses, the first being the "interstate commerce" element. This "jurisdictional element" requires "the government to show that a nexus exists between the firearm and the interstate commerce to obtain a conviction under § 922(g)" *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996). It "is typically satisfied by proof that the firearm . . . , or parts of the firearm, were manufactured in another state or country." . . . A conviction under 18 U.S.C. § 922(g)(1) necessarily includes conduct which would violate N.C. Gen. Stat. § 14-415.1(a), but not vice versa. If, for example, the firearm was manufactured within the state, possessed by a felon within the same, and was not transported by any vehicle of interstate commerce, then possession would presumably fall short of conduct prohibited by § 922(g)(1). Such a situation seems unlikely, however, based upon the federal courts' broad interpretation of "in or affecting commerce." . . .

The second difference concerns the persons subject to punishment. The federal offense requires that the person have been previously convicted of a crime "punishable by imprisonment for a term exceeding one year," while the North Carolina offense requires that the person have been previously "convicted of a felony." A felony conviction in North Carolina is not necessarily punishable by more than one year in prison. . . . If convicted of a Class I felony, a defendant with a prior record level IV or higher may be imprisoned for a term exceeding one year, but a defendant with a prior record level III or lower faces only community or intermediate punishment. . . . Apart from this limited example, however, every other class of felony in North Carolina is punishable by imprisonment for a term exceeding one year and thus comports with the element of the federal offense.

> There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. *But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons.*

Id. at ___, 802 S.E.2d at 498-500 (some citations omitted) (emphasis added). This Court in *Riley* likewise noted that both 18 U.S.C. § 922(g)(1) and N.C. Gen. Stat. § 14-415.1 had remained unchanged between the 2012 and 2015 time period in question.

Indeed, the federal offense of unlawful possession of a firearm and the North Carolina offense of possession of a firearm by a felon have remained unchanged since defendant's federal conviction in 2010. *Compare* 18 U.S.C. § 922(g)(1) (2010) *with* 18 U.S.C. § 922(g)(1) (2016), and N.C. Gen. Stat. § 14-415.1 (2010) *with* N.C. Gen. Stat. § 14-415.1 (2016). Because this Court has already determined that defendant's present offense is substantially similar to his federal offense, we necessarily conclude that the trial court's prior record level determination was correct. *See State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) (" '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.' ") (quoting *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). Accordingly, any such error asserted by defendant is harmless error.

V. Conclusion

For the aforementioned reasons, we conclude that defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges STROUD and ARROWOOD concur.

STOKES v. STOKES

[258 N.C. App. 165 (2018)]

BREE RUSHING STOKES, PLAINTIFF/MOTHER
v.
WILLIAM COREY STOKES, II, DEFENDANT/FATHER

No. COA17-440

Filed 20 February 2018

1. Appeal and Error—interlocutory—motion for change of venue—convenience of witnesses

The trial court's venue order was an interlocutory order where the parties' claims for child custody, child support, and equitable distribution remained unresolved. The grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable, while an order granting or denying a motion for a change based on the convenience of witnesses and the ends of justice is interlocutory. The trial court's findings here did not make clear under which subsection of N.C.G.S. § 1-83 it granted the motion to change the venue, but as the trial court appeared to find venue proper in either venue, it would appear that the decision was based on the convenience of witnesses.

2. Venue—motion to change—filed contemporaneously with answer

Although motions for change of venue based on the convenience of witnesses must be filed after the answer, a motion to change venue filed along with an answer will not be deemed prematurely filed where a defendant's answer is filed contemporaneously with a motion to change venue or where the motion to change venue is such a responsive pleading that it amounts to an answer and is presumed to traverse the allegations of plaintiff's complaint.

Judge MURPHY dissenting.

Appeal by plaintiff from order entered 9 February 2017 by Judge N. Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 31 October 2017.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Passenant & Shearin Law, by Brione B. Pattison, for defendant-appellee.

BRYANT, Judge.

Where the trial court's order granting defendant's motion to change venue was based on N.C. Gen. Stat. § 1-83(2), the convenience of the witnesses, and where a motion for change of venue filed contemporaneously with responsive pleadings is not untimely filed, the trial court's order is interlocutory and not immediately appealable, and we dismiss plaintiff's appeal.

Plaintiff Bree Stokes and defendant William Stokes were married on 6 April 2002 and separated on 20 April 2016. During the marriage, the parties had two children. In April 2016, defendant filed an action for domestic violence against plaintiff in Pitt County. Plaintiff counterclaimed, asking for child custody, child support, alimony, and equitable distribution. At some point, an *ex parte* domestic violence protective order was entered against plaintiff, which included temporary custody provisions. Before 20 October 2016, both parties dismissed their claims, and the domestic violence order was set aside.

On or about 20 October 2016, plaintiff and the minor children relocated from Pitt County to Union County, while defendant remained a resident of Pitt County. On 24 October 2016, plaintiff filed a complaint for child custody, child support, and equitable distribution in Union County. On 26 October 2016, defendant filed his own custody action in Pitt County. Thereafter, on 9 November 2016, defendant filed a motion in Union County for emergency *ex parte* custody and motion to dismiss for improper venue, or in the alternative, a motion to change venue in the Union County case.

On 6 December 2016, the trial court in Union County conducted a hearing on defendant's motion to change venue. After hearing testimony from the parties and the arguments of counsel on the issue of venue, the trial court ruled that venue was proper in both Pitt and Union Counties, but ordered that venue be changed to Pitt County by order entered 9 February 2017. Plaintiff appeals.

On appeal, plaintiff argues the trial court erred as a matter of law and abused its discretion in changing venue from Union County to Pitt County. Specifically, plaintiff contends that venue is proper in Union County and to the extent the order is an attempt to change venue for the convenience of witnesses, the trial court abused its discretion in changing venue to Pitt County. We disagree.

A. The Nature of Defendant's Motion

[1] The trial court's venue order is an interlocutory order in that the parties' claims for child custody, child support, and equitable distribution remain unresolved. "An appeal of an order disposing of . . . a [venue] motion is interlocutory because 'it does not dispose of the case.' " *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 135, 318 S.E.2d 887, 888 (1984)). "Generally, there is no right to appeal an interlocutory order, unless the trial court's decision affects a substantial right of the appellant which would be lost absent immediate review." *Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (citing *Boynton v. ESC Med. Sys., Inc.*, 152 N.C. App. 103, 105–06, 566 S.E.2d 730, 731 (2002)). "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.' " *Heustess v. Bladenboro Emergency Servs., Inc.*, ___ N.C. App. ___, ___, 791 S.E.2d 669, 671 (2016) (alteration in original) (quoting *Hawley v. Hobgood*, 174 N.C. App. 606, 608, 622 S.E.2d 117, 119 (2005)).

"[G]rant or denial of a motion asserting a *statutory right* to venue affects a substantial right and is immediately appealable." *Snow*, 99 N.C. App. at 319, 392 S.E.2d at 768 (emphasis added) (citing *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980)). On the other hand, "an order denying [or granting] a motion for change of venue . . . *based upon the convenience of witnesses and the ends of justice*, is an interlocutory order and not immediately appealable." *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984) (emphasis added) (citations omitted). In other words, "an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable[;] a determination of venue based upon a statutory right to venue in a particular county is immediately appealable." *ITS Leasing, Inc. v. RAM DOG Enters., LLC*, 206 N.C. App. 572, 574, 696 S.E.2d 880, 882 (2010) (citations omitted).

In the instant case, defendant filed a motion in response to plaintiff's complaint in Union County titled "Motion for Emergency *Ex Parte* Custody and Motion To Dismiss For *Improper Venue*, or in the alternative, *Motion to Change Venue*." (Emphasis added). In his motion filed in Union County, defendant objected to venue based on subsections (1) and (2) of N.C. Gen. Stat. § 1-83, and requested as follows:

> 3. That the Court dismiss Plaintiff's Complaint for Child Custody, Child Support, and Equitable Distribution;

> 4. Or in the alternative, that the Court change venue of this action from Union County, North Carolina to Pitt County, North Carolina and consolidate the matter with the action filed by Father in that county.

Our Court has stated that "[u]nlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to G.S. 1-83(2) are properly made only after an answer has been filed." *Godley Constr. Co., Inc. v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360 (1979) (citations omitted).

However, the instant case is analogous to *ITS Leasing*:

> Analysis of this case, and even the determination of whether this interlocutory appeal is immediately appealable, is complicated by the fact that neither defendant's motion nor the trial court's order identified the specific basis for the change of venue, although one basis for the change of venue is of right and the other is discretionary. Also, an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable, *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984); a determination of venue based upon a statutory right to venue in a particular county is immediately appealable. *Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990).

206 N.C. App. at 574, 696 S.E.2d at 882. Thus, where, as here, "the parties have raised arguments both as to discretionary venue under N.C. Gen. Stat. § 1-83(2) and venue as of right[,] . . . and the trial court did not specify the basis for its ruling, we must address both." *Id.* at 575, 696 S.E.2d at 882.

Pursuant to N.C. Gen. Stat. § 1-83,

> [i]f 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.
>
> (2) When the convenience of witnesses and the ends of justice would be promoted by the change.

N.C.G.S. § 1-83(1)–(2) (2015). "In 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).

In the instant case, the trial court made the following findings of fact in its order to change venue:

> 1. Plaintiff (hereinafter "Mother") is a citizen of North Carolina and has resided in Union County, North Carolina since October 20, 2016. Prior to October 20, 2016, Mother was a citizen and resident of Pitt County, North Carolina.
>
> 2. Defendant (hereinafter "Father") is a citizen and resident of Pitt County, North Carolina.
>
> 3. The parties are parents of (2) minor children, . . . born August 22, 2003, and . . . June 14, 2008 (hereinafter the "minor children").
>
> 4. The minor children have resided in Pitt County, North Carolina since their birth. Mother moved to Union County, North Carolina on October 20, 2016 without Father's knowledge or consent.
>
> 5. On October 24, 2016, Mother filed a Complaint for Child Custody in Union County District Court.
>
> 6. On November 9, 2016, Father filed a Motion to Dismiss, a Motion to Change Venue and an Ex Parte Motion for Emergency Custody in Union County.
>
> 7. The parties own several businesses, a home and a parcel of real estate which are all located in Pitt County, North Carolina.
>
> 8. The minor children have attended school in Pitt County their entire lives.
>
> 9. The minor children's therapists, doctors, coaches and teachers all reside in Pitt County.
>
> 10. N.C.G.S. § 1-82 allows for the proper venue of cases to be heard in the county in which the Plaintiff's [sic] or

> the Defendant's [sic] reside with the emphasis on the word "or". The disjunctive allows some cases, such as this one, to be in either venue.
>
> 11. N.C.G.S. § 1-83 literally says, "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 the parties, or by order of the court." The Defendant filed a written response on November 9, 2016 that was filed within the time for answering and it is a written request of the court to change venue along with other relief requested. *The Court finds this is a responsive pleading amounting to an answer and that was timely filed.*

(Emphasis added).

The trial court's findings of fact do not make it abundantly clear under which subsection of N.C. Gen. Stat. § 1-83—(1) or (2)—the trial court concluded that "[v]enue of this action is proper in Pitt County, North Carolina[,]" and granted defendant's motion to change venue to Pitt County. However, as the trial court specifically found venue to be proper "in either venue," it would appear that the trial court's decision to grant defendant's motion to change venue to Pitt County was based on subsection (2), the convenience of the witnesses. *See* N.C.G.S. § 1-83(2) ("The court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.").

Thus, because the trial court's order granting defendant's motion to change venue was based on N.C. Gen. Stat. § 1-83(2), the convenience of the witnesses, such an order is interlocutory "and not immediately appealable." *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743. Nevertheless, plaintiff argues that defendant's motion to change venue was prematurely filed, and as a result the order should be vacated.

B. The Timeliness of Defendant's Motion

[2] "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*." *ITS Leasing*, 206 N.C. App. at 576, 696 S.E.2d at 883 (emphasis added) (citation omitted) (quoting *Smith v. Barbour*, 154 N.C. App. 402, 407, 571 S.E.2d 872, 876 (2002)) (holding that where the defendant's motion for change of venue was based upon the convenience of the witnesses and filed prior to an answer, "it was therefore prematurely filed").

In the instant case, the trial court found as fact that defendant's motion for change of venue "is a responsive pleading *amounting to an answer* and that was timely filed." (Emphasis added). While our case law makes clear that a defendant's motion for change of venue based on subsection (2) of section 1-83 is premature if filed before the answer, *see id.*, it is less clear what result issues when a motion for change of venue is filed *at the same time* as an answer, or is deemed to also amount to answer, as occurred in the instant case. In other words, the question is whether a motion to change venue based on the convenience of the witnesses filed contemporaneously with an answer is "prematurely filed." We conclude that it is not.

In *Hartford Accident & Indemnity Co. v. Hood*, the North Carolina Supreme Court stated as follows:

> Of course it is impossible to anticipate what issues may be raised, when [an] answer or other pleadings are filed. But, *until the allegations of the complaint are traversed*, the occasion for the exercise of discretion will not arise upon the motion for removal for the convenience of witnesses and the promotion of justice. If issues of fact are raised when the answer is filed, which will necessitate a jury trial and the attendance of witnesses, the court may in its discretion grant defendant's motion to remove . . . for the convenience of witnesses and the promotion of justice.

225 N.C. 361, 362, 34 S.E.2d 204, 204–05 (1945) (emphasis added) (citations omitted). In other words, a case is not appropriate for removal to a different venue "until the allegations of the complaint are traversed." The "traversing" refers to the work done by the defendant in filing his answer; by filing his answer, the defendant "traverses" the allegations in the complaint by answering them in a responsive pleading. Thus, where a defendant's answer is filed contemporaneously with a motion to change venue or where a motion to change venue is such a responsive pleading that it amounts to an answer, it is presumed that a defendant has "traversed" the allegations of the plaintiff's complaint such that any motion to change venue filed along with an answer will, therefore, not be deemed to be prematurely filed.

In the instant case, the trial court found that "[d]efendant filed a written response [to plaintiff's complaint] . . . that was filed within the time for answering and it is a written request of the court to change venue *along with other relief requested*. The Court finds this is a *responsive pleading amounting to an answer* and that was timely filed." (Emphasis

added). Plaintiff has challenged this finding of fact (Finding of Fact No. 11) as erroneous, arguing that defendant's motion to change venue does not meet the definition of an answer.

Plaintiff argues that a motion to change venue for the convenience of the witnesses is premature even if it is filed as part of the answer. However, because we agree with the trial court that defendant's responsive pleading in the instant case amounts to an answer in that it addresses, *inter alia*, plaintiff's claim for child custody with defendant's counterclaim for emergency ex parte custody, and moreover because defendant's thirty-four factual allegations listed therein address issues not relevant to the issue of venue. *See Steel Creek Dev. Corp. v. James*, 35 N.C. App. 272, 273, 241 S.E.2d 122, 123 (1978) ("The order of Judge Thornburg provided that defendants were granted 30 days after the filing of an amendment to the complaint to file responsive pleadings. We do not believe that the word "responsive" should be given such a limited definition as to require that the defendants could only answer pleadings filed by the plaintiff. We interpret the order allowing the defendants to file responsive pleadings to give them the right to respond in any proper way they deem appropriate to the amended complaint. This would include further answers and counterclaims."); *see also* Answer, *Black's Law Dictionary* (10th ed. 2014) (defining an "answer" as "usu[ally] set[ting] forth the defendant's defenses and counterclaims").

Accordingly, we conclude that because the trial court found that defendant filed a responsive pleading amounting to an answer contemporaneously with his motion to change venue, the venue motion was not prematurely filed. We now address the interlocutory nature of plaintiff's appeal.

Having concluded that the trial court's venue change order is based on the convenience of the witnesses, N.C. Gen. Stat. § 1-83(2), this conclusion renders plaintiff's appeal interlocutory. *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743 ("[A]n order granting a motion for a change of venue is interlocutory and not immediately appealable."). Therefore, plaintiff's interlocutory appeal is

DISMISSED.

Judge ARROWOOD concurs.

Judge MUPRHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

I accept the facts as set out by the Majority and I agree with the Majority's holding that the Order to Change Venue ("Order") is based on N.C.G.S. § 1-83(2). However, I respectfully dissent from the Majority's holding that Defendant's 9 November 2016 motion is a responsive pleading equating to an answer. In this case, the trial court's ruling on Defendant's motion to change venue was premature because Defendant had not yet filed an answer or responsive pleading traversing the allegations in the complaint. Our appellate courts have consistently exercised jurisdiction to reverse an untimely order related to the inconvenience of venue. *See Thompson v. Horrell*, 272 N.C. 503, 505, 158 S.E.2d 633, 655 (1968); *ITS Leasing, Inc. v. Ram Dog Enters.*, 206 N.C. App. 572, 576, 696 S.E.2d 880, 883 (2010); *Smith v. Barbour*, 154 N.C. App. 402, 407, 571 S.E.2d 872, 876 (2002); *Godley Const. Co., v. McDaniel*, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360-61 (1979); *Poteat v. S. Ry. Co.*, 33 N.C. App. 220, 222, 234 S.E.2d 447, 449 (1977); *Lowther v. Wilson*, 257 N.C. 484, 485, 126 S.E.2d 50, 51 (1962). We have jurisdiction to address this issue, and the Order must be vacated as untimely.

If a plaintiff files suit in an improper venue, a defendant must "demand[] in writing that the trial be conducted in the proper county." N.C.G.S. § 1-83 (2017). A trial court has no discretion to deny a timely request to change the place of trial from an improper venue to a proper one. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 743, 71 S.E.2d 54, 56 (1952). A request is timely if it occurs "before the time of answering expires." N.C.G.S. § 1-83. A defendant must allege improper venue in a motion prior to answering or as a part of the answer. *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 360. "Under G.S. 1A-1, Rule 12(b)(3), the defense of improper venue may be raised in the answer if no pre-answer motions have been made." *Swift & Co. v. Dan-Cleve Corp.*, 26 N.C. App. 494, 495, 216 S.E.2d 464, 465 (1975). However, because venue is not jurisdictional, it can be waived. *Nello L. Teer Co.*, 235 N.C. at 744, 71 S.E.2d at 56. If a defendant fails to make such a request before answering, he or she waives the objection to venue as of right. *Id.* As there is no way to determine convenience prior to knowing what will be and will not be an issue at trial, no such waiver occurs when a party fails to make an immediate motion to change venue for convenience.

A party may move the trial court to change venue "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2). The authority to grant such a request is within the trial court's discretion, reviewable only for manifest abuse

of discretion. *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 361. Unlike a motion to change venue as of right, a motion to change venue based on the convenience of the parties may only be made after an answer has been filed. *Id.* The Supreme Court of North Carolina explained the rationale for this interpretation in *Hartford Accident & Indem. Co. v. Hood*, 225 N.C. 361, 34 S.E.2d 204 (1945). The trial court cannot reasonably exercise its discretion as to the convenience of parties and promotion of justice "until the allegations of the complaint are traversed." *Id.* at 362, 34 S.E.2d at 204. Our appellate courts have reaffirmed this holding over the course of many generations. *See Thompson*, 272 N.C. at 505, 158 S.E.2d at 635; *ITS Leasing, Inc.*, 206 N.C. App. at 576, 696 S.E.2d at 883; *Smith*, 154 N.C. App. at 407, 571 S.E.2d at 876; *McCullough v. Branch Banking & Trust Co.*, 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000); *Godley Const. Co.*, 40 N.C. App. at 607, 253 S.E.2d at 360 61; *Poteat*, 33 N.C. App. at 222, 234 S.E.2d at 449; *Lowther*, 257 N.C. at 485, 126 S.E.2d at 51.

When the initial venue is proper, any change in venue must be based on considerations of convenience and justice. Under *Hartford* and its progeny, a trial court has authority to exercise its discretion in ordering a change in venue only after a defendant has filed an answer. In this way, the two means of changing venue are harmonious: before and up until the answer, a defendant may allege improper venue and move for a change in venue as of right. After the answer, the previous objection is waived, but a defendant may move the court for a change in venue as a matter of convenience and justice.

The Majority observes that a motion to change venue under N.C.G.S. § 1-83(2) "is premature if filed before the answer." The Majority also holds that a motion to change venue under N.C.G.S. § 1-83(2) is proper when "filed contemporaneously with an answer." While this holding is not supported by precedent, it is logically consistent. However, we need not decide the propriety of filing a motion to change venue under N.C.G.S. § 1-83(2) at the same time as an answer, because Defendant's motion does not constitute an answer or other responsive pleading.

Defendant's *Motion for Emergency Ex Parte Custody and Motion to Dismiss for Improper Venue, or in the alternative, Motion to Change Venue* is not a responsive pleading within the meaning of the North Carolina Rules of Civil Procedure. By definition, Defendant's request is a motion, not an answer. More importantly, Defendant's motion does not "traverse" the allegations of Plaintiff's Complaint, which is the rationale underlying the rule from *Hartford*. *See Hartford*, 225 N.C. at 362, 34 S.E.2d at 204 (holding that a trial court cannot exercise its discretion

to change venue "until the allegations of the complaint are traversed"). Defendant moved to change venue before filing an answer and the motion, under N.C.G.S. § 1-83(2), was not properly before the trial court.

Under N.C.G.S. § 1A-1, Rule 7(a), responsive pleadings include "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim" and other similar pleadings, which are relevant only when third parties are involved. N.C.G.S. § 1A-1, Rule 7(a) (2017). Rule 7(b)(1) defines "[m]otions and other papers" as "application[s] to the court for an order" and requires that motions are written and that they include particular grounds and relief sought. N.C.G.S. § 1A-1, Rule 7(b)(1). Rule 7(b)(2) provides that rules applicable to the form of pleadings—like captions and signatures—apply to "all motions and other papers provided for by these rules." N.C.G.S. § 1A-1, Rule 7(b)(2). The definitions within Rule 7 suggest that the terms "pleading" and "motion" are not interchangeable. Pleadings are limited to complaints, answers, and replies, whereas motions may include many types of requests for relief. *See* N.C.G.S. § 1A-1, Rule 7(a), (b).

Rule 8 provides for "[g]eneral rules of pleadings" and dictates the requirements for claims for relief. N.C.G.S. § 1A-1, Rule 8 (2017). Rule 8(a) reiterates that pleadings include "an original claim, counterclaim, crossclaim, or third-party claim" and requires that pleadings include a demand for judgment. N.C.G.S. § 1A-1, Rule 8(a). Rule 8(b) details the "form of denials" in pleadings and requires a party to "admit or deny the averments upon which the adverse party relies." N.C.G.S. § 1A-1, Rule 8(b).

Admittedly, at times, this Court has interpreted some provisions of the above Rules in a flexible manner. For example, in *Brown v. Am. Messenger Serv.*, 129 N.C. App. 207, 498 S.E.2d 384 (1998), this Court concluded that a letter that admitted liability, included a certified check, and promised future payment amounted to an answer, even though the letter did not conform to the requirements under the Rules. *Id.* at 213, 498 S.E.2d at 388. We emphasized that "the general policy of the Rules of Civil Procedure is to disregard the technicalities of form and determine the rights of litigants on the merits." *Id.* at 211, 498 S.E.2d at 387. Accordingly, noncompliance with the form of pleadings required by the Rules is not dispositive. *Id.* at 212, 498 S.E.2d at 387. A response may constitute an answer if it "respond[s] to the allegations of a complaint." *Id.*

Here, Defendant's motion is not a responsive pleading but "[a]n application to the court for an order." N.C.G.S. § 1A-1, Rule 7(b)(1). The

filing is titled a "motion," and the motion does not include admissions or denials as required by Rule 8(b). *See* N.C.G.S. § 1A-1, Rule 8(b). The trial court found that Defendant's motion is "a written request of the court to change venue along with other relief requested," but this description does not resemble the standard for a responsive pleading like an answer. Despite its written form and inclusion of a separate claim for relief—emergency ex parte custody—Defendant's motion does not constitute an answer. Although the trial court found that Defendant's motion was "a written response . . . filed within the time for answering," this standard appears in a part of N.C.G.S. § 1-83 that addresses improper—not inconvenient—venue. As discussed above and by the Majority, the Order does not conclude that venue is improper in Union County.

Moreover, the failure of Defendant's motion to respond to the allegations in Plaintiff's complaint is more than a mere Rule 8(b) violation. Unlike the response at issue in *Brown*, where a letter was construed to constitute an answer, the shortcomings in Defendant's motion are substantive, not technical. *See Brown*, 129 N.C. App. at 213, 498 S.E.2d at 388. Without Defendant's answer, the trial court cannot exercise its discretion to grant a motion to change venue based on interests of convenience or justice. Once Defendant answers and the allegations of the complaint have been traversed, the trial court may exercise its discretion under N.C.G.S. § 1-83(2) to change venue. In this case, Defendant must file an answer in Union County before he may move for a change of venue to Pitt County.

Domestic disputes often present our courts with the perceived responsibility to prevent gamesmanship by litigants, however, we must step back and review this case in light of the general application of our Rules throughout the state and throughout all types of civil litigation. The importance of maintaining *Hartford* can be illustrated in a simple breach of contract case. Company A sues Company B for breach of contract in Cherokee County. The following alternatives could be the next steps in the litigation:

- Company B files an answer to the complaint saying it performed the contract without a breach in Vance County, and, therefore, the case should be transferred to Vance County for convenience of the witnesses to show there was no breach.
- Company B files an answer to the complaint saying there never was a contract between the parties, because of fraud in the inducement, and, therefore, the case should be transferred to Pender County where the contract was executed for

the convenience of the witnesses as to the facts and circumstances surrounding the execution of the contract.

- Company B files an answer to the complaint alleging an affirmative defense, such as accord and satisfaction, and, therefore, the case should be transferred to Catawba County for the convenience of the witnesses as to whether Company A cashed Company B's check.
- Company B files an answer to the Complaint claiming that its alleged agent did not have authority to bind Company B and, therefore, the case should be transferred to Johnston County for the convenience of the witnesses for the testimony of the alleged agent and Company B's president.
- Company B files an answer to the complaint admitting the breach and that there will only be a need for a trial on the amount of damages, and there may be no need to transfer the case from Cherokee County.

The potential scenarios are endless and require the trial court to exercise discretion. However, all of these scenarios require that a defendant has answered and traversed the complaint so that the trial court knows what to consider in exercising discretion. Without an answer, there cannot be an exercise of discretion and an order under N.C.G.S. § 1-83(2) is untimely.

The Majority's decision allowing the trial court to transfer venue may eventually be the proper result after a timely consideration in the correct procedural context. However, it was not possible for the trial court to exercise discretion without Defendant first traversing the allegations in Plaintiff's Complaint. Admittedly, this is a labored method of determining venue, and eventually may result in this case being transferred to Pitt County; but this is not an exercise in form over function, this is an exercise in the potential realities of litigation.

LATONYA A. TAYLOR, Individually, and as the Administratrix of the Estates of SYLVESTER TAYLOR and ANGELA TAYLOR; and as Guardian Ad Litem of J.T., N.H. and A.H., minor children, Plaintiff

v.

WAKE COUNTY, d/b/a THE DIVISION OF SOCIAL SERVICES, Defendant

No. COA17-99

Filed 20 February 2018

Constitutional Law—North Carolina—Corum claim—negligence —adequate state law remedy against State agency

In a case arising from murders and an attempted murder that occurred while defendant department of social services was involved in a domestic dispute in plaintiff's family, the trial court did not err by granting summary judgment on plaintiff's state constitutional due process claim in favor of defendant. Plaintiff could not use *Corum v. University of North Carolina*, 330 N.C. 761 (1992), to assert a direct constitutional claim against the State where she had an adequate state law remedy in the N.C. Industrial Commission under the Tort Claims Act against defendant for the same injuries.

Appeal by Plaintiff from an order entered 7 November 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 August 2017.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for Plaintiff-Appellant.

Office of the Wake County Attorney, by Senior Assistant County Attorney Jennifer Jones and Senior Deputy County Attorney Roger Askew, for Defendant-Appellee.

INMAN, Judge.

This case concerns the scope of a common law doctrine, named for the seminal case *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L.Ed.2d 431 (1992), which allows a plaintiff to sue the State for a violation the North Carolina Constitution. Such claims, colloquially termed *Corum* claims, may be asserted when a plaintiff has suffered a violation of her state constitutional rights and otherwise lacks an adequate remedy under state law. *Id.* at 782, 413 S.E.2d at 289. At issue is whether the adequacy of a remedy

depends upon a plaintiff's ability to recover for a particular injury or to recover from a particular defendant. We hold that adequacy depends upon recovery for the plaintiff's injury, without regard to the party from whom recovery may be obtained.

Latonya A. Taylor ("Plaintiff"), individually, and as the administratrix of the estates of Sylvester Taylor and Anglia[1] Taylor, and as the Guardian ad Litem of her three minor children, J.T., N.H., and A.H., appeals from the trial court's order granting summary judgment in favor of the Wake County Division of Social Services ("Wake County DSS" or "Defendant") on her claims for ordinary negligence, negligent supervision, negligent infliction of emotional distress, wrongful death, willful and wanton negligence, and denial of due process under Article I, Section 19 of the North Carolina Constitution. Plaintiff argues the trial court erred when it concluded she had an adequate remedy under state law by bringing a claim in the North Carolina Industrial Commission against the North Carolina Department of Health and Human Services ("DHHS"), thereby precluding her from asserting her direct constitutional claim under *Corum* against Defendant.

After careful review, we affirm the trial court.

Factual and Procedural History

This case arises from a tragic series of events, which ended in the deaths of Sylvester and Anglia Taylor, Plaintiff's parents, and the attempted murder of Plaintiff in front her minor children. The undisputed facts establish the following:

In January of 2014, Wake County DSS became involved with the affairs of Plaintiff and her children after reports of domestic violence led Plaintiff to obtain a Domestic Violence Protective Order (the "DVPO") against Nathan Lorenzo Holden ("Holden"), Plaintiff's estranged husband.

The DVPO process began on 2 January 2014, when Plaintiff obtained an Ex Parte Domestic Violence Protective Order (the "Ex Parte Order") following a report that Holden threatened to kill Plaintiff and her minor children. The next day, Kathy Sutehall ("Sutehall"), the Wake County DSS caseworker initially assigned to Plaintiff's case, met with Plaintiff at her residence and discussed the allegations. At the time, Plaintiff was residing with her children at her parents' residence. A hearing for the

1. We note the spelling of Anglia Taylor differs between the trial court's order from which Plaintiff appeals—"Angela"—and the complaint and briefs before this Court—"Anglia". We adopt the spelling from the complaint and briefs.

DVPO was scheduled for 9 January 2014, but was continued and the Ex Parte Order remained in place. On 21 January 2014, Holden consented to the DVPO, which prohibited him from having any contact with Plaintiff and ordered that he not threaten any member of Plaintiff's family or household.

On 27 January 2014, Sutehall visited one of Plaintiff's minor children's school. As Sutehall was leaving the school, she learned that Holden was outside the school and she asked the school resource officer to escort her safely to her vehicle.

On 28 January 2014, Sutehall conducted a home visit of Plaintiff's residence, where she found that Plaintiff's father, whom Holden had claimed was dangerous, was not a threat to the minor children. Both of Plaintiff's parents signed a "Safety Assessment" at Sutehall's request, indicating that firearms would not be kept in the home.

Two days later, on 30 January 2014, Holden, through his attorney, alleged that there were firearms present at Plaintiff's parents' house, that Plaintiff's father slapped and pulled a gun on one of the minor children, J.T., and as a result, obtained custody of the minor children following an Emergency Ex Parte hearing before a Wake County District Family Court judge. On 2 February 2014, the Wake County Family Court faxed a copy of the Ex Parte Custody Order (the "Emergency Custody Order") to Sutehall. On 10 February 2014, the Wake County Family Court conducted a hearing concerning the facts alleged in the Emergency Custody Order.

Sometime shortly thereafter, Larna Lea Haddix ("Haddix") took over as Plaintiff's Wake County DSS caseworker. Haddix conducted two home visits with Plaintiff at her residence and one with Holden. Haddix had two additional home visits scheduled with Holden in early April 2014, but Holden was not home when she arrived either time.

On 9 April 2014, Holden went to Plaintiff's residence and shot and killed Plaintiff's parents and shot Plaintiff in front of their children. Holden was later arrested and charged with two counts of murder, assault with a deadly weapon inflicting serious injury with the intent to kill, and attempted first degree murder.

On 4 April 2016, Plaintiff filed a complaint against Wake County DSS in superior court for ordinary negligence, negligent supervision, negligent infliction of emotional distress, and wrongful death. At the same time, Plaintiff filed a complaint, pursuant to the Tort Claims Act, against North Carolina DHHS in the North Carolina Industrial Commission, alleging the same facts and damages as asserted in her suit against Wake

County DSS. Plaintiff later amended her complaint against Wake County DSS to include a claim for willful and wanton negligence and a claim under Article I, Section 19 of the North Carolina Constitution.

On 9 September 2016, Defendant filed its answer, along with a motion to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 16 September 2016, Defendant filed a motion for summary judgment. The trial court granted Defendant's motions to dismiss and for summary judgment, concluding:

> 3. . . . [T]hat each of the claims of the Plaintiff, with the exception of the claim asserting deprivation of the Plaintiff's constitutional rights, is barred by the doctrine of governmental immunity, and that the Defendant has not waived its immunity, and that therefore, . . . each of these claims must be dismissed.
>
> 4. With respect to the Plaintiff's claim asserting deprivation of constitutional rights under the North Carolina Constitution, the Court concludes that the Plaintiff has an adequate remedy under state law before the Industrial Commission, and that therefore, . . . this claim must also be dismissed.

Plaintiff timely appealed.

Analysis

Plaintiff's appeal raises the question of whether an action against DHHS in the North Carolina Industrial Commission pursuant to the Tort Claims Act is an adequate remedy under state law so that Plaintiff is barred from asserting a *Corum* claim against Wake County DSS in superior court, when both claims arise out of the same facts and seek to recover for the same injuries.[2] Plaintiff argues that her claim against DHHS is not an adequate remedy because her claim against DHHS does not provide a remedy *against Wake County DSS*, and, even if she were to recover in the Industrial Commission, her recovery is limited because damages in that forum are capped at one million dollars per person injured and exclude punitive damages. Plaintiff relies upon the North Carolina Supreme Court's decision in *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997), which held that a plaintiff may simultaneously bring

2. Plaintiff does not challenge the trial court's ruling that her common law negligence claims are barred by the doctrine of governmental immunity, and has therefore abandoned any arguments to this issue on appeal.

an action against DHHS in the Industrial Commission and an action against a county DSS agency in superior court.

Because our precedent following *Corum* defines the adequacy of a remedy as a plaintiff's ability to recover for a particular harm and not as a plaintiff's ability to recover against a particular defendant, and because the *Meyer* decision did not expand the definition of an adequate remedy, we hold Plaintiff's argument is without merit.

We begin our analysis by examining the principles underlying the recognition of state constitutional claims in *Corum* and its progeny. In 1992, the North Carolina Supreme Court issued its decision in *Corum v. University of North Carolina*, which permitted a university faculty member to bring a "direct cause of action under the State Constitution against [the Vice Chancellor for Academic Affairs] in his official capacity for alleged violations of [the] plaintiff's free speech rights." 330 N.C. at 783, 413 S.E.2d at 290. The Court reasoned that, because freedom of speech is a guaranteed right under the State Constitution, "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right" when no other remedy exists. *Id.* at 782, 413 S.E.2d at 289. This direct cause of action, the Court held, may not be barred by the doctrine of sovereign immunity because "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. In reaching the conclusion that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under the Constitution[,]" *id.* at 782, 413 S.E.2d at 289, the Court relied primarily on two cases: *Sale v. State Highway & Public Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955), and *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963), *overruled on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983). Corum, 330 N.C. at 781-82, 413 S.E.2d at 289-90.

In *Sale*, the plaintiff sued the State Highway Commission after several of the plaintiff's buildings were destroyed by a fire during the removal and reconstruction process related to a state highway right-of-way project. 242 N.C. at 620, 89 S.E.2d at 297. The Highway Commission contended it could not be sued under statute, in contract, or in tort—the last due to immunity at common law. *Id.* at 620, 89 S.E.2d at 297. The plaintiff asserted, *inter alia*, a claim under Article I, Section 17 of the North Carolina Constitution, *id.* at 618, 89 S.E.2d at 296, which at the time, provided in part that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land[,]"

N.C. Const. of 1868 art. I, § 19.[3] The Court, faced with a plaintiff whose constitutional rights had been abridged, and who would receive no just compensation for this violation, fashioned a remedy—a direct constitutional claim against the State—through which the plaintiff was ensured an opportunity to be heard on the merits of his case, and if successful, would receive redress for his injury. *Sale*, 242 N.C. at 620, 89 S.E.2d at 297-98.

In *Midgett*, the plaintiffs brought suit against the State Highway Commission alleging an unconstitutional taking after the agency constructed a highway altering the natural flow of water and flooding the plaintiffs' property. 260 N.C. at 242-43, 132 S.E.2d at 602-04. Ordinarily under those circumstances, a plaintiff was limited to a statutory remedy that was exclusive when available. *Id.* at 250, 132 S.E.2d at 608. However, because the plaintiffs' damages accrued after the date by which the plaintiffs could bring a statutory cause of action, the Court held that the plaintiffs had no adequate remedy at law and allowed the plaintiffs to proceed with a direct claim under the State Constitution for just compensation. *Id.* at 249-50, 132 S.E.2d at 607-08.

A *Corum* claim allows a plaintiff to recover compensation for a violation of a state constitutional right for which there is either no common law or statutory remedy, or when the common law or statutory remedy that would be available is inaccessible to the plaintiff. By allowing an otherwise common law or statutory claim to proceed as a direct constitutional claim, the North Carolina Supreme Court fashioned an avenue to bypass certain defenses such as sovereign or governmental immunity. A *Corum* claim is available to a plaintiff who is able to establish that (1) her state constitutional rights have been violated, and (2) she lacks any sort of "adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. The question left in the wake of *Corum* is: what qualifies as an "adequate state remedy?"

The North Carolina Supreme Court has considered this notion of adequacy in the context of the interplay between a remedy and sovereign immunity. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009). In *Craig*, the plaintiff sought to recover monetary damages from the New Hanover County Board of Education (the "Board") and the principal of one of the county middle schools, both in

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3. The 1868 North Carolina Constitution was revised in 1970. The applicable Article and Section under the current North Carolina Constitution is Article I, Section 19, which echoes the same language: "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. of 1970 art. I, § 19.

her official and individual capacities. *Id.* at 335, 678 S.E.2d at 352. The plaintiff asserted a common law negligence claim and three violations of the North Carolina Constitution: "Article I, Section 15 (right to the privilege of education); Article I, Section 19 (no deprivation of a liberty interest or privilege but by the law of the land); and Article IX, Section 1 (schools and means of education shall be encouraged)." *Id.* at 335, 678 S.E.2d at 352. This Court held that the doctrine of sovereign immunity[4] defeated the plaintiff's common law negligence claim because the Board did not carry insurance that covered such claims, and therefore had not waived its immunity. *Craig v. New Hanover Cty. Bd. of Educ.*, 185 N.C. App. 651, 654-55, 648 S.E.2d 923, 925-26 (2007), *rev'd by Craig*, 363 N.C. at 342, 678 S.E.2d at 357. This Court also held that the plaintiff was not permitted to bring his direct constitutional claims because his common law negligence claim was an adequate state remedy. *Id.* at 655-56, 648 S.E.2d at 926-27.

The North Carolina Supreme Court reversed, holding that the plaintiff's "common law negligence claim [was] not an 'adequate remedy at state law' because it [was] entirely precluded by the application of the doctrine of sovereign immunity." *Craig*, 363 N.C. at 342, 678 S.E.2d at 356-57. The Court explained that "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* at 339-40, 678 S.E.2d at 355. Because the plaintiff's common law negligence claim was absolutely barred by governmental immunity, the Court allowed the plaintiff to "move forward in the alternative, bring his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim." *Id.* at 340, 678 S.E.2d at 355. The Court highlighted that, similar to the plaintiff in *Midgett*, "the facts [the] plaintiff allege[d] and the damages he [sought] [were] . . . the same under either his common law negligence claim or his direct colorable constitutional claim." *Id.* at 342, 678 S.E.2d at 356 (citing *Midgett*, 260 N.C. at 251, 132 S.E.2d at 608-09). The Court concluded that to hold a claim barred by immunity as adequate "would be contrary to our opinion in Corum and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury." *Id.* at 342, 678 S.E.2d at 357.

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4. The North Carolina Supreme Court rightly distinguished that the Board was a county agency, and therefore "the immunity it possess[ed] [was] more precisely identified as governmental immunity[.]" *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n.3 (citing *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884). Similarly here, Wake County DSS is a county agency and any immunity it possesses is more properly termed governmental immunity. However, as in *Craig*, this distinction is immaterial in the present case.

A year later, the North Carolina Supreme Court addressed the issue of adequacy again in a case involving school suspensions. *Copper v. Denlinger*, 363 N.C. 784, 688 S.E.2d 426 (2010). In *Copper*, the plaintiffs sought various damages against, among others, the Durham Public Schools Board of Education (the "Board"), and the Durham Public Schools Superintendent in both her official and individual capacities. *Id.* at 786, 688 S.E.2d at 427. The plaintiffs alleged, *inter alia*, that the Board violated the plaintiffs' right to due process of law by denying a student a hearing before issuing a long-term suspension. *Id.* at 786, 688 S.E.2d at 427. The Court rejected the plaintiffs' argument, noting that

> [u]nder [N.C. Gen. Stat.] §§ 115C-45(c) and 391(e), the student here always had the statutory right to appeal; thus, the complaint's allegation that he "was never given" that opportunity fails. As we recently observed in *Craig*, "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." 363 N.C. at 339-40, 678 S.E.2d at 355. *Here, the complaint contains no allegations suggesting that the student was somehow barred from the doors of either the courthouse or the Board.* Nor does the complaint allege that he exhausted his administrative remedies, or even that it would have been futile to attempt to appeal his suspension to the Board. Thus, under our holdings in both *Corum* and *Craig*, *an adequate remedy exists at state law to redress the alleged injury*, and this direct constitutional claim is barred.

Id. at 789, 688 S.E.2d at 429 (emphasis added).

In sum, the North Carolina Supreme Court's definition of adequacy is twofold: (1) that the remedy addresses the alleged constitutional injury, *Copper*, 363 N.C. at 789, 688 S.E.2d at 429, and (2) that the remedy provides the plaintiff an opportunity to "enter the courthouse doors," *Craig*, 363 N.C. 339-40, 678 S.E.2d at 355; *Copper*, 363 N.C. at 789, 688 S.E.2d at 429. The Court in *Copper* extended the scope of an adequate remedy beyond the doors of the superior court, holding that an administrative remedy—appeal to the local board of education—may satisfy the opportunity requirement under *Craig*. *Copper*, 363 N.C. at 789, 688 S.E.2d at 429.

We must consider these precedents in the context of the legislative intent of the Tort Claims Act. The General Assembly explicitly granted authority to the North Carolina Industrial Commission to function as a

court for claims within its jurisdiction, providing: "The North Carolina Industrial Commission is *hereby constituted a court for the purpose of hearing and passing upon tort claims* against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2015) (emphasis added). Plaintiff's assertion that she has been denied access to the "courthouse doors" is unavailing in light of such an unequivocal designation.

Our Court has provided additional guidance regarding the types of remedies deemed adequate to bar the assertion of a *Corum* claim—specifically, those involving administrative remedies and alternative defendants. In *Wilcox v. City of Asheville*, 222 N.C. App. 285, 286-87, 730 S.E.2d 226, 229 (2012), the plaintiff brought suit against the Asheville Police Department and several of its officers, in their official and individual capacities, for an unreasonable use of force that resulted in the plaintiff sustaining two gunshot wounds. The plaintiff's complaint asserted claims for (1) negligence, gross negligence, recklessness, and willful and wanton conduct on the part of the officers for shooting her and on the part of the City of Asheville and the Chief of Police for failing to adequately train and supervise the officers; (2) imputed liability against the City of Asheville for its officers' actions; (3) a violation of the plaintiff's state constitutional rights; and (4) punitive damages for egregiously wrongful, malicious, willful and/or wanton conduct of the individual defendants. *Id.* at 287, 730 S.E.2d at 229. The trial court dismissed all claims against the City of Asheville and the individual defendants in their official capacities on the basis of governmental immunity. *Id.* at 287, 730 S.E.2d at 229. The defendants then filed a motion for summary judgment seeking dismissal of the remaining claims on two grounds: "(1) public official immunity as barring all claims against the [i]ndividual defendants in their individual capacities; and (2) the existence of an adequate state remedy as barring the claims arising under the North Carolina Constitution." *Id.* at 287, 730 S.E.2d at 229. The trial court granted the motion only as far as dismissing the constitutional claims, leaving the plaintiff with her claims against the individual defendants in their individual capacities. *Id.* at 287, 730 S.E.2d at 229.

In reviewing the trial court's partial grant of summary judgment, we answered the question whether, based on the plaintiff having viable claims against the individual defendants in their individual capacities, she could still pursue her constitutional claims against the State under *Corum*. *Id.* at 298, 730 S.E.2d at 236. The plaintiff argued that her claims against the individual defendants were not adequate because it was

uncertain whether those claims were subject to public official immunity—a decision left to the jury—and success on these claims required the plaintiff to prove an additional element than what was required for her other constitutional claims—*i.e.*, the plaintiff would have to prove that the individual defendants "acted with a 'subjective bad motive,' or malice." *Id.* at 301, 730 S.E.2d at 238. Our Court started with the premise that "[d]irect claims against the State arising under the North Carolina Constitution '[are] permitted *only* "in the absence of an adequate state remedy," ' and where an adequate state remedy exists, those direct constitutional claims must be dismissed." *Id.* at 298, 730 S.E.2d at 236 (second alteration in original) (emphasis in original) (quoting *Davis v. Town of S. Pines*, 116 N.C. App. 663, 675-76, 449 S.E.2d 240, 247-48 (1994)). We reasoned that because "adequacy is found not in success, but in chance[,]" and there was "a genuine issue of material fact as to the applicability of public official immunity," the plaintiff "still ha[d] a chance to obtain relief[,]" regardless of the heightened burden. *Id.* at 299-300, 730 S.E.2d at 237. We upheld the trial court's dismissal of the plaintiff's *Corum* claims because her ability to assert claims against the defendants in their individual capacities provided an adequate avenue for redress of her alleged injuries. *Id.* at 302, 730 S.E.2d at 238-39.

Our decision in *Wilcox* is derived from a line of cases from our Court beginning with *Alt v. Parker*, 112 N.C. App. 307, 435 S.E.2d 773 (1993). The plaintiff in *Alt* was pursing, *inter alia*, a claim for the deprivation of his constitutional rights by the State arising from his alleged unlawful restraint and seclusion at a state mental hospital. *Id.* at 310, 317-18, 435 S.E.2d at 775, 779-80. Our Court held that the plaintiff had two alternative remedies: a common law claim for false imprisonment and "the administrative grievance procedure provided for in the [Department of Human Resources] Rules[,]" under which the plaintiff "could have filed a grievance with the Department of Mental Health." *Id.* at 318, 435 S.E.2d at 779. The Court rejected the plaintiff's constitutional claim, holding that "[s]ince there is no evidence that [the] plaintiff ever filed a grievance action and received an unfavorable result and since [the] plaintiff had the common law tort action for false imprisonment available to him, we cannot say that [the] plaintiff is without adequate state remedy." *Id.* at 318, 435 S.E.2d at 779.

We next addressed the adequacy of a state law claim in *Rousselo v. Starling*, 128 N.C. App. 439, 495 S.E.2d 725 (1998), in which the plaintiff sued a State Highway Patrolman in both his official and individual capacities for, *inter alia*, an unreasonable search. *Id.* at 447-48, 495 S.E.2d at 730-31. The plaintiff argued that "common law immunity would

defeat any common law tort claim that he brought against the State" and that therefore "there is no adequate state law remedy for his claim and . . . he is entitled to bring a claim under the North Carolina Constitution." *Id.* at 448, 495 S.E.2d at 731. Rejecting this argument, our Court held that "the existence of an adequate alternate remedy is premised on whether there is a remedy available to [the] plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action." *Id.* at 448, 495 S.E.2d at 731. The plaintiff also argued that his common law tort claim against the defendant in his individual capacity was inadequate because the plaintiff would have to show that the defendant "acted with malice, corruption, or beyond the scope of his duty." *Id.* at 448-49, 495 S.E.2d at 731 (citation omitted). Portending our holding in *Wilcox*, we again rejected the plaintiff's argument, declining to hold that he "has no adequate remedy merely because the existing common law claim might require more of him." *Id.* at 449, 495 S.E.2d at 732.

In *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911, (2000), *rev'd on other grounds by*, 354 N.C. 327, 554 S.E.2d 629 (2001), the plaintiffs argued that a common law claim of false imprisonment on behalf of a deceased victim did not provide an adequate remedy for an unconstitutional detention or seizure because "[a] cause of action for false imprisonment . . . does not survive the death of a decedent." 137 N.C. App. at 437, 528 S.E.2d at 916 (citing N.C. Gen. Stat. § 28A-18-1(b)(2) (1999)). Our Court, agreeing with the plaintiffs, held that "[b]ecause the test for whether an adequate state remedy exists is 'whether there is a remedy available to [the] plaintiff for the violation,' [the] [p]laintiffs did not have an adequate state remedy." *Id.* at 437, 528 S.E.2d at 916 (second alteration in original) (quoting *Rousselo*, 128 N.C. App. at 448, 495 S.E.2d at 731). The Court noted that "[a]n adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the *same injury* alleged in the direct constitutional claim." *Id.* at 437, 528 S.E.2d at 915-16 (emphasis in original) (citing *Rousselo*, 128 N.C. App. at 447, 495 S.E.2d at 731).

From these cases it follows that adequacy of a state law remedy depends upon the injury alleged by a plaintiff, rather than upon the party from whom a plaintiff seeks recovery. While the law generally allows plaintiffs to select the defendant(s) from whom they wish to obtain relief, such is not the case when doing so requires the extraordinary exercise of the judiciary's constitutional power necessary to permit a *Corum* claim. *See, e.g.*, *Wilcox*, 222 N.C. App. at 301-02, 730 S.E.2d at 238-39 (holding that suit against a defendant *in his individual capacity*

is sufficient to preclude the plaintiff from asserting a *Corum* claim against the defendant *in his official capacity*); *Phillips v. Gray*, 163 N.C. App. 52, 57-58, 592 S.E.2d 229, 233 (2004) (holding that a plaintiff's rights were adequately protected by a wrongful discharge claim against a Sheriff in his individual capacity so that dismissal of the plaintiff's free speech claim against the Sheriff in his official capacity was appropriate). So long as a plaintiff has a means of recovering for the alleged constitutional injury, the plaintiff may not use *Corum* to assert a direct constitutional claim against the State as a means of bypassing some fatal defense.

Here, Plaintiff, in her amended complaint against Wake County DSS in superior court, alleges one count each of ordinary negligence, negligent supervision, negligent infliction of emotional distress, wrongful death, and willful and wanton negligence. Following these allegations, Plaintiff asserts her direct claim under the North Carolina Constitution: "In the alternative, the conduct of the Defendant as alleged above constituted a violation of Article I, Section 19 of the North Carolina Constitution." Plaintiff explicitly alleges that "the State Constitutional claims are based on the same facts that formed the basis for the common law negligence claims." Plaintiff's ability to recover for the negligence claims is thereby necessarily related to her ability to assert her direct constitutional claims.

Defendant included Plaintiff's complaint filed against DHHS in the Industrial Commission with its motion for summary judgment. Plaintiff's Industrial Commission complaint asserts claims against DHHS, acting by and through its agent Wake County DSS, for ordinary negligence, negligent supervision, negligent infliction of emotional distress, and wrongful death. Plaintiff's asserted injuries and basis of fact for her Industrial Commission claims are the same as those asserted in her suit against Wake County DSS in superior court.

The adequacy of a state remedy requires only the opportunity to be heard, and if successful to recover for the injuries alleged in the direct constitutional claim. If successful in the Industrial Commission, Plaintiff will be compensated for the same injuries as alleged in her direct constitutional claim. We are, therefore, compelled to hold that Plaintiff has an adequate remedy under state law for the alleged violations of her constitutional rights. Absent Plaintiff establishing that her Industrial Commission claims are impossible, Plaintiff may not assert her direct constitutional claims under Corum against Wake County DSS in superior court. *See, e.g.*, *Davis*, 116 N.C. App. at 675-76, 449 S.E.2d at 248 (holding that a false imprisonment claim is an adequate remedy because

"[i]f [the] plaintiff's false imprisonment claim is successful, *she will be compensated for the injury she claims in her direct constitutional claim*" (emphasis added) (citing *Alt*, 112 N.C. App. at 317-18, 435 S.E.2d at 779)). The limited scope of damages available to Plaintiff in the Industrial Commission, as compared to damages available in superior court, results from the General Assembly's determination of what amount of recovery, and what type of recovery, is adequate for claims within the jurisdiction of the Industrial Commission.

Plaintiff argues that this holding is inconsistent with the North Carolina Supreme Court's decision in *Meyer v. Walls*. We disagree. In *Meyer*, the Court addressed whether a county DSS agency was subject to the Tort Claims Act, thereby vesting the North Carolina Industrial Commission with sole jurisdiction over tort claims filed against the agency. 347 N.C. at 104, 489 S.E.2d at 884. The Court drew the distinction that "[a]n agent of the State and a state agency are fundamentally different and are treated differently by the Tort Claims Act." *Id.* at 107, 489 S.E.2d at 885. By classifying county DSS agencies as agents of the State—the Department of Human Resources[5]—as opposed to state agencies themselves,[6] the Court held that the Tort Claims Act does not apply to county DSS agencies and that the trial court's dismissal of a negligence claim for lack of subject matter jurisdiction was improper. *Id.* at 108, 489 S.E.2d at 886 (citations omitted). The Court went on to note that "[a]lthough a plaintiff may not receive a double recovery, he may seek a judgment against the agent or the principal or both." *Id.* at 108, 489 S.E.2d at 886. The Court explained that

> the fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against [a county DSS agency] in Superior Court. A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.

Id. at 108, 489 S.E.2d at 886 (citing *Wirth v. Bracey*, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963)).

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5. Now the Department of Health and Human Resources. N.C. Gen. Stat. § 143B-138.1 (2015).

6. The Court reiterated its holdings in *Vaughn v. N.C. Dep't of Human Resources*, 296 N.C. 683, 690, 252 S.E.2d 792, 797 (1979), and *Gammons v. N.C. Dep't of Human Resources*, 344 N.C. 51, 54, 472 S.E.2d 722, 723 (1996), "that the county departments of social services were agents of DHR." *Meyer*, 347 N.C. at 107, 489 S.E.2d at 885.

Plaintiff argues that because the North Carolina Supreme Court held that a plaintiff may maintain both a Tort Claims Act action against DHHS in the Industrial Commission and a common law negligence action against a county DSS agency in the superior court, Plaintiff is permitted to assert her direct constitutional claim under *Corum* as well. This reasoning, however, ignores the finding in *Meyer* that the county agency "waived immunity pursuant to [N.C. Gen. Stat.] § 153A-435(a) through the purchase of liability insurance." *Meyer*, 347 N.C. at 108, 489 S.E.2d at 886. Our holding today does not preclude Plaintiff from maintaining a negligence action against Wake County DSS in superior court concurrently with her Tort Claims Act action against DHHS in the Industrial Commission if Wake County DSS has waived immunity; such a holding would certainly be contrary to *Meyer*. Rather, our holding goes only so far as to prevent Plaintiff from elevating her negligence claims by way of *Corum* to bypass governmental immunity, when she has an alternate remedy where, if successful, she will be compensated for the injuries she has alleged in her direct constitutional claim.

As instructed by the Court in *Corum*,

> [w]hen called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, . . . the judiciary must recognize two critical limitations. First, *it must bow to established claims and remedies* where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, *the judiciary must minimize the encroachment upon other branches of government*—in appearance and in fact—*by seeking the least intrusive remedy* available and necessary to right the wrong.

Corum, 330 N.C. at 784, 413 S.E.2d at 291 (emphasis added) (internal citations omitted). In keeping true to this language, it follows that Plaintiff's ability to seek redress for the exact injury underlying her direct constitutional claim prevents us from allowing her to pursue a *Corum* claim. To hold otherwise would run contrary to *Corum*'s instruction that we must give way to established remedies and would unnecessarily encroach on the General Assembly's ability to direct actions against the State.

Ultimately, the implementation of the constitutional mechanism used to allow a *Corum* claim to proceed is extraordinary. Plaintiff's Tort Claims Act proceeding is less intrusive than a direct constitutional claim and, if successful, still provides a remedy capable of righting the

alleged constitutional wrong. Accordingly, we hold that Plaintiff's Tort Claims Act action against DHHS is an adequate remedy under state law such that Plaintiff is unable to purse a direct constitutional claim against Wake County DSS in superior court.

Conclusion

For the foregoing reasons, we conclude that the purpose of allowing direct constitutional claims is to provide plaintiffs the ability to seek redress for particular injuries for which no state law remedy exists, and because Plaintiff has an adequate state law remedy—*e.g.*, a claim under the Tort Claims Act against a State agency for the same injuries complained of in her direct constitutional claim—her direct constitutional claim must be dismissed; accordingly, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and DAVIS concur.

USA TROUSER, S.A. DE C.V., PLAINTIFF
v.
JAMES A. WILLIAMS; NAVIGATORS INSURANCE COMPANY; AND NAVIGATORS MANAGEMENT COMPANY, INC., DEFENDANTS

No. COA17-918

Filed 20 February 2018

1. Insurance—judgments—trade creditor's judgment against insured debtor—unfair and deceptive trade practices

Where plaintiff clothing company sold socks on credit to another company (International Legwear Group, Inc., "ILG") and subsequently obtained a default judgment for nearly two million dollars against ILG, plaintiff did not become a third-party beneficiary to ILG's directors and officers liability insurance policy. The trial court did not err by dismissing plaintiff's claims for unfair trade practices and bad faith claims settlement practices against the insurance company (and its management company) that issued the policy.

2. Conspiracy—civil—fraud—pleadings—particularity

The trial court did not err by dismissing plaintiff's conspiracy to defraud claim for failure to plead with particularity, where the

complaint did not allege the time, place, or specific individuals who made the alleged misrepresentations or omissions.

Appeal by plaintiff from order and opinion entered 25 July 2016 by Chief Judge James L. Gale in the North Carolina Business Court. Heard in the Court of Appeals 22 January 2018.

Law Offices of Matthew K. Rogers, PLLC, by Matthew K. Rogers, for plaintiff-appellant.

Cozen O'Connor, by Tracy L. Eggleston and Patrick M. Aul, and Angelo G. Savino, pro hac vice, for defendant-appellees.

TYSON, Judge.

USA Trouser, S.A. de C.V. ("Plaintiff" or "USAT") appeals an order of the North Carolina Business Court, granting Navigators Insurance Company's and Navigators Management Company, Inc.'s motions to dismiss. We affirm the trial court's order.

I. Background

The record on appeal tends to show the following:

USAT is a Mexican company, which manufactures socks and hosiery products. USAT sold socks on credit to International Legwear Group, Inc. ("ILG"), a company conducting business within North Carolina.

Navigators Insurance Company ("Navigators Insurance") had issued a directors and officers liability insurance policy (the "Policy") to ILG for the period from 31 December 2010 through 31 December 2017.

In September 2011, USAT filed suit (the "Underlying Action") against ILG and a number of its directors and officers. USAT alleged ILG had failed to disclose its worsening financial condition, while continuing to obtain products from USAT upon credit. USAT asserted claims for breach of contract; breach of fiduciary duty; fraudulent concealment; negligent misrepresentation; unfair and deceptive trade practices; breach of implied covenants of good faith and fair dealing; fraudulent and/or negligent failure to perform statutory duties; conversion; and fraudulent conveyance. A default judgment (the "Judgment") was entered against ILG for $1,993,856.48 in the United States District Court. The plain language of the Policy indicates Navigators Insurance had no duty to defend ILG for the claims brought in the Underlying Action.

On 2 June 2014, USAT filed suit in Guilford County Superior Court against James A. Williams ("Williams"), the CEO and President of ILG, to enforce the Judgment. Williams asserted counterclaims against USAT.

On 20 June 2014, USAT sent Navigators Insurance a copy of the Judgment and a letter demanding payment of the Judgment. After Navigators Insurance failed to respond to the demand letter, USAT filed an amended complaint purporting to add Navigators Insurance Company and Navigators Management Company, Inc. ("Navigators Management") (collectively "Defendants") as defendants to the suit against Williams. The case was designated a mandatory complex business case by order of the Chief Justice of the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-45.4(a). The case was assigned to Chief Judge James L. Gale of the North Carolina Business Court.

USAT asserted claims against Navigators Insurance and Navigators Management for: (1) conspiracy to defraud; (2) bad faith claims settlement practices; and (3) "unfair trade practices" pursuant to N.C. Gen. Stat. § 75-1.1. On 17 October 2014, Navigators Insurance and Navigators Management filed motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Navigators Management premised its motion to dismiss on arguments that: (1) it was not a party to the Policy between ILG and Navigators Insurance; (2) USAT did not plead its conspiracy to defraud claims with specificity; and (3) it did not issue the Policy.

In its motion to dismiss, Navigators Insurance argued (1) the Policy did not provide coverage for the Judgment; (2) USAT's lack of coverage under the Policy precluded it from acting in "bad faith" by not paying the judgment; (3) the lack of coverage precluded USAT's unfair trade practices claims; (4) USAT did not plead its conspiracy to defraud claim with specificity; and (5) USAT's lack of coverage under the Policy precluded the fraudulent concealment claim.

On 21 July 2016, the trial court issued an order and opinion dismissing all of USAT's claims against Navigators Insurance and Navigators Management. On 2 March 2017, the remaining claims by and between USAT and Williams were voluntarily dismissed. USAT filed timely notice of appeal of the trial court's order.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2013) and 1-277 (2017). In 2014, our General Assembly enacted Chapter 102 of the 2014 North Carolina Session Laws, which, among other things, amended N.C. Gen. Stat. § 7A-27 so as to provide a

direct right of appeal to the Supreme Court from a final judgment of the Business Court. *See* 2014 N.C. Sess. Laws 621, 621, ch. 102, § 1.

The effective date of the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2) was 1 October 2014. *See* 2014 N.C. Sess. Laws 621, 629, ch. 102, § 9 ("Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date.").

The present case was designated as a mandatory complex business case on 7 July 2014, prior to the effective date of the 2014 amendments to N.C. Gen. Stat. § 7A-27(a)(2). This case is properly before this Court.

III. Standard of Review

> The standard of review of an order granting a [motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6)] is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted).

A motion to dismiss should be granted when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

"[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). We review the trial court's dismissal of an action *de novo*. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013).

IV. Analysis

A. *Introduction*

USAT argues the trial court erred by granting Defendants' motions to dismiss. USAT asserts it became a third-party beneficiary to the Policy

upon entry of the default judgment against ILG, obtained the right to payment on the Judgment from Defendants, and to sue Defendants directly for their failure to pay.

B. *Third-Party Beneficiary*

[1] USAT argues the trial court erred when it dismissed its claims against Defendants for unfair trade practices and bad faith claims settlement practices because USAT is a third-party beneficiary of the Policy. We disagree.

USAT brings its unfair or deceptive trade practices claim pursuant to N.C. Gen. Stat § 75-1.1 and its bad faith claims settlement claim pursuant to N.C. Gen. Stat. § 58-63-15(11).

It is well-established in North Carolina that:

> [while] a plaintiff generally cannot sue the insurance company of an adverse party under G.S. § 75-1.1, if the plaintiff achieves the status of an *intended third-party beneficiary* arising from the contractual relationship between the adverse party and the adverse party's insurance company, the plaintiff may then bring a claim against the insurance company for violating the unfair and deceptive practices statute.

Prince v. Wright, 141 N.C. App. 262, 270, 541 S.E.2d 191, 197 (2000) (emphasis supplied). "[A] private right of action under N.C.G.S. § 58-63-15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party." *Lee v. Mut. Community Sav. Bank*, 136 N.C. App. 808, 810, 525 S.E.2d 854, 856 (2000) (citation and quotation marks omitted).

The controlling case regarding direct actions by a third-party plaintiff against an insured's insurer is *Wilson v. Wilson*, 121 N.C. App. 662, 468 S.E.2d 495 (1996). In *Wilson*, this Court held "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of an adverse party based on unfair and deceptive trade practices under N.C.G.S. § 75-1.1." *Id.* at 665, 468 S.E.2d at 497. Shortly after *Wilson* was decided, this Court created an exception to the *Wilson* rule, and held, "[t]he injured party *in an automobile accident* is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party." *Murray v. Nationwide Mut. Ins. Co.* 123 N.C. App. 1, 15, 472 S.E.2d 358, 366 (1996) (emphasis supplied) (citations omitted), *rev. denied*, 345 N.C. 344, 483 S.E.2d 173 (1997).

Following *Murray*, this Court has required the third-party plaintiff, in an automobile accident context, to have obtained a judgment against the liability insurance company's insured before it may have standing to sue the insurance company directly. *See Craven v. Demidovich*, 172 N.C. App. 340, 342, 615 S.E.2d 722, 724 (2005) (affirming dismissal of plaintiff's claims against insurer when insured's liability had not been judicially determined).

USAT argues *Murray* holds that a third-party claimant's obtainment of a judgment against the insurance company's insured *ipso facto* raises the claimant to a retroactive intended third-party beneficiary of the insurance contract, and thereby places the third-party claimant in privity of contract with the insurer. We disagree.

USAT's argument ignores the fact that the third-party claimant's privity with the insurer is based upon the third-party claimant being an injured party in an automobile accident. *See Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366. The Court's ruling in *Murray* was premised upon its recognition that an "injured party *in an automobile accident* is an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party . . . *and for this reason alone, [the plaintiff is] not bound by the third-party restrictions set forth in Wilson*." *Id.* (emphasis supplied).

In the automobile accident context, an injured party is recognized as a third-party beneficiary to the liability insurance policy, because, under the statute, "[t]he primary purpose of th[e] compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists." *Nationwide Mut. Ins. Co. v. Chanto*s, 293 N.C. 431, 440, 238 S.E.2d 597, 604 (1977).

Contrary to USAT's assertions, *Murray* did not recognize nor implement a general rule that judgments against insureds provide claimants with rights to recover from insurers directly. *Murray* recognizes (1) that if a third-party claimant is a party to an insurance contract and (2) obtains a judgment against an insurance company's insured, then the third-party claimant would have standing to sue the insurer directly. *See Murra*y, 123 N.C. App. at 15, 472 S.E.2d at 366.

Murray does not establish that a third-party claimant's obtainment of a judgment against an insured establishes privity with the insurer as a matter of law, as USAT asserts we should hold. USAT's argument also misconstrues language in *Taylor v. N.C. Farm Bureau Mut. Ins. Co.*, 181 N.C. App. 343, 638 S.E.2d 636 (2006), *disc. review denied*, 361 N.C. 369, 646 S.E.2d 773 (2007), summarizing the holding of *Murray*, to argue

the obtainment of a judgment by a third-party against an insured establishes privity with the insured's insurer.

As quoted by USAT, this Court stated in *Taylor*, "In [*Murray*] we found privity between the plaintiff and the tortfeasor's insurer and allowed an excess policy coverage claim for unfair and deceptive trade practices based on the insured's post judgment behavior towards the plaintiff." *Taylor*, 181 N.C. App. 345-46, 638 S.E.2d at 637-38. *Taylor* does not recognize or summarize *Murray* as holding that a third-party obtains privity with an insurer by obtaining a judgment against its insured. *See id.*

USAT asserts it can bring direct claims against Defendants for unfair or deceptive trade practices and bad faith settlement practices, based upon this Court's reversal of a trial court's dismissal of a negligence claim against an insurer in *Prince v. Wright*. In *Prince*, the personal representative of the estate of a minor child killed by a fire in a rental house caused by an electrical problem brought claims against the landlord for negligence, breach of statutory duties, and wrongful death. *Prince*, 141 N.C. App. at 264-65, 541 S.E.2d at 194-95. The personal representative also brought claims against the landlord's insurance company for negligence and unfair and deceptive trade practices. *Id.*

The insurance company had undertaken to conduct an inspection of the rental house "for the purpose of detecting and detailing the suitability of the house for residential purposes, including but not limited to, damage or potential damage to the electrical system[.]" *Id.* at 267, 541 S.E.2d at 196. The personal representative alleged in her negligence claim against the insurer that the insurer had failed to warn the residents of the potential fire hazard created by water damage to the electrical system. *Id.* In reversing the trial court's dismissal of the negligence claim against the insurance company, this Court determined, that even though the plaintiff was not in privity with the landlord's insurer, the plaintiff could maintain the negligence action against the insurer because "[the insurer] may have created for itself a duty to plaintiff which it breached by first expressly undertaking to conduct an inspection of the suitability of the house for residential purposes and then by failing to warn tenants of the dangerous conditions it discovered during that inspection." *Id.*

On the personal representative's claims for unfair or deceptive trade practices, this Court cited *Wilson* and *Murray* and held the personal representative did not have standing to bring the unfair or deceptive trade practices claim. *Id.* at 269-70, 541 S.E.2d at 197.

The Court determined the personal representative was not an intended third-party beneficiary of the landlord's insurance contract with the insurer, because the insurer insured the house against loss or damage for the benefit of the landlord, and the landlord did not enter into the insurance policy for the benefit of potential residents living in the house, "but rather paid for the coverage to reduce or eliminate loss caused by circumstances such as a house fire." *Id.* at 270, 541 S.E.2d at 198. The Court affirmed the trial court's dismissal of the unfair or deceptive trade practices claim because the personal representative was not in privity with the insurer to bring a direct action under the policy. *Id.*

Unlike the plaintiff in *Prince*, USAT has not asserted a claim against Defendant-insurers for negligence. *See id.* The Court's holding in *Prince* with regards to the negligence claim does not support USAT's argument that it has standing to bring an unfair or deceptive trade practices claim and bad faith settlement practices claim directly against Defendants. This Court's review and disposition of the negligence claim in *Prince* is irrelevant to USAT's claims, especially in light of the Court's ruling in *Prince* that the plaintiff did not have standing to bring an unfair or deceptive trade practices claim against the insurer, because she was not an intended third-party beneficiary of the insurance contract between the insurer and insured defendants. *Id.*

USAT also argues the recent case of *Nash Hosps., Inc. v. State Farm Mut. Auto. Ins. Co.*, __ N.C. App. __, 803 S.E.2d 256 (2017), supports its contention "that the rule in *Wilson* is not applicable when privity is established by judgment or settlement." In *Nash*, a not-at-fault motorist injured in an automobile accident incurred treatment costs with several medical providers, including the plaintiff, Nash Hospitals. *Nash*, __ N.C. App. at __, 803 S.E.2d at 259. State Farm, the insurer for the at-fault driver, received notice of Nash Hospitals' medical liens under N.C. Gen. Stat. §§ 44-49 and -50 from Nash Hospitals' counsel. *Id.* State Farm entered into a settlement agreement with the not-at-fault driver and provided her with a check payable to herself, Nash Hospitals and another medical provider. *Id.* Nash Hospitals was not notified of the settlement nor presented with the check for endorsement or payment. *Id.* Nash Hospitals eventually sued State Farm, asserting that N.C. Gen. Stat. § 44-50 "specifically requires the liability insurer to retain out of any recovery, before any disbursements, a sufficient sum to pay lien holders," and State Farm's failure to comply with §§ 44-49 and -50 constituted an unfair trade practice. *Id.*

State Farm argued Nash Hospitals did not have standing to bring an unfair or deceptive trade practices claim, because its suit did not involve

a dispute over an insurance contract. *Id.* at __, 803 S.E.2d at 262. This Court determined that State Farm and the not-at-fault driver, who was not State Farm's insured, were in privity upon them entering into the settlement agreement, and that Nash Hospitals was in privity with State Farm, reasoning:

> Once a claimant and an insurance company enter into a settlement agreement, they are therefore in privity. And by enacting N.C. Gen. Stat. §§ 44-49 *et seq.*, the General Assembly expanded the scope of privity to hospitals and medical service providers. As discussed *supra*, the purpose of N.C. Gen. Stat. §§ 44-49 *et seq.* is to protect hospitals and other health care providers that provide medical services to injured persons who may be unable to pay at the time the services are rendered, but who may later receive compensation for their injuries. *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50. As a result, Nash Hospitals' privity became effective the moment Defendant received notice from Nash Hospitals of its assertion of a valid lien pursuant to N.C. Gen. Stat. § 44-49 *and* reached a settlement agreement with [the injured driver].

Id. at __, 803 S.E.2d at 263 (emphasis in original).

This Court held, in part, that Nash Hospitals had standing to sue State Farm for unfair or deceptive trade practices because of the statutory privity provided to hospitals and medical service providers by N.C. Gen. Stat. § 44-49. *Id.*

Contrary to USAT's contention, this Court in *Nash* did not make a general determination "that the rule in *Wilson* is not applicable when privity is established by judgment or settlement[,]" but that N.C. Gen. Stat. § 44-49 operates to grant a medical service provider privity with regard to a settlement agreement between an injured person "who may be unable to pay at the time the services are rendered[]" and an insurance company. *Id.*

USAT attempts to assert an alternative argument for the first time on appeal that certain provisions of the Policy should be interpreted as making it an intended third-party beneficiary. USAT failed to raise or make this alternative argument within its responsive briefing to Defendants' motions to dismiss before the trial court, at the hearing on Defendants' motions before the trial court, or allege it in its complaint. USAT cannot assert a new theory for the first time on appeal. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination

of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].”); *see State v. Sharpe*, 344 N.C. 190,195, 473 S.E.2d 3, 6 (1996), *cert. denied*, 350 N.C. 848, 539 S.E.2d 647 (1999) (“[I]t is well settled in this jurisdiction that [a party] cannot argue for the first time on appeal [a] new ground . . . that he did not present to the trial court.”). This alternative argument is dismissed.

USAT has not cited any authority, binding upon this Court, which tends to establish a trade creditor is in privity with its debtor and the debtor’s insurer with respect to a directors and officers liability insurance policy, merely by virtue of the trade creditor’s obtainment of a judgment against the insured debtor. It is undisputed and admitted that USAT is not specifically and expressly named in the Policy.

Treating the allegations in USAT’s complaint as true, USAT has failed to establish the privity required by *Murray* for it to have standing to assert claims for unfair or deceptive trade practices and bad faith claims settlement. Without privity, the general rule that “a private right of action under N.C.G.S. § 58-63-15 and N.C.G.S. § 75-1.1 may not be asserted by a third-party claimant against the insurer of an adverse party[,]” prevails. *Lee*, 136 N.C. App. at 810, 525 S.E.2d at 856 (citation and quotation marks omitted). USAT does not have standing to assert its unfair or deceptive trade practices claim and bad faith settlement claim. *See id.*

USAT has failed to state an unfair trade practices claim or a bad faith settlement claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2017). USAT’s unfair trade practices claim and bad faith settlement claim were properly dismissed. USAT’s arguments are overruled.

C. *Conspiracy to Defraud*

[2] USAT also fails to state a claim upon which relief can be granted with respect to its conspiracy to defraud claim. North Carolina does not recognize an independent cause of action for civil conspiracy. *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citation omitted). A civil conspiracy claim must be based on an adequately pled underlying claim. *Id.* The claim underlying USAT’s civil conspiracy allegations is fraud.

Rule 9(b) of our Rules of Civil Procedure requires that “[i]n all averments of fraud . . . the circumstances constituting fraud or mistake shall be stated with particularity.” N.C. Gen. Stat. § 1A-1, Rule 9(b) (2017). “[I]n pleading actual fraud, the particularity requirement is met by

alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981).

"Dismissal of a claim for failure to plead with particularity is proper where there are no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations." *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006) (citation and internal quotation marks omitted).

Here, the Business Court properly concluded that USAT had failed to plead fraud with particularity. In its conspiracy to defraud claim, USAT alleges with respect to Defendants, the following:

> 228. Navigators conspired with ILG's officers and directors to commit fraud on the court by intending to cause default be entered against ILG purportedly for non-payment of legal fees, when Navigators intended to pay for the defense of co-defendants and when the ILG Policy covered ILG with regard to the acts and omissions of ILG's officers including Williams, and Navigators conspired to dissolve ILG without disposing of contingent or known liabilities of which Navigators was aware or reasonably should've been aware.
>
> . . .
>
> 230. Navigators are conspiring with Williams to avoid paying the Judgment despite facts that already establish liability of both be established and Trouser is entitled to attorney fees as damages relating thereto.
>
> 231. Navigators Insurance is conspiring with Navigators Management to avoid paying the Judgment in violation of North Carolina law.

The complaint does not: (1) allege the identity of any specific person associated with Navigators Insurance or Navigators Management who made misrepresentations or omissions; or (2) provide either the specific, or even the approximate, "time or place" at which either of the Defendants, together or separately, conspired with ILG's directors. *Id.* The Complaint contains none of this specific information, but instead asserts only conclusory allegations that Defendants are liable for paying the Judgment against ILG, and are engaging in fraudulent acts to avoid paying the Judgment.

Because USAT failed to plead the underlying claim of fraud with particularity, the conspiracy to defraud claim was properly dismissed by the Business Court. N.C. Gen. Stat. § 1A-1, Rule 9(b); *see Edwards*, 176 N.C. App. at 39, 626 S.E.2d at 321 ("A trial court properly dismisses a claim for failure to plead fraud with particularity where there are no facts whatsoever setting forth the time, place, or specific individuals who purportedly made the misrepresentations."). USAT's arguments are overruled.

V. Conclusion

USAT did not become a third-party beneficiary to the Policy upon entry of the default judgment against ILG, nor did USAT obtain the right to payment on the Judgment directly from Defendants, or to sue Defendants directly for unfair trade practices or bad faith claims settlement practices. USAT also failed to plead the underlying claim of fraud with particularity and the conspiracy to defraud claim was properly dismissed by the Business Court.

Plaintiff's complaint fails to state a claim upon which relief can be granted. The order and opinion of the North Carolina Business Court granting Defendants' motions to dismiss is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 FEBRUARY 2018)

ADAME v. AEROTEK No. 16-1118	N.C. Industrial Commission (13-735592)	Remanded
BROWN v. COX No. 17-436	Guilford (16CVS2858)	No Error
BYRD v. LOWE'S HOME CTRS., INC. No. 17-841	N.C. Industrial Commission (13-734272)	Affirmed
CMTY. MGMT. CORP. v. SARVER No. 17-870	Macon (16CVD584)	Affirmed
DASS v. DASS No. 17-702	Mecklenburg (16CVD19645)	Affirmed
IN RE A.G. No. 17-827	Durham (16J205)	Affirmed
IN RE H.W. No. 17-785	Cherokee (16JA11)	Affirmed in part, reversed in part, and remanded.
IN RE I.V.F. No. 17-739	Cumberland (11JT507) (14JT67)	Affirmed
IN RE J.B. No. 17-781	Robeson (15JT204)	Affirmed
IN RE J.D. No. 17-709	Cumberland (16JA418)	Reversed.
IN RE K.M. No. 17-578	Affirmed (13JA18)	Johnston
IN RE L.F. No. 17-875	Guilford (16J201) (16JB510)	Vacated and Remanded
IN RE R.Z. No. 17-543	Buncombe (16SPC1629)	Vacated
IN RE T.X.W. No. 17-855	Guilford (16JA205-207)	Reversed

SMITH v. SMITH No. 17-753	Lincoln (12CVD129)	Dismissed
STATE v. ADKINS No. 17-715	Stokes (16CRS51046) (16CRS51047) (16CRS51049)	Affirmed; Remanded for Correction of Clerical Errors in Case 16CRS-51049.
STATE v. BARBOUR No. 17-537	Johnston (15CRS53787-89)	No prejudicial error in part, no error in part
STATE v. BATTLE No. 17-673	Nash (16CRS51286-87)	NO PREJUDICIAL ERROR
STATE v. BRANNING No. 17-771	Haywood (15CRS54092)	Affirmed
STATE v. BROWN No. 17-568	Buncombe (13CRS56553) (13CRS56554)	Affirmed in part, dismissed in part, and remanded
STATE v. HARRIS No. 17-644	Johnston (15CRS56635) (16CRS89)	No Error
STATE v. HUNT No. 17-722	Cleveland (15CRS52006-08)	No Error
STATE v. JONES No. 17-217	Mecklenburg (15CRS12694-95)	No Error
STATE v. KORNEGAY No. 17-632	Johnston (16CRS50059-61)	No Error
STATE v. LITTLEJOHN No. 17-551	Cleveland (14CRS52738) (14CRS52739)	No Error
STATE v. MOORE No. 17-766	Pitt (15CRS2559)	Reversed
STATE v. NICHOLS No. 17-826	Cumberland (16CRS51527)	Dismissed
STATE v. SMITH No. 17-687	Davidson (12CRS50228) (12CRS50230)	Affirmed

STATE v. THORPE No. 17-307	Person (13CRS2036)	No Error
STATE v. WILSON No. 16-1215	Stanly (15CRS50386)	No Error in Part; Vacated in part

BRIGGS v. DEBBIE'S STAFFING, INC.

[258 N.C. App. 207 (2018)]

WILLARD BRIGGS, EMPLOYEE, PLAINTIFF
v.
DEBBIE'S STAFFING, INC., EMPLOYER, N.C. INS. GUAR. ASS'N, CARRIER; EMPLOYMENT PLUS, EMPLOYER, N.C. INS. GUAR. ASS'N; AND PERMATECH, INC., EMPLOYER, CINCINNATI INS. CO., CARRIER, DEFENDANTS

No. COA17-778

Filed 6 March 2018

Workers' Compensation—occupational disease—risk for contracting disease—expert medical evidence

The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee's claims for benefits where plaintiff failed to offer expert medical evidence showing that his job actually placed him at a greater risk of contracting asthma as required by *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85 (1983).

Appeal by plaintiff from opinion and award entered 31 March 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 November 2017.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by John A. Tomei and Matthew D. Flammia, for defendants-appellees Employment Plus and NCIGA.

Muller Law Firm, PLLC, by Tara Davidson Muller, and Anders Newton, PLLC, by Gregg Newton, for defendants-appellees Permatech and Cincinnati Insurance.

Cranfill Sumner & Hartzog LLP, by Buxton S. Copeland and Tracy C. Myatt, for defendants-appellees Debbie's Staffing and NCIGA.

DAVIS, Judge.

In this workers' compensation appeal, we revisit the issue of whether an employee is required to present expert medical evidence in order to establish that the conditions of his employment placed him at a greater risk than members of the general public for contracting a disease. Willard Briggs appeals from the opinion and award of the North Carolina Industrial Commission denying his claim for workers'

compensation benefits in which he alleged that his asthma resulted from his working conditions. Because we conclude the Industrial Commission properly found that Briggs failed to offer expert medical evidence showing that his job actually placed him at a greater risk of contracting asthma, we affirm.

Factual and Procedural Background

The facts of this case involve events that occurred during Briggs' employment with Permatech, Inc. ("Permatech") and two staffing agencies — Debbie's Staffing, Inc. ("Debbie's Staffing") and Employment Plus. Briggs worked for Permatech from 14 June 2010 to 25 April 2012. Permatech and Debbie's Staffing served as his joint employers from 14 June 2010 to 22 April 2012. Permatech and Employment Plus served as his joint employers from 23 April 2012 to 25 April 2012.

Permatech is a refractory manufacturer that makes "precast troughs and molds that are used in the molten metal industry." Briggs worked as a ceramic technician at the Permatech facility in Graham, North Carolina. A portion of his time was spent working on a "Voeller" machine — a large, circular mixing machine containing a blade that mixes dry ingredients with water. Briggs also worked on "smaller molds in other areas of the plant or helping to cast small parts." The dry ingredients that were mixed in the Permatech machines included "alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, and silicon carbide . . . ."

Due to the dusty environment created by the Voeller machine, Permatech employees were required to wear respiratory protection masks while working around the machine. Briggs was provided with a P95 mask, "which filters out 95 percent of the airborne particulate that is respirable." In addition, near the end of his employment at Permatech, he was given a P100 cartridge respirator, which "had a 99.9% filtration rate for airborne particulate."

Briggs was terminated from his employment at Permatech for attendance-related issues. He subsequently filed a Form 18 (Notice of Accident) on 5 November 2013, alleging that he had "developed COPD and asthma as a result of working as a Voeller technician . . . ." Employment Plus and Debbie's Staffing each filed a Form 61 in which they asserted that Briggs "did not suffer a compensable occupational disease arising out of and in the course of his employment . . . ."

On 8 October 2015, a hearing was held before Deputy Commissioner J. Brad Donovan. Briggs testified in support of his claim at the hearing.

Depositions were later taken of Dr. Dennis Darcey and Dr. Douglas McQuaid as well as of two vocational experts.

Dr. McQuaid, a pulmonary and critical care physician employed by LeBauer HealthCare, testified that Briggs had come to his office complaining of shortness of breath and wheezing. He opined that Briggs' condition had been caused by the substances he was exposed to at the Permatech facility. He conceded, however, that he was unaware of the fact that Briggs had (1) smoked cigarettes during breaks at work; (2) been given a respirator mask for use during work hours; (3) a history of marijuana usage; and (4) previously been treated for allergies with albuterol.

Dr. Darcey, the Division Chief of Occupational and Environmental Medicine and the Medical Director of the Occupational Medicine Clinic at Duke University, testified that Briggs' asthma likely predated his employment with Defendants because his medical records established that he "already had a reactive airway before he began working at the Permatech facility." He did state, however, his belief that Briggs' asthma had been aggravated during his employment at Permatech.

On 18 May 2016, the deputy commissioner issued an opinion and award concluding that "[b]ased upon the preponderance of evidence in view of the entire record . . . [Briggs] has met his burden and is temporarily totally disabled from employment as a result of his occupational disease and is entitled to temporary total disability compensation at the rate of $213.27 per week for the period beginning on 25 April 2012 and continuing." Defendants appealed to the Full Commission.

On 31 March 2017, the Full Commission issued an Opinion and Award reversing the deputy commissioner's decision and denying Briggs' claim for benefits. Commissioner Bernadine S. Ballance dissented. On 4 April 2017, Briggs filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App.

377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

"For an injury or death to be compensable under our Workmen's Compensation Act it must be either the result of an 'accident arising out of and in the course of the employment' or an 'occupational disease.'" *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 465, 256 S.E.2d 189, 194 (1979) (citation omitted). N.C. Gen. Stat. § 97-53(13) provides that a disease is considered occupational if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2017).

Our Supreme Court has held that in order

> [f]or a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the claimant's employment.

Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citation, quotation marks, and brackets omitted). The Supreme Court has made clear that "[a]ll ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." *Id.* (citation omitted).

The first two prongs of the *Rutledge* test "are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365 (citation omitted). "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 94, 301 S.E.2d at 365 (citation and quotation marks omitted).

This Court has explained that

> [r]egardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), the employee must nevertheless satisfy the

> remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for *contracting* the condition than the general public.

Futrell v. Resinall Corp., 151 N.C. App. 456, 460, 566 S.E.2d 181, 184 (2002) (citation omitted and emphasis added), *aff'd per curiam*, 357 N.C. 158, 579 S.E.2d 269 (2003).

In the present case, the Commission's Opinion and Award contained the following pertinent findings of fact:

> 1. Plaintiff is a thirty-two-year-old high school graduate who worked primarily as a restaurant cook and lawn care worker before obtaining vocational training in a forestry fire fighter program through Job Corps. Prior to Plaintiff's involuntary termination from the Job Corps program in 2008, he was noted to complain of wheezing during medical visits on May 30, 2007, July 27, 2007, and January 14, 2008. Plaintiff was also prescribed Albuterol for his symptoms.
>
> 2. Permatech is a refractory manufacturer which makes precast troughs and molds that are used in the molten metal industry. Plaintiff worked at Permatech as a ceramic technician. As a ceramic technician, less than half of Plaintiff's time was spent working on the "Voeller" machine. The remainder of Plaintiff's time was spent working on smaller molds in other areas of the plant or helping to cast small parts.
>
> 3. The Voeller machine is a big circular mixing machine which measures approximately 12 to 13 feet in diameter and contains a blade which mixes dry ingredients with water. The dry ingredients which are mixed in the Voeller machine and the smaller molding machines Plaintiff would work with were composed of, *inter alia*, alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, and silicon carbide, all materials which may cause upper respiratory irritation and can aggravate preexisting chronic lung conditions.
>
> 4. The dry ingredients were taken to the Voeller machine by a forklift operator, who maneuvers the bag or bin over a chute which measure[s] approximately 20 inches by 20 inches and was located at the top of the

machine. Once the bag or bin was in place, about one or two feet above the chute, Plaintiff would cut a hole in the bottom to discharge the mix. A plume of dust would surround Plaintiff as each bag was emptied into the chute and would stay in the air approximately two to three minutes before it would settle. After the material and any needed chemicals were poured into the machine, its blades would spin, and then water was added in an amount that the chemist of the plant directed. Operation of the Voeller machine and cleaning it out created a dusty environment, but not to the extent or magnitude depicted by Plaintiff in his testimony. While Plaintiff testified that he dumped 10 to 20 bins or bags per day, Permatech records show that the above-described process occurred on average 1.9 times per day.

5. Plaintiff was required to wear respiratory protection when working around the Voeller machine. Permatech provided Plaintiff with a P95 mask, which OSHA has deemed a respirator and which filters out 95 percent of the airborne particulate that is respirable. Plaintiff wore the P95 mask as required. Towards the end of Plaintiff's employment at Permatech, he was provided with a P100 cartridge respirator, which had a 99.9% filtration rate for airborne particulate.

6. Dust sampling results for testing done at Permatech, including personal air monitoring, were all well below OSHA's permissible exposure limits, except in the Moldable Department, where Plaintiff never worked. The results were also well below the "occupational exposure limits" which Permatech's predecessor in interest, Alcoa, established internally and which were more stringent than those set forth by OSHA. The air sampling results also do not take into account the ten-fold protection afforded by the P95 mask Plaintiff was required to wear. While the testing relied upon by Defendants was done prior to Plaintiff's employment at Permatech, there have not been any significant changes in weight or equipment usage up to and through the time Plaintiff worked there, so the same testing results would be expected. Permatech has never been cited by OSHA for exceeding the regulatory exposure limits for dusts and chemicals,

and no employee other than Plaintiff has alleged an occupational lung disease from employment at Permatech.

7. Plaintiff alleges that his breathing problems began in 2011 while working at the Permatech facility and developed gradually thereafter. However, he never complained of breathing problems to anyone at Permatech or to any medical provider when he was working at Permatech. Moreover, contrary to what he subsequently reported to medical providers, Plaintiff continued to smoke cigarettes during the time he worked at Permatech.

8. On July 18, 2012, almost three months after he was terminated from his employment at Permatech for attendance issues, Plaintiff presented to the Emergency Department at University of North Carolina Hospitals complaining of wheezing and shortness of breath. Plaintiff reported that he was experiencing shortness of breath since November 2011, that at onset he may have had some cold symptoms, that he initially believed he had developed bronchitis, but then his symptoms became persistent. He also reported using asthma medications and that his symptoms appeared to improve with Albuterol. It is unclear from the record who had prescribed the asthma medications he was taking or how long he had been taking them. Plaintiff underwent a chest x-ray and EKG and the attending physician ruled out the possibility of interstitial lung disease.

. . . .

11. Plaintiff began treatment with Dr. Douglas McQuaid, who is board-certified in internal medicine, pulmonary medicine, and critical care medicine, beginning April 22, 2014 and continuing through September 2014. Plaintiff was evaluated for the purpose of establishing care for asthma, a condition he had previously had medical treatment for, including Albuterol. Plaintiff reported a history of smoking approximately one-quarter pack per week for 3 years, quitting in 2005. Plaintiff also reported that he was directly exposed to silica fibers and chemicals containing iron particles on a daily basis at his job and that he developed a cough, shortness of breath, and wheezing for the first time in his life while working at

the Permatech facility. Plaintiff further reported that he began to produce black nasal and chest mucus and was not given a respirator for several months.

12. Plaintiff underwent pulmonary function testing, which revealed moderate airflow obstruction. This condition was capable of reversal with a bronchodilator. Based upon his examination and the testing, Dr. McQuaid was of the opinion that Plaintiff had asthma. Plaintiff reported experiencing seasonal allergies and Dr. McQuaid recommended allergy testing, but Plaintiff declined. According to Dr. McQuaid, it is important to understand any allergies an asthmatic person may have because "if you're allergic to something and you have asthma, it can make the asthma symptoms worse."

13. In response to a letter from Plaintiff's counsel dated April 20, 2015, Dr. McQuaid opined that Plaintiff's condition was caused by the substances he was exposed to at the Permatech facility. However, there is no description of all of the substances and the letter indicates plaintiff did not use a breathing device. Dr. McQuaid could not remember seeing any additional documentation setting out the specific substances used at the Permatech facility. Dr. McQuaid did not review material data safety sheets of the chemicals Plaintiff worked with and did not review Permatech's dust sampling results in conjunction with his evaluation and diagnosis of Plaintiff. Dr. McQuaid was not familiar with the types of respiratory masks used at the Permatech facility and used by Plaintiff. Dr. McQuaid testified that his understanding was that plaintiff "was exposed to some black stuff."

14. When Dr. McQuaid testified by deposition, he initially opined, to a reasonable degree of medical certainty, that Plaintiff's asthma was very likely caused by his environmental exposure at the Permatech facility. However, Dr. McQuaid did not know that Plaintiff had smoked cigarettes after 2005, did not know that Plaintiff had complained of wheezing in 2007 and 2008, and did not know that Plaintiff wore a respirator mask during the entirety of his employment at the Permatech facility. Dr. McQuaid ultimately testified that a different history might affect his opinions on causation, and that Plaintiff's smoking at

work after 2005 would be a different history than the one Plaintiff gave him.

15. On September 29, 2015, Dr. Dennis Darcey conducted an independent medical examination of Plaintiff at the request of Defendants Debbie's Staffing, Inc., and NCIGA. Dr. Darcey is an expert in occupational and environmental medicine, industrial hygiene, and epidemiology and is currently the Division Chief of Occupational and Environmental Medicine at Duke University and the Medical Director of Duke's Occupational Medicine Clinic. In addition to reviewing Plaintiff's medical records, Dr. Darcey reviewed the material safety data sheets and Permatech's dust sampling results in conjunction with his evaluation of Plaintiff. Dr. Darcey noted Plaintiff's past history of allergic reaction to cats, smoking cigarettes and marijuana, and inhalant abuse.

16. After ordering a high resolution CT examination and pulmonary function studies, Dr. Darcey concluded that Plaintiff suffers from a mild to moderate case of asthma. Dr. Darcey explained that asthma occurs when the airways become irritated and inflamed, and that reactions can be triggered by any number of things. However, irritant dust does not generally cause new onset asthma; it is more typically associated with an aggravation of a preexisting airway hyperreactivity. With regard to Plaintiff specifically, Dr. Darcey testified that, based on the history of smoking and allergic responses, Plaintiff had a reactive airway before he began working at the Permatech facility, and that Plaintiff's exposure to dust at Permatech could have aggravated his preexisting reactive airway/asthma condition.

17. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's employment was a significant contributing factor in his development of asthma, to the extent that his exposure to irritant dust aggravated but did not cause his asthma.

18. Neither Dr. McQuaid nor Dr. Darcey testified that Plaintiff's employment placed him at an increased risk of *contracting*, as opposed to aggravating, asthma as compared to members of the general public not so employed.

> During Dr. Darcey's deposition, Plaintiff's counsel introduced two articles which summarized studies of silicon carbide protection workers in Norway and Romania. The articles are based upon exposure to dust in facilities where silicon carbine is made and there is no evidence that this was similar to the dust exposure at the Permatech facility. The level of silicon carbide-containing dust in the studies was significantly higher than the levels documented at Permatech, and significantly higher than what Plaintiff could have possibly been exposed to with his P95 respirator/mask. According to one article, the study was conducted in a Romanian silicon carbide production facility where "the overall level of pollution was exceptionally high" and the measurement of total dust in the air was "more than 50 times the maximum level permitted in Romania." Furthermore, the articles do not indicate whether the workers wore respiratory protection at work. These articles do not support a finding that Plaintiff's employment placed him at an increased risk of contracting asthma.

After setting out its findings of fact, the Commission then made conclusions of law stating, in relevant part, as follows:

> 4. In order to satisfy the remaining two prongs of the *Rutledge* test, Plaintiff was required to present competent medical evidence that his exposure to alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, silicon carbine alumina, and other dusts placed him at a greater risk than the general public of contracting asthma. . . .
>
> 5. Plaintiff has failed to prove through competent expert opinion evidence that his employment at the Permatech facility placed him at an increased risk of contracting asthma than the general public. . . .

The only one of the Commission's findings of fact challenged by Briggs in this appeal is Finding No. 6. Thus, because the remainder of the Commission's findings of fact are unchallenged, they are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation omitted)).

The interplay between the three prongs of the *Rutledge* test was explained by this Court in *Futrell*. In *Futrell*, the employee filed a workers' compensation claim contending that he had contracted carpal tunnel syndrome as a result of his employment as a resin kettle operator. He testified that his job responsibilities required him to "tear[ ] open fifty-pound bags of chemicals with his hands, us[e] an axe to bang on drums to loosen their contents, and monitor[ ] kettles." *Futrell*, 151 N.C. App. at 457, 566 S.E.2d at 182.

The defendants presented testimony from an orthopedic surgeon who testified that the "plaintiff's employment did not place him at a greater risk for developing carpal tunnel syndrome than the general public." *Id.* at 459, 566 S.E.2d at 183. The Commission determined that "neither of plaintiff's treating physicians, Drs. Vernon Kirk and Anthony DiStasio, offered evidence that plaintiff's job placed him at an increased risk for development of the disease as compared to the employment population at large." *Id.* Based on its findings, the Commission concluded that the plaintiff had failed to establish that his carpal tunnel syndrome was compensable because he had not satisfied the first two prongs of the *Rutledge* test. *Id.* at 458, 566 S.E.2d at 183.

We affirmed the Commission's decision, ruling that its findings were supported by competent evidence and supported its conclusions of law. In our opinion, we stated the following:

> . . . [T]here is no authority from this State which allows us to ignore the well-established requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for *contracting* the condition, even where the condition may have been aggravated but not originally caused by the plaintiff's employment. We cannot agree with the dissent's position that this reading of *Rutledge* effectively precludes recovery in all cases where a claimant does not argue that his employment caused him to contract the disease. It simply precludes recovery where a claimant cannot meet all three well-established requirements for proving an occupational disease. This is not a novel approach or reading of *Rutledge*.
>
> Indeed, if the first two elements of the *Rutledge* test were meant to be altered or ignored where a claimant simply argued aggravation or contribution as opposed to contraction, then our courts would not have consistently

> defined the third element of the *Rutledge* test as being met where the claimant can establish that the employment caused him to contract the disease, or where he can establish that it significantly contributed to or aggravated the disease. . . . *Rutledge* and subsequent case law applying its three-prong test make clear that evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third element of the *Rutledge* test. Regardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), the employee must nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public.

Id. at 460, 566 S.E.2d at 184 (internal citations omitted).

Here, the Commission concluded that Briggs had satisfied the third prong of the *Rutledge* test by showing that the conditions at the Permatech facility aggravated his asthma, and this determination is not in dispute. Rather, the key question in this appeal is whether Briggs has likewise satisfied the first two prongs of the *Rutledge* test.

Briggs asserts that he provided sufficient evidence to demonstrate that his conditions of employment increased his risk of contracting asthma as compared with the general public. Specifically, he contends that the evidence he presented in the form of lay testimony and articles — coupled with basic notions of "common sense" — was sufficient to meet his burden of proof. Defendants, conversely, argue that Briggs was required to produce expert medical evidence in order to establish that his employment conditions placed him at a greater risk for contracting asthma. In order to analyze this issue, we find it instructive to review the relevant case law from our appellate courts applying *Rutledge*.

Norris v. Drexel Heritage Furnishings, Inc., 139 N.C. App. 620, 534 S.E.2d 259 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001), involved a worker who brought a claim for workers' compensation benefits based on her allegations that her employment as a splicing machine operator had caused her fibromyalgia. *Id.* at 622, 534 S.E.2d at 261. The plaintiff offered the testimony of a specialist in chronic pain management who had diagnosed her with myofascial pain syndrome. He "indicated a causal relation existed between plaintiff's condition and

her employment." *Id.* at 621-22, 534 S.E.2d at 261. Several other medical specialists with whom the plaintiff had consulted stated that they had diagnosed her disease as fibromyalgia. *Id.* at 622, 534 S.E.2d at 261. Additionally, three of the plaintiff's co-workers testified that "they experienced similar burning sensation and knots in their upper backs and shoulders as a result of performing the job." *Id.* at 622, 534 S.E.2d at 261.

The Commission found that "the plaintiff had fibromyalgia and that her fibromyalgia was caused or aggravated by her employment with the defendant." *Id.* However, because the Commission concluded that "there was no medical evidence that plaintiff's employment with defendant placed her at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed," it concluded that her fibromyalgia was not an occupational disease. *Id.*

We affirmed the Commission's decision, stating as follows:

> Plaintiff . . . contends that the Commission acted under a misapprehension of law by requiring medical evidence to prove plaintiff's employment subjected her to a greater risk of developing fibromyalgia than the general public not so employed. We disagree.
>
> . . . . [W]ith regard to the necessity of proof by expert medical testimony, our Supreme Court has stated that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. . . . It has also stated that when a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony. . . . Therefore, findings regarding the nature of a disease—its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony.

Id. at 622-23, 534 S.E.2d at 262 (internal citation and quotation marks omitted).

In *Chambers v. Transit Mgmt.*, 360 N.C. 609, 636 S.E.2d 553 (2006), the employee sought workers' compensation benefits for a left ulnar

nerve entrapment affecting his elbow and a cervical spine condition affecting his neck. He alleged that these conditions were caused by his occupation as a bus driver. *Id.* at 610, 636 S.E.2d at 554.

The plaintiff offered testimony from Dr. Tim Adamson, a neurosurgeon who diagnosed him with a "double crush syndrome" and helped describe the relationship between the two injuries. *Id.* at 611, 636 S.E.2d at 554. Dr. Adamson also wrote a letter to the plaintiff's attorney in which he stated that "plaintiff's occupation as a bus driver did place him slightly at higher risk than the general public." *Id.* at 614, 636 S.E.2d at 556. At his deposition, he clarified the statements in his letter by testifying that he was "not able to say that the bus driving activities caused the ulnar neuropathy, but that it could have aggravated the ulnar neuropathy[.]" *Id.* at 615, 636 S.E.2d at 557. Based on Dr. Adamson's opinions, the Commission found that both of the plaintiff's injuries were compensable occupational diseases. *Id.* at 611, 636 S.E.2d at 554.

The Supreme Court reversed the Commission's award and held that the "plaintiff ha[d] failed to establish that his employment placed him at a greater risk of contracting either his ulnar nerve entrapment or his cervical spine condition than the general public." *Id.* at 614, 636 S.E.2d at 556. The Court focused its analysis on the medical evidence presented by the plaintiff, holding that even though Dr. Adamson's letter stated that the plaintiff was "at higher risk than the general public[,]" the letter did not "satisfactorily distinguish between the risk faced by plaintiff of *contracting* his conditions and the risk of *aggravating* a preexisting condition relative to the general public[.]" *Id.* at 614-15, 636 S.E.2d at 556. Thus, the Court concluded that the plaintiff had not met his burden of establishing through expert medical evidence that his employment placed him at a greater risk than members of the general public of contracting the diseases. *Id.* at 615, 636 S.E.2d at 556.

Briggs does not dispute the proposition that he was required to satisfy the first two prongs of the *Rutledge* test by showing that his employment at Permatech exposed him to a greater risk of contracting asthma than the general public. Instead, he contends that North Carolina courts have never expressly required expert medical evidence to establish the first two prongs of the *Rutledge* test. However, based on our careful reading of *Norris* and *Chambers*, we conclude that our case law has, in fact, consistently required that such evidence be produced in order for these two prongs to be met. *See Thomas v. McLaurin Parking Co.*, 181 N.C. App. 545, 551, 640 S.E.2d 779, 783 (2007) (affirming denial of benefits where "[n]o evidence was presented by either doctor presenting

testimony to the Commission that plaintiff's employment placed him at a greater risk for contracting degenerative arthritis").[1]

The Commission's unchallenged findings of fact fully support its conclusion that Briggs failed to offer sufficient medical evidence that the conditions at the Permatech facility placed him at a greater risk for contracting asthma than the general public. In Finding No. 17, the Commission found that "Plaintiff's employment was a significant contributing factor in his development of asthma, to the extent that his exposure to irritant dust aggravated but did not cause his asthma." In Finding No. 18, the Commission found that "[n]either Dr. Darcey nor Dr. McQuaid testified that Plaintiff's employment placed him at an increased risk of *contracting*, as opposed to aggravating, asthma as compared to members of the general public not so employed." Moreover, as the Commission also noted, Dr. Darcey testified that "asthma occurs when the airways become irritated and inflamed, and that reactions can be triggered by any number of things" but that "irritant dust does not generally cause new onset asthma . . . ."

Briggs also argues that the Commission erred by failing to determine that the two articles he submitted during Dr. Darcey's deposition supported a finding that his job at Permatech placed him at an increased risk of contracting asthma. As an initial matter, these articles are not an adequate substitute for expert medical evidence on this issue. Furthermore, we note that the Commission made an unchallenged finding that these articles — which detailed studies of silicon carbide effects on workers in factories in Norway and Romania — involved working environments in which the amounts of silicon carbide were significantly higher than those at the Permatech facility. The Commission also found that the articles did not specify whether the workers in the study wore respiratory masks for protection as did the workers in the Permatech facility.

In his final argument, Briggs contends that expert medical evidence was not required under the circumstances of this case to establish the first two prongs of the *Rutledge* test because the facts here did not involve complex questions of science so much as "common sense." He

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1. While Briggs attempts to rely on *Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985), that case is inapposite. The issue in *Caulder* was not whether the plaintiff's employment placed him at a greater risk than the general public of contracting his disease for purposes of the *Rutledge* test. Rather, the question in *Caulder* involved the entirely separate issue of whether the defendants' employment was the plaintiff's "last injurious exposure" to the hazards of the disease from which the plaintiff suffered. *Id.* at 72, 331 S.E.2d at 647 (emphasis added).

argues that "[t]he average person is not exposed to 108 tons of asthma-causing dust" and asserts that any layperson would know that working in a dusty environment exposes a worker to an increased risk of contracting asthma.

We are unable to agree with Briggs that the question of whether an individual can actually *contract* asthma simply by working in a dusty environment is one that a layperson could answer. Rather, we believe such a determination is beyond a layperson's understanding given that questions as to the root causes of asthma can only be answered by medical experts.[2] *See Norris*, 139 N.C. App. at 622-23, 534 S.E.2d at 262 (holding that "when a layman can have no well-founded knowledge and can do no more than indulge in mere speculation (as to the cause of a physical condition), there is no proper foundation for a finding by the trier without expert medical testimony").

Thus, Briggs failed to establish that "[his] employment exposed [him] to a greater risk of contracting [asthma] than the public generally . . . ." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365 (citation omitted). Accordingly, the Commission properly denied his claim.

Conclusion

For the reasons stated above, we affirm the Commission's 31 March 2017 Opinion and Award.

AFFIRMED.

Judges TYSON and BERGER concur.

2. We observe that Briggs' "common sense" argument stands in stark contrast to Dr. Darcey's testimony that asthma is generally *not* caused by irritant dust.

DAVIS v. NEW ZION BAPTIST CHURCH

[258 N.C. App. 223 (2018)]

SARAH B. DAVIS, ET AL., PLAINTIFFS
v.
NEW ZION BAPTIST CHURCH, DEFENDANT

No. COA17-523

Filed 6 March 2018

1. Jurisdiction—standing—church dispute

Plaintiffs had standing to pursue claims against a church where the injuries they alleged occurred during a time when they were active members of the church, even though the church asserted that plaintiffs were told they were no longer members of the church after the lawsuit was filed.

2. Churches and Religion—dispute between members—amendments to bylaws—procedural rules

The trial court could declare void an amendment to church bylaws where the question was whether the church and its members had followed the procedural rules established in those bylaws.

3. Churches and Religion—deacons and trustees—court-ordered election

The trial court exceeded its authority by ordering a mandatory election of deacons and trustees in a dispute between church members.

4. Churches and Religion—removal of deacons and trustees—bylaws

The trial court properly determined that it could play no part in determining whether deacons and trustees were properly removed from their posts in a dispute within the church. The church's bylaws were silent on the matter; without neutral principles to apply, the courts have no authority.

Appeals by defendant and plaintiffs from judgment entered 23 November 2016 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2018.

James, McElroy & Diehl, P.A., by J. Alexander Heroy, Edward T. Hinson, Jr., and Preston O. Odom, III, for plaintiffs-appellees.

The McIntosh Law Firm, P.C., by Jesse C. Jones, for defendant-appellant.

DIETZ, Judge.

This dispute between a church and some of its former members returns to us for a second time. Our review is constrained by the mandate in the previous decision of this Court, and the limits on judicial intervention in the governance of religious bodies established in the First Amendment to the United States Constitution.

As explained below, we affirm the trial court's judgment that, applying neutral principles of law, the church did not follow the procedure established in its bylaws when it attempted to amend them. Because the bylaws govern some non-ecclesiastical issues involving church property and contract rights, courts have the power to adjudicate this issue. With respect to the remaining issues on appeal, concerning removal and election of church deacons and trustees, the bylaws are silent. The courts can play no role in the resolution of those issues. We therefore affirm the trial court's order in part and vacate the order in part.

Facts and Procedural History

In 2013, Plaintiffs, all of whom were active, voting members of New Zion Baptist Church, sued the Church and its pastor, Henry Williams, Jr.

All of Plaintiffs' claims stemmed from the Pastor's management of Church finances and a decision by the Church in 2013 to amend the Church bylaws, changing various tenets of Church doctrine as well as other aspects of the Church's day-to-day operations. The trial court denied the Church's motion to dismiss for lack of subject matter jurisdiction, rejecting the argument that the First Amendment barred the courts from adjudicating these claims.

This Court affirmed the trial court in part. *Davis v. Williams*, 242 N.C. App. 262, 774 S.E.2d 889 (2015). We held that courts had the power to adjudicate Plaintiffs' claim with respect to the Church's breach of its own bylaws, but only to the extent that this claim involved application of neutral principles of law to Church rules that did not involve doctrine or religious practice. *Id.*

On remand, the trial court entered summary judgment holding that the Church "violated its Bylaws in its 2013 attempts to vote on proposed amendments" and therefore those amendments were void. The trial court also found that, because the existing bylaws were "silent as to the process for removing deacons and trustees," the trial court could not play any role in reviewing the removal of those officers from their posts. But the trial court nevertheless ordered the Church to hold an election

"to fill vacancies in the office of deacon and trustee . . . at the next regular business meeting of the church, but in any event, no later than ninety (90) days from the filing of this Order." Both parties timely appealed portions of the trial court's ruling.

Analysis

I. Standing

[1] We begin with the Church's argument that Plaintiffs lack standing to pursue their claims.

Standing is a jurisdictional principle that stems from the notion of "justiciability." It is designed to ensure that a party seeking relief from the courts has a sufficient stake in the controversy to justify adjudication of the dispute. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). There is a well-established body of case law governing standing in the federal courts. But because "North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution," our State's standing jurisprudence is broader than federal law. *Id.* at 114, 574 S.E.2d at 52. Although our Supreme Court has declined to set out specific criteria necessary to show standing in every case, the Supreme Court has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury. *See, e.g., Goldston v. State*, 361 N.C. 26, 34–35, 637 S.E.2d 876, 881–82 (2006).

Here, Plaintiffs were voting members of the Church in good standing at the time of the alleged violations of the Church bylaws, and at the time they filed this lawsuit. They alleged that they were harmed, as voting members of the Church, by the Church's failure to follow the proper voting procedure when amending the bylaws.

But the Church asserts in its brief that, "[a]fter this lawsuit was filed, plaintiffs were advised . . . they are no longer members of the church." Thus, the Church argues, Plaintiffs no longer have standing because, as non-members of the Church, they have no right to challenge the Church bylaws or voting practices.

We disagree. Because the injury Plaintiffs allegedly suffered occurred during a time that the parties concede they were active members of the Church, and because that injury has not been resolved or redressed among these parties, we hold that Plaintiffs have a sufficient stake in the controversy to confer standing despite their removal as

members after the lawsuit began. *See Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009).

II. Trial court's entry of summary judgment

[2] We next turn to the merits of the parties' arguments. This case returns to us with the parties asserting many of the same arguments they asserted in *Davis I*. Since then, the law has not changed. As we explained in *Davis I*, "[t]he 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." 242 N.C. App. at 264, 774 S.E.2d at 892 (quoting *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510–11, 714 S.E.2d 806, 810 (2011)). Courts may resolve disputes involving a religious institution through "neutral principles of law." *Id.* "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Id.*

We first address the portion of the trial court's order that declared the 2013 amendments to the Church's bylaws void. As our analysis in *Davis I* indicates, this portion of the order did not violate the First Amendment. Although with respect to the "establishment and exercise of church polity the civil courts have no jurisdiction or right of supervision," the courts can determine "whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules" with respect to "civil, contract or property rights." *Western Conference of Original Free Will Baptists of North Carolina v. Creech*, 256 N.C. 128, 140–41, 123 S.E.2d 619, 627 (1962).

Put another way, when the Church creates written bylaws that govern the use of church property, and other matters unrelated to church doctrine and religious practice, courts can review whether the Church and its members followed the procedural rules created in those bylaws. *Davis I*, 242 N.C. App. at 265, 774 S.E.2d at 892. The trial court did so, consistent with our mandate from *Davis I*, when it declared that the means by which the Church and its members voted to amend the bylaws violated the procedure established in the bylaws. We therefore affirm that portion of the trial court's judgment.

[3] The Church next challenges the portion of the trial court's ruling that is, in effect, a mandatory injunction stating that "[a]n election to fill vacancies in the office of deacon and trustee shall be held at the next regular business meeting of the church, but in any event, no later than ninety (90) days from the filing of this Order." The Church, citing *Creech*, argues that this portion of the trial court's order impermissibly assumes

a supervisory role over Church governance. Plaintiffs concede that the trial court "exceed[ed] its authority by . . . ordering a new vote." We agree and therefore vacate this portion of the trial court's order.

[4] Finally, we agree with the Church that the trial court properly determined it could play no part in determining whether deacons and trustees properly were removed from their posts. As the trial court held, the Church bylaws "are silent as to the process for removing deacons and trustees." Neither party directs this Court to any neutral principles of law that would permit this Court to fill in the gaps. With no neutral principles to apply, the courts have no authority to wade into when and how these church leaders are removed from office. *Id.*

Conclusion

Consistent with our previous mandate in this case, we affirm the trial court's judgment that the 2013 proposed amendments to the Church bylaws are void because, applying neutral principles of law, the Church did not properly use the procedure contained in the bylaws when attempting to amend them.

We vacate the portion of the trial court's order requiring the Church to hold elections to fill vacancies in the offices of Church deacons and trustees at a specified time.

VACATED IN PART AND AFFIRMED IN PART.

Judges ELMORE and HUNTER, JR. concur.

GRIER FLEISCHHAUER, REX H. FRAZIER AND JENNIE FRAZIER, ROBERT TAYLOR AND BARRY TAYLOR, JACK V. MACKMULL; HERBERT NETHERTON AND DOROTHY L. NETHERTON, ED HARTMAN AND KATHY HARTMAN, STEPHEN J. LEARY AND PATTI LEARY, BARBARA SACCHI, JACK MATTHEWS AND SERENA MATTHEWS, JERRY TOOMES; DONALD LESAGE AND JUDY LESAGE; EDWARD MENNONA; STANLEY M. FARRIOR AND JULIE E. FARRIOR; BILL BURNS AND JULIE BURNS; LISA BERESNYAK; WALTER STARKEY; CATHERINE MURPHY; RANDY PRICE; DON TISDALE AND VICKY TISDALE; JAMES YORK AND DIANA YORK; KIM FRANCE; GWEN FRAZIER AND JENNIE FRAZIER; KEVIN KEIM; BEN AND MARY THOMPSON, PLAINTIFFS

v.

TOWN OF TOPSAIL BEACH, NORTH CAROLINA, DEFENDANT

No. COA17-915

Filed 6 March 2018

Jurisdiction—subject matter jurisdiction—ripeness—no final determination—use of land—declaratory judgment

The trial court did not err in a declaratory judgment action, concerning the issuance of building permits on beach property that would allow for the alteration of dunes, by granting defendant town's motion to dismiss based on lack of subject matter jurisdiction where the issues raised by the complaint were not ripe for review. There was no final determination about what uses of the land would be permitted by defendant, and plaintiff landowners' speculation that defendant would make a certain determination was insufficient to create a justiciable case or controversy.

Appeal by plaintiffs from an order entered 13 April 2017 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 7 February 2018.

Kilpatrick Townsend & Stockton, LLP, by Phillip A. Harris, Jr., Todd S. Roessler, and Joseph S. Dowdy, for plaintiffs-appellants.

Rountree Losee, LLP, by Stephen D. Coggins, Anna Richardson-Smith, and Laura K. Greene, and Jack Cozort, for defendant-appellant.

ARROWOOD, Judge.

Grier Fleischhauer; Rex H. Frazier and Jennie Frazier; Robert Taylor and Barry Taylor; Jack V. Mackmull; Herbert Netherton and Dorothy L. Netherton; Ed Hartman and Kathy Hartman; Stephen J. Leary and Patti

Leary; Barbara Sacchi; Jack Matthews and Serena Matthews; Jerry Toomes; Donald Lesage and Judy Lesage; Edward Mennona; Stanley M. Farrior and Julie E. Farrior; Bill Burns and Julie Burns; Lisa Beresnyak; Walter Starkey; Catherine Murphy; Randy Price; Don Tisdale and Vicky Tisdale; James York and Diana York; Kim France; Gwen Frazier and Jennie Frazier; Kevin Keim; and Ben and Mary Thompson ("plaintiffs") appeal from an order granting Town of Topsail Beach's ("defendant" or "Topsail Beach") motion to dismiss for lack of subject matter jurisdiction and dissolving a previously issued temporary restraining order. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Topsail Beach, a municipality organized and existing pursuant to the laws of North Carolina, is located on a barrier island along the southeastern coast of North Carolina. Plaintiffs own soundside properties on the south end of Topsail Beach. Twenty-eight undeveloped lots ("the oceanfront lots") lie between plaintiffs' properties and the Atlantic Ocean. Some of the plaintiffs own lots adjacent to the land, while others own lots a city block or more from the oceanfront lots.

On 19 December 2016, plaintiffs filed suit against Topsail Beach, seeking a declaratory judgment that (1) any excavation or manmade alterations of the landward dune on the oceanfront lots would violate local ordinances, the town's land use plan, and federal law, and (2) any permits issued by defendant that would allow the excavation or manmade alterations of the landward dune on the lots would violate local ordinances, the town's land use plan, and federal law. Plaintiffs also requested injunctive relief, enjoining defendant "from issuing any [permits] that would allow the owners of [the oceanfront lots] to proceed with excavation or any manmade alterations of the landward dune and development of the lots." That same day, plaintiffs obtained an *ex parte* temporary restraining order, prohibiting defendant from issuing building permits on "property that would allow the alteration of dunes."

On 28 December 2016, the temporary restraining order was modified and extended. On 16 February 2017, defendant answered and filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, motion to strike pursuant to Rule 12(f), motion to join necessary parties pursuant to Rule 12(b)(7), and motion to dissolve the temporary restraining order pursuant to Rule 65.

On 30 March 2017, defendant's motions came on for hearing in Pender County Superior Court, the Honorable R. Kent Harrell presiding. The materials considered at the hearing, including pleadings,

motions, affidavits, and memoranda submitted to the court, tended to show as follows.

State and local government have concurrent responsibilities with regard to coastal area management in North Carolina. N.C. Gen. Stat. § 113A-101 (2017). Under State law, the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. § 113A-100 *et seq.*, requires the property owners of the oceanfront lots to obtain a CAMA minor development permit ("CAMA permit") before constructing a residence on their lot. *See* N.C. Gen. Stat. § 113A-118(a) (2017). The North Carolina Division of Coastal Management, the agency tasked with administering CAMA, has issued minor development permits to six of the property owners of the oceanfront lots in accordance with State law.

Once an owner of an oceanfront lot obtains a CAMA permit, the owner must then obtain a zoning permit and a building permit from the municipality before he can construct a residence. The building permit process aims to ensure compliance with the State Building Code and local ordinances, including the town's Flood Damage Prevention Ordinance ("FDPO"). The FDPO states, "[t]here shall be no alteration of sand dunes which would increase potential flood damage[,]" Topsail Beach, N.C., Code ("Town Code") § 14-75(7) (2017), and requires property owners in a VE Zone,[1] where the oceanfront lots are located, to provide an engineering analysis that a proposed project will not increase potential flood damage before they may obtain a building permit. Whether a proposed project will increase potential flood damage is a site specific inquiry. Once the town, through a permit official, decides whether to allow or deny a building permit, any "person aggrieved" may seek review of the decision to the Board of Adjustment, and, if discontent with the Board decision, may seek redress in the courts. *See* Town Code §§ 16-301, 16-351 (2017). A "person aggrieved" includes one who either has "an ownership interest in property that is the subject of the situations or conditions[,]" or:

> [p]ersons who will suffer special damages that:
>
> a. Arise by virtue of the person aggrieved's ownership interest in property that is adjacent to property that is the subject of situations and conditions that are the subject of a final decision . . . ; and

1. A VE Zone is a "coastal high hazard area[,]" defined as "special flood hazard areas . . . associated with high velocity waters from storm surges or seismic activity . . . ." Town Code § 14-75.

b. Are distinct from any damage all the remainder of the town may suffer in consequence of the situations and conditions; and

c. Are directly and proximately caused by situations and conditions that are the subject of a final decision.

Town Code § 16-295(a) (2017). "A town officer or official, department, board, or commission[,]" or certain associations organized to protect and foster the interest of a particular neighborhood or local area, as set out in § 16-295, may also qualify as a "person aggrieved" pursuant to the Town Code. *Id.* Presently, Topsail Beach has received no applications for a zoning permit or a building permit for the oceanfront lots.

Although State and local law manage the development of North Carolina's coast, Topsail Beach also opts in to the National Flood Insurance Program ("NFIP"), created by the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 *et seq.*, and administered by the Federal Emergency Management Agency ("FEMA"). To participate in the NFIP, a municipality must adopt ordinances setting forth certain minimum requirements to reduce the risk of flood damage. 44 C.F.R. § 59.22(a)(3) (2017). The minimum requirements include prohibiting the man-made alterations of naturally occurring sand dunes in VE zones that would increase potential flood damage. *See* 44 C.F.R. §§ 59.1, 60.3(e) (2017). Property owners receive lower insurance premiums through the NFIP if local law adopts heightened standards of flood protection in addition to the minimum requirements. When a participant in the NFIP fails to implement or enforce certain requirements, it may be subject to probation or suspension from the program. 44 C.F.R. § 59.24(d) (2017). The NFIP must provide the participant with notice and an opportunity to cure any deficiencies before placing the participant on probation or suspending the participant from the program. *Id.* The policyholders in Topsail Beach receive the highest possible discount on their flood insurance premiums, and Topsail Beach has not received notice that it may be subject to probation or suspension from the program, or that the premiums available to policyholders may increase.

On 14 December 2016, defendant repealed one of its local ordinances, the Dune Protection Ordinance, which provided protections for dunes that were additional to the FDPO that plaintiffs allege generally prevented development of the oceanfront lots. Although the FDPO remains in effect, plaintiffs allege the issuance of building permits and development of the oceanfront lots is now imminent. Plaintiffs claim that developing the oceanfront lots will increase the potential flood

damage to plaintiffs' properties, and jeopardize both their participation in the NFIP and also their discounted NFIP premiums.

After hearing arguments of counsel, and reviewing the pleadings, motions, affidavits, and memoranda in the record, the trial court dismissed plaintiffs' complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because (1) the issues raised by the complaint were not ripe for review because there was no final determination about what uses of the land will be permitted by defendant, and (2) plaintiffs did not have standing to pursue their action.

Plaintiffs appeal.

II. Discussion

Plaintiffs present two issues on appeal. First, plaintiffs argue the trial court erred in concluding the issues raised in the complaint are not ripe for adjudication. Second, plaintiffs argue the trial court erred in concluding that plaintiffs did not have the standing to institute this action. We agree with the trial court that this matter is not ripe for adjudication. Therefore, we affirm the trial court's order dismissing plaintiffs' action for lack of subject matter jurisdiction, however, we do not reach the issue of whether plaintiffs had standing to institute the action.

Rule 12(b)(1) of the North Carolina Rules of Civil Procedure "permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citing N.C.R. Civ. P. 12(b)(1) (2017)). We review a trial court's dismissal for lack of subject matter jurisdiction *de novo* and may consider evidence outside the pleadings. *Id.* at 482, 720 S.E.2d at 735 (citation omitted).

"Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Prop. Rights Advocacy Grp. ex rel. Its Members v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (citation and internal quotation marks omitted). To satisfy this requirement, the complaint must show "that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough[,]" *id.* at 182, 617 S.E.2d at 717 (citation and internal quotation marks omitted), because "[t]he resources of the judicial system should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions." *Andrews v. Alamance Cty.*, 132 N.C. App. 811, 814, 513 S.E.2d 349, 350 (1999) (citation and internal quotation marks omitted).

A speculative possibility that land development might proceed in the future does not constitute a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718. Indeed, "[a]ny challenges relating to land use are not ripe until there has been a final determination about what uses of the land will be permitted." *Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted).

Here, plaintiffs sought a declaratory judgment that the development of the oceanfront lots, and the issuance of permits to develop the same, violates local and federal law because any development would alter the landward dune on the properties. However, plaintiffs have not shown that defendant made a final determination as to what development of the land, if any, will be permitted by the town. Plaintiffs have not even shown that the oceanfront lot owners have submitted applications for zoning or building permits to defendant to request such a determination. Additionally, there is no evidence that FEMA has notified defendant, or any flood insurance policyholder within Topsail Beach, that, with regard to NFIP, probationary status is impending or that policyholders' insurance premiums may increase.

In essence, plaintiffs ask us to rule that they may challenge the permissible uses of neighboring oceanfront lots based on a speculative possibility that development will proceed in the future. We decline to do so, as, until defendant makes a final decision about what uses of the oceanfront lots will be permitted, any challenge related to the use thereof will not be ripe for adjudication. *See Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted). Therefore, the trial court correctly dismissed plaintiffs' action for lack of subject matter jurisdiction.

We note that plaintiffs argue that because defendant permitted the construction of a beach house in 2014, prior to the decision to repeal the Dune Protection Ordinance, it is clear that defendant will approve similar development, which plaintiffs allege violates federal and local laws. We disagree. It would be precipitous to presume Topsail Beach has made a final decision as to the permissible development of the oceanfront lots because defendant previously authorized a building permit for an oceanfront property. Plaintiffs' speculation that defendant will make a certain determination is insufficient to create a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718.

Plaintiffs failed to show the existence of a justiciable case or controversy. *See Andrews*, 132 N.C. App at 815, 513 S.E.2d at 351. Thus,

we affirm the trial court's dismissal of plaintiffs' action for lack of subject matter jurisdiction and do not reach or decide the issue of whether plaintiffs have standing.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

DONNIE L. GOINS AND JACKIE KNAPP, PLAINTIFFS
v.
TIME WARNER CABLE SOUTHEAST, LLC, AND WAKE ELECTRIC MEMBERSHIP CORPORATION D/B/A WAKE ELECTRIC, DEFENDANTS

No. COA17-531

Filed 6 March 2018

1. Negligence—contributory—following too closely

In an accident that began with cyclists running over a downed utility line, the issue of contributory negligence in whether plaintiff Knapp was following the cyclist in front of her too closely was for the jury. Furthermore, even if she was following too closely, there was a question of whether she would have hit the wire even if no one was in front of her.

2. Negligence—sudden emergency—instruction—prejudicial error

An instruction on sudden emergency was prejudicial error in a case arising from an accident that began with cyclists running over a downed power line. There was evidence that defendant did not act reasonably in attending to the downed power line, on which the trial court correctly instructed the jury; evidence of contributory negligence in that plaintiffs were traveling too fast, failed to keep a proper lookout, and that defendant followed the cyclist in front of her too closely, on which the trial court also instructed the jury; but no evidence from which the jury should have been asked to determine whether plaintiff's failure to see the wire was caused by some sudden emergency.

Appeal by Defendant from judgment entered 8 August 2016 and order entered 30 September 2016 by Judge Elaine M. O'Neal in Wake County Superior Court. Heard in the Court of Appeals 16 October 2017.

Martin & Jones, P.L.L.C., by H. Forest Horne and Huntington M. Willis, for the Plaintiffs-Appellees.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Thomas M. Buckley and Joshua D. Neighbors, for the Defendant-Appellant.

DILLON, Judge.

Donnie L. Goins and Jackie Knapp (together, "Plaintiffs") brought this action seeking damages sustained when they each (at different times) collided with a utility line owned by Time Warner Cable Southeast, LLC, ("Defendant") that was lying at ground level in a public roadway. The jury found that Defendant was negligent and that neither Plaintiff was contributorily negligent. Defendant appeals from the trial court's judgment entered based on the jury's verdict and from the trial court's subsequent denial of its Motion for Judgment Notwithstanding the Verdict ("JNOV"). We agree with Defendant that, based on our jurisprudence, the trial court committed reversible error by instructing the jury on the sudden emergency doctrine, an instruction which provided a theory by which the jury could determine that neither Plaintiff was contributorily negligent. Specifically, there was no evidence to support the instruction. Accordingly, we vacate the judgment entered by the trial court and remand the matter for a new trial.

I. Background

The evidence presented at trial tended to show the following:

On 11 January 2014, severe weather caused a utility line belonging to Defendant to fall from its poles. That same day, Defendant was notified of the fallen line.

The following morning, Donnie Goins ("Plaintiff Goins") was cycling and was severely injured when his front tire made impact with the line, which was still lying in the roadway. A short time later, Jackie Knapp ("Plaintiff Knapp") was cycling when a cyclist directly in front of her struck the wire and wrecked. Plaintiff Knapp was unable to stop before colliding with him, resulting in a pile-up and causing Plaintiff Knapp to sustain severe injuries.

A jury ultimately found Defendant responsible for both Plaintiffs' injuries, and the trial court entered judgment on the verdict and denied Defendant's subsequent motion for JNOV. Defendant now appeals.

II. Analysis

Defendant contends that the trial court erred in two respects. First, Defendant argues that the trial court should never have allowed the issue of Plaintiff Knapp's contributory negligence to reach the jury, contending that Plaintiff Knapp was contributorily negligent as a matter of law. Second, Defendant argues that a jury instruction regarding the doctrine of sudden emergency was not warranted in this case. We address each argument in turn.

A. Plaintiff Knapp's Contributory Negligence

[1] In its first argument, Defendant challenges the trial court's denial of its JNOV as to Plaintiff Knapp, contending that Plaintiff Knapp was contributorily negligent as a matter of law for cycling too closely to the cyclist in front of her before she was injured. Therefore, Defendant argues, the issue of Plaintiff Knapp's contributory negligence should never have gone to the jury.[1] We disagree.

"[A] directed verdict [or a JNOV] for [the moving party] on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to [the non-moving party] establishes the [non-moving party's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976). Decisions regarding motions for directed verdict and JNOV are questions of law, to be reviewed *de novo*. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013).

Defendant contends that the only reasonable conclusion to be drawn from the evidence in this case is that Plaintiff Knapp was negligent *per se*, and that the trial court should have granted its summary motions on the issue. Specifically, Defendant claims Plaintiff Knapp's actions fall within the purview of Section 20-152(a) of our General Statutes, in that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." N.C. Gen. Stat. § 20-152 (2015). It is true that a violation of the statute amounts to negligence *per se*. *See Ratliff v. Duke Power Co.*, 268 N.C. 605, 612, 151 S.E.2d 641, 646 (1966).

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1. We note here that Defendant's contentions on appeal regarding the contributory negligence of Plaintiffs focuses solely on Plaintiff Knapp. Whether it was proper for the jury to review any negligence on the part of Plaintiff Goins is not before us on appeal.

However, our Supreme Court has repeatedly held that a rear-end collision by a following vehicle is mere evidence that the driver may have been following too closely, and such is a question of fact for the jury. *See Beanblossom v. Thomas*, 266 N.C. 181, 188-89, 146 S.E.2d 36, 42 (1966); *Fox v. Hollar*, 257 N.C. 65, 71, 125 S.E.2d 334, 338 (1962).

We hold that the issue of Plaintiff Knapp's contributory negligence was one for the jury. There is a question as to whether Plaintiff Knapp was following the cyclist in front of her too closely. Furthermore, assuming she was following too closely, there is a question as to whether this negligence proximately caused her injuries. That is, the jury could have determined from the evidence that Plaintiff Knapp would have hit the wire and been injured anyway even if no one was in front of her.

The evidence presented to the jury was not such that the only reasonable conclusion to be drawn was in favor of Defendant on the question of Plaintiff Knapp's contributory negligence, and we therefore find no error.

B. Sudden Emergency

[2] Defendant's second argument concerns the trial court's jury instruction regarding the doctrine of sudden emergency, to which it objected at trial. Specifically, Defendant contends that there was no evidence to support this instruction.

We review challenges regarding the appropriateness of jury instructions to determine, first, whether the trial court abused its discretion, *see Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 393, 396 (1988), and, second, whether such error was likely to have misled the jury. *Union Cty. Bd. of Educ. v. Union Cty. Bd. of Comm'rs* 240 N.C. App. 274, 290-91, 771 S.E.2d 590, 601 (2015). "[W]e consider whether the instruction [challenged] is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence." *Minor v. Minor*, 366 N.C. 526, 531, 742 S.E.2d 790, 793 (2013). For the reasons stated below, we agree with Defendant that the evidence did not warrant the instruction and that the error was prejudicial.

Our Supreme Court has explained that the doctrine of sudden emergency excuses the actions of a party which may normally constitute negligence where the party so acted *in response* to a sudden emergency which the party did not cause:

> The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in

> such an emergency. *If he does so, he is not liable for failure to follow a course which calm, detached reflection at a later date would recognize to have been a wiser choice.*

Rodgers v. Carter, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1966) (emphasis added).

The doctrine of sudden emergency applies only to conduct, alleged to be negligent, that occurs *after* the emergency arises. *See Carrington v. Emory*, 179 N.C. App. 827, 830, 528 S.E.2d 532, 534 (2006) ("[A] sudden emergency arises in most, if not all, motor vehicle collisions, but the doctrine of sudden emergency is applicable only when there arises from the evidence . . . an issue of negligence by an operator *after being confronted by the emergency*." (alteration in original) (emphasis added)). In applying the doctrine,

> the jury is permitted to consider, in its determination of whether specific conduct was reasonable under the circumstances, that the actor faced an emergency. It logically follows that in order for perception of an emergency to have affected the reasonableness of the actor's conduct, the [actor] *must have perceived the emergency circumstance and reacted to it.*

Pinckney v. Baker, 130 N.C. App. 670, 673, 504 S.E.2d 99, 102 (1998) (emphasis added).

In the present case, the trial court properly instructed the jury on Defendant's negligence, as there was evidence, taken in the light most favorable to Plaintiffs, that Defendant did not act reasonably in attending to its fallen utility line. Further, the trial court properly instructed the jury on Plaintiffs' contributory negligence, as there was evidence, taken in the light most favorable to Defendant, that Plaintiffs were traveling too fast and that they failed to keep a proper lookout, and that Plaintiff Knapp followed too closely to the cyclist in front of her.

However, over Defendant's objection, the trial court also instructed the jury on the doctrine of sudden emergency as a theory by which the jury could excuse Plaintiffs' behavior of traveling too fast or failing to keep a proper lookout, which normally might constitute contributory negligence. Defendant argues the trial court improperly instructed the jury on sudden emergency because the instruction was not supported by the evidence. We agree. As our Supreme Court has held, a motorist is not entitled to a sudden emergency instruction to excuse otherwise negligent behavior (e.g., failing to keep a proper lookout) where it is this otherwise negligent behavior that contributed to the emergency:

> A motorist is required in the exercise of due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen. Where a motorist discovers, or in the exercise of due care should discover, obstruction within the extreme range of his vision and can stop if he acts immediately, but his estimates of his speed, distance, and ability to stop are inaccurate and he finds stopping impossible, he cannot then claim the benefit of the sudden emergency doctrine.
>
> The crucial question in determining the applicability of the sudden emergency doctrine is thus whether [the motorist], when approaching the [obstruction in the roadway], saw or by the exercise of due care should have seen that he was approaching a zone of danger. Did his failure to decrease his speed and bring his [vehicle] under control without first ascertaining the nature of the highway conditions ahead of him constitute negligence on his part which contributed to the creation of the emergency thereafter confronting him? The sudden emergency must have been brought about by some agency over which he had no control and not by his own negligence or wrongful conduct.

Hairston v. Alexander Tank, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984) (citations omitted).

Plaintiffs contend the instruction was proper because "the emergency situation *was created by* the very negligence of [] [D]efendant giving rise to the cause of action, namely a dangerous hazard left in the roadway." (emphasis in original). Plaintiffs' argument misconstrues the sudden emergency doctrine. That is, assuming the jury determined that Plaintiffs failed to keep a proper lookout, Defendant's failure to remove the wire did not *cause* Plaintiffs' failure to keep a proper lookout or failure to travel at a safe speed. The doctrine of sudden emergency would apply if, for instance, the Plaintiffs were keeping a proper lookout and then, suddenly, an outside agency, such as a car turning into their lane of traffic, caused them to swerve into the wire. In such a case, their action of swerving in a direction without first determining if there was an obstacle in that direction might be excused since their action of swerving was in response to a sudden emergency, i.e., the car turning into their lane of traffic.

In the present case there is no evidence that an outside agency caused them to fail to keep a proper lookout. For example, Plaintiff

Knapp admitted she was unaware that a hazardous road condition existed and had no opportunity to "react" or attempt to avoid injury before colliding with the cyclist in front of her. Her testimony necessarily precludes application of the sudden emergency doctrine. Likewise, Plaintiff Goins testified he was simply traveling down a hill and then suddenly saw the wire in the road and did not have time to react. There was no evidence that any outside agency distracted them.

Accordingly, based on the evidence, the questions were (1) whether Defendant was negligent in failing to attend to its wire and (2) whether Plaintiffs were contributorily negligent in failing to perceive the wire. There was no evidence from which the jury should have been asked to determine whether Plaintiffs' failure to perceive the wire was caused by some sudden emergency.

Further, we are persuaded, if not compelled, by our Supreme Court's holding in *Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 806 (1966) to conclude that the instruction constituted *prejudicial* error likely to mislead a jury. In *Rodgers*, our Supreme Court held that it was prejudicial error for the trial court to instruct on sudden emergency where the evidence showed that a motorist seeking the instruction hit a child who ran into the road in his path, where there was otherwise no evidence of any prior emergency which caused the motorist to be distracted:

> The learned judge who presided at the trial of this action so instructed the jury [on the motorists' duty to keep a proper lookout], but he added to these instructions [his] remarks concerning the doctrine of sudden emergency, which were not applicable in view of the evidence presented and could have confused the jury as to the principle by which they were to be guided in reaching their verdict.

Rogers, 266 N.C. at 571, 146 S.E.2d at 812.

In the present case, it may be that the jury determined Plaintiffs were not contributorily negligent because they kept a proper lookout. Alternatively, it may be that the jury determined that either or both of the Plaintiffs were not keeping a proper lookout and/or were following too closely, but improperly determined that Plaintiffs were otherwise not contributorily negligent because they were confronted with the "sudden emergency" of a wire in their path which they could not avoid. Because there is a reasonable possibility that the latter occurred, we must conclude that the instruction on sudden emergency was prejudicial error.

III. Conclusion

We conclude that the trial court did not err in denying Defendant's JNOV motion. We conclude, however, that the trial court did commit prejudicial error by instructing the jury on the doctrine of sudden emergency. We vacate the judgment and remand the matter for a new trial consistent with these conclusions.

NEW TRIAL.

Chief Judge McGEE and Judge CALABRIA concur.

IN THE MATTER OF C.P.

No. COA17-639-2

Filed 6 March 2018

1. Child Abuse, Dependency, and Neglect—dependency—appropriate alternative child care arrangement

The trial court erred in a child neglect and dependency case by adjudicating a child as dependent where the child had an appropriate alternative child care arrangement. The child was living with his brother, who was a responsible adult.

2. Child Abuse, Dependency, and Neglect—neglect and dependency—reunification—concurrent plan

The trial court erred in a child neglect and dependency case by failing to order reunification as a concurrent plan during the initial permanency planning hearing pursuant to N.C.G.S. § 7B-906.2(b).

3. Child Abuse, Dependency, and Neglect—reunification efforts—ceased at first permanency planning hearing

Because it was bound by a prior decision in *In re H.L.*, 256 N.C. App. 450 (2017), the Court of Appeals held that the trial court did not err by ceasing reunification efforts with respondent mother at the first permanency planning hearing based on its findings that reunification would be unsuccessful or not in the juvenile's interests. Because the prior holding was contrary to the plain statutory language, the Court of Appeals panel noted that the issue would need to be resolved through an en banc hearing or a decision of the N.C. Supreme Court.

4. Child Abuse, Dependency, and Neglect—neglect and dependency—permanent plan of guardianship—statutorily required findings

The trial court erred in a child neglect and dependency case by ordering a permanent plan of guardianship with a relative without making a finding, as mandated by N.C.G.S. § 7B-906.1(e)(1), on whether it was possible for the child to be returned to respondent-mother within six months and, if not, why placement of the child with respondent-mother was not in the child's best interest.

5. Appeal and Error—preservation of issues—guardianship—notice—failure to raise issue at trial

Respondent-mother waived appellate review of her argument that the trial court erred by awarding guardianship of her child to a non-parent without finding that respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected parental status. Respondent-mother had ample notice that guardianship was being recommended, but she failed to raise the issue below.

Judge ARROWOOD concurring in result only.

Appeal by respondent-mother from order entered 21 March 2017 by Judge Joseph Moody Buckner in Orange County District Court. Originally heard in the Court of Appeals 14 December 2017. Petition for Rehearing allowed 14 February 2018.

Holcomb and Stephenson, LLP, by Angenette Stephenson, for Orange County Department of Social Services, petitioner-appellee.

K&L Gates LLP, by Leah D'Aurora Richardson, for guardian ad litem.

W. Michael Spivey, for respondent-appellant mother.

BERGER, Judge.

Respondent-mother appeals from an order that adjudicated the juvenile, C.P. ("Carl"),[1] as a neglected and dependent juvenile, and awarded permanent guardianship to the juvenile's half-brother ("Chris"). On

1. Carl is a stipulated pseudonym for ease of reading and to protect the juvenile's identity pursuant to N.C.R. App. P. 3.1(b).

January 2, 2018, this Court filed an opinion that reversed the adjudication that Carl is a dependent juvenile, and vacated the order for failing to order reunification as a concurrent plan and failing to make required findings regarding guardianship with Chris. On January 29, 2018, petitioner-appellee Orange County Department of Social Services ("OCDSS") filed a Petition for Rehearing pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure. We subsequently allowed the Petition for Rehearing, and this opinion replaces the original opinion. After careful review, we affirm the portion of the trial court's order that ceases reunification efforts; reverse the adjudication that Carl is a dependent juvenile; and vacate the order for failing to order reunification as a concurrent permanent plan and failing to make required findings regarding guardianship with Chris.

Factual and Procedural Background

On July 14, 2015, OCDSS filed a juvenile petition alleging that thirteen-year-old Carl was a neglected and dependent juvenile. A hearing was held on August 6, 2015 and an order was entered on August 27, 2015 in which the trial court (1) adjudicated Carl and his older sister[2] as neglected and dependent, and (2) awarded custody of Carl and his sister to their adult half-brother. Respondent-mother appealed.

On October 4, 2016, this Court reversed and remanded the case for a new hearing because the order did not result from a proper adjudicatory hearing or valid consent by Respondent-mother. *In re K.P., C.P.*, ___ N.C. App. ___, ___, 790 S.E.2d 744, 749 (2016). On remand, the trial court held an "adjudication/disposition and permanency planning hearing" on March 2, 2017. The trial court (1) adjudicated Carl as dependent and neglected, and (2) awarded guardianship of Carl to his adult half-brother in an order dated March 21, 2017. Respondent-mother filed notice of appeal.

Respondent-mother concedes that she failed to serve a copy of her written notice of appeal on the guardian for the juvenile. *See* N.C.R. App. P. 3.1(a). Although Respondent-mother failed to comply with Rule 3.1(a) of the North Carolina Rules of Appellate Procedure, this Court has the discretionary authority "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)(1). Therefore, we grant Respondent-mother's petition for writ of certiorari and address the merits of this case.

2. Carl's sister has reached the age of majority and is not a party to this appeal.

Analysis

[1] Respondent-mother first contends that the court erred by adjudicating Carl as a dependent juvenile. The Juvenile Code defines a dependent juvenile as one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Respondent-mother argues that all of the evidence and findings show that Carl was always in the care of a suitable relative, and thus he could not be adjudicated as dependent. OCDSS concedes that this adjudication was error because at the time of the adjudication, Carl was living with his brother, who was a responsible adult. Because he had an appropriate alternative child care arrangement, Carl was not a dependent juvenile, and the adjudication must be reversed.

[2] Respondent-mother next contends that the court lacked authority to cease reunification efforts at the initial dispositional hearing. Specifically, she argues the court improperly heard the adjudication, initial disposition, and permanency planning hearings on the same day. Associated therewith, Respondent-mother also asserts that the trial court was required to order reunification as a concurrent plan pursuant to N.C. Gen. Stat. § 7B-906.2.

The "dispositional hearing shall take place immediately following the adjudicatory hearing." N.C. Gen. Stat. § 7B-901(a) (2015). The trial court is required to "conduct a review hearing within 90 days from the date of the [initial] dispositional hearing." N.C. Gen. Stat. § 7B-906.1(a) (2015). Within one year from "the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." *Id.* The General Assembly has not proscribed conducting adjudications, dispositional, and permanency planning hearings on the same day, and the trial court did not err in hearing these matters.

However, Respondent-mother correctly asserts, and the guardian *ad litem* concedes, that the trial court erred in failing to order reunification as a concurrent plan during the initial permanency planning hearing. "At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. *Reunification shall remain* a primary or secondary plan unless" certain findings are made. N.C. Gen. Stat. § 7B-906.2(b) (2015) (emphasis

added). The statutory requirement that "reunification shall remain" a plan presupposes the existence of a prior concurrent plan which included reunification. Thus, reunification must be part of an initial permanent plan. Here, even though the trial court found that Respondent-mother "presents a risk to the health and safety of the juvenile" and that "[r]eunification efforts . . . would be futile," the trial court erred in failing to include reunification as part of the initial concurrent plan.

[3] The same cannot be said of reunification efforts, however. Pursuant to Section 7B-906.1(g), a trial court "*shall* inform the parent, guardian, or custodian that failure or refusal to cooperate with the plan may result in an order of the court in a *subsequent* permanency planning hearing that reunification efforts may cease." N.C. Gen. Stat. § 7B-906.1(g) (2015) (emphasis added). However, despite the plain language of Section 7B-906.1(g), a prior panel of this Court has held that a trial court can cease reunification efforts at the first permanency planning hearing if necessary findings of fact were made that showed reunification would be unsuccessful or not in the juvenile's interests. *In re: H.L.*, ___ N.C. App. ___, ___, 807 S.E.2d 685, 693 (2017).[3] The trial court made findings that: Respondent is a danger to C.P.'s health and safety; Respondent failed to take her medications properly; Respondent was unable to feed or care for C.P.; C.P. did not feel safe with Respondent; C.P. was afraid to go to sleep because of Respondent's behavior; and Respondent abused medications and used marijuana which impacted her ability to function and parent C.P. The trial court also found that reunification efforts would be futile and Respondent was unable to provide a safe and stable home for C.P. These findings support the trial court's conclusion that reunification efforts may be ceased, and we must affirm this portion of the order despite the fact that such action is contrary to the plain language of Section 7B-906.1(g).

[4] Respondent-mother next contends that the court erred by ordering a permanent plan of guardianship with a relative without making a finding mandated by N.C. Gen. Stat. § 7B-906.1(e)(1) (2015); namely,

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3. Respectfully, it appears that our Court in *H.L.* did not focus on Section 7B-906.1(g) in its entirety. The second sentence of that section requires prior notice be provided to a parent before reunification efforts may be ceased. Thus, the statutory language precludes eliminating reunification efforts at the permanency planning hearing in this case, as appellant never received the mandated notice. However, case law requires us to follow *H.L. 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.") This issue will need to be resolved through an *en banc* hearing with this Court, or a decision from the North Carolina Supreme Court.

"[w]hether it is possible for the juvenile to be placed with a parent within the next six months, and if not, why such placement [with the parent] is not in the juvenile's best interests." *Id.* The guardian *ad litem* and OCDSS concede that the order does not contain the mandated finding. Although the trial court addressed Respondent-mother's faults as a mother and the fractured relationship she had with Carl, the court erred in not finding the key issues of whether it is possible for the child to be returned to her within six months, and if not possible, why placement of the child with Respondent-mother is not in the child's best interest.

[5] Respondent-mother next contends that the court erred by awarding guardianship of Carl to a non-parent without finding that Respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected parental status. Respondent-mother concedes that she did not raise this issue in the trial court but argues she did not have the opportunity.

"[T]o apply the best interest of the child test in a custody dispute between a parent and a non-parent, a trial court must find that the natural parent is unfit or that . . . her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). This finding should be made when the court is considering whether to award guardianship to a non-parent. *In re P.A.*, 241 N.C. App. 53, 66-67, 772 S.E.2d 240, 249 (2015). To preserve the issue for appellate review, the parent must raise it in the court below. *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (citation omitted). However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing. *In re R.P.*, ___ N.C. App. ___, ___, 798 S.E.2d 428, 431 (2017). Here, although counsel had ample notice that guardianship with Chris was being recommended, Respondent-mother never argued to the court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis. We conclude Respondent-mother waived appellate review of this issue.

Conclusion

Accordingly, we affirm the portion of the trial court's order that ceases reunification efforts. We reverse the adjudication that Carl is a dependent juvenile, and vacate the order for failing to order reunification as a concurrent permanent plan and failing to make required findings regarding guardianship with Chris. Because we reverse and remand, we need not address the issue of visitation, but we note that

the trial court made appropriate findings pursuant to N.C. Gen. Stat. § 7B-905.1. We remand for findings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judge ELMORE concurs.

Judge ARROWOOD concurs in result only.

IN THE MATTER OF D.A.

No. COA17-819

Filed 6 March 2018

1. Child Abuse, Dependency, and Neglect—child abuse and neglect—constitutionally protected status as parent—sufficiency of findings of fact

The trial court erred in a child abuse and neglect case by finding and concluding that respondent-father acted inconsistently with his constitutionally protected status as a parent where the findings of fact were insufficient.

2. Child Abuse, Dependency, and Neglect—child abuse and neglect—reunification efforts—sufficiency of findings

The trial court erred in a child abuse and neglect case by failing to make the necessary findings of fact to cease reunification efforts with respondent-mother when it awarded permanent custody of a child to his foster parents.

Appeal by respondents from order entered 12 May 2017 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 15 February 2018.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

Miller & Audino, LLP, by Jay Anthony Audino, for respondent-appellant mother.

Julie C. Boyer for respondent-appellant father.

Parker Poe Adams & Bernstein LLP, by E. Bahati Mutisya, for guardian ad litem.

TYSON, Judge.

Respondent-parents appeal from an order granting full physical and legal custody of their child, D.A., to court-approved caretakers. We vacate and remand.

I. Background

Respondents are married and both serve as active-duty marines in the United States Marine Corps. D.A. was born in June 2014. On 9 July 2014, Respondents sought medical treatment for D.A. after Respondent-father observed dried blood in D.A.'s mouth and nose. D.A. was hospitalized for over two weeks while being treated for a pulmonary hemorrhage.

Respondents sought further medical care for D.A. on 16 September 2014. D.A. was evaluated for possible maltreatment and a blood disorder. A skeletal survey revealed a healing rib fracture, which was not present in an earlier skeletal survey in July 2014. After a medical evaluation, D.A. was diagnosed as suffering from child physical abuse.

Following an investigation by law enforcement, Respondent-mother was charged with felony assault inflicting serious bodily injury, felony child abuse, and misdemeanor contributing to the delinquency of a juvenile. Respondent-father was charged with misdemeanor contributing to the delinquency of a juvenile. Respondent-mother subsequently pled guilty to misdemeanor child abuse. Respondent-father's charge was dismissed.

On 22 September 2014, the Onslow County Department of Social Services ("DSS") filed a juvenile petition, alleging that D.A. was abused and neglected. DSS obtained nonsecure custody of D.A. the same day. Following a hearing, the trial court entered an order on 15 June 2015 adjudicating D.A. as an abused and neglected juvenile. Respondents were ordered to submit to mental health and psychological evaluations, follow all resulting recommendations, and complete parenting classes. The trial court held a permanency planning hearing on 13 January 2016, after which the court entered an order establishing a primary permanent plan of reunification "with a parent, with a secondary plan of custody with a relative or court-approved caretaker." After a 31 August 2016 permanency planning hearing, the trial court entered an order on 12 May 2017, which granted custody of D.A. to his foster parents and waived further review. Respondents timely filed notice of appeal.

II. Issues

Respondent-father contends the trial court erred by: (1) finding and concluding that he had acted inconsistently with his constitutionally protected status as a parent; (2) finding that returning the juvenile to the home of his parents would be contrary to the juvenile's best interests; (3) placing the juvenile in the custody of the foster parents as the most reasonable permanent plan; and, (4) ruling that it would be in the best interests of the juvenile for him to be placed in the full legal and physical custody of the foster parents.

Respondent-mother contends: (1) the trial court's findings were not supported by clear, cogent, and convincing evidence and it failed to make the necessary findings of fact to cease reunification efforts with Respondent-mother and to grant custody to D.A.'s foster parents; and, (2) the evidence presented at the permanency planning hearing did not support the trial court's finding that Respondent-mother has unresolved mental health issues, and the trial court abused its discretion to make such a finding.

III. Standard of Review

"A trial court must determine by 'clear and convincing evidence' that a parent's conduct is inconsistent with his or her [constitutionally] protected status." *Weideman v. Shelton*, ___ N.C. App. ___, ___, 787 S.E.2d 412, 417 (2016) (citation omitted), *disc. review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

Our review of "[w]hether . . . conduct constitutes conduct inconsistent with the parents' [constitutionally] protected status" is *de novo*. *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 242 (2011) (citation omitted). Under this review, we "consider[ ] the matter anew and freely substitute[ ] [our] judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted).

IV. Analysis

A. Respondent-Father's Appeal

[1] Respondent-father argues that the trial court erred in finding and concluding that he acted inconsistently with his constitutionally protected status as a parent. We agree.

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (alteration in original) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). As is present here, "to apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009).

DSS and the guardian *ad litem* ("GAL") argue that, because custody was granted from a non-parent (DSS) to a non-parent (the foster parents), the trial court did not need to find that the parents had acted inconsistently with their constitutionally protected status prior to awarding permanent custody to the foster parents. In support of this position, they cite *In re J.K.*, 237 N.C. App. 99, 766 S.E.2d 698, 2014 WL 5335274 (2014) (unpublished). In *In re J.K.*, this Court held that the trial court was not required to find that the parents were unfit or had acted inconsistently with their constitutionally protected status before transferring custody because "the court in the order under review did not transfer legal custody from a parent to a nonparent, but instead transferred legal and physical custody from DSS to a relative." *Id.* at 2014 WL 5335274 *5-6.

As an initial issue, DSS and the GAL fail to inform this Court of the *In re J.K* opinion's unpublished status, in violation of N.C. R. App. P. 30(e)(3). Moreover, DSS and the GAL fail to acknowledge the next statement in the opinion that "[w]e note, nonetheless, that at the time when the court awards *permanent* custody of [the juvenile], it must make these determinations prior to awarding custody to a nonparent." *Id.* at 2014 WL 5335274 *6 (emphasis supplied).

Because the trial court awarded *de facto* permanent custody of D.A. to the foster parents and waived further review, the trial court was first required to find that the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents. *See In re P.A.*, 241 N.C. App. 53, 56, 66-67, 772 S.E.2d 240, 243, 249 (2015)

(instructing the trial court on remand to make findings regarding whether the respondent had lost her constitutionally protected right of control over her child after the trial court had initially failed to do so when transferring custody from DSS to a nonparent).

In awarding permanent custody of D.A. to his foster parents, the trial court found and concluded that "[R]espondents have acted inconsistently with their constitutionally protected status as parents." In support of this finding and conclusion, the trial court found that

> this juvenile has been in the custody of [DSS] for nearly two years, and in that time, neither respondent parent has taken responsibility or provided a plausible explanation for the injuries that occurred to the juvenile while he was in their care. That while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries, and this remains a barrier to reunification as the home remains an injurious environment.

Respondent-father contends that the trial court held him responsible for D.A.'s injuries, despite a lack of any evidence tending to show Respondent-father caused or knew the cause of D.A.'s injuries. The trial court's findings are insufficient to support a conclusion that Respondent-father was unfit or had acted inconsistently with his constitutionally protected status as a parent.

In the case of *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517, *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010), the trial court held both the respondent-parents responsible for the juvenile's injury where the court made findings that the injury was non-accidental, the parents were the sole caregivers for the juvenile when she sustained her injury, neither parent explained nor took responsibility for the juvenile's injury, and the trial court could not "separate the parents as to culpability." *Id.* at 124-25, 695 S.E.2d at 520.

In affirming the trial court's order, this Court stated that, "[a]s the child's sole care providers, it necessarily follows that Respondents were jointly and individually responsible for the child's injury. Whether each Respondent directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each Respondent is responsible." *Id.* at 129, 695 S.E.2d at 522-23.

By contrast, in the present case, the trial court failed to make any finding that the juvenile's injuries were non-accidental or that

Respondents were the sole caregivers for D.A. when he sustained his injuries. Moreover, even if the trial court intended to find that Respondents were the sole caregivers when D.A. suffered non-accidental injuries, the court's findings are unclear of which parent or parents the court assigned responsibility.

The trial court's finding that the "injuries . . . occurred to the juvenile while he was in [Respondents'] care" could suggest that the court intended to hold both parents responsible for D.A.'s injuries. However, the findings next state that "while respondent father's charges were dismissed, and despite pleading guilty to the charges imposed upon her for harming her child, respondent mother continues to maintain that she did not inflict the juvenile's injuries." This finding suggests the trial court looked to Respondent-mother as the cause for D.A.'s injuries.

The trial court's findings do not explain how Respondent-father was culpable for D.A.'s injuries, unfit, or otherwise acted inconsistently with his constitutionally protected status as a parent to support its conclusion. Absent clear findings, based upon clear, cogent, and convincing evidence, demonstrating how Respondent-father acted inconsistently with his constitutionally protected status, the trial court erred in awarding permanent custody of D.A. to the foster parents. We vacate and remand for a new hearing.

Respondent-father additionally challenges one of the trial court's findings of fact as unsupported by the evidence. We need not review Respondent-father's remaining arguments because of our holding that the trial court's findings do not support its ultimate finding and conclusion that Respondent-father acted inconsistently with his constitutionally protected status as parent.

B. Respondent-Mother's Appeal

[2] Respondent-mother first contends that the trial court lacked clear, cogent, and convincing evidence and necessary findings of fact to cease reunification efforts with Respondent-mother and grant permanent custody to D.A.'s foster parents. In response, DSS and the GAL contend that the trial court did not cease reunification efforts in the order.

We agree with Respondent-mother that the permanent order, without further scheduled hearings, effectively ceases reunification efforts. In the case of *In re N.B.*, 240 N.C. App. 353, 771 S.E.2d 562 (2015), this Court held that the trial court ceased reunification efforts in the permanency planning order despite not explicitly doing so by "(1) eliminating reunification as a goal of [the juveniles'] permanent plan,

(2) establishing a permanent plan of guardianship with [the prospective guardians], and (3) transferring custody of the children from [Youth and Family Services] to their legal guardians." *Id.* at 362, 771 S.E.2d at 568.

In this case, the order eliminated reunification as a goal of D.A.'s permanent plan, established a permanent plan of full legal and physical custody with the foster parents, and transferred custody of the child to the foster parents. In addition, the order waived regular periodic reviews and released all the attorneys for the parties and the GAL. While the trial court's order may not have explicitly ceased reunification efforts, these actions show its effect, in fact and in law, was to waive further review and cease reunification efforts.

1. Ceasing Reunification

We must now consider whether the trial court's order contains the necessary statutory findings to cease reunification efforts. Under our statutes: "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) 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) (2017). Here, the trial court failed to make findings under N.C. Gen. Stat. § 7B-901(c) (2017). The court could only cease reunification efforts after finding that those efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.

2. Statutory Requirements

In order to cease reunification efforts in this way, the statute requires:

> the court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d).

Here, the trial court made findings related to the factors listed in N.C. Gen. Stat. § 7B-906.2(d)(1)-(3), all of which were largely favorable to Respondents. The trial court failed to make findings related to whether Respondents were acting in a manner inconsistent with D.A.'s health or safety. The order also contains no findings that embrace the requisite ultimate finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety."

While the order does state that "the home remains an injurious environment" and that "a return home would be contrary to the best interests of the juvenile," these findings are not tantamount to a finding that reunification efforts would be unsuccessful or inconsistent with D.A.'s health or safety. These findings appear to be more directed at Respondent-mother's failure to admit she had caused D.A.'s injuries after pleading guilty to misdemeanor child abuse. The trial court failed to make the requisite findings required to cease reunification efforts. N.C. Gen. Stat. § 7B-906.2(d) clearly requires the trial court to do so before it ceases reunification efforts. We vacate the trial court's order and remand for further proceedings.

Respondent-mother also challenges one of the findings as lacking in evidentiary support. In light of our holding, we need not review that challenge. We determine the trial court's findings do not support its decision to cease reunification efforts and make custody of D.A. with the foster parents permanent.

V. Conclusion

We vacate the trial court's order and remand for further proceedings. With respect to Respondent-father, the trial court is to make the statutory findings to determine whether Respondent-father is unfit or has acted inconsistently with his constitutionally protected status, and, if so, how. With respect to Respondent-mother, the trial court is to also make the necessary statutory findings and conclusions to determine whether to cease reunification efforts. All findings must be supported by clear, cogent and convincing evidence. *It is so ordered.*

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

IN RE HOFFMAN LIVING TRUST

[258 N.C. App. 255 (2018)]

IN THE MATTER OF THE ADMINISTRATION OF THE MAYETTE E. HOFFMAN LIVING TRUST U/A DATED AUGUST 4, 1997, AS AMENDED.
KIMBERLI HOFFMAN BULLARD, CO-TRUSTEE, PETITIONER
v.
JAMES HOFFMAN, CO-TRUSTEE, RESPONDENT

No. COA17-972

Filed 6 March 2018

Trusts—administration of trusts—costs and attorney fees

On appeal from an order of a superior court clerk awarding attorney fees and costs to petitioner trustee, the trial court did not err by finding there was a factual basis to support the award. The residence at issue, which was the primary asset of the trust, was wasting as it remained vacant, and respondent co-trustee obstructed efforts to repair and sell it, jeopardizing the health of the trust.

Appeal by respondent from order entered 23 May 2017 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 7 February 2018.

Booth Harrington & Johns of NC PLLC, by A. Frank Johns, for petitioner-appellee.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for respondent-appellant.

ARROWOOD, Judge.

James Hoffman ("respondent") appeals from an order entered in Guilford County Superior Court denying his appeal from the Guilford County Clerk of Superior Court's award of attorneys' fees in favor of Kimberli Hoffman Bullard ("petitioner"). For the following reasons, we affirm.

I. Background

This appeal of an attorneys' fees award arises out of a special proceeding between petitioner and respondent in their roles as co-trustees of a trust, the primary asset of which is a residence located at 4423 Oakcliffe Road in Greensboro, North Carolina. Petitioner and respondent became solely responsible for the property as co-trustees after their father, Mayette E. Hoffman, was adjudicated incompetent in September

2010 and suffered health issues in May 2012 that forced him to permanently move from the property into a retirement community, leaving the property unoccupied. Letters by the father's attorney, now petitioner's attorney, dated 10 May 2013 and by the father's guardian's attorney dated 3 December 2013 notified petitioner and respondent of their fiduciary duties as co-trustees to manage the property, including dealing with the repair and maintenance issues that plagued the property.

Over the next couple of years, because petitioner and respondent disagreed over the management of the trust, the property remained vacant, bills went unpaid, insurance lapsed, and the property continued to deteriorate. On 10 April 2015, petitioner sent a certified letter to respondent outlining alleged breaches of respondent's fiduciary duties and requesting that he voluntarily resign as co-trustee. Respondent signed a return receipt on 13 April 2015 acknowledging acceptance of the letter, but did not otherwise respond.

On 28 May 2015, petitioner filed a petition to remove respondent as co-trustee for cause. In addition to removal, petitioner sought damages, costs, and attorneys' fees. The petition sought removal and damages because

> [r]espondent, by failing [to] agree to repairs and renovations to ready and place the real property on the market; by allowing the assets to waste and to continue to deplete the cash assets of the guardianship estate; by acting unilaterally to place the home for sale; and by removing personal property of his father from the home, has acted with bad faith and with improper motive and has breached the duty to administer the trust in good faith, in accordance with its terms, purposes and interests of the beneficiaries in violation of N.C.G.S. § 36C-8-801 and 802.

Respondent filed a response and counterclaim on 4 June 2015. Respondent alleged that he had expended his own time and money on the upkeep of the property and to avert tax foreclosure. Thus, respondent sought reimbursement for amounts expended. Respondent also sought to prevent petitioner from "hampering and disrupting the efforts to sell the real estate." Petitioner answered respondent's counterclaim.

The matter first came on for hearing 18 and 19 April 2016 before the Honorable Lisa Johnson-Tonkins, Clerk of Guilford County Superior Court. That hearing concluded with the parties agreeing to sell the property and requesting that the clerk continue the matter to allow time for a sale. The clerk granted the continuance. The matter came back on

for hearing on 11 July 2016. At that time, issues in the sale of the property were explained to the clerk and the matter was continued again until 11 August 2016. Issues with the sale continued with the prospective buyer backing out of the purchase agreement and wanting a lower price. As a result of the issues and the need to have the property occupied with some source of income, petitioner's counsel recommended a lease to the potential buyer until they could proceed with a sale. Counsel for the parties worked together to construct a lease but respondent would not agree. Therefore, petitioner sought court approval of the lease by motion filed 26 July 2016. The clerk filed an order approving the lease on 1 August 2016 "in order to stop the wasting of the asset of the trust and to receive rental income." The matter then came back on for hearing on 11 August 2016 as scheduled. At that time, the clerk revisited petitioner's petition to remove respondent as co-trustee. An order granting the petition to remove respondent as co-trustee was filed 16 September 2016.

Following the removal of respondent as co-trustee, petitioner filed a motion for attorneys' fees and costs on 12 October 2016. Petitioner sought a total of $26,096.70, claiming it was expressly allowed under N.C. Gen. Stat. § 36C-10-1004.

Petitioner's motion for attorneys' fees and costs came on for hearing before the clerk on 18 November 2016. On 22 November 2016, the clerk filed an order awarding some attorneys' fees and costs to petitioner. Specifically, the clerk found "[t]hat [r]espondent's behavior as [c]o-[t]rustee during July and August 2016 was egregious and obstructionist, jeopardizing the health of the Mayette E. Hoffman Living Trust[.]" Therefore, the award was limited to $7,243.00 in attorneys' fees and costs for services rendered to petitioner from 7 July 2016 through 12 August 2016. The clerk concluded the limited award for "services rendered . . . during the period of July and August 2016[] is within the discretion of [the] [c]ourt and is appropriate because of [r]espondent's egregious and obstructionist behavior as [c]o-[t]rustee[.]" The clerk further concluded that "[c]osts before and after July and August 2016 are not relevant to the egregious and obstructionist behavior of . . . [r]espondent and are therefore denied[.]"

Respondent filed notice of appeal to the superior court on 30 November 2016. Following a hearing before the Honorable David L. Hall in Guilford County Superior Court, on 23 May 2017, an order was filed by the superior court denying respondent's appeal. Respondent filed notice of appeal to this Court on 22 June 2017.

II. Discussion

The sole issue raised by respondent on appeal to this Court is whether the superior court erred in finding there was a factual basis to support the clerk's award of attorneys' fees and costs. Respondent does not challenge his removal as co-trustee.

Pertinent to this case, the North Carolina Uniform Trust Code ("UTC"), Chapter 36C of the North Carolina General Statutes, provides that "[i]n a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, as provided in the General Statutes." N.C. Gen. Stat. § 36C-10-1004 (2017). The "North Carolina Comment" to N.C. Gen. Stat. § 36C-10-1004, in turn, directs attention specifically to N.C. Gen. Stat. § 6-21(2), which provides that "[c]osts . . . shall be taxed against either party, or apportioned among the parties, in the discretion of the court" in "any action or proceeding which may require the construction of any . . . trust agreement, or fix the rights and duties of parties thereunder . . . ." N.C. Gen. Stat. § 6-21(2) (2017).

Respondent acknowledges these statutes, but asserts the discretion of the court to award attorneys' fees and costs is "severely constrained" to those instances where there is egregious conduct, such as bad faith or fraud. Respondent relies on the "Official Comment" to N.C. Gen. Stat. § 36C-10-1004 and this Court's decision in *Belk v. Belk*, 221 N.C. App. 1, 728 S.E.2d 356 (2012). We are not convinced that the discretion of the court to award attorneys' fees and costs is so limited.

In *Belk*, the respondent was ordered to pay $138,043.55 in attorneys' fees in an action seeking an accounting of custodial funds. *Belk*, 221 N.C. App. at 5, 728 S.E.2d at 358. Among the issues raised on appeal, the respondent argued the trial court erred in awarding attorneys' fees because there is no statutory authority for such an award under the North Carolina Uniform Transfers to Minors Act ("UTMA"), Chapter 33A of our General Statutes. *Id.* at 12, 728 S.E.2d at 363. Recognizing that attorneys' fees are not ordinarily recoverable in North Carolina absent express statutory authority and that the UTMA is silent regarding attorneys' fees, this Court looked to N.C. Gen. Stat. § 6-21(2) and determined that "trust agreement" as used in that section was not limited to trusts governed under the UTC, but included custodial arrangements under the UTMA. *Id.* at 12-15, 728 S.E.2d at 363-64 ("[T]he generic provision in N.C. Gen. Stat. § 6-21(2) allowing for the award of attorney's fees in an action to fix the rights and duties of a party under a trust agreement encompasses actions under UTMA for the removal of a custodian and

resulting accounting[.]"). This Court bolstered its decision with a review of cases from other jurisdictions which have allowed attorneys' fees in actions to remove a custodian or for an accounting under the UTMA. *Id.* at 15-17, 728 S.E.2d at 365-66.

Upon finding attorneys' fees may be awarded in UTMA cases pursuant to N.C. Gen. Stat. § 6-21(2), this Court went a step further, stating that "we believe there is ample authority providing for not only an award of attorney's fees in this case, but also for that award to be assessed against respondent personally, as custodian, rather than against the corpus of [the] UTMA account." *Id.* at 18, 728 S.E.2d at 366. This Court explained that

> persuasive precedent from other jurisdictions on this issue reason that the goal of a breach of fiduciary duty action under UTMA is to make the minor beneficiary whole, which cannot be accomplished if the minor, either personally or by way of her account funds, must expend more in attorney's fees to recover the lost corpus of the account than its original value.

Id. This Court also, again, looked to the UTC and N.C. Gen. Stat. § 36C-10-1004, noting that the "Official Comment" to that section provides that

> [t]he court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. *Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud.*

Id. at 19, 728 S.E.2d at 367 (quoting N.C. Gen. Stat. § 36C-10-1004 official comment) (emphasis in original).

Respondent contends that, in *Belk*, this Court "adopted and confirmed that standard [in the official comment] and required egregious conduct on the part of the respondent in order to justify the award of fees against him." We disagree.

In *Belk*, this Court cited *In re Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988), explaining as follows:

> Finding the assessment of costs, including attorney's fees assessable to a fiduciary, *both as a matter of then-existing statutory law and as a matter of common law in North*

> *Carolina*, we stated in *Jacobs* that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred[,]" and therefore, "the court may fashion its order to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee."

Belk, 221 N.C. App. at 19, 728 S.E.2d at 367 (quoting *Jacobs*, 91 N.C. App. at 146, 370 S.E.2d at 865) (emphasis added).

In *Jacobs*¸ the Court affirmed the order awarding costs, witness fees, and attorneys' fees without mention of whether the conduct of the defendant was egregious. *Jacobs*, 91 N.C. App. at 145-46, 370 S.E.2d at 865. In fact, the Court noted there were no findings showing a breach of the UTC. *Id.* at 146, 370 S.E.2d at 865. Similarly, in *Belk*, this Court held that the trial court's finding of egregious conduct "indicates that respondent undoubtedly would have been personally liable for the attorney's fees at issue, were this an ordinary breach of trust action." *Belk*, 221 N.C. App. at 21, 728 S.E.2d at 368.

This Court never addressed whether conduct that is not egregious would support an award of attorneys' fees. Although this Court noted that in most instances an award of attorneys' fees will not be taxable personally against a trustee or custodian, *id.*, the Court's holding does not mandate that egregious conduct is required for an award of attorneys' fees.

Nowhere in N.C. Gen. Stat. §§ 36C-10-1004 or 6-21(2) is there a requirement that egregious conduct must be found before attorneys' fees are awarded. Read together, those statutes provide that in a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, in the discretion of the court. Furthermore, it is important to recognize that although *Belk* looks to the UTC for guidance, its decision that attorneys' fees may be awarded in a UTMA proceeding is not controlling in this case.

However, even if we had found that egregious conduct was necessary for awarding fees, we find there was sufficient evidence of egregious conduct to support the superior court's denial of respondent's appeal. N.C. Gen. Stat. § 1-301.3 governs the appeal of trust and estate matters determined by the clerk. Concerning the duty of the judge on appeal, it provides as follows:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of facts.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law. . . .

N.C. Gen. Stat. § 1-301.3(d) (2017).

Here, the clerk's award of attorneys' fees was limited to $7,243.00 for services rendered from 7 July 2016 through 12 August 2016. The clerk found that during that time frame, "[r]espondent's behavior as [c]o-[t]rustee . . . was egregious, and obstructionist, jeopardizing the health of [the trust]." Upon review of the record on appeal to the superior court, the court determined that the clerk's findings were supported by the pleadings and hearings before her, that these findings supported the clerk's award of attorneys' fees, and the clerk did not abuse her discretion in awarding attorneys' fees.

Respondent now argues the superior court erred because there is no basis for the clerk's finding that his behavior was egregious and obstructionist. We disagree.

The record indicates that all parties were aware that there were issues with the property that were causing the property to waste as it remained vacant. The parties were attempting to sell the property and had an agreement to sell but the buyer had reservations. During the relevant period from 7 July 2016 through 12 August 2016, respondent refused to accept alternative arrangements, maintaining the position that the buyer must perform on the agreement to purchase. The record is clear that all parties were concerned that the property was deteriorating while it was vacant, without utilities, uninsured, and uninsurable. The lease agreement proposed by petitioner's counsel and negotiated by counsel for all parties addressed these concerns and generated income while the parties continued to work towards a sale of the property. Respondent's counsel indicated that they did not oppose petitioner's motion for the clerk to approve the lease, but explained that respondent refused to sign the lease as co-trustee. When the clerk made her decision to remove respondent as co-trustee, the clerk indicated it was this unwillingness and delay by respondent, which caused the clerk to intervene to approve the lease, that constituted the change in circumstances warranting removal.

Based on the record before this Court, we hold the superior court did not err in determining the record supported the clerk's finding that respondent's conduct "was egregious and obstructionist, jeopardizing the health of the [trust]." The clerk did not abuse her discretion in awarding attorneys' fees.

III. Conclusion

For the reasons discussed, we affirm the superior court's denial of respondent's appeal from the clerk's award of attorneys' fees.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF J.A.K.

No. COA17-574

Filed 6 March 2018

1. Appeal and Error—termination of parental rights—reunification—statutory requirements to appeal

An order in a termination of parental rights case that ceased reunification efforts with the father complied with the requirements of N.C.G.S. § 7B-1001(a)(5)(a) for appellate review by the Court of Appeals. The current statute, unlike the former version, does not require written notice that the parent was also appealing the reunification cessation order. Review by certiorari was not necessary. There was no statutory right to appeal a later order that merely continued a permanent plan.

2. Termination of Parental Rights—cessation of reunification efforts—findings

Although the father in a termination of parental rights case contended that the trial court erred in ceasing reunification efforts because its findings were not based on sufficient credible evidence, the transcript from the permanency planning hearing was not part of the record on appeal and the father did not reconstruct the proceedings by including a narrative of the hearing in the record. The uncontested findings demonstrated that the father had not made progress on the housing component of his case plan and was not

cooperative with the Department of Social Services. The trial court's uncontested findings were sufficient to show a lack of initiative by the father to demonstrate that reunification would be successful.

3. Termination of Parental Rights—grounds—willfully leaving juveniles in foster care—no reasonable progress to correct conditions

The trial court was justified in terminating a father's parental rights for willfully leaving juveniles in foster care for over twelve months and not making reasonable progress to correct the conditions that led to the removal of the juveniles from their home. The father cited no authority for his contention that the twelve-month period began only when he first appeared at a hearing with counsel. As for the father's challenges to particular findings of fact, it was apparent that the trial court weighed the evidence and drew inferences from it, and the Court of Appeals declined to reweigh the evidence.

4. Termination of Parental Rights—grounds—failure to make progress—willfulness

In a termination of parental rights case, the father's contentions that his conduct was not willful and that he had made reasonable progress under the circumstances was rejected. The father's argument regarding poverty was rebutted directly by the trial court's findings. The findings also demonstrated that the father fell short in achieving a major component of his case plan. The father's completion of parenting classes amounted to nothing more than limited progress and did not rebut his failure to obtain adequate housing.

Judge MURPHY concurring in part and dissenting in part.

Appeal by Father from orders entered 18 April 2016, 19 October 2016, and 22 March 2017 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 18 January 2018.

Jennifer Cooke for Petitioner-Appellee New Hanover County Department of Social Services.

Jeffrey L. Miller for the Respondent-Appellant Father.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

DILLON, Judge.

Father appeals from three orders: the trial court's 22 March 2017 order (the "TPR Order") terminating his parental rights to J.A.K. ("Jack") [1] and two prior permanency planning orders entered in this matter; one entered on 18 April 2016 (the "April Order") eliminating reunification efforts and changing the permanent plan to adoption with a concurrent plan of guardianship; and one entered six months later on 19 October 2016 continuing the April Order (the "October Order"). We affirm the trial court's TPR Order and the April Order, and we dismiss Father's appeal of the October Order.

I. Background

In August 2014, the New Hanover County Department of Social Services ("DSS") obtained nonsecure custody of four-month-old Jack,[2] and filed a petition alleging that he was a neglected juvenile. Father was named in the petition, but, despite several attempts, was never served with process.

In September 2014, the trial court entered an order adjudicating Jack neglected based on the mother's stipulation to the allegations in the petition. Though Father still had not been served with process, the trial court ordered Father to present himself to DSS to enter into a case plan and establish a visitation agreement.

In June 2015, after paternity testing confirmed Father was Jack's biological father, Father was appointed counsel. Father also began visitation with Jack, and he entered into a case plan with DSS. His case plan required completion of parenting classes and maintaining stable and appropriate housing and employment. In a permanency planning order following a September 2015 hearing, the trial court ordered Father to comply with his case plan.

Months later, in the April Order, the trial court ordered DSS (1) to cease reunification efforts with Father; (2) pursue termination of Father's parental rights; and (3) changed the permanent plan for Jack from reunification to adoption by Jack's foster parents, with a concurrent plan of guardianship.

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1. Pseudonyms are used throughout this opinion to protect the identity of the juveniles and for ease of reading.

2. The petition also alleged that Jack's half-brother (who has a different biological father) was also neglected. However, neither the half-brother's father nor the children's mother is a party to this appeal.

In June 2016, DSS filed a petition to terminate Father's parental rights to Jack, alleging two grounds for termination. The petition also sought to terminate the parental rights of Jack's mother. In the October Order, a permanency planning order entered in October 2016, the trial court confirmed the permanent plan of adoption with the foster parents, with a concurrent plan of guardianship with the foster parents.

Following a hearing, the trial court entered the TPR Order, in which it found the existence of both grounds for termination alleged against Father and Jack's mother. The trial court also concluded that termination of the parental rights of Father and of Jack's mother was in the juvenile's best interest. Father appealed.

II. Analysis

[1] As an initial matter, we must determine whether Father's appeals from the April Order and October Order are properly before us. Father has filed an alternative petition for writ of *certiorari* in the event that they are not. We address each order in turn.

In the April Order, the trial court ceased reunification efforts with Father pursuant to N.C. Gen. Stat. § 7B-906.2(b) (2015). Section 7B-1001(a) of our juvenile code states that when our Court is reviewing a trial court order terminating parental rights, our Court shall also review any prior order by the trial court eliminating reunification as a permanent plan if *all* the following apply:

> 1. A motion or petition to terminate the parent's rights is heard and granted.
>
> 2. The order terminating parental rights is appealed in a proper and timely manner.
>
> 3. The order eliminating reunification as a permanent plan is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2015). In this case, the appeal complies with all the requirements of Section 7B-1001(a)(5)(a).

We note that under the former version of N.C. Gen. Stat. § 7B-507(c) (2013), a party seeking review of the reunification order was required to give *written* notice that (s)he was also appealing the reunification cessation order. *See also* N.C. Gen. Stat. § 7B-1001(b). The new statutory scheme, however, does not appear to require written notice. Rather, the plain language of Section 7B-1001(a)(5) suggests that written notice

is no longer required: the statute expressly states that appeal may be taken from an order entered under Section 7B-906.2(b) so long as it is "properly preserved, *as follows*," then listing the three conditions quoted above. N.C. Gen. Stat. § 7B-1001(a)(5) (emphasis added).[3]

Because Father has complied with these requirements, review by *certiorari* is not necessary. Therefore, we dismiss his petition as to the trial court's April Order.

Father also requests issuance of the writ to review the October Order. In that order, however, the trial court merely continued the permanent plan announced in its April Order. Therefore, it is not an order eliminating reunification as a permanent plan pursuant to Section 7B-906.2(b). And Section 7B-1001(a) does not provide for appeal from an order that merely continues a permanent plan. Because Father has no statutory right to appeal from the October Order, we dismiss his appeal and, in our discretion, deny his petition for writ of *certiorari* as to the October Order.

A. April (Permanency Planning) Order

[2] In his first argument, Father contends that the trial court erred in ceasing reunification efforts[4] in the April Order. Specifically, Father contends that the trial court's findings are not based on sufficient credible evidence and are insufficient to comply with the statutory requirements of N.C. Gen. Stat. § 7B-906.2(b). For the following reasons, we disagree.

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010). Findings supported by competent evidence, as well as any uncontested findings, are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

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3. We note that N.C. Gen. Stat. § 7B-1001(b) still describes the manner in which notice to preserve the right to appeal must be made. However, given that the General Assembly eliminated the notice requirement from N.C. Gen. Stat. § 7B-906.2(b), we find that reference to the "notice to preserve" in Section 7B-1001(b) is surplusage. Simply stated, a statute governing the manner in which notice to preserve must be made is ineffectual where there is no statutory requirement that a party must actually give notice to preserve a right of appeal.

4. While the current Section 7B-906.2(b) no longer uses the term "ceasing reunification efforts," the parties and the trial court in the instant case still use this term, which is a vestige of the former Section 7B-507(c).

Pursuant to N.C. Gen. Stat. § 7B-906.2, if it determines that reunification should no longer be part of the permanent plan, the trial court is required to make "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).

First, we note that the transcript from the permanency planning hearing was not made part of the record on appeal. "The burden is on the appellant to 'commence settlement of the record on appeal, including providing a verbatim transcript if available.' " *Sen Li v. Zhou*, ___ N.C. App. ___, ___, 797 S.E.2d 520, 524 (2017) (quoting *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006)). Father has likewise failed to reconstruct the proceedings by including a narrative of the hearing in the record on appeal. *See In re L.B.*, 184 N.C. App. 442, 454, 646 S.E.2d 411, 417 (2007). Without a verbatim transcript or narrative, the evidence Father "challenges as insufficient is not before us in the record." *Sen Li*, ___ N.C. App. at ___, 797 S.E.2d at 524. Consequently, we must deem the findings of fact as conclusive on appeal, and we limit our review to whether the findings of fact support the decision to cease reunification efforts with Father. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.[5]

Here, the trial court found that "a continuation of [reunification] efforts would be clearly futile and inconsistent with the Juveniles' health, safety, and need for a safe, permanent home within a reasonable period of time." While this language is slightly different than the statutory language contained in N.C. Gen. Stat. § 7B-906.2(b), it is sufficient to comply with the requirements of the statute. This ultimate finding

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5. Our Court ordered Father to provide the transcript by August 2017; however, Father failed to meet this deadline and never requested an extension. In November 2017, well after the record was settled and briefs were filed, the transcripts were provided to our Court. Father then filed a motion with our Court to amend the record to incorporate the transcript in December 2017.

A majority of our panel, in our discretion, has denied Father's motion. The dissent disagrees with our decision to deny Father's motion, while agreeing with our ultimate resolution of the appeal. It could be argued that our panel's split decision as to the resolution of Father's motion creates an appeal of right from our decision *on that motion* to the Supreme Court under the plain language of N.C. Gen. Stat. § 7A-30(2):

> Except as provided in [N.C. Gen. Stat. §] 7A-28, an appeal lies of right to the Supreme Court from *any decision* of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges.

N.C. Gen. Stat. § 7A-30 (2017) (emphasis added). A denial of a motion by our Court is arguably a "decision . . . rendered in a case[.]" *Id.*

was based on findings that Father had not progressed on his case plan, that he missed a recent Child and Family Team meeting, that he refused home visits by a social worker, and that his legal fees were a barrier to progress. The court also found that Father's visitation had not been expanded, and that inspection of his home was required prior to any unsupervised visitation with Jack. In another finding, the trial court noted that Father was still trying to obtain housing, from which one can infer that he did not have appropriate or independent housing at the time of the permanency planning hearing.

The uncontested findings of fact demonstrate that Father had not made progress on the housing component of his case plan and was uncooperative with DSS. Given that housing was an area of concern for DSS, and that a year had passed since Father became involved in the case, we conclude that the trial court's findings are sufficient to show a lack of initiative by Father to demonstrate that reunification would be successful and consistent with Jack's health and safety. Accordingly, we hold that the trial court did not err in its April Permanency Planning Order ceasing reunification efforts.[6]

B. TPR Order

[3] Next, Father challenges the trial court's grounds for terminating his parental rights in the TPR Order. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. If this Court determines that the findings of fact support one ground for termination, we need not review the other challenged grounds. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). Any unchallenged findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

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6. Father also claims that the trial court failed to make findings under N.C. Gen. Stat. § 7B-906.2(d), which requires the trial court to make certain findings regarding the parent's progress, cooperation, and other actions. However, Father has not provided any further argument as to the trial court's compliance with Section 7B-906.2(d), and therefore, we decline to address it 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.").

We conclude that the trial court was justified in terminating Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Under this subsection, the trial court must find that the parent *willfully* left the juveniles in foster care for over twelve months, and that the parent has not made reasonable progress to correct the conditions which led to the removal of the juveniles from their home. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005). And it is well-established that "willfulness" under this ground does not require a showing of fault by the parent. *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398 (citation omitted). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001).

As an initial matter, Father contends that he did not leave Jack in foster care for the requisite twelve-month period. Although Jack was taken into nonsecure custody on 18 August 2014, Father contends that as the "non-removal parent," the twelve-month period should not commence until 30 September 2015, when Father purportedly "first was recognized by the court and allowed to participate as a parent with counsel." We disagree.

First, we note that Father cites to no legal authority for his specific contention that the relevant statutory period commenced only when Father first appeared at a hearing with counsel. Indeed, the only case cited by Father supports the opposite conclusion—that the relevant period of time commences when the trial court enters a court order requiring that the juvenile be removed from the home. *In re A.C.F.*, 176 N.C. App. 520, 526, 626 S.E.2d 729, 734 (2006). In *A.C.F.*, this Court held "that 'for more than 12 months' in [N.C. Gen. Stat.] § 7B-1111(a)(2) means the duration of time beginning when the child was 'left' in foster care or placement outside the home *pursuant to a court order*, and ending when the motion or petition for termination of parental rights was filed." *Id.* at 527, 626 S.E.2d at 734-35 (emphasis added and omitted).

Next, we turn to Father's challenges to particular findings of fact. The trial court made finding of fact 11 regarding this ground for termination which outlines Father's behavior during the relevant one-year period, which included his lack of reasonable progress in his visitation with Jack, obtaining adequate housing, gaining employment, and completing parenting classes:

> His delay and lack of progress during the year and nine months prior to the filing of the Termination Petition leads the Court to find that [Father] has not put himself

> in a position to correct his lack of involvement with the child since birth, that he has disregarded the fact that the child's mother has made no progress to correct her issues by repeatedly having the child communicate with her during visitation despite warnings to stop this practice, and did not establish a home for himself and the child in a timely fashion as detailed in the Finding of Fact numbered 9 above.

In finding of fact number 9, the trial court detailed the inadequacies of Father's housing. The court found that Father did not obtain independent housing until 1 April 2016, a week after the permanency planning hearing at which reunification efforts were ceased, and that his residence was later deemed unsafe for Jack. Father told a social worker that his girlfriend often spent the night and that he intended to get a roommate. The lease was under a different name, and a Google search of that name revealed a mugshot of Father. Lastly, he failed to let the social worker visit his prior residence.

Father makes several challenges to findings of fact 9 and 11. First, he claims that most of the findings of fact in finding of fact 11 involve "stale matters and circumstances." Father again claims that the relevant time period began on 30 September 2015, after he attended his first hearing represented by counsel. Again, we are not persuaded, and Father cites no authority for his claim. Indeed, Father was on notice that he was Jack's putative father since April 2014, and he began participating in the juvenile proceedings as early as April 2015. Moreover, much of the finding of fact 11 pertains to Father's actions after his paternity was established. Therefore, we reject his argument that the evidence concerns stale matters.

Next, Father takes issue with the portion of finding of fact 11, quoted above, which provided that by allowing Jack's mother to communicate with Jack, Father disregarded the mother's failure to make progress. He essentially claims the trial court imputed her lack of progress onto him. Father, however, misses the point of this finding. A social worker warned Father several times to refrain from allowing Jack to speak to the mother, but he continued to do so despite the warnings. Thus, in making this finding, the trial court was not imputing the mother's actions to Father, but instead was demonstrating Father's poor judgment and lack of cooperation with DSS.

Father also attempts to challenge several portions of finding of fact number 9 pertaining to his inability to obtain independent and appropriate

housing. He argues that the trial court failed to account for his poverty and his legal woes. He also argues that his apartment was clean and well-decorated, and that DSS's concerns were speculative. In total, he contends that the trial court failed to consider these issues and resolve conflicts in the evidence. Thus, Father does not appear to challenge the factual basis for the findings pertaining to his housing, but instead argues that the trial court should have drawn different inferences from the evidence. However, it is apparent that the court simply weighed the evidence and drew certain inferences from it. This is the duty of the trial court, and we decline to reweigh 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."). Given that the trial court's findings of fact are supported by the testimony of the social worker, we reject Father's challenges to the findings regarding housing.

Father also challenges finding of fact 12, in which the trial court found that Father would benefit from dismissal of the termination of parental rights action in his immigration case. Father argues that consideration of his immigration case was improper and that this finding is not supported by the evidence. However, we conclude that the other findings detailed above are sufficient to support termination of Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, we need not address his challenge to finding of fact 12. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.").

[4] Finally, we address Father's contentions that his conduct was not *willful* and that he made reasonable progress under the circumstances. Father argues that he became fully engaged as a father as soon as his paternity was established and made substantial progress by attending parenting classes and consistently visiting with Jack. Father also argues that his trouble in acquiring independent housing was due to his poverty, which the trial court failed to consider. We are not persuaded.

First, we note that Father's argument regarding poverty is rebutted directly by the trial court's finding of fact 11, in which the trial court found that Father's actions were not solely the result of poverty. Second, the findings of fact demonstrate that Father fell short in achieving a major component of his case plan. Father's case plan had

two main components: to attend parenting classes and to stabilize his housing situation and income. It took Father nearly a year after his initial participation in the case to obtain independent housing, and even then, his housing was not appropriate for Jack. Father used an alias to sign his lease and did not know who would be living in his residence. Without the name of a roommate, DSS had no way to verify whether the residence would provide a safe environment for Jack. Additionally, he had previously refused to allow home visits and he could not provide verification of his income beyond a single check. "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). "Extremely limited progress is not reasonable progress." *Id.* at 700, 453 S.E.2d at 224-25. Thus, based on the findings by the trial court, Father's completion of parenting classes amounts to nothing more than limited progress and does not rebut his failure to obtain adequate housing.

III. Conclusion

In conclusion, we affirm the trial court's April Order and the TPR Order. We dismiss Father's appeal from the October Order entered 19 October 2016.

AFFIRMED IN PART; DISMISSED IN PART.

Judge HUNTER, JR. concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

MURPHY, Judge, concurring in part, but dissenting in the decision rendered as to Appellant's motion.

While I concur in the reasoning and the result based upon the Record and transcripts before us and join whole-heartedly with all but the first paragraph in footnote 5, the Majority's resolution of Father's *Motion for Consideration of Transcript as Part of Record on Appeal* improperly deprives Father of appellate review. Father was not required to act in accordance with our 7 July 2017 *Order*, but the transcriptionist was:

> The motion filed in this cause on the 5th of July 2017 and designated '[Father's] Motion for Transcripts . . .' is allowed. The Court Reporter shall prepare and deliver the transcript for the 24 March 2016 and 22 September 2016

> permanency planning hearings on or before 11 August 2017. The transcriptionist shall upload the transcript to this Court's Electronic Filing site, and shall provide copies 'to the respective parties to the appeal.'

Further, Father had been found indigent at the trial level and assigned the Appellate Defender who in turn assigned counsel of record. As revealed through Father's *Motion for Transcripts* and *Motion for Consideration of Transcript as Part of Record on Appeal*, neither Father nor his counsel could exercise control over the transcriptionist in this matter. The transcriptionist did not complete and upload the transcript until 20 November 2017, more than three months after the date we had ordered, and Father timely filed his motion on 6 December 2017. Therefore, justice requires that we grant Father's motion and consider his arguments in light of the transcripts. I respectfully dissent from that portion of the Majority's opinion that places the burden of the transcriptionist's failure to comply with our *Order* on the indigent party and denies his motion.

IN THE MATTER OF K.C., A MINOR CHILD

No. COA17-1079

Filed 6 March 2018

Termination of Parental Rights—abandonment—law of the case doctrine

> The trial court did not violate the law of the case doctrine where a new petition for termination of parental rights was filed after the Court of Appeals reversed an order that terminated the mother's parental rights based upon abandonment. The new petition was based on a new period of time and supported by new evidence of abandonment.

Appeal by respondent from judgment entered 5 July 2017 by Judge Roy J. Wijewickrama in District Court, Clay County. Heard in the Court of Appeals 22 February 2018.

James L. Blomeley, Jr., for petitioner-appellee.

Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

STROUD Judge.

Respondent appeals from a judgment terminating her parental rights to her minor child. Because this Court's reversal of the trial court's 2015 order terminating respondent's parental rights based upon a petition filed in 2014 does not control the order on appeal, which was entered based upon a new petition for termination and based upon events during the six months next preceding the filing of the 2016 petition, the trial court's order does not violate the "law of the case" doctrine as argued by respondent. We therefore affirm.

The background of this case can be found in the opinion issued at *In re K.C.*, __ N.C. App. __, 805 S.E.2d 299 (2016) ("*K.C. I*") wherein this Court concluded the district court erred when it terminated mother's parental rights to her son Karl[1] on the basis of neglect by abandonment. About six months after issuance of the opinion reversing the 2015 termination, on 16 November 2016, father filed a new petition to terminate respondent's parental rights. *See generally id.* Following a hearing, the trial court entered judgment on 5 July 2017 terminating respondent's parental rights after adjudicating the existence of abandonment under North Carolina General Statute § 7B-1111(a)(7). Respondent appeals.

Respondent does not argue that the findings of facts regarding abandonment are not supported by the evidence, but instead argues that this Court's earlier reversal of the trial court's 2015 termination order based upon abandonment constitutes the law of the case such that the trial court could not again conclude that respondent abandoned Karl based at least in part upon her failure to visit with Karl. But "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." *Bank of America, N.A. v. Rice*, __ N.C. App. __, __, 780 S.E.2d 873, 880 (2015) (citation and quotation marks omitted).

Petitioner filed a new petition for termination of parental rights six months after the filing of this Court's opinion reversing the 2015 order. *See generally K.C. I*, __ N.C. App. ___, 805 S.E.2d 299. Since the hearing on the first petition was held in May of 2015, *see id.* at ___, 805 S.E.2d at 300, a year and a half had elapsed after the first hearing until the filing of the second petition. The new petition alleges:

> As of the date of filing of this petition, the Respondent, the mother of the child, has willfully abandoned the child

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

> for at least six consecutive months immediately preceding the filing of this petition, by withholding her presence, her love, her care, and failing to take any opportunity to display maternal affection, as set forth in G.S. 7B-1111(a)(7), including, but not limited to, the following particulars[.]

The "particulars" alleged in part that respondent "has not asked to see the child since April 10, 2014" nor has she sent letters, gifts, or any other communication since then. The petition also listed respondent's few visits to see the child since 2012, the most recent being 12 October 2013.

Here, the trial court necessarily made some findings related to events that took place prior to the filing of the first petition to terminate parental rights in 2014; obviously, the child's date of birth and history leading up to the first petition's filing had not changed. But in the order on appeal, the district court made several unchallenged findings of fact about events occurring *after* the filing of the first petition. One finding is that respondent had not visited or spoken with Karl since 2013; although this time period – since 2013 – includes 2014, it also includes all of the time after the filing of the 2014 petition up to the filing of the new petition in 2016. In addition, the trial court found that respondent has not sent Karl any cards or gifts, and respondent has not contacted family members to ask about Karl. The trial court ultimately found respondent "has willfully abandoned the minor child for a period of *at least six consecutive months immediately preceding the filing of this petition*, by withholding her presence, her love, her care and failing to take any opportunity to display maternal affection, as set forth in G.S. 7B-1111 (a)(7)." (Emphasis added.) Although respondent's failure to visit with or communicate with the child continued from 2013 until the filing of the second petition (and even thereafter), the prior opinion of this Court does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority even if she never seeks to see him or communicate with him again.

In this Court's first opinion, we noted the trial court's findings regarding the reason for respondent's failure to visit:

> [Respondent] also requested in April 2014 to visit with Karl, but this request was denied based on the decision of Karl's therapist. These actions are not consistent with abandonment as defined under North Carolina law.
>
> Furthermore, the fact that Respondent did not visit Karl between 10 April 2014 and the 4 May 2015 hearing cannot be taken as evidence of abandonment. *The trial*

> *court's findings indicate that Respondent was denied visitation during that period because "the Petitioner declined her request on the grounds that the child's therapist determined that visits should be suspended indefinitely* . . . ." Thus, this lack of contact was not voluntary and therefore cannot support a finding that Respondent intended to abandon Karl. *See In re T.C.B.*, 166 N.C. App. 482, 486–87, 602 S.E.2d 17, 20 (2004) (holding that trial court's conclusion of abandonment was not supported by its findings regarding lack of visits given that respondent's attorney instructed him not to have any contact with child and subsequent protection plan disallowed visitation).

Id. at ___, 805 S.E.2d at 301-02 (emphasis added).

Even if respondent's reason for failing to visit with the child prior to the hearing in the 2014 termination action was the therapist's recommendation, there is no finding of fact in the order on appeal regarding respondent's reasons for her continued failure to visit or contact the child *in the six months prior to the filing of the new petition in 2016*. Despite reversal of the 2015 order terminating her parental rights – which essentially gave respondent a second chance to assert her rights as a parent – she *still* did not have even minimal contact with the child. The trial court made unchallenged findings of fact that petitioner has had the same cell phone number since 2006, and this number was the primary way respondent had contacted him in the past. In addition, the trial court found that respondent had in the past contacted the paternal grandmother, but she has "not done so in several years." The trial court also found that petitioner had the same "home phone number for over three years" but respondent did not call at that number either. Respondent also did not appear at the hearing of this matter, although her counsel had advised her several times, in writing and by telephone, of the court date and advised her "that she needed to be present." There was no evidence and no finding of fact that petitioner prevented respondent from having contact with the child since 2014.

The operative facts supporting the trial court's conclusion of abandonment were based upon the six months immediately preceding the filing of the 2016 petition. Although the history of the child and actions of the respondent prior to the filing of the 2014 petition is the same as it was in 2014, time does not stand still. The law of the case doctrine does not prevent termination of respondent's parental rights based upon her abandonment during the six months next preceding the filing of the

second petition. *See Bank of America, N.A.* at __, 780 S.E.2d at 880. Respondent has not presented any other issues for this Court's review. We affirm the trial court's termination judgment.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

IN THE MATTER OF S.J.T.H., MINOR CHILD

No. COA17-1009

Filed 6 March 2018

Child Abuse, Dependency, and Neglect—neglect—adjudication—paternity—findings

The Court of Appeals reversed an order of the trial court in a child neglect case to the extent that it placed respondent-father's son in the custody of the Department of Human Services and ordered respondent-father to comply with certain conditions to gain custody. The only evidence presented regarding respondent-father was establishment of paternity, and there were no substantive findings of fact regarding him.

Appeal by respondent from order entered 28 June 2017 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Court of Appeals 21 February 2018.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for petitioner-appellee Cabarrus County Department of Social Services.

Jeffrey L. Miller, for respondent-appellant.

Michael N. Tousey, for guardian ad litem.

STROUD, Judge.

Respondent appeals an adjudication and disposition order placing his son in the custody of the Cabarrus County Department of Human Services and ordering him to comply with certain conditions to gain custody. DSS presented no evidence regarding respondent beyond that

supporting paternity, and the trial court made no substantive findings of fact about respondent other than those relevant to paternity. The trial court's findings and conclusions regarding the adjudication of neglect by the mother are not challenged on appeal. We affirm the adjudication of neglect, all portions of the order regarding the mother, and the adjudication of paternity, but we reverse the provisions of the order directing respondent to comply with the order's conditions and remand for entry of an order in compliance with respondent's constitutional and statutory rights as the minor child's father.

I. Background

In February of 2017, Sam[1] was born. Sam's mother identified Abel as his father and gave Sam Abel's last name. Because of mother's prior history with Cabarrus County Department of Human Services ("CCDHS") for her older child and her ongoing drug abuse, Sam could not be released to her custody. Abel initially said he would care for Sam but failed to show up when it was time for Sam's discharge from the hospital. Sam was placed with a family friend. In March of 2017, respondent contacted CCDHS; he reported that he may be Sam's father, and offered to care for him. In April of 2017, CCDHS filed a petition which identified both Abel and respondent as possible fathers, and alleged Sam was a neglected and dependent juvenile based upon mother's prior history with CCDHS and drug abuse; Sam was placed in non-secure custody. In May of 2017, a paternity test confirmed that respondent is Sam's father. In June of 2017, the trial court adjudicated Sam's paternity, adjudicated him as neglected based upon mother's drug abuse and other issues, and granted custody to CCDHS. CCDHS presented no evidence regarding respondent other than basic identification information and evidence to establish paternity.[2] The order -- incorrectly titled as a consent order -- ordered respondent to comply with the same eleven mandates as mother, including completing a substance abuse assessment, undergoing random drug testing, participating in parenting classes, and verifying that he had sufficient income. The order essentially makes no distinction between mother and respondent although all of the evidence addressed mother's issues, including her drug abuse, criminal history,

1. We will use pseudonyms for the child as well as the man Sam's mother initially identified as his father in order to protect the identity of the minor child.

2. The reports by CCDHS provided to the district court addressed mother's circumstances at length but did not address respondent's circumstances or ability to care for the child at all. Despite the absence of any information about respondent, CCDHS recommended exactly the same plan and requirements for respondent as it did for mother. No additional information regarding respondent was presented in testimony at the hearing.

and prior CCDHS involvement, with nothing presented about respondent, who had only been discovered as Sam's father in the prior month. Respondent appeals.

II. Adjudication Order

Respondent does not challenge the trial court's adjudication of paternity nor the adjudication of Sam as a neglected juvenile due to his mother's actions and thus we will not address those portions of the order and, they will remain in force. But respondent challenges the remainder of the order to the extent that it addresses him, particularly as to the trial court's determination that Sam should not be released to his custody and the conditions placed on respondent. *All* of respondent's challenges would require us to analyze whether the evidence supports the trial court's findings of fact and conclusions of law regarding respondent. *See generally In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) ("When an appellant asserts that an adjudication order of the trial court is unsupported by the evidence, this Court examines the evidence to determine whether there exists clear, cogent and convincing evidence to support the findings.")

As respondent points out, there was a total lack of evidence regarding him at the adjudication hearing other than the evidence to establish paternity. Here, there is nothing for this Court to analyze as the record and order are devoid of evidence and findings of fact regarding respondent beyond establishing paternity. There was no evidence about respondent's ability to parent, his home life, his ability to provide for Sam, or any other evidence a trial court must consider before finding a parent unfit or determining custody. While CCDHS urges this Court to ignore respondent's rights as a father and instead consider Sam's best interests, even a determination of his best interests would require evidence about respondent.

> A natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status. 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) (citations, quotation marks, and brackets omitted). Our courts cannot presume a parent to be unfit or to have acted inconsistently with his constitutional

rights as a parent without clear, cogent, and convincing evidence to demonstrate why the parent cannot care for his child. *See id.*; *see also McCabe*, 157 N.C. App. at 679, 580 S.E.2d at 73. In *D.M.*, the minor child was only adjudicated as dependent and

> DSS's juvenile petition alleging dependency was based solely on the actions of Dana's mother and not respondent-father. Here, the trial court specifically found that neither parent is unfit to parent, and thus it could not award permanent custody to the maternal grandmother in the absence of findings of fact and conclusions of law that respondent-father had acted inconsistently with his constitutional rights as a parent. Because the trial court failed to make any findings of fact or conclusions of law as to whether respondent-father had acted inconsistently with his parental rights, it erred in awarding permanent custody to Dana's maternal grandmother. Accordingly, we reverse the 20 July 2010 order awarding custody of Dana to her maternal grandmother.

Id. (citations, quotation marks, and brackets omitted).

In summary, the trial court's adjudication of neglect and adjudication of respondent as father of Sam remain undisturbed. Mother did not appeal and all provisions of the order addressing mother remain in effect. We reverse the order to the extent that it mandates any action by respondent and grants custody to CCDHS. We remand this case for the trial court to enter a new order addressing respondent's rights and granting him custody unless DSS presents clear, cogent, and convincing evidence which would support another disposition. Upon request by any party, the trial court shall receive additional evidence on remand. Because we are reversing and remanding the order in its entirety as to respondent, other than the adjudication of paternity, we need not address respondent's other issues on appeal.

III. Conclusion

Because there was no evidence presented regarding respondent other than establishment of paternity and the trial court made no substantive findings of fact regarding him beyond paternity, we reverse the order to the extent that it requires any actions by respondent and grants custody to CCDHS. We affirm the adjudication of neglect and of paternity.

AFFIRMED in part; REVERSED in part; REMANDED.

Judges DAVIS and ARROWOOD concur.

MAHAFFEY v. BOYD

[258 N.C. App. 281 (2018)]

TODD ROBERT MAHAFFEY, Plaintiff
v.
CHRISTOPHER C. BOYD, Executor for the Estate of
DOROTHY COE BOYD, Defendant

No. COA17-812

Filed 6 March 2018

Civil Procedure—motion for new trial—untimely—improper motion for relief from summary judgment—writ of certiorari

The trial court did not abuse its discretion by denying plaintiff's N.C.G.S. § 1A-1, Rule 59 motion for a new trial where plaintiff exceeded the time permitted for serving and filing the motion by approximately nine months. Further, a Rule 59(a) motion was not a proper ground for relief from an entry of summary judgment, and instead, plaintiff should have filed a writ of certiorari with the Court of Appeals.

Appeal by Plaintiff from order entered 10 October 2016 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 28 November 2017.

Todd Robert Mahaffey, Plaintiff-Appellant, pro se.

McGuire, Wood & Bissette, P.A., by Matthew S. Roberson, for the Defendant-Appellee.

DILLON, Judge.

I. Background

In February 2015, Todd Robert Mahaffey filed a complaint alleging that Christopher C. Boyd (the "Executor"), the executor for the estate of Dorothy C. Boyd, owed him payment for renovations Mr. Mahaffey made to Ms. Boyd's home.

The record shows as follows:

Ms. Boyd died in July 2014. However, in the years before she died, she engaged Mr. Mahaffey to perform work on her home and yard. Mr. Mahaffey continued to perform work on the property at Ms. Boyd's direction, and after Ms. Boyd's death, at the direction of the Executor.

In September 2014, two months after Ms. Boyd's death, Mr. Mahaffey delivered documents to the Executor's law firm consisting of receipts,

bills, and time sheets relating to projects he completed at Ms. Boyd's property. Shortly thereafter, an employee at the law firm asked Mr. Mahaffey to provide clearer documentation of the work he had completed and any payments which had already been made.

In a letter dated 19 November 2014, the Executor informed Mr. Mahaffey that, based on his lack of response to the law firm's request, he was denying Mr. Mahaffey's claim in accordance with N.C. Gen. Stat. § 28A-19-16, which requires that a claim against a decedent's estate be "in writing and state the amount or item claimed[.]" N.C. Gen. Stat. § 28A-19-1 (2013).

Three months later, in February 2015, Mr. Mahaffey commenced this action. In April 2015, the Executor answered the complaint and served requests for admissions, to which Mr. Mahaffey failed to respond in a timely fashion.

In May 2015, the Executor moved for summary judgment, contending that Mr. Mahaffey (1) failed to comply with the requirements of N.C. Gen. Stat. § 28A-19-1 in order to preserve his claim against Ms. Boyd's estate, and (2) performed illegal contracting services because he was not a licensed contractor[1] and undertook a project for which the cost of improvement was greater than $30,000.[2]

In June 2015, after a hearing on the matter, the trial court entered an order granting the Executor's summary judgment motion, based in part on Mr. Mahaffey's failure to respond to the requests for admissions. Mr. Mahaffey timely appealed from the order (the "Summary Judgment Order"); however, he failed to take steps to properly perfect the appeal.

Three months later, in September 2015, the Executor filed a motion to dismiss the appeal. In October 2015, after a hearing, the trial court entered an order dismissing Mr. Mahaffey's appeal of the Summary

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1. Section 87-1 of our General Statutes provides that a person who undertakes "the construction of any building . . . or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more, . . . shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina." N.C. Gen. Stat. § 87-1 (2015). A person acting as a general contractor in North Carolina must be authorized and licensed by the State. N.C. Gen. Stat. § 87-13.

2. In his complaint, Mr. Mahaffey contended that Ms. Boyd requested that he undertake nine consecutive, separate projects on her property, none of which cost more than $30,000. We acknowledge that there certainly existed a material issue of fact as to whether Mr. Mahaffey completed one large project totaling $53,740 or nine separate projects which did not exceed $30,000 per project.

Judgment Order, concluding that Mr. Mahaffey had failed to comply with "the deadlines for presenting the appeal for decision under the North Carolina Rules of Appellate Procedure."

About a year later, on 9 September 2016, Mr. Mahaffey filed a motion titled "Rule 59 Motion for New Trial; Amend Judgment" (the "Rule 59 Motion"). In his Rule 59 Motion, Mr. Mahaffey requested that the trial court reverse its October 2015 order dismissing his appeal of the Summary Judgment Order. In October 2016, the trial court entered an order denying Mr. Mahaffey's Rule 59 Motion (the "Rule 59 Order"). Mr. Mahaffey timely appealed from the Rule 59 Order.

II. Analysis

This matter involves three orders: (1) the Summary Judgment Order entered June 2015; (2) the order entered in October 2015 dismissing Mr. Mahaffey's appeal of the Summary Judgment Order; and (3) the Rule 59 Order.

In his brief on appeal, Mr. Mahaffey seeks review of two of these orders: the Summary Judgment Order and the Rule 59 Order. However, he failed to properly perfect his appeal of the Summary Judgment Order. Our review is therefore limited to consideration of the Rule 59 Order. *See Davis v. Davis*, 360 N.C. 518, 526, 631 S.E.2d 114, 120 (2006) ("Appellate review of a denial of a Rule 59 motion for a new trial is distinct from review of the underlying judgment or order upon which such a motion may be based."). And after careful review, we affirm the trial court's Rule 59 Order.

A trial court's ruling on a motion for new trial under Rule 59 is reviewed for abuse of discretion:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

Davis, 360 N.C. at 523, 631 S.E.2d at 118.

A motion for a new trial under Rule 59 must be served "not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(b). Here, Mr. Mahaffey exceeded the time permitted for serving and filing a Rule 59 Motion by approximately nine months. *See id.* Therefore, we hold that the trial court did not abuse its discretion in denying Mr. Mahaffey's motion.

We further hold, in the alternative, that Mr. Mahaffey's Rule 59 Motion was not an appropriate method of challenging the trial court's order dismissing his appeal from the Summary Judgment Order. Our Court has concluded that a "Rule 59(a) motion is not a proper ground for relief from an entry of summary judgment." *Bodie Island Beach Club Ass'n v. Wray*, 215 N.C. App. 283, 294-95, 716 S.E.2d 67, 77 (2011) (holding that "[b]ecause both Rule 59(a)(8) and (9) are *post-trial* motions and because the instant case concluded at the summary judgment stage, the court did *not* err by concluding that it [would be improper] to set aside default against [the] Defendant [] and vacate the summary judgment pursuant to Rule 59(a)(8) and (9)" (emphasis added)); *see also Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 538 (2016) ("All of the enumerated grounds in Rule 59(a), and the concluding text addressing 'an action tried without a jury,' indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits.' ").[3] Because the order dismissing the appeal was based on Mr. Mahaffey's failure to perfect his appeal from the Summary Judgment Order within the proper time period – a procedural matter – it could not possibly be considered a judgment ending the case on its merits. *See id.*

Accordingly, we conclude that a Rule 59 motion was an inappropriate method of challenging the trial court's order dismissing Mr. Mahaffey's appeal in this case. In order to properly appeal the order dismissing his appeal, Mr. Mahaffey should have filed a petition for writ of *certiorari* with our Court. *See State v. Evans*, 46 N.C. App. 327, 327, 264 S.E.2d 766, 767 (1980). Recently, in *E. Brooks Wilkins Family Medicine, P.A. v. WakeMed*, ___ N.C. App. ___, 784 S.E.2d 178 (2016), our Court concluded that it has no jurisdiction to review an order dismissing an appeal, and thus there is no right of appeal from such an order. *E. Brooks Wilkins Family Medicine*, ___ N.C. App. at ___, 784 S.E.2d at 185. The proper remedy to obtain review of an order of the trial court dismissing an appeal for failure to perfect it within the appropriate time period is

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3. Between our decisions in *Bodie Island* and *Tetra Tech*, a different panel of our Court held that a trial court erred in denying a party's Rule 59 motion to amend a partial summary judgment order, thus sanctioning the use of a motion under Rule 59 to challenge a summary judgment order. *See Rutherford Plantation, LLC v. Challenge Golf Grp. of Carolinas, LLC*, 225 N.C. App. 79, 737 S.E.2d 409 (2013). On this point, *Rutherford* is clearly in direct conflict with *Bodie Island* and *Tetra Tech*. However, although *Rutherford* was affirmed *per curiam* by our Supreme Court, it was affirmed "without precedential value," with three Justices voting to affirm and three voting to reverse. *See Rutherford Plantation, LLC v. Golf Grp. of the Carolinas, LLC*, 367 N.C. 197, 753 S.E.2d 152 (2014). We conclude that the present case is controlled by *Bodie Island* and *Tetra Tech* on this issue.

"by petition for writ of *certiorari*[.]" *Evans*, 46 N.C. App. at 327, 264 S.E.2d at 767 (emphasis added).

In light of the foregoing, we are unable to conclude that the trial court abused its discretion in denying Mr. Mahaffey's Rule 59 Motion. We therefore affirm the ruling of the trial court.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY ALLEN

No. COA17-661

Filed 6 March 2018

1. Evidence—hearsay—exceptions—business records—authentication

The trial court did not err by admitting a notice banning defendant from all Belk department stores under the business records exception to the hearsay rule, where the notice was made in the ordinary course of business two months before the incident in question and was authenticated by a Belk employee familiar with such notices and the system under which they were made.

2. Burglary and Unlawful Breaking or Entering—felonious breaking or entering—elements—breaking or entering-ban from store

The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering where defendant had been banned from entering any Belk store for fifty years and, two months later, entered a Belk store.

Judge MURPHY concurring in the result only.

Appeal by defendant from judgment entered 1 February 2017 by Judge Lisa C. Bell in Catawba County Superior Court. Heard in the Court of Appeals 6 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tenisha S. Jacobs, and Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline for defendant-appellant.

BRYANT, Judge.

Where the notice prohibiting defendant's entry in all Belk Stores was made in the ordinary course of business at or near the time of the transaction involved and was authenticated at trial by a witness familiar with such notices and the system under which they are made, the document was properly authenticated and the trial court did not err in admitting it. Where the general license or privilege to enter a store open to the public was specifically revoked as to defendant, and his ban from the store was implemented and "personally communicated" to him and no evidence suggests it had been rescinded, defendant's entry to the Belk store in Hickory was unlawful, and therefore, the State's evidence was sufficient to support defendant's conviction for felonious breaking and entering.

On 21 January 2016, Renae Harris was on duty at her place of employment, Belk Store #26 in Hickory, North Carolina, where she was a loss prevention associate ("LPA"). In that position, she monitored cameras located throughout the store to ensure that "anybody behaving suspiciously" did not "try to exit without paying." Around 5:00 p.m., Harris was surveying the camera system when she observed defendant Billy Ray Allen in the men's shoe department. Defendant was wearing a blue and white hat. She continued monitoring other cameras when she noticed defendant again, this time in the menswear department wearing a black hat. She then watched as defendant walked to a rack of men's coats, removed his own coat, and put on a Michael Kors coat worth $240.00. Harris observed defendant "mak[ing] a motion that looked like he was pulling off the tag or the SKU number that the associate would ring at purchase . . . then [defendant] picked up his coat and went into the fitting room."

Harris and another LPA, Winston Faxon, proceeded to the fitting room area while defendant was inside. Defendant exited the fitting room a few minutes later with "[h]is jacket . . . on over the top of [the Michael Kors] jacket." Harris identified herself as a Belk LPA and escorted defendant back to her office. As they were about to enter the office area, however, defendant pushed against Harris and "ran towards the door to try to get out of the department. He tried to approach the doors." Defendant made it past the point where items could be purchased, but he tripped

before he could go any further, and Faxon was able to place him in handcuffs and take him to the office.

Harris entered defendant's name in a Belk store database. She found an entry for his name at Belk Store #329 in Charlotte, along with a photograph that resembled defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, defendant had been banned from Belk stores for a period of fifty years pursuant to a Notice of Prohibited Entry following an encounter at the Charlotte store (the "2015 Notice"). The notice contained a signature under the portion acknowledging receipt by "Billy Ray Allen."

Harris proceeded to complete another Notice of Prohibited Entry for the 21 January 2016 incident (the "2016 Notice"), banning defendant from Belk for a period of ninety-nine years. Defendant, Harris, and Faxon all signed the 2016 Notice. Thereafter, defendant was arrested and charged with "unlawfully, willfully[,] and feloniously" breaking and entering the Belk store and stealing property. Defendant was then indicted for (1) felonious breaking and entering in violation of N.C. Gen. Stat. § 14-54(a) and (2) felonious larceny in violation of N.C. Gen. Stat. § 14-72(b)(2) and 14-72(c).

At the 1 February 2017 Criminal Session for Catawba County, defendant's case was tried before a jury, the Honorable Lisa Bell, Superior Court Judge presiding. The jury found defendant guilty of both charges—breaking and entering, and larceny. The trial court consolidated the charges and sentenced defendant to six to seventeen months imprisonment. Defendant's sentence was suspended, and he was placed on supervised probation for eighteen months. Defendant was ordered to pay court costs and serve forty-eight hours of community service. Defendant appeals.

On appeal, defendant argues (I) the trial court erred by admitting the 2015 Notice banning defendant from all Belk stores without requiring proper authentication; (II) evidence of felony breaking and entering is insufficient where defendant entered a public area of a store during regular business hours; and (III) his conviction should be vacated where there is insufficient evidence that he entered the store unlawfully.

I

[1] Defendant first argues the trial court erred by admitting the 2015 Notice banning defendant from all Belk stores as a business

record without requiring proper authentication pursuant to Rule 901. We disagree.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015) (quoting *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011)).

"Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896 (2001) (citing N.C. Gen. Stat. § 8C-1, Rule 901(a)). However, records of regularly conducted activity "are not excluded by the hearsay rule, even though the declarant is unavailable as a witness" if such records are "(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . ." N.C.G.S. § 8C-1, Rule 803(6) (2015). Thus, the business records exception recognizes "[t]he impossibility of producing in court all the persons who observed, reported and recorded each individual transaction . . . ." *State v. Springer*, 283 N.C. 627, 634, 197 S.E.2d 530, 535 (1973) (citation omitted).

The test for receiving business records into evidence is that they are "made in the ordinary course of business at or near the time of the transaction involved" and "authenticated by a witness who is familiar with them and the system under which they are made." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted). "The authenticity of such records may . . . be established by circumstantial evidence." *Id.* (citation omitted). However, "[t]here is no requirement that the records be authenticated by the person who made them." *Id.* (citations omitted).

In the instant case, the State presented evidence that the 2015 Notice was completed and maintained by Belk in the regular course of business and issued two months before the incident in question. Harris, a Belk employee and LPA, testified that she was familiar with Belk's procedures for issuing bans from its properties and with the computer system in which Belk maintained its information about the incidents reported on such forms. She also established her familiarity with the forms, including the 2015 Notice, and that such forms were executed in the regular course of business, as well as her knowledge that not all forms were handled exactly the same way by each store. Pursuant to *Wilson*, and contrary to defendant's argument, it is of no legal moment that Harris

did not herself make or execute the 2015 Notice about which she testified as it is clear she was "familiar . . . with the system under which they [were] made." *Id.* (citations omitted). Accordingly, the trial court did not err in admitting the 2015 Notice into evidence, as Harris's testimony satisfied this Court's test for receiving business records. Defendant's argument is overruled.

II & III

[2] Defendant argues (II) the trial court erred in denying his motion to dismiss because there is insufficient evidence of felony breaking and entering where defendant entered the public area of the Belk store during regular business hours. Specifically, defendant contends a person cannot be convicted of felonious entry into a place of business during normal hours because North Carolina case law states that this does not constitute an unlawful entry. As a result, defendant argues, (III) his conviction for felony breaking and entering should be vacated. We disagree.

This court reviews "the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

Here, defendant was charged with felonious breaking or entering. The essential elements of this crime are "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Brooks*, 178 N.C. App. 211, 214, 631 S.E.2d 54, 57 (2006) (quoting *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262 (1987)). At issue in this case is the meaning of the first element, "breaking or entering."

"In order for an entry to be unlawful under N.C. Gen. Stat. § 14-54(a), the entry must be without the owner's consent." *State v. Rawlinson*, 198 N.C. App. 600, 607, 679 S.E.2d 878, 882 (2009) (citation omitted). "[A]n entry *with* consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under [N.C. Gen. Stat. §] 14-54(a)." *State v. Boone*, 297 N.C. 652, 659, 256 S.E.2d 693, 687 (1979) (emphasis added).

In *Boone*, the defendant argued that the trial court erred in denying his motion to dismiss the felonious entry charge where the evidence

showed he entered a store that was open to the public at the time. *Id.* at 655, 256 S.E.2d at 684. This Court concluded that "[h]is entry was thus *with the consent*, implied if not express, of the owner [of the store]." *Id.* at 659, 256 S.E.2d at 687 (emphasis added). Therefore, "[i]t [could not] serve as the basis for a conviction for felonious entry." *Id.*

Defendant attempts to draw from *Boone* a bright-line rule that if a person enters a store at a time when it is open to the public, that person's entry is with the consent, "implied if not express," of the owner of that store. *See id.* Defendant's argument, however, ignores certain facts present in the instant case which change the analysis completely and render *Boone* distinguishable.

Unlike the store the defendant entered in *Boone*, here, the State presented evidence from which the jury could—and did—infer that the Belk store did not consent to defendant's entering its property on 21 January 2016. Belk issued the 2015 Notice expressly prohibiting defendant "from re-entering the premise[s] of any property or facility under the control and ownership of Belk wherever located" for a period of fifty years. The State's witness, Harris, also testified that the 2015 Notice of the ban had not been rescinded, no one expressly allowed defendant to come back onto Belk store property, and no one gave defendant permission to enter the Belk store on 21 January 2016. In *Boone*, there was no evidence that the defendant in that case had ever been banned from the store in question. *See id.*

While defendant is correct in his assertion that "no case in North Carolina has held that this [precise] conduct constitutes felony breaking and entering," *cf. State v. Lindley*, 81 N.C. App. 490, 494, 344 S.E.2d 291, 293–94 (1986) (upholding conviction for felonious breaking and entering where the defendant entered the premises of his former residence without consent of the property owner pursuant to a marital separation agreement signed by the defendant), a Missouri Court of Appeals case with a nearly identical fact pattern is illustrative.

In *State v. Loggins*, the defendant entered a Wal-Mart property after having been previously banned indefinitely from all Wal-Mart properties two years before. 464 S.W.3d 281, 282 (Mo. App. 2015). Similar to defendant in the instant case, the defendant in *Loggins* had "signed a Wal-Mart-issued document titled, 'Notification of Restriction from Property[,]' " on the date he was initially banned from all Wal-Mart stores. *Id.* at 282 n.1. Upon entering a Wal-Mart store after his ban was implemented, the defendant attempted to steal a bottle of bourbon and conceal it under his shirt and leave the store. *Id.* at 282–83. The defendant was caught and

charged with first-degree burglary,[1] but at trial (and also later on appeal) the defendant attempted to argue that he could not be guilty of burglary "because there was no unlawful entry insofar as Wal-Mart consented to his entry." *Id.* at 283. In other words, the defendant argued, much as defendant does in the instant case, that "because Wal-Mart was open to the public, [he] generally had a license or privilege to enter, regardless of his purpose." *Id.*

The Missouri Court of Appeals disagreed, stating "that license or privilege was revoked on [the date] when Wal-Mart 'personally communicated' to [the defendant] (through the 'Notification of Restriction from Property') that he was no longer allowed to enter onto Wal-Mart Stores, Inc. property, unless and until the notice of restriction was rescinded." *Id.* Accordingly, the Missouri court held that because "there was no evidence that Wal-Mart either expressly or impliedly rescinded its notification banning [the defendant] from the property" the notice of his ban from the property "remained in effect, rendering [the defendant's] entry unlawful." *Id.* at 284.

We hold that the general license or privilege to enter the Belk store held by defendant was revoked on 14 November 2015, the date on which defendant was presented with and signed the 2015 Notice of Prohibited Entry banning defendant from entering "any Belk property" for a period of fifty years. As the incident in question occurred on 21 January 2016, two months after the ban was implemented and "personally communicated" to defendant, *see id.*, and no evidence suggests the ban had been rescinded, we conclude it remained in effect, rendering defendant's entry to the Belk store in Hickory unlawful. Accordingly, the State's evidence was sufficient to support the felonious breaking and entering charge, and defendant's argument that his conviction for the same should be vacated is overruled.

NO ERROR.

Judge BERGER concurs.

Judge MURPHY concurs in the result only.

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1. Missouri's burglary statute is markedly similar to North Carolina's felony breaking and entering statute: "A person commits the crime of burglary in the first degree if he knowingly enters unlawfully . . . a building . . . for the purpose of committing a crime therein, and . . . while in the building[,] . . . [t]here is present . . . another person who is not a participant in the crime." *State v. Loggins*, 464 S.W.3d 281, 283 (alterations in original) (quoting Mo. Rev. Stat. § 569.160.1(3)). *Compare id.*, *with* N.C. Gen. Stat. § 14-54(a) (2015) ("Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.").

STATE OF NORTH CAROLINA
v.
SAMUEL ANTHONY CAMPOLA, DEFENDANT

No. COA17-354

Filed 6 March 2018

Search and Seizure—traffic stop—lawfully extended

In a prosecution for heroin possession and possession of drug paraphernalia, the trial court's unchallenged findings and the uncontroverted evidence confirmed that the car in which defendant was riding was lawfully stopped for a traffic violation and that, before the stop was completed, the officer obtained reasonable suspicion of illegal drug activity and could lawfully extend the stop. The stop began when the car in which defendant was riding, which was in a parking lot in a high crime area, sped away and made an illegal turn when an officer drove by. After searching databases for information about the driver and the car, and waiting for backup, one officer had begun to give the driver a warning when the officer saw two syringe caps inside the car. A search of defendant and the car revealed the evidence of heroin and drug paraphernalia.

Appeal by Defendant from judgment entered 1 September 2016 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph A. Newsome, for the State.

Meghan Adelle Jones for Defendant-Appellant.

INMAN, Judge.

When a police officer initiates a traffic stop and, in the course of accomplishing the mission of the stop, develops reasonable suspicion that the driver or passenger is engaged in illegal drug activity, the officer may prolong the stop to investigate that suspicion without violating the passenger's Fourth Amendment rights.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant, a passenger in a vehicle stopped for a traffic violation, was indicted for possession of heroin and possession of drug

paraphernalia on 13 July 2015 after a search of the vehicle revealed the presence of the drug. Prior to trial, Defendant filed a motion to suppress all evidence obtained as a result of the traffic stop, contending that the police officer executing the stop had impermissibly and unconstitutionally extended the traffic stop without reasonable suspicion or probable cause. Following a hearing on the motion to suppress, the trial court orally denied the motion after making findings of fact and conclusions of law, and later entered a written order consistent with its oral ruling. In the course of trial, Defendant's counsel objected to the introduction of the evidence subject to the earlier motion and was overruled by the trial court. The jury found Defendant guilty on both charges, and the trial court entered its judgment on 1 September 2016. Defendant timely filed his notice of appeal on 8 September 2016.

The findings in the trial court's written order are summarized as follows:

On 26 November 2014, Officer Matthew Freeman ("Officer Freeman"), a patrol officer with the Charlotte-Mecklenburg Police Department ("CMPD"), was on patrol in a vehicle near Nations Ford Road in Charlotte, North Carolina. Officer Freeman had received training in the identification of drugs and had been a patrolman for almost six years, participating in 100 drug arrests. In the course of the patrol, Officer Freeman pulled into the parking lot of a Motel 6. He considered the location a high crime area. When Officer Freeman entered the parking lot, he saw two white males sitting in a green Honda. After Officer Freeman passed by, the Honda exited the parking lot at a high rate of speed. Officer Freeman followed the car out of the parking lot as it drove toward an intersection. At the intersection, the car turned right without yielding the right-of-way to oncoming traffic turning left through the intersection, nearly causing a collision. Officer Freeman turned on his emergency lights and siren and stopped the vehicle.

Once the car stopped, Officer Freeman observed that it displayed a temporary license tag. He approached the driver's side and asked the driver for his license, registration, and proof of insurance, observing that the driver was more nervous than usual. The driver provided Officer Freeman with his insurance information, the car's title, and a South Carolina driver's license, which identified him as Matthew Matchin ("Matchin").[1] When asked why they were at the motel, Matchin stated

1. The trial transcript identifies the driver's last name as "Meacham," while various filings in the printed record use the name "Matchin." Both the State and Defendant adopt the latter in their briefs, believing the transcript's spelling to be a typographical error.

that he and his passenger did not go into a room there. The passenger did not have any identifying documents, but identified himself by name to Officer Freeman. Officer Freeman then returned to his patrol car to run the above information through the onboard computer.

Once in his patrol car, Officer Freeman called for a back-up unit to assist him, as there were multiple occupants in the vehicle. While he waited for another officer to arrive, Officer Freeman entered the VIN number for the stopped vehicle through a 50-state database, as he did not have a state registration with which to search. This search took longer than a search using a state vehicle registration. As a result of the search, Officer Freeman determined that the vehicle was not stolen and that neither Matchin nor Defendant had any outstanding warrants. However, Officer Freeman found multiple prior drug arrests for both Matchin and Defendant.

Shortly after the above searches were completed, and twelve minutes after the stop was initiated, another CMPD officer, Damon Weston ("Officer Weston"), arrived in response to Officer Freeman's earlier call for back-up. Officer Freeman spoke with Officer Weston on his arrival, and told him about the stop as well as the information gleaned from Matchin, Defendant, and the database searches. Officer Freeman told Officer Weston that he was going to issue Matchin a warning for his unsafe movement, but asked Officer Weston to approach Defendant.

The officers approached the stopped vehicle together some fourteen minutes after the stop was initiated. Officer Freeman asked Matchin to step to the rear of the vehicle so that they could see the intersection where the illegal turn occurred while Officer Freeman explained his warning. Officer Freeman then gave Matchin a warning, returned the documents, and requested a search of the vehicle. Matchin declined the request. While Officer Freeman was speaking with Matchin, Officer Weston approached Defendant and observed a syringe cap in the driver's seat. Officer Weston asked Defendant to step out of the car and Defendant complied. At this time, Officer Weston observed a second syringe cap in the passenger's seat. Now four minutes into their respective conversations, Officer Weston approached Officer Freeman and informed him of the syringe caps. Officer Freeman asked Matchin if he was diabetic, and he responded that he was not. Officer Freeman then searched the vehicle, discovering two syringes and a spoon

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Because the name of the driver is not a fact at issue on appeal, we adopt the "Matchin" spelling used in the documents in the printed record and the parties' briefs for consistency and ease of reading.

with a brown "liquidy" substance. The officers then arrested Matchin and Defendant.

At the suppression hearing, the trial court received the benefit of testimony from Officer Freeman and Officer Weston, as well as documentary evidence in the form of a dash-cam video of the stop from Officer Freeman's patrol car.[2] Officer Freeman testified that this portion of Nations Ford Road was part of his usual patrol, and that he had personally responded to a high number of drug arrests, shootings, and robberies in the area. Officer Weston also testified that the motels around Nations Ford Road were "high crime, high drug areas." Officer Freeman testified that, when he pulled into the Motel 6 parking lot and spotted the green Honda, he intended to get out of his vehicle to speak with its occupants. But, before he could park his vehicle, the two men looked up at Officer Freeman with "a kind of surprised look on their face[s], wide[-] eyed type of look" and then exited the parking lot in the car at "a high rate of speed." The dash-cam video shows Officer Freeman following the green Honda out of the parking lot and the Honda can be observed turning right at a red light without yielding to oncoming traffic turning left through the intersection, nearly causing a collision. The video's timestamp shows Officer Freeman stopped the Honda and exited his vehicle at 4:25 P.M.

Officer Freeman testified that he saw the car had a temporary paper tag from Pennsylvania. He also testified that Matchin seemed "overly nervous, more than . . . on a normal traffic stop, more shaking of the hands. Kind of not really directly answering [questions] . . . . Just kind of stumbling a bit about the answer." Officer Freeman also detailed the contents of his conversation with Matchin in his testimony, stating that Matchin claimed that he went into the Motel 6 to meet a friend in the lobby, although he could not remember the friend's name. Per the dash-cam video, Officer Freeman returned to his patrol car at 4:26 P.M., less than two minutes into the stop.

Officer Freeman testified that he radioed for back-up upon returning to his vehicle, consistent with general safety and CMPD policy concerning traffic stops with multiple occupants. While he waited for another officer to arrive, Officer Freeman entered the VIN number for the stopped vehicle through a 50-state database, as he did not have a permanent state license plate number with which to search. This

2. Defendant filed a petition for writ of mandamus to compel the State to produce a copy of the dash-cam video in a format viewable by this Court. Because we are able to view the video in the format in which it was originally provided, we deny Defendant's motion.

national database search alone took between five to eight minutes, longer than a search using a permanent license plate registered in a single state. Officer Freeman also ran Matchin's and Defendant's names through a local database of arrest and other records, followed by a search of a statewide database. These searches revealed multiple prior drug arrests for both Matchin and Defendant. Officer Freeman testified that his conduct up to this point in the stop, including the questioning of Matchin and Defendant, his database searches, and his request for back-up, were standard procedure in the course of a traffic stop involving multiple occupants.

On the dash-cam video, chimes from Officer Freeman's onboard computer can be heard multiple times between 4:27 P.M., a minute after he returned to his patrol car, and 4:36 P.M. Officer Freeman testified that the chimes indicated the return of a result from one of his database searches. Less than a minute after the last chime played in the dash-cam excerpt, Officer Freeman can be heard talking in person with Officer Weston, and Officer Freeman testified that he was still searching for Defendant's information and receiving results from the statewide database when Officer Weston arrived on the scene.

The conversation between the officers was captured on the dash-cam video played for the trial court. It begins with Officer Freeman stating that "the guy in the front passenger seat is named Samuel Campola. I've heard that name before." After providing Defendant's prior arrest history to Officer Weston, Officer Freeman then describes his arrival at the Motel 6, where "as soon as they see me [Officer Freeman], his eyes get real big and [they] just take off." Officer Freeman is next heard describing the vehicle's failure to yield to oncoming traffic, and the officers discuss how to resolve the stop. Officer Freeman provides Officer Weston with Matchin's arrest history, and then reiterates that he had "heard of Samuel Campola before" and that Defendant's physical appearance indicated he was a heroin user. He then tells Officer Weston his suspicion that "they [Matchin and Defendant] were either buying or selling over there [at the Motel 6.]" Officers Freeman and Weston next agree that Officer Freeman will approach the driver, ask him to exit the vehicle, and issue him a warning while Officer Weston speaks with Defendant. The officers agree on the course of action, and leave the vehicle at 4:39 P.M.

The video shows the officers approach the vehicle, with Officer Freeman speaking to Matchin at the rear of the vehicle and Officer Weston talking to Defendant through the passenger window. Per his testimony, Officer Freeman asked Matchin to step out of the vehicle, which was his standard practice when explaining traffic violations to a driver. Once at

the rear of the vehicle, Officer Freeman returned the driver's license, the vehicle's title, and proof of insurance to Matchin and began explaining his traffic warning. Officer Freeman then asked the driver if there was anything illegal in the car and for consent to search the vehicle. Matchin refused the search.

While Officer Freeman was speaking to the driver at the rear of the vehicle, Officer Weston was speaking to Defendant through the passenger window. Officer Weston noticed an orange syringe cap in the driver's seat that Matchin had just vacated. Officer Weston asked Defendant if he possessed any weapons or drugs and if he consented to a search of his person. Defendant said that he had nothing illegal and gave Officer Weston permission to search him. When Defendant stepped out of the vehicle to allow Officer Weston to perform the search, Officer Weston noticed a second orange syringe cap, this time in the now-empty passenger's seat of the vehicle. Officer Weston informed Officer Freeman of his discovery, and resumed his search of Defendant. Officer Weston found nothing illegal on Defendant's person.

Officer Freeman then searched the vehicle while Officer Weston stood with Matchin and Defendant outside the vehicle. Officer Freeman opened the passenger door, where he observed a syringe cap in the driver's seat and a syringe cap in the passenger's seat. Officer Freeman also saw a spoon protruding from beneath the passenger's seat. The spoon had a brown substance on it in a partially liquid, partially solid state. Officer Freeman also saw uncapped syringes, a Q-tip with the cotton pulled off, and a belt in the front of the car, as well as an open bottle of liquor in the backseat. Officer Freeman photographed the items he found in the vehicle and radioed for an officer with more experience with heroin to assist. The third officer arrived and found a baggie containing black-tar heroin in Matchin's sock.[3] Both Matchin and Defendant were arrested at the scene.

II. ANALYSIS

Defendant argues on appeal that the trial court erred in denying his motion to dismiss, contending that the officers unconstitutionally extended the stop and that any reasonable suspicion that arose to justify an extension of the stop was not particularized to Defendant. Because reasonable suspicion sufficient to detain both Matchin and Defendant arose at the time Officer Freeman completed his record searches in the

3. The State presented evidence that the contents of the plastic bag were confirmed by chemical analysis to be heroin. Defendant does not challenge this evidence on appeal.

course of and prior to accomplishing the mission of the traffic stop, we hold there was no error.

A. Standard of Review

We review an order on a motion to suppress by determining whether the trial court's findings of fact are supported by competence evidence and whether those findings support the conclusions of law. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). "Our review of a trial court's conclusions of law on a motion to suppress is *de novo*[,]" *State v. Chadwick*, 149 N.C. App. 200, 202, 560 S.E.2d 207, 209 (2002) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)), meaning we consider the legal conclusion anew and freely substitute our judgment for that of the trial court. *Tucker v. Mecklenburg Cnty. Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff'd in part, discretionary review improvidently allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003).

The trial court did not distinguish between findings of fact or conclusions of law in its order; however, "[t]he 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*." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (internal citations omitted).

B. The Constitutional Duration of Traffic Stops

The Fourth Amendment to the United States Constitution protects persons from "unreasonable searches and seizures," U.S. Const. amend. IV, and its protections extend to traffic stops. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). As established by the United States Supreme Court in *Rodriguez v. United States*, 575 U.S. ___, 191 L. Ed. 2d 492 (2015), the Amendment's "Constitution[al] shield" prohibits police from "exceeding the time needed to handle the matter for which the [traffic] stop was made[.]" *Id.* at ___, 191 L. Ed. 2d at 496. Thus, "[u]nder *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission . . . *unless reasonable suspicion of another crime arose before the mission was completed*[.]" *State v. Bullock*, ___ N.C. ___, ___, 805 S.E.2d 671, 673 (2017) (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499) (emphasis added).

In *Bullock*, the North Carolina Supreme Court set forth with clarity the parameters of a constitutional traffic stop post-*Rodriguez*:

> The reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " [*Rodriguez*] at ___, 135 S. Ct. at 1615[, 191 L. Ed. 2d at 499] (alteration in original) (quoting [*Illinois v.*] *Caballes*, 543 U.S. [405,] 408, 125 S.Ct. 834[, 160 L. Ed. 2d 842]). These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*
>
> In addition, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S.Ct. at 1616[, 191 L. Ed. 2d. at 500]. These precautions appear to include conducting criminal history checks, as *Rodriguez* favorably cited a Tenth Circuit case that allows officers to conduct those checks to protect officer safety. *See id.* (citing *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc), *abrogated on other grounds as recognized in United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007)); *see also United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996) ("Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive."), *quoted in Holt*, 264 F.3d at 1221. Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. *Rodriguez*, 575 U.S. at ___, 135 S.Ct. at 1616[, 191 L. Ed. 2d at 500]. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop. *See id.* at ___, ___, 135 S.Ct. at 1612, 1614[, 191 L. Ed. 2d at 499-500].

Bullock, ___ N.C. at ___, 805 S.E.2d at 673-74 (alterations to citations added).

Defendant argues that two unconstitutional extensions of the traffic stop occurred in this case: (1) when Officer Freeman waited roughly

twelve minutes after first speaking with Matchin and Defendant before issuing his warning to Matchin; and (2) when Officer Freeman questioned Matchin while Officer Weston questioned and searched Defendant.

We disagree with Defendant that Officer Freeman unconstitutionally extended the duration of the stop for several reasons. First, Officer Freeman was engaged in conduct within the scope of his mission until Officer Weston arrived roughly twelve minutes later. Defendant does not challenge any findings relating to Matchin's traffic violation or the trial court's finding that Officer Freeman was engaged in a series of database searches during this time, including a search of a 50-state database for the VIN number that "takes longer to process than a check of a registration card." As held by the United States Supreme Court in *Rodriguez* and recognized by the North Carolina Supreme Court in *Bullock*, database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop. *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499 ("Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " (alteration in original) (quoting *Caballes*, 543 U.S. at 408, 160 L. Ed. 2d 842)); *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 ("These inquiries include 'checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.' " (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499)). As for his research into Matchin and Defendant's criminal histories, this too was permitted under *Rodriguez* and *Bullock* as a safety precaution related to the traffic stop. *Bullock*, ___ N.C. at ___, 805 S.E.2d at 674 (" '[A]n officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.' These precautions appear to include conducting criminal history checks . . . ." (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 500)). Because these searches were within the scope of his mission, no delay could occur until they were completed, and the uncontradicted evidence demonstrates that the database searches began within a minute of him returning to his vehicle with Matchin's and Defendant's information and continued up until Officer Weston arrived.[4]

4. While the trial court did not make a finding of fact as to the exact length of the searches, no such finding was required: "where there is no material conflict in the evidence as to a certain fact, the trial court is not required to make any finding at all as to that fact." *State v. Travis*, ___ N.C. App. ___, ___, 781 S.E.2d 674, 679 (2016) (citing *State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999)). In such situations, "[a] finding may be implied by the trial court's denial of defendant's motion to suppress where the evidence is uncontradicted." *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 (citation omitted). The uncontradicted evidence introduced at trial shows that Officer Freeman was engaged in these database searches at least until the time Officer Weston arrived.

Second, Officer Freeman's request for back-up by Officer Weston was itself a safety precaution. The trial court found that the back-up call was made "because there were two occupants in the vehicle[,]" and Officer Freeman testified that safety concerns and CMPD policy dictated that he request back-up when stopping a vehicle with multiple occupants. "[B]ecause officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission." *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676. Even if we were to assume *arguendo* that Officer Freeman's call for back-up was a safety precaution divorced from the traffic stop, such a precaution is impermissible only "if [it] extend[s] the duration of the stop." *Id.* at ___, 805 S.E.2d at 674 (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 500). Here, no extension of the stop occurred because database searches within the scope of the mission were running from the time Officer Freeman returned to his car and until Officer Weston arrived.

In addition to holding that Officer Freeman was acting within the scope of his mission until Officer Weston arrived, we further hold that, by the time Officer Weston arrived on the scene, Officer Freeman had developed a reasonable suspicion of criminal activity sufficient to constitutionally extend the traffic stop. Reasonable suspicion arises where an officer possesses "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Navarette v. California*, 572 U.S. ___, ___, 188 L. Ed. 2d 680, 686 (2014) (citations and quotation marks omitted). This requires "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (citation and quotation marks omitted). The reasonableness of such suspicion is measured by determining whether "a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citations and internal quotation marks omitted). In engaging in this analysis, "[a] reviewing court must consider the totality of the circumstances—the whole picture." *Id.* at 116, 726 S.E.2d at 167 (internal citations and quotation marks omitted).

A considerable body of case law has established what "specific and articulable facts" give rise to "rational inferences" supporting a determination of reasonable suspicion when considered in "the totality of the circumstances" with other such facts. *Id.* at 116, 726 S.E.2d at 167 (internal citations and quotation marks omitted). These include: (1) a person's history of criminal arrests, *State v. Watson*, 119 N.C. App. 395, 398, 458

S.E.2d 519, 522 (1995) (holding that a police officer had reasonable suspicion for an investigatory stop of a defendant in part because the officer knew of defendant's prior drug arrests); (2) a driver's questionable travel plans, *State v. Castillo*, ___ N.C. App. ___, 787 S.E.2d 48, 55-56, *appeal dismissed*, *review denied*, 369 N.C. 40, 792 S.E.2d 784 (2016) (holding that an officer's knowledge of defendant's prior DUI arrest, along with the presence of a cover scent, the defendant's extreme nervousness, registration of the vehicle to a third party, and inconsistent travel plans supported reasonable suspicion to extend a traffic stop); (3) a person's evasive action after noticing a police officer, *State v. Butler*, 331 N.C. 227, 233-34, 415 S.E.2d 719, 722-23 (1992) (holding that a defendant's presence at a location known for drug sales and apparent flight from officers upon making eye contact, among other facts, supported reasonable suspicion); (4) an officer's recognition of an individual as one previously involved in illegal activity, *Travis* at ___, 781 S.E.2d at 678-79 (holding reasonable suspicion existed where, among other facts, the officer recognized defendant as a former informant in drug purchases); (5) a person's unusual nervousness, *Castillo* at ___, 787 S.E.2d at 55; (6) registration of the vehicle to a third party, *id.* at ___, 787 S.E.2d at 55; and (7) presence in an area known for criminal activity. *Butler* at 233, 415 S.E.2d at 722-23.

Here, the trial court made findings of fact that: (1) Officer Freeman was a trained patrol officer of six years and had participated in 100 drug arrests; (2) Officer Freeman noticed Matchin and Defendant in a high crime area;[5] (3) after Officer Freeman drove by them, Matchin and Defendant took off at high speed and made an illegal right turn, nearly causing a collision; (4) Matchin informed Officer Freeman that he and Defendant were at the motel but did not go into a room there; (5) Matchin was unusually nervous; and (6) both Matchin and Defendant had multiple prior drug arrests. All of these findings are either unchallenged or supported by uncontradicted evidence, and Officer Freeman was apprised of each fact prior to the arrival of Officer Weston and the completion of his mission in initiating the traffic stop. Thus, by the time that Officer Freeman and Officer Weston approached Matchin and Defendant, Officer Freeman could rely on all of these facts, in their totality, in arriving at a reasonable suspicion that criminal activity beyond a

5. This is the only relevant finding challenged by Defendant, arguing that it constitutes a mere recitation of testimony. However, such recitative findings are "insufficient only where a material conflict actually exists on that particular issue." *Travis* at ___, 781 S.E.2d at 679 (emphasis added). Because the evidence is uncontradicted as to this fact, we reject Defendant's challenge.

traffic violation was afoot. *Watson* at 398, 458 S.E.2d at 522; *Castillo* at ___, 787 S.E.2d at 55; *Butler* at 233-34, 415 S.E.2d at 722-23; *Travis* at ___, 781 S.E.2d at 678-79; *Bullock* at ___, 805 S.E.2d at 677-78. We hold that Officer Freeman had a reasonable suspicion to extend the stop, and that such suspicion arose before he completed the mission for the stop.

Even if we were to assume *arguendo* that the facts found above were insufficient to support the extended stop, the uncontradicted evidence discloses further facts supporting reasonable suspicion that we may imply from the ruling of the trial court. *Smith*, 135 N.C. App. at 380, 520 S.E.2d at 312 ("After conducting a hearing on a motion to suppress, a trial court should make findings of fact that will support its conclusions as to whether the evidence is admissible. If there is no conflict in the evidence on a fact, failure to find that fact is not error. Its finding is implied from the ruling of the court." (citation and quotation marks omitted)). These include Matchin's and Defendant's surprise at seeing Officer Freeman in the motel parking lot, the titling of the vehicle to someone other than Matchin or Defendant, Matchin's statement that he met a friend at the motel but that he did not know the friend's name, and Officer Freeman's recognition of Defendant's name and appearance as someone involved in illegal drug activity. *Castillo* at ___, 787 S.E.2d at 55-56; *Travis* at ___, 781 S.E.2d at 678-79. Considering all the facts, both found and implied from the trial court's ruling, we hold that the totality of the circumstances supports a conclusion that Officer Freeman had reasonable suspicion to extend the traffic stop prior to the completion of his mission.

Finally, we note the similarity between the facts in this case and those confronting our Supreme Court in *Bullock*, its most recent decision on point. There, a police officer stopped a rental car for "speeding, following a truck too closely," and weaving over the line marking the outer bound of the interstate. *Bullock*, ___ N.C. at ___, 805 S.E.2d at 674. The officer knew the interstate was frequently used to traffic drugs between Georgia and Virginia. *Id.* at ___, 805 S.E.2d at 674. In asking the driver for his license and vehicle registration, the officer observed the driver appeared nervous and was not an authorized driver on the rental agreement. *Id.* at ___, 805 S.E.2d at 674. The officer also noticed multiple cell phones in the car. *Id.* at ___, 805 S.E.2d at 674. When the officer asked the driver where he was going, the driver responded that he had intended to visit his girlfriend but that he had missed his exit; however, the officer was aware that the driver had since passed at least three additional exits where he could have turned to reach his stated destination. *Id.* at ___, 805 S.E.2d at 674. The driver also made contradictory

statements about his girlfriend to the officer. *Id.* at ___, 805 S.E.2d at 675. The officer informed the defendant he would be receiving a warning, asked the defendant to exit the vehicle, frisked the defendant, and then asked him to sit in the patrol car while the officer ran his information through local, state, and national databases. *Id.* at ___, 805 S.E.2d at 675. The databases returned a criminal history contrary to prior statements made by the defendant. *Id.* at ___, 805 S.E.2d at 675. The officer asked if he could search the rental vehicle. *Id.* at ___, 805 S.E.2d at 675. The driver consented to a search of the vehicle but not the possessions therein; a trained police canine arrived a few minutes later and sniffed the possessions, signaling the presence of heroin. *Id.* at ___, 805 S.E.2d at 675. On these facts, the Supreme Court ruled that there existed sufficient circumstances to support a reasonable suspicion of drug activity prior to the arrival of the canine, so that no unconstitutional extension of the traffic stop occurred. *Id.* at ___, 805 S.E.2d at 676-78.

Defendant argues that any reasonable suspicion supporting an extension of the stop in this case was not particularized to him, and therefore any extended seizure of him individually was unlawful. We disagree. First, the record includes several circumstances, supported by uncontroverted evidence, sufficient to support a reasonable suspicion particularized to Defendant that he was engaged in drug activity, including Defendant's presence in a high crime area known by Officer Freeman to be the site of drug transactions, Defendant's history of drug arrests, his expression of surprise at seeing Officer Freeman in the Motel 6 parking lot, and Officer Freeman's recognition of Defendant's name and appearance in the context of prior illegal drug activity. *See*, *e.g.*, *State v. Stone*, 179 N.C. App. 297, 303-04, 634 S.E.2d 244, 248 (2006) (holding that an officer had reasonable suspicion of illegal activity particularized to a passenger in a vehicle stopped for a traffic violation where he was "moving from side to side inside the vehicle and [the officer] also recognized defendant as someone who had been identified to police as a drug dealer"), *aff'd*, 362 N.C. 50, 653 S.E.2d 414 (2007). Second, "[a] law enforcement officer may stop and briefly detain a vehicle *and its occupants* if the officer has reasonable, articulable suspicion that criminal activity may be afoot." *State v. Jackson*, 199 N.C. App. 236, 241, 681 S.E.2d 492, 496 (2009) (citation omitted) (emphasis added). "[A] passenger in a car that has been stopped by a law enforcement officer is still seized when the stop is extended[,]" *id.* at 240, 681 S.E.2d at 495, and it logically follows that a lawfully extended detention of the vehicle and driver due to a reasonable suspicion of drug activity includes a lawful extended detention of a passenger in that vehicle.

Because Officer Freeman had reasonable suspicion of drug activity to lawfully extend the traffic stop, he was permitted to ask additional questions of Matchin related to drug activity in addition to issuing his traffic warning. The trial court's unchallenged findings included the fact that Officer Weston observed an orange syringe cap in the driver's seat while Officer Freeman questioned Matchin. Officer Weston then asked Defendant to exit the vehicle, which he was lawfully permitted to do, even absent reasonable suspicion as to Defendant. *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000) ("[T]he United States Supreme Court has affirmed the right of police to order passengers from a vehicle in order to conduct a search of the driver's car, despite the complete absence of probable cause or reasonable suspicion concerning the passengers." (citing *Maryland v. Wilson*, 519 U.S. 408, 137 L. Ed. 2d 41 (1997))). The trial court also found, and Defendant does not challenge the fact, that when Defendant exited the vehicle per this lawful instruction, Officer Weston noticed a second syringe cap in the passenger's seat. Officer Weston informed Officer Freeman about the syringe caps and, following additional questioning of Matchin as to whether he was diabetic, Officer Freeman searched the vehicle and arrested Matchin and Defendant.[6] All of this conduct occurred within the course of a lawfully extended traffic stop based on reasonable suspicion of drug activity arising prior to the completion of the stop's original mission. Defendant's argument that Officers Freeman's and Weston's interactions with Matchin and Defendant after a warning was given to Matchin about his unsafe driving unconstitutionally extended the traffic stop is overruled.

Defendant challenges as unsupported or erroneous several additional findings of fact and conclusions of law. Specifically, Defendant challenges the trial court's findings that Officer Freeman was still explaining his warning when he was advised of the syringe caps, and that he had not completed his mission at that time. Because we hold on *de novo* review that the trial court properly concluded that "Officer Freeman had reasonable suspicion of illegal drug activity, namely the possession of drug paraphernalia, and that justified prolonging the stop to investigate that behavior," any error in the challenged findings was not prejudicial. *See, e.g.*, *State v. Williams*, 190 N.C. App. 301, 307, 680 S.E.2d 189, 193 (2008) (affirming a trial court's order which included an unsupported finding that was "unnecessary to the trial court's ultimate conclusions of

6. Defendant argues on appeal only that the traffic stop was unconstitutionally extended; he does not argue that the search of the vehicle was unconstitutional.

law and ruling"). The trial court properly denied Defendant's motion to suppress, and any error in making an unsupported finding unnecessary to that ruling does not demonstrate "a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . ." N.C. Gen. Stat. § 15A-1443 (2015). As to Defendant's argument that the trial court erred in concluding Officer Weston's removal of Defendant from the vehicle was lawful and that Officer Freeman had reasonable suspicion of illegal drug activity, we affirm those conclusions on *de novo* review as set forth *supra*.

III. CONCLUSION

The trial court's unchallenged findings and the uncontroverted evidence confirm that Officer Freeman lawfully stopped Matchin and Defendant for a traffic violation and that, before he completed the mission of the stop, Officer Freeman obtained reasonable suspicion of illegal drug activity and could lawfully extend the stop to investigate any wrongdoing. The lawful investigation yielded probative evidence of a crime, and the trial court did not err in denying Defendant's motion to suppress the evidence obtained as a result of the stop.

NO ERROR.

Judges BRYANT and DAVIS concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS NACOLEON HARDING

No. COA17-448

Filed 6 March 2018

1. Appeal and Error—preservation of issues—failure to object at trial—plain error

An alleged instructional error was not excluded from plain error review under the invited error doctrine in a prosecution for kidnapping and other offenses where the State alleged that defendant actively participated in crafting the instruction given and affirmed that it was "fine."

2. Kidnapping—release in a safe place—instructions—no plain error

The trial court's instructional error in a first-degree kidnapping prosecution was erroneous but not plain error where the indictment charged only the elevating element of sexual assault but the jury was also charged on the other two elements. However, the State presented compelling evidence to support the element of failure to release in a safe place, and the jury separately found defendant guilty of first-degree kidnapping based on all three elements. Defendant did not carry his burden of demonstrating plain error.

3. Appeal and Error—preservation of issues—double jeopardy—failure to object

The Court of Appeals declined to invoke Appellate Rule 2 to hear a kidnapping and sexual offense defendant's contentions on double jeopardy where defendant did not raise the issue at trial.

4. Appeal and Error—preservation of issues—sentencing for two assaults—failure to object below

Notwithstanding defendant's failure to object below to being sentenced for both assault on a female and assault by strangulation, defendant's argument was preserved for appellate review where the court acted contrary to a statutory mandate. N.C.G.S. § 14-33(c) contains a mandatory prefatory clause that prohibits the trial court from punishing defendant for assault on a female since he was also punished for the higher offense of assault by strangulation based on the same conduct.

5. Assault—assault on a female—assault by strangulation

The trial court did not violate N.C.G.S. § 14-33(c) by imposing sentences based on assault on a female and assault by strangulation. The convictions arose from separate and distinct acts constituting different assaults; furthermore, both assaults were consolidated with a higher class offense and the sentences imposed were based on those higher class offenses.

6. Sexual Offenses—first-degree sexual offense—elements—inflicting serious personal injury

In a prosecution for first-degree sexual offense, there was substantial evidence to support the challenged element of inflicting serious personal injury on the victim.

7. Appeal and Error—preservation of issues—failure to object—sentencing—satellite-based monitoring order—statutory mandate

Defendant's right to appeal a satellite-based monitoring order was preserved despite his failure to object at trial where the issue he raised implicated a statutory mandate.

8. Satellite-Based Monitoring—lifetime registration—findings

An order requiring lifetime registration as a sexual offender and satellite-based monitoring was reversed and remanded where the trial court found that defendant had not been convicted of an aggravated offense, was not a recidivist, and had not been classified as a sexually violent predator. The trial court did not render oral findings to explain its rationale and the Court of Appeals could not meaningfully assess whether any of the trial court court's findings were merely clerical errors or whether the trial court simply erred in ordering registration and monitoring.

9. Constitutional Law—ineffective assistance of counsel—-further investigation needed

Defendant's claims for ineffective assistance of counsel were dismissed without prejudice where the cold record was inadequate for meaningful review and further investigation was required.

Appeal by defendant from judgments and orders entered 18 August 2016 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 1 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

ELMORE, Judge.

Defendant Nicholas Nacoleon Harding appeals from judgments entered after a jury convicted him of first-degree sexual offense, first-degree kidnapping, assault on a female, and assault inflicting physical injury by strangulation. He also appeals the trial court's orders requiring him to enroll in lifetime sex offender registration and lifetime satellite-based monitoring (SBM).

Defendant contends the trial court erred by (1) instructing the jury on two unindicted first-degree kidnapping elements; (2) sentencing him, on double jeopardy grounds, for both kidnapping based on sexual assault and for first-degree sexual offense; (3) sentencing him for both assaults in violation of a statutory mandate requiring that only one sentence be imposed for the same conduct; (4) denying his motion to dismiss the first-degree sexual offense charge for insufficient evidence; and (5) ordering he enroll in lifetime registration and SBM on grounds that

the trial court's findings do not support its orders, and that the trial court failed to determine the reasonableness, under the Fourth Amendment, of imposing SBM pursuant to *Grady v. North Carolina*, ___ U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015). Defendant also advances (6) five separate claims of ineffective assistance of counsel (IAC) that allegedly occurred during sentencing.

We hold that defendant's first four alleged errors are meritless and thus that he received a fair trial, free of error, and the sentences imposed based upon the jury convictions were proper. However, based on the first issue of defendant's fifth alleged error, we reverse the trial court's registration and SBM orders and remand for further proceedings, including a new SBM hearing. We dismiss defendant's numerous IAC claims without prejudice to his right to reassert them in a subsequent motion for appropriate relief (MAR) proceeding.

I. Background

On 8 September 2014, defendant was indicted for first-degree sexual offense, first-degree kidnapping, assault on a female, and assault inflicting physical injury by strangulation. At trial, the State's evidence showed the following facts.

During the afternoon of 7 December 2013, Anna,[1] a twenty-two-year-old, ninety-five-pound female, was waiting at a bus stop when a stranger, defendant, struck up a conversation with her. Defendant followed Anna onto the bus, after she changed buses, and after she got off at a bus stop on Brevard Road in Asheville. Anna had never taken this route home before and started walking down Pond Road, in a non-residential and "somewhat . . . deserted" area. Defendant followed about ten feet behind. Eventually, defendant caught up to Anna, and the two began walking together and talking. As they continued walking down this isolated stretch of road, they came to an area surrounded by excavation machinery and overlooking a creek about twenty feet below, and Anna stopped to take off her fleece jacket.

Unexpectedly, defendant "grabbed [Anna's] hair and then . . . tossed [her] over the [em]bank[ment]." When Anna got up, she tried to run away, but defendant "grabbed [her] and started beating [her] face." Anna screamed for help as she fell to the ground. Defendant pinned her body down, grabbed her throat, and "kept choking . . . and hitting [her] until [she] stopped trying to fight him." Defendant agreed to stop his physical

1. A pseudonym is used to protect the victim's identity.

assault if Anna quit screaming and resisting. Anna calmed down briefly and begged defendant not to hurt her. Defendant warned Anna that he was a "mob boss," but instructed her that as long as she did what he demanded, everything would be okay. Anna started screaming again. Defendant "hit [her] in the head" and covered her mouth. When Anna bit defendant's hand, he "hit [her] again in the head multiple times." Eventually, Anna stopped resisting and defendant let her up. After threatening Anna's and her one-year-old child's life, defendant forced Anna to perform fellatio on him.

Defendant then instructed Anna to sit on a nearby rock near the creek with him while she calmed down. He eventually let Anna retrieve her cell phone and watched as she texted her partner that she was going to be late coming home. Defendant demanded that Anna meet him the next day at 11:00 a.m. in front of the post office downtown and that, if she did not, he "would send somebody to take care of [her] and [her] child." Defendant then instructed Anna to stay put until he walked away and demanded her not to call the police. Once defendant was out of sight, Anna immediately called 9-1-1. Responding officers found defendant walking down a nearby road and arrested him.

The State also presented Rule 404(b) evidence through the testimony of two other witnesses, Cindy and Lisa.[2] According to Cindy and Lisa, defendant had also attempted, unsuccessfully, to force himself on them only a few days apart from the incident with Anna. Defendant similarly targeted these women in the afternoon, while they were alone, attempted to befriend them and bring them to an isolated location, and demanded sexual favors. Defendant similarly warned these women that he was a "mob boss" when they refused his demands, and threatened their lives if they continued to deny him.

Defendant presented no evidence, and the jury convicted him on all counts. The trial court consolidated the first-degree-sexual-offense and assault-on-a-female convictions into one judgment, imposing an active sentence of 276 to 392 months in prison; it consolidated the first-degree-kidnapping and assault-by-strangulation convictions into another judgment, imposing a consecutive sentence of 83 to 112 months. The trial court also ordered, *inter alia*, that defendant enroll in lifetime sex offender registration and SBM. Defendant appeals from the judgments, and from the registration and SBM orders.

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2. Pseudonyms.

II. Alleged Errors

On appeal, defendant contends the trial court erred by (1) instructing the jury on two first-degree kidnapping elements which were not charged in the indictment; (2) sentencing him for both first-degree kidnapping and first-degree sexual offense on the double jeopardy grounds that the kidnapping conviction was based on the underlying sexual offense; (3) sentencing him for both assault on a female and assault by strangulation in violation of statutory mandates requiring only one punishment for the same conduct; (4) denying his motion to dismiss the first-degree sexual offense charge for insufficiency of the evidence; and (5) ordering he enroll in lifetime sex offender registration and SBM on the grounds that the trial court's findings were inadequate to support such orders, and a proper *Grady* hearing on the reasonableness of SBM was never conducted. Defendant also asserts (6) he was denied effective assistance of counsel several times.

III. Instructing on Unindicted First-Degree Kidnapping Elements

Defendant first contends the trial court plainly erred by instructing the jury it could find him guilty of first-degree kidnapping based on all three elevating elements of N.C. Gen. Stat. § 14-39(b) when the indictment only charged the subsection (b) element of sexual assault. We disagree.

A. Issue Preservation

[1] Defendant concedes his counsel failed to object to the instructions at trial and is thus entitled only to plain error review of this alleged error. *See* N.C. R. App. P. 10(b)(2), (c)(4). The State argues that defendant is precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was "fine." We disagree.

Even where the "trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not found the defendant invited his alleged instructional error but applied plain error review. *See State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (acknowledging that the defendant at multiple times failed to object and approved the challenged instruction but nonetheless electing to review his alleged instructional error for plain error). Further, the transcript excerpt the State cites to support its participating-in-crafting-the-instructions argument concerned the subsection (a) purpose element of kidnapping, not

any subsection (b) elements. Accordingly, we conclude this alleged instructional error is not precluded from plain error review.

B. Review Standard

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, internal quotation marks, and brackets omitted).

C. Discussion

[2] Kidnapping is the unlawful confinement, restraint, or removal, from one place to another, of any person over 16 years old without their consent, for one of six statutorily enumerated purposes. N.C. Gen. Stat. § 14-39(a) (2013). Kidnapping is elevated to the first-degree if the defendant (1) did not release the victim in a safe place, (2) seriously injured the victim, or (3) sexually assaulted the victim. N.C. Gen. Stat. § 14-39(b) (2013). "[T]he language of [N.C. Gen. Stat. §] 14-39(b) states essential elements of the offense of first-degree kidnapping . . . ." *State v. Jerrett*, 309 N.C. 239, 261, 307 S.E.2d 339, 351 (1983). Thus, "to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of both subsection (a) and subsection (b)." *Id.* (citation omitted).

"[I]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) (citations omitted); *see also id.* at 249, 321 S.E.2d at 863 (awarding new first-degree kidnapping trial under plain error review where trial court instructed on an different subsection (a) purpose theory, for which the State presented no supportive evidence, and a different subsection (b) elevating element, than those charged in the indictment). However, our Supreme Court has "found no plain error where the trial court's instruction included the [subsection (a)] purpose that was listed in the indictment and where compelling evidence had been presented to support an additional element or elements not included in the indictment as to which

the court had nevertheless instructed." *State v. Tirado*, 358 N.C. 551, 575, 599 S.E.2d 515, 532 (2004) (citing *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001)); *see also id.* at 575–76, 599 S.E.2d at 532–33 (finding no plain error where the trial court instructed on the subsection (a) kidnapping purpose theory charged in the indictment in addition to an unindicted purpose theory, on grounds that "the evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions").

Here, the indictment only charged the subsection (b) elevating element of sexual assault. Yet the trial court instructed the jury that it could find defendant guilty if it found "the [victim] was not released by the defendant in a safe place and/or had been sexually assaulted and/or had been seriously injured." Thus, the jury was instructed on the indicted subsection (b) elevating element of sexual assault, as well as the two remaining subsection (b) elements not charged in the indictment. The jury was then supplied a special verdict sheet that separately listed all three subsection (b) elements, and the jury indicated it found defendant guilty of first-degree kidnapping based on each individual subsection (b) element.

Because the instruction contained subsection (b) elements not charged in the indictment, it was erroneous. *See Brown*, 312 N.C. at 247, 321 S.E.2d at 862 (finding error where the judge "instructed the jury that to convict of first-degree kidnapping they must find that defendant 'sexually assaulted' the victim, rather than that he failed to release her in a safe place" as the indictment charged). However, after carefully examining the record, the instruction, and the jury's verdict, we hold that defendant failed to satisfy his burden of demonstrating this instructional error amounted to plain error. The State presented compelling evidence to support the subsection (b) element of not released in a safe place, and the jury separately found defendant guilty of first-degree kidnapping based on all three subsection (b) elements.

The subsection (b) element of not released in a safe place for first-degree kidnapping "require[s] a conscious, willful action on the part of the defendant to assure that [the] victim is released in a place of safety." *State v. Garner*, 330 N.C. 273, 294, 410 S.E.2d 861, 873 (1991) (citing *Jerrett*, 309 N.C. at 262, 307 S.E.2d at 351). Merely departing a premises is insufficient to effectuate a "release." *See State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242 (2006) (rejecting an argument that "release" merely requires a relinquishment of dominion or control over the victim, reasoning: "[I]n fact defendants may have physically left the premises, but through their active intimidation, they left the victims with a constructive presence"); *see also State v. Anderson*, 181 N.C. App. 655,

658–60, 640 S.E.2d 797, 800–02 (2007) (finding victim not released in a safe place when kidnapper left victims bound in their home after shooting his gun in the air and running out the back door, reasoning that he remained constructively present, since the victims, and later the police, were uncertain as to whether kidnapper actually relinquished the victims or vacated the premises). Additionally, an isolated location is generally not a "safe place." *See State v. Burrell*, 165 N.C. App. 134, 141, 598 S.E.2d 246, 250 (2004) (finding adult victim not released in a safe place when kidnappers pushed him out of their vehicle around 1:30 a.m. onto the side of an interstate located in an "isolated and wooded" area).

Here, the State's evidence showed that after defendant finished his assaults, he demanded Anna to meet him the next day and threatened that, if she refused, he would "send somebody to take care of [her] and [her] child." Defendant then merely departed the scene on foot, leaving Anna alone at the bottom of a rocky creek embankment under a bridge near a deserted stretch of road. Anna testified that after she watched defendant walk away, she continued to feel unsafe because she "didn't know whether [defendant] was going to come back or not." Anna further testified that when she called the police, they seemed to take a long time to arrive because she had difficulty explaining her location. No evidence indicated a conscious, willful effort on defendant's part to release Anna in a place of safety. Rather, compelling evidence was presented that, based on defendant's current and future threats, and Anna being uncertain of his whereabouts after he left, defendant may have left Anna's proximate location but remained constructively present. Compelling evidence was also presented that defendant left Anna in an isolated location. This evidence supported the subsection (b) element of not released in a safe place. Further, the jury indicated on its special verdict sheet that it separately found defendant guilty of first-degree kidnapping based on all three subsection (b) elements.

Based on the overwhelming and uncontroverted evidence, and the jury's special verdict sheet indicating it found him guilty based on all three subsection (b) elements, defendant has failed to show this instructional error "had a probable impact on the jury's finding that the defendant was guilty" of first-degree kidnapping. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). We thus hold that the trial court's instructional error did not amount to plain error.

IV. Sentencing on Both Kidnapping and Sexual Offense

[3] Defendant contends the trial court erred by imposing sentences for both first-degree kidnapping and first-degree sexual offense on double jeopardy grounds. The State retorts this issue is unpreserved because

defendant failed to object and raise this constitutional double jeopardy argument below. We agree.

A defendant's failure to object below on constitutional double jeopardy grounds typically waives his or her right to appellate review of the issue. *See*, *e.g.*, *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) ("To the extent defendant relies on constitutional double jeopardy principles, we agree that his argument is not preserved because constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." (citations, internal quotation marks, and brackets omitted)). Further, our Rules of Appellate Procedure require a defendant to make "a timely request, objection, or motion [below], stating the specific grounds for the [desired] ruling" in order to preserve an issue for appellate review. N.C. R. App. P. 10(a)(1). Additionally, despite defendant's argument to the contrary, this Court recently reaffirmed that Rule 10(a)(1)'s issue preservation requirements apply to alleged errors at sentencing. *See State v. Meadows*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 33 (No. 16-1207) (Oct. 17, 2017) (deeming waived under Rule 10(a)(1) the defendant's alleged constitutional error that arose during sentencing based on her "fail[ure] to object at sentencing" (citation omitted)).

Nonetheless, defendant asks us to invoke Rule 2 of our Rules of Appellate Procedure to address the merits of his unpreserved constitutional double jeopardy argument. *See* N.C. R. App. P. 2 (granting this Court discretionary authority under exceptional circumstances to vary or suspend any of the appellate rules, including Rule 10(a)(1)'s issue-preservation requirement). After thoughtfully considering the record and this argument, we conclude that defendant has failed to satisfy his heavy burden of demonstrating that his is the "rare case meriting suspension of our appellate rules . . . ." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017). We thus decline to invoke Rule 2 and dismiss this unpreserved argument.

V. Sentencing on Both Assaults

Defendant contends the trial court erred by sentencing him for both assault on a female and assault by strangulation. The State does not address the merits of defendant's argument but contends this issue is not preserved for appellate review.

A. Issue Preservation

[4] Defendant concedes his trial counsel failed to object below but claims a right to appellate review on statutory mandate grounds. He

argues in relevant part that the assault on a female statute contains a mandatory prefatory clause, *see* N.C. Gen. Stat. § 14-33(c) (2013) ("*Unless the conduct is covered under some other provision of law providing greater punishment*, any person who [assaults a female] is guilty of a Class A1 misdemeanor . . . ." (emphasis added)), which prohibited the trial court from punishing him for that offense since he was also punished for the higher class offense of assault by strangulation based on the same conduct. The State argues N.C. Gen. Stat. § 14-33(c) does not impose a "statutory mandate" for issue preservation purposes.

"When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citations and quotation marks omitted). This Court has interpreted N.C. Gen. Stat. § 14-33(c)'s prefatory clause as imposing a statutory mandate that preserved for appellate review an analytically identical argument notwithstanding the defendant's failure to object below. *See State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014) (deeming preserved, absent an objection below and on statutory mandate grounds, the defendant's argument that he was improperly sentenced for both assault on a female, and for the higher class offense of assault inflicting serious bodily injury based on the same underlying conduct). While this argument implicates similar double jeopardy principles as the unpreserved allegation of constitutional error we dismissed above, under *Jamison*, this argument is preserved for our review. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted).

B. Discussion

[5] We review *de novo* statutory construction and application issues. *Jamison*, 234 N.C. App. at 238, 758 S.E.2d at 671 (citation omitted). While the prefatory clause of N.C. Gen. Stat. § 14-33(c) mandates that a person cannot be punished for both assault on a female and for the higher class offense of assault by strangulation, this mandate is triggered only if both assaults were based on the same "conduct."

Additionally, where multiple assaults occur during one altercation may be "deemed separate and distinct," multiple sentences based on those assaults may be imposed. *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (explaining that where multiple assault convictions arise from "one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first" (citation omitted)).

In *State v. Rambert*, our Supreme Court identified three factors it considered in rejecting the defendant's double jeopardy argument that he was improperly sentenced for three counts of discharging a firearm into occupied property that arose from three gunshots he fired at the victim's car during a single altercation. 341 N.C. 173, 459 S.E.2d 510 (1995); *see also id.* at 176, 459 S.E.2d at 512 (concluding that "defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts"). Those three factors follow: (1) "[e]ach shot . . . required that [the] defendant employ his thought processes each time he fired the weapon"; (2) "[e]ach act was distinct in time"; and (3) "each bullet hit the vehicle in a different place." *Id.* at 176–77, 459 S.E.2d at 513 (citation omitted).

In *State v. Wilkes*, we applied the *Rambert* Court's separate-and-distinct-act analysis in the assault context. 225 N.C. App. 233, 239, 736 S.E.2d 582, 587, *aff'd*, 367 N.C. 116, 748 S.E.2d 146 (2013) (per curiam). There, the defendant was convicted and sentenced for both assault with a deadly weapon with intent to kill inflicting serious injury, and for assault with a deadly weapon inflicting serious injury, based on a single brutal altercation with his wife. *Id.* at 236, 736 S.E.2d at 585. On appeal, the defendant similarly argued that he was improperly convicted and sentenced for both assaults on double jeopardy grounds. *Id.* at 238, 736 S.E.2d at 586–87. We applied *Rambert*'s three factors to reach our holding that, because certain assault conduct required a separate thought process, they were distinct in time, and the victim sustained injuries to different parts of her body, the defendant had committed two distinct assaults. *Id.* at 239–40, 736 S.E.2d at 587–88. We thus held the defendant's two assault convictions did not violate his double jeopardy rights. *Id.*

Here, the assault on a female and the assault by strangulation convictions were based on different conduct. Defendant's act of pinning down Anna and choking her throat with his hands to stop her from screaming supported the assault by strangulation conviction. Defendant's acts of grabbing Anna by her hair, tossing her down the rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The trial court specifically instructed the jury on assault on a female based on this evidence.

Furthermore, when applying *Rambert*'s three factors, the two assaults were sufficiently separate and distinct to sustain both convictions. First, defendant's assaults required different thought processes. Defendant's decisions to grab Anna's hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down Anna while she was

on the ground and strangle her throat to quiet her screaming. Second, the assaults were distinct in time. After defendant's initial physical assault, and then the strangulation, he briefly ceased his physical assault after Anna stopped screaming and resisting. But after defendant informed Anna that he was a "mob boss" and threatened her life if she refused his sexual demand, Anna screamed again, and defendant "hit [her] again in the head multiple times." Third, Anna sustained injuries to different parts of her body. The evidence showed that Anna suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation.

The trial evidence here shows that both convictions arose not from the same conduct but from separate and distinct acts constituting different assaults. Accordingly, the trial court did not violate N.C. Gen. Stat. § 14-33(c)'s mandate by imposing sentences based on the two assault convictions. Furthermore, both assaults were consolidated with a higher class offense, and the sentences imposed were based on those higher class offenses. Thus, even assuming the two assault convictions could not support two sentences on the ground they were based on the same conduct, defendant cannot establish prejudice from this alleged sentencing error.

VI. Denying Motion to Dismiss Sexual Offense Charge

[6] Defendant contends the trial court erred by denying his motion to dismiss the first-degree sex offense for insufficiency of the evidence. We disagree.

A. Review Standard

We review *de novo* the denial of a motion to dismiss for insufficient evidence. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016) (citation omitted). Such a motion is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Denny*, 361 N.C. 662, 664, 652 S.E.2d 212, 213 (2007) (citations and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). All evidence must be viewed "in the light most favorable to the State and . . . all contradictions and discrepancies [resolved] in the State's favor." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citation omitted).

B. Discussion

Defendant was charged with first-degree sexual offense under N.C. Gen. Stat. § 14-27.4 (2013) (recodified as N.C. Gen. Stat. § 14-27.26 by

S.L. 2015-181, § 3(a), eff. Dec. 1, 2015). Relevant here, one essential element of that crime is that the defendant "inflict[ ] serious personal injury upon the victim . . . ." *Id.* § 14-27.4(a)(2)(b). Serious personal injury may be proved by showing physical injury, or mental or emotional injury, *see State v. Baker*, 336 N.C. 58, 64, 441 S.E.2d 551, 554 (1994) (citation omitted), or a combination of both, *see State v. Ackerman*, 144 N.C. App. 452, 461, 551 S.E.2d 139, 145 (2001).

> [I]n order to prove a serious personal injury based [solely] on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the '*res gestae*' results present in every forcible rape. *Res gestae* results are those so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening.

State v. Finney, 358 N.C. 79, 90, 591 S.E.2d 863, 869 (2004) (internal quotation marks omitted) (quoting *Baker*, 336 N.C. 58, 62–63, 441 S.E.2d 551, 554). "In determining whether serious personal injury has been inflicted for purposes of satisfying the elements of first-degree rape, the court must consider the particular facts of each case." *State v. Richmond*, 347 N.C. 412, 429, 495 S.E.2d 677, 686 (1998) (citation and internal quotation marks omitted).

Here, evidence was presented that defendant, a forty-three-year-old male, approximately 5'10" tall with a medium build, physically and sexually assaulted Anna, a twenty-two-year-old female, approximately 5'1" tall, and weighing only ninety-six pounds. After what Anna perceived was a friendly conversation, defendant unexpectedly grabbed her and threw her down a steep, rocky embankment about ten to twelve feet below. Defendant punched Anna's face and head numerous times, straddled her when she fell to the ground, and pinned her down as he strangled her throat. After Anna stopped resisting, defendant briefly stopped his physical assault, but after she started screaming and resisting again, defendant continued punching Anna's face and head again before finally forcing her to perform oral sex on him.

The State presented evidence that Anna was diagnosed with a head injury at the hospital, and that for days after the incident, Anna experienced pain throughout her body. Her head hurt "extremely bad," her neck and shoulders hurt, she suffered two black eyes and bruises on her body, she had hoarseness in her voice from the strangulation, and she had "an extremely difficult time concentrating on things." The

incident occurred on 7 December 2013. As of Anna's trial testimony on 15 August 2016, she continues to have a hard time trusting people, has difficulty opening up to others, and is unable to maintain many friendships. Additionally, the State's evidence showed that Anna still is unable to concentrate as effectively, has difficulty remembering things, and suffers from short-term memory loss as a result of the attack, all of which have caused her problems at work.

Viewing this evidence in the light most favorable to the State and giving it the benefit of all reasonable inferences arising therefrom, we conclude that the State presented substantial evidence to support the challenged element of inflicting serious personal injury. The trial court thus properly denied defendant's dismissal motion.

VII. Ordering Lifetime Registration and SBM

Defendant next contends the trial court erred by ordering him to enroll in lifetime sex offender registration and lifetime SBM on grounds that the trial court's findings do not statutorily support such orders, and that it never made a determination as to the reasonableness of SBM under the Fourth Amendment pursuant to *Grady*. The State does not address the merits of either argument but contends that because defendant failed to object at sentencing, he failed to preserve these issues for appellate review.

A. Grounds for Appellate Review

[7] As an initial matter, defendant gave oral notice of appeal at the 19 August 2016 sentencing hearing but failed to file a written notice of appeal as required to preserve his right to appeal from an SBM order. *See State v. Brooks*, 204 N.C. App. 193, 194–95, 693 S.E.2d 204, 206 (2010) (holding oral notice of appeal at SBM hearing is insufficient to confer appellate jurisdiction to review SBM order and requiring a defendant to file written notice of appeal pursuant to N.C. R. App. P. 3(a)).

However, on 2 May 2017, defendant filed a petition for a writ of *certiorari* to preserve his right to appellate review of the registration and SBM orders despite his failure to file a timely written appeal. Under Appellate Rule 21, this Court may issue a writ of *certiorari* "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.] . . ." N.C. R. App. P. 21(a)(1). Because we deem defendant's first challenge concerning the sufficiency of the trial court's findings to support its registration and SBM orders to be meritorious, in our discretion, we allow defendant's petition to review these orders.

B. Issue Preservation

In *State v. Johnson*, we held that despite the defendant's failure to object at sentencing, his right to appeal an SBM order was nonetheless preserved on statutory mandate grounds because we determined the issue he raised, that the trial court's erroneous "aggravating offense" finding did not support the imposition of lifetime registration, implicated the trial court's failure to follow N.C. Gen. Stat. § 14-208.23's mandate as to when a defendant "shall" maintain lifetime registration. ___ N.C. App. ___, ___, 801 S.E.2d 123, 128 (2017). Accordingly, under *Johnson*, notwithstanding defendant's failure to raise this issue at sentencing, his argument that the trial court's findings were insufficient to support its lifetime registration and SBM orders is preserved for appellate review. Because we hold that the registration and SBM orders must be reversed and remanded for resentencing based on this error, defendant's *Grady* argument becomes moot.

C. Discussion

[8] Defendant contends that although the trial court found that he was neither a (1) sexually violent predator, nor (2) a recidivist, and that (3) none of his convictions were "aggravated offenses" under N.C. Gen. Stat. § 16-208.6(1a), nor (4) involved a minor, it nonetheless erroneously ordered him to enroll in lifetime sex offender registration and SBM.

"On appeal from an order imposing satellite-based monitoring, this Court reviews 'the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.' " *State v. Springle*, 244 N.C. App. 760, 765, 781 S.E.2d 518, 521–22 (2016) (citations omitted). Additionally, "[a]lleged statutory errors are questions of law and as such, are reviewed *de novo*." *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 128 (citation and quotation marks omitted).

Where, as here, a trial court finds a person was convicted of a "reportable conviction," it must order that person to maintain sex offender registration for a period of at least thirty years. N.C. Gen. Stat. § 14-208.7(a) (2013). If a trial court also finds that the person has been classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense, it must order lifetime registration. N.C. Gen. Stat. § 14-208.23 (2013). Where a trial court enters an order imposing lifetime registration based upon an erroneous finding that a conviction constituted a statutory aggravating offense, we have reversed the order and remanded to the trial court "for entry of a registration order based upon proper findings." *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 130.

Under N.C. Gen. Stat. § 14-208.40A, before a trial court may impose SBM, it must make factual findings determining whether

> (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

N.C. Gen. Stat. § 14-208.40A(b) (2013) (amended in 2015 and 2017). "[T]he five categories of offenders referenced [above] constitute the only types of offenders that the Generally Assembly has made eligible for enrollment in the SBM program." *State v. Hadden*, 226 N.C. App. 330, 335, 741 S.E.2d 466, 469 (2013) (citations omitted).

Because Anna was not a minor, the first three categories are relevant here. As to those categories, a trial court "shall order" lifetime SBM if it finds that the offender (1) "has been classified as a sexually violent predator," (2) "is a recidivist," (3) or "has committed an aggravated offense[.]" N.C. Gen. Stat. § 14-208.40A(c) (2013). However, where a trial court finds an offender does not fall within any of the five categories, it is error to impose SBM. *Hadden*, 226 N.C. App. at 335, 741 S.E.2d at 469 (vacating SBM order and remanding for reconsideration where the trial court "expressly found that defendant did not fall within any of the [five] statutorily enumerated categories of offenders requiring monitoring, but nonetheless ordered defendant to enroll in the SBM program due to [its findings of other non-statutorily listed factors]").

Here, in its registration and SBM orders, the trial court found that defendant had not been convicted of an aggravated offense, was not a recidivist, nor had he been classified a sexually violent predator. But the trial court nonetheless ordered that defendant enroll in lifetime registration and lifetime SBM. As these findings, standing alone, do not support either lifetime registration, or enrollment in SBM for any duration, we reverse the trial court's registration and SBM orders.

As defendant correctly argues, this Court has held that first-degree sexual offense is not an "aggravated offense" under N.C. Gen. Stat. § 14-208.6(1a) triggering lifetime registration or SBM. *See State v. Green*, 229 N.C. App. 121, 129, 746 S.E.2d 457, 464 (2013). But the sentencing hearing transcript does not indicate whether the State and trial court were under a misapprehension that first-degree sexual offense constituted such an aggravating offense. At sentencing, but during its request that the trial court run the sentences consecutively, the State argued in relevant part:

> [T]he defendant's behavior in this situation shows that he is a very dangerous individual. He is a threat to the members of our community. He chose to assault a young, very small, defenseless person . . . .
>
> Also, the fact that the 404(b) evidence from the two other women that he has assaulted in Asheville, the State has reason to believe that he had only been in Asheville for about three months. . . . [H]e chose to perpetrate on three different individuals, all strangers to him, all in broad daylight. The boldness of his actions and the dangerousness of what he has done is truly concerning to the State, Your Honor, on behalf of the citizens of Buncombe County, and would . . . respectfully request that Your Honor take all of those factors into consideration.

Additionally, evidence was presented that defendant suffers from mental illness, and in its judgment the trial court recommended defendant receive "psychiatric and/or psychological counseling" while incarcerated, which may implicate "sexually violent predator" classification. *See* N.C. Gen. Stat. § 14-208.6(6) (2013) (defining a "[s]exually violent predator" in relevant part as "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers . . . .").

However, the trial court did not render oral findings or explain its rationale for ordering lifetime registration and SBM, and those orders merely contain the bare statutorily required findings that defendant was neither a sexually violent predator, a recidivist, nor had been convicted of an aggravating offense. Accordingly, we cannot meaningfully assess whether any of the trial court's findings were merely clerical errors, or whether the trial court simply erred in ordering lifetime registration and SBM. We therefore reverse the registration and SBM orders, and remand only those issues for resentencing.

If the State pursues SBM on remand, it must satisfy its burden of presenting evidence, *inter alia*, from which the trial court can fulfill its judicial duty to make findings concerning the reasonableness of SBM under the Fourth Amendment pursuant to *Grady*. *See*, *e.g.*, *Johnson*, ___ N.C. App. at ___, 801 S.E.2d at 131 (reversing SBM order and remanding for a new SBM hearing where the trial court failed to conduct a proper *Grady* hearing); *see also State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016) (holding that "the State shall bear the burden of proving that the SBM program is reasonable").

VIII. Ineffective Assistance of Counsel

[9] Defendant also contends that he suffered five separate instances of IAC at sentencing based on his trial counsel's alleged failures to: (1) object when he was sentenced to first-degree kidnapping and first-degree sexual assault because the indictment only charged the subsection (b) element of sexual assault; (2) object when he was sentenced twice for the same assault; (3) object when he was sentenced to lifetime SBM, although he was not eligible for lifetime SBM; (4) present expert testimony allegedly supporting a particular statutory mitigating factor; and (5) request that the trial court consider that particular statutory mitigating factor, rather than a non-statutory mitigating factor his trial counsel raised during sentencing.

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, when the cold record is inadequate for meaningful appellate review, and "the reviewing court [thus] determine[s] that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

After carefully considering the cold record and defendant's IAC claims, we conclude that each claim requires further investigation and were thus asserted prematurely. We therefore dismiss defendant's IAC claims without prejudice to his right to reassert those claims in a subsequent MAR proceeding. *See Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citation omitted).

IX. Conclusion

As to defendant's first four alleged errors, we hold that defendant received a fair trial, free of error, and valid sentences based upon the jury's convictions. However, because the trial court's findings, without more, do not support its orders imposing lifetime registration or enrollment in SBM, and the record precludes meaningful appellate review, we reverse these orders and remand for resentencing solely on the issues of registration and SBM. If the State pursues SBM on remand, it must satisfy its burden of presenting evidence from which the trial court can make its required findings concerning the reasonableness of imposing SBM pursuant to *Grady*. We dismiss defendant's numerous IAC

claims without prejudice to his right to reassert them in a subsequent MAR proceeding.

NO ERROR IN PART; REVERSED AND REMANDED IN PART; DISMISSED IN PART.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
KENNETH WILLIAM MILLER

No. COA17-405

Filed 6 March 2018

Motor Vehicles—driving while impaired—driving golf cart on highway—defense of necessity—distinct from duress

A conviction for driving while impaired was remanded for a new trial where the trial refused to instruct the jury on necessity. Defense counsel requested an instruction on duress and necessity and specifically the pattern jury instruction on duress. There is no pattern jury instruction on necessity, but the defenses are separate and distinct and the trial judge was not relieved of the duty to give a correct instruction if there was evidence to support it. Here, the trial court clearly considered an additional element—fear—that is not an element of necessity but makes sense in the context of duress. On the specific facts of this case, defendant and his wife drove a golf cart to a nearby bar along a path that was not a highway but later fled along a highway when a fight broke out and a gun was pulled. Taken in the light most favorable to defendant, the evidence was such that the jury could find the elements of necessity, and the failure to give the instruction was prejudicial.

Judge DILLON concurring with separate opinion.

Appeal by Defendant from judgment entered 8 April 2016 by Judge Michael R. Morgan in Superior Court, Wake County. Heard in the Court of Appeals 2 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Lennon, for the State.

Chetson Hiltzheimer, PLLC, by Damon Chetson, for Defendant.

McGEE, Chief Judge.

I. *Brief Factual Background*

Kenneth William Miller ("Defendant") and his wife, Heather Miller ("Heather") drove their golf cart (the "golf cart") from their house (the "house") to a nearby bar called Bones' Place ("Bones") on the evening of 1 March 2014 to hear a band. According to the evidence taken in the light most favorable to Defendant, there was a path between the house and Bones that permitted the drive to be conducted without travelling on any public roadways. At approximately midnight, Heather decided she wanted to leave Bones. Defendant went outside while Heather went to the restroom, and an altercation occurred between Defendant and some men in the Bones parking lot (the "parking lot"). When Heather walked out of Bones and onto the parking lot, she witnessed the altercation. The situation escalated and one of the men drew a handgun and threatened Defendant, causing Defendant and Heather to get into the golf cart, and Defendant then drove away from the parking lot.

Wake County Sheriff's Deputy Joshua Legan ("Deputy Legan") was on patrol shortly after midnight on 2 March 2014, when he observed the golf cart heading toward him. Deputy Legan testified that the golf cart was being driven without lights and was straddling the center line on Old U.S. Highway 1. Deputy Legan immediately turned around and drove to intercept the golf cart. By the time Deputy Legan activated his lights and caught up to the golf cart, it had turned off of the highway onto a dirt path. Deputy Legan noticed the odor of alcohol emanating from Defendant and that Defendant's speech was slurred and his eyes were "red and bloodshot[.]" Additional deputies arrived at the scene. Defendant was administered tests for impairment and, based upon all the factors Deputy Legan observed, Defendant was arrested for driving while impaired and driving left of the center line.

Defendant was found guilty of driving while impaired and responsible for driving left of center in district court on 11 June 2015, and he appealed to superior court. Defendant was tried before a jury at the 6 April 2016 session of Wake County Superior Court, and was again found guilty of driving while impaired and responsible for driving left of center. Defendant appeals. Additional relevant facts will be discussed in the analysis portion of this opinion.

II. *Analysis*

In Defendant's sole argument, he contends the trial court erred by refusing to instruct the jury on the defense of necessity when the evidence presented at trial supported giving the instruction. We agree.

A. Case Law

The affirmative defense of necessity is available to defendants charged with driving while under the influence ("DWI"). *State v. Hudgins*, 167 N.C. App. 705, 710 606 S.E.2d 443, 447 (2005). As an affirmative defense, "the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury." *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). It is well established:

> A trial court must give a requested instruction if it is a correct statement of the law and supported by the evidence. "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when *viewing the evidence in a light most favorable to the defendant*. "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

State v. Brown, 182 N.C. App. 115, 117–18, 646 S.E.2d 775, 777 (2007) (citations omitted) (emphasis added). However, "'a trial court is not obligated to give a defendant's exact instruction so long as the instruction actually given delivers the substance of the request to the jury.'" *State v. Holloman*, 369 N.C. 615, 625, 799 S.E.2d 824, 831 (2017) (citations omitted). Further,

> a trial judge's jury charge shall "give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." For that reason, "the judge has the duty to instruct the jury on the law arising from all the evidence presented." In instructing the jury with respect to a defense to a criminal charge, "*the facts must be interpreted in the light most favorable to the defendant*."

Id. at 625, 799 S.E.2d at 831 (citations omitted) (emphasis added).

"A defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Hudgins*, 167 N.C. App.at 710–11, 606 S.E.2d at 447.

> The rationale behind the defense is based upon the public policy that "the law ought to promote the achievement of higher values at the expense of lesser values, and [that] sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person] is justified in violating it."

State v. Thomas, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991) (citations omitted) (alterations in original).

The question before this Court, which we review *de novo*, is whether, when viewed in the light most favorable to Defendant, substantial evidence was presented at trial that Defendant took "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available" to Defendant. *Hudgins*, 167 N.C. App.at 710–11, 606 S.E.2d at 447. Therefore, if the evidence presented at trial, viewed in the light most favorable to Defendant and ignoring all contradictory evidence, was sufficient to permit the jury to *reasonably infer* the existence of these three elements, the trial court was required to give the instruction on necessity. It would then be the sole province of the jury to determine whether, based upon those facts, Defendant had met his burden of proving necessity to the satisfaction of the jury:

> [Our appellate] cases enunciate and reiterate the rule – established in our law for over one hundred years, – that when the burden rests upon an accused to establish an affirmative defense . . . the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied.

State v. Freeman, 275 N.C. 662, 666, 170 S.E.2d 461, 464 (1969) (citations omitted).

We now address a potential issue that arises from the present appeal. During the charge conference, Defendant requested that the trial court give an instruction on necessity and duress, but specifically requested N.C.P.I. Crim. 310.10, the instruction for "Compulsion, Duress, or Coercion." In North Carolina, there is no pattern jury instruction that expressly addresses the defense of necessity. At the charge conference, both Defendant and the State discussed a recent unpublished opinion of this Court, *State v. Badson*, 242 N.C. App. 384, 776 S.E.2d 364, 2015 WL 4430202 (2015) (unpublished).[1] In *Badson*, this Court stated: "Although the defenses of duress and necessity were 'historically distinguished' under common law, '[m]odern cases have tended to blur the distinction[.]' *State v. Monroe*, 233 N.C. App. 563, 565, 756 S.E.2d 376, 378 (2014). Thus, for purposes of this opinion, the two defenses are discussed interchangeably." *Badson*, 242 N.C. App. 384, 776 S.E.2d 364, 2015 WL 4430202 at *3.[2] We note that the language quoted from *Monroe* is language discussing federal law, not the law of North Carolina. *Monroe*, 233 N.C. App.at 565, 756 S.E.2d at 378 (2014). Further, in *Badson* this Court quotes *Hudgins* for the proposition that the "defense of necessity is available in a DWI prosecution[,]" *Badson*, 2015 WL 4430202 at *4 (citation omitted), and sets forth the elements of *necessity* as found in *Hudgins*: "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Id.* (citation omitted).

The elements of *duress* have been stated as follows:

> "In order to successfully invoke the duress defense, a defendant would have to show that his 'actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act.'" Furthermore, a defense of duress "cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm."

State v. Smarr, 146 N.C. App. 44, 54–55, 551 S.E.2d 881, 888 (2001) (citations omitted). The pattern jury instruction for compulsion, duress, or coercion states, partially tracking the language of *Smarr* and other opinions involving duress:

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1. In the transcript the case is identified as "*State v. Batson*;" however, it is clear that the case discussed was *Badson*.

2. *See also State v. Smith*, __ N.C. App. __, 791 S.E.2d 544, 2016 WL 6081424, at *3 (2016) (unpublished opinion conflating duress and necessity).

> 310.10 COMPULSION, DURESS, OR COERCION.
>
> There is evidence in this case tending to show that the defendant acted only because of [compulsion] [duress] [coercion]. The burden of proving [compulsion] [duress] [coercion] is upon the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. The defendant would not be guilty of this crime if *his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime*. His assertion of [compulsion] [duress] [coercion] is a denial that he committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.

N.C.P.I. Crim. 310.10 (emphasis added).

We find no binding precedent supporting the proposition that duress and necessity have ceased to be distinct defenses in North Carolina.[3] In recognizing the availability of the necessity defense in trials for DWI, this Court in *Hudgins* held that the defense of necessity was available based in part on the fact that other "common law defenses are available in DWI prosecutions." *Hudgins*, 167 N.C. App. at 709, 606 S.E.2d at 447. Countering the State's argument that the necessity defense should not be allowed, this Court held:

> The State's argument cannot be reconciled with decisions of this Court indicating that common law defenses are available in DWI prosecutions. This Court recently held that "[i]n appropriate factual circumstances, the defense of entrapment is available in a DWI trial." This Court has also implicitly acknowledged that *the defense of duress* would be appropriate in a DWI trial. *See State v. Cooke*, 94 N.C. App. 386, 387, 380 S.E.2d 382, 382-83[.]
>
> Moreover, courts in other jurisdictions have specifically held that the defense of necessity is available in a DWI prosecution. We likewise hold that the defense of necessity is available in a DWI prosecution.

Id. at 709–10, 606 S.E.2d at 447 (citations omitted) (emphasis added). If necessity and duress have ceased to be distinct defenses in North

3. We note that on appeal, both Defendant and the State limit their arguments to whether the trial court erred by failing to give an instruction on *necessity*, and do not discuss the defense of duress.

Carolina, this Court in *Hudgins* could have simply cited *Cooke* as having implicitly established the viability of the merged necessity/duress defense instead of relying on *Cooke*'s implicit acceptance of the duress defense, along with this Court's explicit recognition of the defense of entrapment, in order to hold that the defense of necessity is also available to defendants on trial for DWI. In addition, reference to the acceptance of necessity as a defense to DWI in other jurisdictions would have been superfluous. We hold the defense of necessity is recognized as a defense separate and distinct from the defense of duress (compulsion or coercion).

In the present case, both parties and the trial court, while discussing the elements of the requested instruction at the charge conference, solely discussed the elements of necessity as set forth in *Badson* – and thus *Hudgins*. However, the elements in *Hudgins* do not track the language in N.C.P.I. Crim. 310.10, the pattern jury instruction for duress. The State argued the required elements as follows: "That it first must be a reasonable act taken to . . . protect the life, limb, or health of a person. . . . . And to the third action, that [there] must be no other acceptable choices available." The State then suggested that this Court's opinion in *Cooke* recognized a fourth element: "That [D]efendant [continued to face] threatening conduct of any kind at the time the officer saw him while driving while intoxicated."

Despite the fact that the elements discussed by the parties at the hearing were those for necessity, the trial court, clearly relying on language from N.C.P.I. Crim. 310.10, denied Defendant's request to instruct the jury on the defense of necessity based upon its determination that no evidence had been presented demonstrating that Defendant was in actual "fear" at the time he drove the golf cart on the highway:

> [THE COURT:] While the issue appears on it sure to be quite detailed and involved really, *a look at the instruction* makes it fairly simple in terms of the resolution here. The instruction 310.10 reads in pertinent part to the extent that it influences the decision here, quote:
>
> . . . .
>
> [] [D]efendant would not be guilty of this crime if his actions were caused by a reasonable *fear* that he or another would suffer immediate death or serious bodily injury if he did not commit the crime. Unquote.
>
> Of course there is reasonable dispute concerning the length of time that was involved here in terms of when

> that fear still is recognized by the law to be present and existent in terms of the length of time or the length of participation as to where there was a fear that began as opposed to the point where it was still considered to be ongoing until such time as the deputy effected the stop here.
>
> There's also the aspect as to whether or not, as the [S]tate argues as well, whether there was such a serious threat that would connote immediate death or serious bodily injury being a potential outcome but for [] [D]efendant's actions.
>
> *But all of that presupposes something that's not even in evidence, and that is, in terms of looking at the plain language of the instruction, [] [D]efendant will not be guilty of this crime if his actions were caused by reasonable fear.*
>
> *There is no evidence that [] [D]efendant was in fear.* There's evidence that the testimony was his wife was in fear, but *there's no evidence that [] [D]efendant was in fear* for me to consider over this instruction being given, so as to instruction about that, this point 310.30 will not be given because there is no evidence that [] [D]efendant had a reasonable fear which would have him to commit the alleged crime.
>
> . . . .
>
> [DEFENDANT'S COUNSEL:] To say that the only way that [Defendant] can mount the defense is to actually hear from [him] would be a violation of his right against self-incrimination.
>
> THE COURT: I didn't say that [Defendant] had to testify that he was in fear. I said there is *no evidence that he was in fear*, whether that would come from him or anybody else that he was in fear. But you can make your statements for the record, but I've made the decision. (Emphasis added).

The trial court clearly considered there to be an additional element requiring that Defendant was motivated by emotional "fear" to drive the golf cart on the highway. Our case law does not include fear as an element of the defense of necessity. "A defendant must prove three elements to establish the defense of necessity: (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable

choices available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). Although Defendant's mental state could be potentially relevant in analyzing the required elements, fear itself is simply not an element of the defense.

We are not called upon in the present appeal to determine whether "fear," as implicitly defined by the trial court in the present case – an emotional or mental state – is an element of the defense of duress.[4] However, in the interest of being thorough, we compare the elements of the defenses of necessity and duress as set forth in appellate opinions of this State. The elements of necessity are that the defendant engaged in "(1) reasonable [though illegal] action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available[.]" *Hudgins*, 167 N.C. App. at 710-11, 606 S.E.2d at 447 (citations omitted). The elements of duress are (1) that a defendant's illegal "'actions were caused by [the defendant's] reasonable fear that [the defendant or another] would suffer'" (2) "'immediate death or serious bodily injury[,]'" (3) "'if [the defendant had] not so act[ed][,]'" and (4) the defendant had no "reasonable opportunity to avoid doing the [illegal] act without undue exposure to death or serious bodily harm." *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted). Both necessity and duress require that a defendant demonstrate an absence of reasonable alternatives to the course of action actually undertaken.[5]

Though not expressly stated in any precedent that we have found, the manner in which the elements of necessity are worded implies that they are analyzed pursuant to an objective standard of reasonableness, not a subjective standard: "(1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). In potential contrast, the first element of duress, as established by precedent and as presented in N.C.P.I. Crim. 310.10, suggests a

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4. However, if the trial court in the present case correctly interpreted "fear" as it relates to duress, and the instruction for duress, then the defenses of necessity and duress have clearly not merged in North Carolina since necessity requires no proof of any state of mind.

5. We make no attempt to answer whether the showing required to prove "no other acceptable choices were available" to a defendant is the same as the showing required to prove a defendant had no "reasonable opportunity to avoid doing the [illegal] act without undue exposure to death or serious bodily harm." We also note that N.C.P.I. Crim. 310.10 includes no express requirement that the jury find an absence of reasonable alternatives: "The defendant would not be guilty of this crime if his actions were caused by a reasonable fear that he (or another) would suffer immediate death or serious bodily injury if he did not commit the crime." N.C.P.I. Crim. 310.10.

subjective standard — that the defendant acted based upon *his* "reasonable fear that [he or another] would suffer immediate death or serious bodily injury" absent his actions. *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted).

This focus on a defendant's "fear" makes sense in the context of duress, coercion or compulsion, because this defense is generally used to justify the actions of a defendant based upon intentional threats from a third party for the express purpose of coercing the defendant to act in an illegal manner. For example, in *State v. Cheek*, 351 N.C. 48, 520 S.E.2d 545 (1999), our Supreme Court, in rejecting the defendant's duress argument, reasoned:

> Defendant contends that the Nelson diary was material to defendant's defense because it supported defendant's contention that Nelson was a violent person, which in turn supported defendant's defense that he accompanied Nelson only out of fear. . . . .
>
> . . . .
>
> [T]he affirmative defense of duress, if proven, would serve as a complete defense to the kidnapping and robbery charges. In order to successfully invoke the duress defense, a defendant would have to show that his "actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act."
>
> In the case *sub judice*, the record contains no evidence which indicates that defendant participated in the kidnapping and robbery of Oxendine as a result of *coercion*. During the extended course of the crimes against Oxendine, defendant had several opportunities to report that he had been *forced by duress* to commit these crimes and to seek help. The record shows that defendant went to New Hanover Hospital after the murder, where he could have sought help, but he failed to do so.

Id. at 61–62, 520 S.E.2d at 553 (citations omitted); *see also State v. Shields*, COA17-69, 2017 WL 6460104, at *4 (2017) (unpublished opinion) ("defendant presented evidence that he remained afraid of Travis even after he entered the home with the other men, and that his continued fear precluded any reasonable opportunity to retreat").

Necessity, however, tends to be used to excuse actions that were based upon a defendant's reasonable response to some *event* or

occurrence, not necessarily involving a third-party, that threatens the life or health of any person. For example, in *Hudgins*, the defendant was convicted of driving while impaired, but argued that the trial court should have instructed the jury on the defense of necessity. *Hudgins*, 167 N.C. App. at 708, 606 S.E.2d at 446. According to the defendant's evidence, he was intoxicated, but was being driven home by his sober friend "Maney," in Maney's truck, when Maney pulled off the road and stopped to examine a fallen tree. *Id.* at 707, 606 S.E.2d at 445. While both Maney and the defendant were outside the truck, the defendant "looked back and saw that the truck was rolling. *Id.* He ran to the truck, jumped in the passenger door, slid over to the driver's side, and unsuccessfully tried to stop the truck[,]" which ended up hitting another vehicle and a house. *Id.* The defendant's actions in *Hudgins* were clearly not the result of coercion by a third-party, nor the result of fear of any bodily harm to himself. *Id.* In fact, the defendant's actions removed the defendant from a place of safety and placed him in a place of physical danger. *Id.* at 711, 606 S.E.2d at 448 ("The fact that defendant and Maney were themselves safely out of harm's way, as the State argues, is irrelevant if the jury believed that defendant's actions were necessary to protect others.").

In *Hudgins*, this Court held that the evidence, taken in the light most favorable to the defendant, was sufficient to allow a proper inference that he acted reasonably under the circumstances – for the purpose of protecting others from the runaway truck – and that no other acceptable choices were available. *Id.* at 711–12, 606 S.E.2d at 448 ("because the record contains substantial evidence of each element of the necessity defense, the trial court should have instructed the jury on that defense").

Presumably, in the present case, Defendant requested N.C.P.I. Crim. 310.10 because no specific North Carolina Pattern Jury Instruction exists for the defense of necessity. Although Defendant could have requested a non-pattern jury instruction correctly stating the elements of necessity, it was not fatal to his argument that he failed to do so. "[A] trial judge [is] not . . . relieved of his duty to give a correct . . . instruction, there being evidence to support it, merely because [a] defendant's request was not altogether correct." *State v. White*, 288 N.C. 44, 48, 215 S.E.2d 557, 560 (1975) (citation omitted). With these issues in mind, we look *de novo* to determine whether there was evidence sufficient to support Defendant's requested necessity instruction.

B. Additional Facts

The evidence viewed in the light most favorable to Defendant was as follows: Defendant and Heather lived in close proximity to Bones.

There were "paths" that connected the house with Bones, and it was possible to travel between the house and Bones without ever travelling on any public roadway. Defendant and Heather had utilized the paths on multiple prior occasions, either by walking or by driving the golf cart. The purpose of utilizing the golf cart and the paths was to avoid driving a car, and further to avoid the use of public roadways, after consuming alcohol. Bones attracted varied clientele, and had become "kind of a rough place" where there could be "fights and it was just very unpredictable." Deputy Legan testified that he had known Bones "to be an establishment that serves the biker crowd."

Defendant and Heather arrived at Bones' parking lot in the golf cart at approximately 9:30 p.m. on 1 March 2014. Heather testified that they planned on returning home "[t]he same way we came. I knew I probably would be driving the golf cart home, but just the same we came through the back path." Heather testified that she would probably drive home because it was likely that Defendant would drink more alcohol than she. According to Heather, as the night progressed the atmosphere at Bones "became intense; it became kind of mean. It just wasn't a place I wanted to be in anymore." Heather testified that while at Bones – a period of less than three hours – she consumed "more than four, less than seven" alcoholic drinks, and that she did not eat anything during that time because she had eaten dinner before leaving the house that evening. Defendant and Heather decided to leave shortly after midnight, 2 March 2014, and Heather went to the restroom while Defendant went outside to wait for her.

When Heather walked out of Bones, she noticed Defendant was in the parking lot arguing with "several guys" that she did not know. There were at least three men with whom Defendant was arguing, and there may have been as many as five. The arguing was intense, involving shouting and cursing, and Defendant eventually punched one of the men ("the man"), who was in his "late 20s, maybe early 30s[,]" causing the man to fall to the ground. Defendant later described the man to Deputy Legan as "the baddest motherf_cker in the bar[.]" Heather further testified that when the man "got up he was extremely red-faced and he pulled a gun from his waistband" and "[r]aised it in the air." Heather testified that Defendant did not have a gun and, that as far as she knew, Bones did not have security guards or bouncers. Heather testified:

> It got very, very chaotic at that point. There was a woman [who] was next to me who was – she said "you need to get out of here. He's crazy."[6] [Defendant] had turned around

6. The woman was referring to the man with the gun.

> and was screaming at me "go, go, go, go, go." We got going. When [the man] pulled the gun I just wanted to get out of there.

Heather further testified that, after the man raised the gun, she started screaming and just "wanted to get out." When she saw the gun she wanted "[j]ust to get away. To get – to get away. That's all I wanted." Heather testified that she was "not a runner" because she had "broken [her] leg area" at some time in the past.

At trial, the following colloquy transpired between Heather and Defendant's attorney:

> Q. Are you aware of what [sic] he was going to shoot at you, or anyone else for that matter, do you recognize at this point that [Defendant] was sort of the target of this guy?
>
> A. Yes.
>
> Q. What did you do next?
>
> A. I got in the golf cart and we left.

Defendant still had the keys to the golf cart, so he got behind the wheel and Heather got in the passenger seat. The parking lot was packed with vehicles and people, which prevented Defendant from driving around the back of Bones toward the path they had taken from the house earlier that evening. Heather was not really thinking about what direction they should drive because she was still focused on the "altercation" that had just taken place; however, she saw that the way to the back path was blocked and therefore "was not the fastest out." Defendant "pulled out of the parking lot the only way we could in the golf cart." When asked on cross-examination whether she believed it was safer for them to drive the golf cart through the parking lot and onto the road instead of running away, Heather stated: "The golf cart can go faster than I can go. It was a split-second decision and it seemed the only option." Heather was asked the following, and then answered:

> Q. . . . Do you have any doubt that had you not taken the actions that [Defendant] and you took that evening in getting into that golf cart and fleeing through the open area of the parking lot, that you might have been hurt or killed by that person who pulled the gun?
>
> A. I have no doubt.

Heather testified that she did not notice Deputy Legan until after they had turned off the road and onto the dirt path to head home. She stated: "We went along the road along the clump of trees and then on to the dirt path and that's where we were pulled over." Where they had turned onto the dirt path was a short distance from Bones' parking lot, and Heather first saw Deputy Legan "within minutes" of the altercation in the parking lot. Although she did not know, Heather assumed they had been pulled over initially because of the altercation in the Bones' parking lot.

Deputy Legan testified that he passed Defendant driving the golf cart on Old U.S. 1, turned around in the Bones parking lot, which was crowded, then pulled up behind Defendant after Defendant had turned the golf cart off the highway and onto a dirt path that connected Old U.S. 1 to Friendship Road. Deputy Legan testified that the distance from Bones parking lot to where Defendant stopped "was no more than point two-tenths of a mile[,]" and that Defendant was stopped "maybe fifty to a hundred feet" down the dirt path connecting Old U.S. 1 highway to Friendship Road. A map of the relevant area, introduced for illustrative purposes, shows that the distance from the north end of the parking lot to the dirt path was just over 500 feet, or approximately one-tenth of a mile, and the spot marked on the map as the place Deputy Legan first contacted Defendant was approximately fifty feet down the dirt path.

Heather testified that after being pulled over:

> It was all happening so fast. It was just very chaotic. I was telling the deputy what I was thinking. I told him everything that just happened.
>
> Q. When you say "everything" what does that mean?
>
> A. The fight, the gun, the chaos.[7]
>
> Q. Did you think that there was any other reasonable solution to what you and [Defendant] did in fleeing?
>
> A. No, I don't.
>
> Q. Had you been able to get back through that grass, – was that your intention, to drive through the night, you know, either have you drive or [Defendant] drive on a grass path?

7. On cross-examination, Heather appears to contradict this testimony that she had told a deputy about the fight and the gun, but because we are reviewing the evidence in the light most favorable to Defendant, we do not consider that testimony. Contradictions in the evidence and issues of credibility were for the jury to decide.

A. The way we came, yes.

Q. You have cars, actual cars?

A. Vehicles, yes.

Q. Why did you choose to drive basically a glorified golf cart on that evening?

A. Because it was not far. It's, you know, a close drive and if we're going to be drinking it's probably the smarter thing to do.

Heather testified that she did not talk much to the deputies because she "was crying and was upset[.]" Heather did not know if Defendant discussed the gun with the deputies, but she clearly heard Defendant tell them about the fight. Deputy Legan testified Defendant stated he had been in an altercation and that Deputy Legan would probably be receiving a call about it. Deputy Legan testified that Defendant had referred to the man as "the baddest motherf_cker in the bar[,]" and "seemed a bit agitated" at the time. Defendant exercised his right not to testify at his trial.

C. Elements of Necessity

1. Reasonable Action Taken to Protect Life, Limb, or Health

We address the first two elements of the defense of necessity – (1) reasonable action (2) taken to protect life, limb, or health of a person – together. Defendant did not testify at trial; therefore, all evidence relating to the reasonableness of the actions he took, and the legitimacy of his concerns that people's lives were in jeopardy, was introduced through the testimony of Heather and Deputy Legan. When viewed in the light most favorable to Defendant, this testimony indicated the following: Bones attracted a potentially rough clientele, including, according to Deputy Legan, "the biker crowd." It was not unusual for fights to break out between patrons, but Bones employed no obvious security. While Defendant was at Bones for close to three hours on the evening of 1 March 2014 and into the early morning of 2 March 2014, the atmosphere in Bones became increasingly "intense" and "mean" to a degree that Heather testified she wanted to leave, and Defendant agreed that they should do so. Defendant got into an argument with between three and five men in the Bones' parking lot which escalated from arguing to shouting and cursing. The main individual with whom Defendant was arguing, "the man," was in his late twenties to early thirties, and Defendant described him as "the baddest motherf_cker in the bar[.]" This altercation escalated to the point that Defendant punched the man,

knocking him to the ground. The man got back up, "extremely red-faced," drew a handgun from his waistband, and threatened Defendant. Neither Defendant nor Heather were armed.

In response to the man's threatening actions with the gun, the scene turned "chaotic." A woman nearby told Heather – and likely Defendant as well – that the man was "crazy" and they needed to "get out of [t]here."[8] Heather started screaming, and just wanted to get away from what was clearly a dangerous and volatile situation. Heather testified to the obvious concern that the man might shoot Defendant, her, or someone else with his gun, and further testified that Defendant would have been the most obvious potential target. When Defendant became aware of the gun, and the obvious danger associated with a man he had just assaulted brandishing a firearm, he "screamed" at Heather "go, go, go, go, go." During her testimony, Heather stated that she had "no doubt" that had she and Defendant "not taken the actions that [they] took that evening in getting into [the] golf cart and fleeing through the open area of the parking lot, that [they] might have been hurt or killed by [the man] who pulled the gun[.]" Deputy Legan testified that Defendant "seemed agitated" when speaking with Deputy Legan immediately after the incident, and that Defendant described the man with the gun as "the baddest motherf_cker in the bar."

As our Supreme Court has stated:

> Circumstantial evidence and direct evidence are subject to the same test for sufficiency, and the law does not distinguish between the weight given to direct and circumstantial evidence. . . . .
>
> Circumstantial evidence is often made up of independent circumstances that point in the same direction. These independent circumstances are like
>
> > "strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the [element at issue]. . . . [E]very individual circumstance must in itself at least tend to prove the [relevant element] before it can be admitted as evidence.

State v. Parker, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (citations omitted). Further, "[t]his Court has held that it is fundamental to

8. The jury was free to make the inference that Defendant, who was standing next to Heather, would have heard these comments too.

a fair trial that a witness's credibility be determined by a jury," *State v. Crabtree*, __ N.C. App. __, __, 790 S.E.2d 709, 715 (2016) (citation omitted), and issues of common sense are for the jury to decide. *State v. Zuniga*, 320 N.C. 233, 251, 357 S.E.2d 898, 910 (1987). This Court cannot decide issues of credibility, must take all proper testimony favorable to Defendant as true, and resolve any conflict in the evidence in Defendant's favor.

When viewed in the light most favorable to Defendant, we hold that substantial evidence was presented that could have supported a jury determination that a man drawing a previously concealed handgun, immediately after having been knocked to the ground by Defendant, presented an immediate threat of death or serious bodily injury to Defendant, Heather, or a bystander, and that attempting to escape from that danger by driving the golf cart for a brief period on the highway was a reasonable action taken to protect life, limb, or health. *Hudgins*, 167 N.C. App. at 710-11, 606 S.E.2d at 447, *see also Cooke*, 94 N.C. App. at 387, 380 S.E.2d at 382–83 (evidence that the defendant "drove the vehicle away from a drunken party in the country because several irate people were chasing him on foot" "tend[ed] to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian pursuers").

Further, even assuming *arguendo* that "fear" of some sort is an element of necessity, we hold that substantial evidence was presented at trial upon which the jury could have made a common sense determination that a reasonable person in Defendant's position would become frightened by the appearance of a gun in the hand of the man Defendant had just punched in the face. Based on the evidence presented at trial, the jury could have reasonably inferred that Defendant was afraid for his life, Heather's life, or the lives of others present in the parking lot, and that this fear was objectively reasonable. Because substantial evidence of these two elements was produced at trial, final determination of "[w]hether [Defendant's actions were] reasonable under the circumstances . . . w[as a] question[] for the jury." *Hudgins*, 167 N.C. App. at 711, 606 S.E.2d at 448.

2. No Other Acceptable Choices

We now review the record to determine if substantial evidence was presented at trial from which the jury could have determined that there were "no other acceptable choices available" to Defendant at the time he chose to drive the golf cart while intoxicated. *Id.* at 711, 606 S.E.2d at 447 (citation omitted). This element is closely associated with the "reasonable action" element, and we include our analysis above in our analysis of this element.

Initially, the State, in its argument, relies on evidence favorable to the State while discounting evidence favorable to Defendant, which is not permissible on appellate review. *Brown*, 182 N.C. App. at 117–18, 646 S.E.2d at 777. For example, the State argues that Defendant (and Heather) were capable of running and that the golf cart could not travel much more than five miles-per-hour. Based upon this evidence favorable to the State, the State argues that Defendant and Heather should have run away instead of having Defendant drive, or that, if Defendant was going to drive, he should have taken a route that did not involve the highway. However, Heather testified they would have driven the golf cart back the way they had come had that had been an option – and thereby would have avoided driving on the highway – but the route that would have allowed them to avoid driving on the highway was blocked by automobiles and people. Heather testified she did not believe there "was any other reasonable solution to what [she and Defendant] did in fleeing[.]" Heather also testified that Defendant "pulled out of the parking lot *the only way we could* in the golf cart." (Emphasis added).

In support of another argument, the State improperly quotes Deputy Legan's testimony that Heather did not appear to have been intoxicated. The State argues that even if it was reasonable to use the golf cart to get away, and even if the only available open route was onto the highway for at least a brief period, it should have been the more sober Heather, not Defendant, who did the driving. However, there was evidence presented strongly suggesting Heather would have been intoxicated at the relevant time, and it was for the jury, not the trial court, to weigh that evidence. Heather testified that while at Bones – a period of less than three hours – she consumed "more than four, less than seven" alcoholic drinks, and that she did not eat anything during that time because she had "eaten dinner before leaving the house that evening." The jury could use their common sense and lay knowledge to determine that Heather was also likely intoxicated at the time of the incident. Defendant's evidence was that he had the keys to the golf cart; that he was a military veteran trained to make quick, reasoned decisions in a crisis; that Heather was panicking, as evidenced by her testimony that she was screaming and not really focusing on anything other than the desire to get away; that Defendant instigated their departure from the scene by yelling at Heather "go, go, go, go, go."

At the charge conference, the State argued the following in support of denying the necessity instruction:

> Well, [Defendant's] witness[] has stated there was nothing else we could do. It's still in the [trial c]ourt's view to

> analyze the circumstances and come to that same conclusion. In this case it's not been shown why it was not simply available to these individuals who their own witness testified we can both run. The bar was still – that they could have gone back into the bar or simply run and disperse into this crowd of people.

It was not the province of the trial court to analyze the evidence and come to a conclusion concerning whether driving away in the golf cart constituted a reasonable option for Defendant, or whether running into the crowd, or back into Bones, constituted viable alternatives to driving away in the golf cart. Those decisions, based on credibility analysis and weighing of the evidence, were the sole province of the jury. The only role of the trial court at that point was to determine whether sufficient evidence had been admitted upon which *the jury* could decide in favor of Defendant on those contested issues. Though the jury *might* have rejected some or all of the testimony favorable to Defendant, it was the province of the jury to make those determinations. Just like the trial court in this instance, this Court cannot make any determinations concerning the weight to be given Defendant's evidence, or the credibility of any witness. After reviewing the facts before us in the light most favorable to Defendant, we hold that Defendant met his burden of introducing "evidence that a reasonable person would find sufficient to support" the "no other acceptable choices" element. *Hudgins*, 167 N.C. App. at 709, 711, 606 S.E.2d at 446-47 (citations omitted).

3. Abatement of the Perceived Danger

We further hold there was substantial evidence from which the jury could determine that a reasonable person in Defendant's position could have maintained the concern that both Defendant's and Heather's lives were in jeopardy, and further maintained the concern that the danger had not clearly abated by the time Deputy Legan stopped the golf cart. In *Cooke*, *supra*, involving the defense of duress, the defendant presented evidence "that he drove the vehicle away from a drunken party in the country [while intoxicated] because several irate people were chasing him on foot[.]" *Cooke*, 94 N.C. App. at 387, 380 S.E.2d at 382. This Court held on those facts:

> [Evidence was presented that the defendant] had been driving on different public highways for about thirty minutes when the officer stopped him. While this evidence *tends to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian*

> *pursuers*, it does not tend to show that he was still justifiably fearful *thirty minutes later after his pursuers had been left many miles behind*. [N]othing in the record suggests that defendant would have exposed himself to harm of any kind if he had stopped driving the car long before the officer saw him.

Id. at 387, 380 S.E.2d at 382–83 (emphasis added) (citations omitted); *see also State v. Kapec*, 234 N.C. App. 117, 761 S.E.2d 754, 2014 WL 2116530, *5 (2014) (unpublished) (Distinguishing *Cooke*, and holding evidence was sufficient to require an instruction on the defense of necessity: "[W]e do not agree with the State that the result in this case is controlled by *State v. Cooke*. In *Cooke*, the defendant was stopped by police after 'he had been driving on different public highways for about thirty minutes.' We held that although the 'evidence tends to show that defendant was justifiably in fear for his safety when he drove away from his pedestrian pursuers,' there was no evidence that 'he was still justifiably fearful thirty minutes later after his pursuers had been left many miles behind.' In this case, defendant was stopped by Officer Mobley about three blocks from Mr. Cayson's house and within five minutes of leaving. *Cooke* is factually distinguishable and does not control the outcome of the present case.").

In the present case, Deputy Legan testified that Defendant had pulled off the highway approximately two-tenths of a mile from Bones' parking lot, and Heather testified that she saw Deputy Legan "within minutes" after the altercation in the parking lot. On the facts of this case, including the fact that Defendant's evidence was that there was a man with a firearm who had threatened to shoot Defendant, and who would likely have access to a vehicle, we hold two-tenths of a mile was not, *as a matter of law*, an unreasonable distance to drive before pulling off the highway. That determination should have been made by the jury following a correct instruction on the defense of necessity.

4. Duress

Finally, were we to conduct our analysis applying the elements of duress, the result would not change. We hold that there was substantial evidence, when viewed in the light most favorable to Defendant, to have supported a jury determination that (1) Defendant's "'actions [briefly driving the golf cart on the highway while intoxicated] were caused by [Defendant's] reasonable fear that [Defendant or another] would suffer [(2)] immediate death or serious bodily injury[,]" (3) had Defendant did not taken those actions, and (4) Defendant had no "reasonable

opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *Smarr*, 146 N.C. App. at 54–55, 551 S.E.2d at 888 (citations omitted).

5. Prejudice

Defendant must still demonstrate that the trial court's failure to give an instruction on necessity prejudiced him:

> Even if a trial court errs by failing to give a requested and legally correct instruction, the defendant is not entitled to a new trial unless there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial."

State v. Fletcher, __ N.C. __, __, 807 S.E.2d 528, 537 (2017) (citations omitted). We hold, on the facts before us, that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2017).

III. *Conclusion*

We vacate Defendant's conviction for DWI and remand for a new trial on that charge. Defendant's adjudication of responsible for driving left of the center line is not affected by our holding. If Defendant is retried on the DWI charge and he requests an instruction on the defense of necessity, the trial court shall issue a proper instruction on the defense of necessity if, when viewed in the light most favorable to Defendant, the evidence is such that the jury *could* reasonably find, to its satisfaction, that Defendant's actions constituted (1) reasonable action, (2) taken to protect life, limb, or health of a person, and (3) no other acceptable choices [were] available." *Hudgins*, 167 N.C. App. at 710–11, 606 S.E.2d at 447 (citation omitted). If the trial court instructs the jury on necessity, the instruction shall be in accordance with the established elements of that defense. The same mandate also applies should the trial court instruct the jury on the defense of duress.

NEW TRIAL.

Judges CALABRIA concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, concurring.

Our jurisprudence compels us to view the evidence in the light most favorable to Defendant in determining whether to give the requested instruction. And in viewing the evidence in such light, we are to determine only whether it is possible that at least one juror would have concluded that Defendant acted out of necessity or duress.

The trial court based its decision not to instruct the jury on necessity/duress on its conclusion that, though Defendant's wife testified that she was in fear, there was no evidence that Defendant, himself, acted out of fear. Regarding this decision, I agree with the majority that there *was* enough evidence from which a juror could have concluded that Defendant was in fear. True, no one specifically testified that (s)he thought Defendant was in fear. However, there was evidence that Defendant had just punched a man; the man pulled a gun; in response, Defendant immediately exclaimed to his wife to "go, go, go, go, go;" and Defendant sped away in the golf cart. From this evidence, I conclude that at least one juror could have reasonably found that Defendant acted out of fear. I note the other evidence which strongly suggests that Defendant was not in fear; however, it is not our job to weigh the evidence.

I do find some merit in the State's argument that driving the golf cart in the direction of and then past the gunman to escape was not the only acceptable means of escape, but that Defendant and his wife could have simply run in the other direction. However, the evidence also showed that Defendant's wife was not a strong runner, that they both had been drinking, and that the gunman was much younger (around 30 years old) than Defendant (who was 43). Based on this evidence, I must again conclude that it is reasonably possible that a juror could have concluded that Defendant reasonably determined that running was not a reasonable alternative to driving the golf cart in their quest to reach a safe location.

In conclusion, I agree with the majority's determination that the trial court should have given the requested instruction and that its failure to do so warrants a new trial.

STATE v. WATSON

[258 N.C. App. 347 (2018)]

STATE OF NORTH CAROLINA
v.
JAMAL M. WATSON, DEFENDANT

No. COA17-253

Filed 6 March 2018

1. Evidence—judicial notice—documents from federal case

The State's motion to take judicial notice of documents from defendant's federal case was granted where defendant was charged with state and unrelated federal charges. The documents met the requirements for judicial notice and there was no apparent prejudice to defendant.

2. Appeal and Error—standard of review—motion for appropriate relief—interpretation of statute

Although the denial of a motion for appropriate relief (MAR) is, as a general matter, reviewed under the abuse of discretion standard, de novo review was used here because the appeal required interpretation of a statute.

3. Sentencing—orders of commitment—date sentence begins

Defendant's state sentence did not run while he was in federal custody where his state judgment did not enter an order of commitment for the N.C. Department of Correction to take custody of defendant. Under the plain language of N.C.G.S. § 15A-1353(a), the trial court must issue an order of commitment when the sentence includes imprisonment; the date of the order is the date the service of sentence is to begin.

4. Sentencing—plea bargain—active sentence—date sentence begins

Where defendant received state and federal sentences but the there was no commitment order for the state sentence, calculating his state sentence to begin after his federal sentence was not contrary to his plea bargain for an "active sentence." Such a sentence was imposed; properly calculating when it began was not related to whether the sentence was active or suspended.

5. Sentencing—state and federal sentences—not concurrent—federal sentence served first

Precedent cited by a defendant with state and federal sentences did not support his argument that his sentences were concurrent.

At the time defendant received his state sentence, defendant had pleaded guilty to the federal charge but had not yet been sentenced, so that the state sentence was neither concurrent nor consecutive when it was entered. However, defendant served his federal sentence first because a state commitment order was not entered at that time. North Carolina does not allow time in federal custody to be credited toward a state sentence, and the state judgment was effectuated by defendant serving his sentence in state custody without consideration of the federal charge. The federal court had evinced an intent that the federal sentence run separately from and consecutively to any state sentence.

Appeal by Defendant from order entered 26 September 2016 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Daniel F. Read, for Defendant.

INMAN, Judge.

North Carolina law requires a sentencing criminal court to enter an order of commitment consistent with the judgment entered, and a defendant is entitled to entry of such order *nunc pro tunc* where no such order is entered. However, a commitment order entered *nunc pro tunc* may not vary the terms of the underlying judgment, including a requirement that the defendant serve his sentence in the custody of a state agency. Therefore, a defendant's sentence does not begin until he is actually remitted to the custody of the agency designated in and as required by the judgment.

Jamal M. Watson ("Defendant") appeals from an order denying his Motion for Appropriate Relief ("MAR"), requesting the superior court strike a detainer filed against him and enter an order calculating his sentence as served. On appeal, Defendant, who was in federal custody prior to and following his sentencing in state court, argues that the trial court was required to enter a commitment order effective the date of the entry of the underlying criminal judgment, as no commitment order was entered at that time. As a result, Defendant reasons, the mandate in N.C. Gen. Stat. § 15A-1353(a) (2009) that "the date of the [commitment] order is the date service of the sentence is to begin" would require the trial

court to hold that Defendant's state sentence is served, as he has been in federal custody for the entire length of his state sentence. We agree with Defendant that the sentencing court was required by state law to enter a commitment order at the time of judgment and sentencing. However, because the judgment required his sentence be served "in the custody of: N.C. DOC[,]" i.e., the North Carolina Department of Correction,[1] and an order of commitment cannot vary the terms of a judgment, we remand for entry of a commitment order *nunc pro tunc* requiring his sentence begin upon his release from federal custody.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant committed the offense of Possession of a Firearm by a Felon on 21 December 2006 and was taken into state custody. Defendant posted bond and was released from custody the following day. Defendant was indicted on that charge and as a Habitual Felon on 2 January 2007.

On 1 May 2007, Defendant was again arrested for Possession of a Firearm by a Felon and taken into state custody. Defendant again posted bond, and was released from custody on 2 May 2007. Defendant was indicted on the second Possession of a Firearm by a Felon charge and a second Habitual Felon charge on 5 May 2008. The two Possession of a Firearm by a Felon charges and the two Habitual Felon charges are referred to collectively as the "State Charges."

While Defendant's State Charges were pending, Defendant was indicted on felony charges in the United States District Court for the Eastern District of North Carolina on 24 September 2008 (the "Federal Case").[2] Per the indictment filed in federal court, the Federal Case was unrelated to the State Charges. Defendant was arrested and taken

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1. In 2012, the North Carolina General Assembly consolidated the North Carolina Department of Correction with several other state agencies to form the Department of Public Safety, which includes the "The Division of Adult Correction, which shall consist of the former Department of Correction." Current Operations and Capital Improvements Appropriations Act of 2011, ch. 145, sec. 19.1.(b), 2011 N.C. Sess. Laws 535. *See also* N.C. Gen. Stat. §§ 143B-600 & 143B-630 (2017) (establishing the Department of Public Safety and creating the Division of Adult Correction and Juvenile Justice therein). Thus, we use "N.C. DOC" to refer to both the North Carolina Department of Corrections and its successor agency, the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice.

2. The State filed a motion to take judicial notice of public records contemporaneously with its brief. The motion requests this Court take judicial notice of various indictments, a warrant, and several orders filed and entered in the Federal Case. As set forth *infra* Part II.A., we grant the State's order and include facts contained in these records throughout our recitation of the procedural history of the case.

into federal custody by a special agent with the Federal Bureau of Investigation on 29 September 2009. A detention order was entered in the Federal Case on 30 September 2008, and Defendant waived a detention hearing on 15 October 2008. Defendant pleaded guilty in the Federal Case on 2 March 2009 and, following a continuance, was scheduled for sentencing on 6 July 2009.

After he pleaded guilty and while awaiting sentencing in the Federal Case, Defendant pleaded guilty to the State Charges on 18 May 2009. The trial court held a sentencing hearing that day, and, per the plea, Defendant agreed to a consolidated sentence of 80 months minimum and 105 months maximum imprisonment. On 19 May 2009, the trial court entered its judgment (the "Judgment") using Administrative Office of the Courts form AOC-CR-601. Per the language of the form, the Judgment ordered that Defendant "be imprisoned . . . for a minimum term of: 80 months [and] for a maximum term of: 105 months in the custody of: N.C. DOC[.]" The trial court left unchecked boxes on the form indicating Defendant's sentence would begin consecutive to any other imposed sentences. The trial court also left unchecked the boxes on the reverse of the form in the section titled "ORDER OF COMMITMENT/APPEAL ENTRIES[,]" which would have either denoted notice of appeal of the judgment by Defendant or ordered "the sheriff or other qualified officer . . . [to] cause the [D]efendant to be delivered . . . to the custody of the agency named [in the Judgment] *to serve the sentence imposed* . . ." (emphasis added).

Following his sentencing in state court, judgment was entered against the Defendant in the Federal Case on 12 November 2009, sentencing him to concurrent sentences of 180 and 120 months in the custody of the United States Bureau of Prisons. Defendant began service of his federal sentence but, on 30 March 2016, the North Carolina Department of Public Safety provided a detainer action letter to the United States Department of Justice indicating a detainer was filed concerning Defendant's sentence on the State Charges.[3] The letter, contrary to the Judgment, stated that the Defendant's term of imprisonment for the State Charges was "to run consecutive."

Upon learning of the detainer, Defendant filed an MAR on 20 July 2016, requesting that he "be adjudged to have served all his North Carolina time." At the MAR hearing, counsel for Defendant stated that he was not asking for jail credit towards the term of imprisonment imposed

3. Defendant included the detainer action letter, but not the detainer itself, in the record on appeal.

in the Judgment. Instead, counsel for Defendant stated he was seeking entry of a commitment order *nunc pro tunc* 12 May 2009, the date of the Judgment, because no such order had been entered at that time as required by N.C. Gen. Stat. § 15A-1353(a). Defendant's counsel further reasoned that, because the statute stated "[u]nless otherwise specified, the date of the [commitment] order is the date service of the sentence is to begin[,]" N.C. Gen. Stat. § 15A-1353(a), Defendant's sentence under the Judgment should be calculated to have run beginning 12 May 2009.

The trial court denied Defendant's motion by order entered 26 September 2016. Defendant filed a petition for writ of certiorari to this Court for review of the trial court's order, which was granted 29 December 2016.

II. ANALYSIS

A. State's Motion for Judicial Notice

[1] The State, by motion filed with its brief, requests this Court take judicial notice of the following documents from the Federal Case: (1) an indictment; (2) an arrest warrant; (3) an order of detention; (4) a waiver of detention hearing; (5) a superseding indictment; (6) a plea agreement; and (7) a motion and order continuing sentencing. We grant the State's motion.

Our Rules of Evidence set forth certain specific requirements allowing for judicial notice in our state's trial courts. Rule 201(b) requires that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2015). A trial court must take judicial notice under Rule 201 where it is "requested by a party and [the court is] supplied with the necessary information." N.C. Gen. Stat. § 8C-1, Rule 201(d) (2015).

As for appellate courts, Rule 9 of the North Carolina Rules of Appellate Procedure states that our "review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2017). However, "[a]ppellate courts may take judicial notice *ex mero motu* on 'any occasion where the existence of a particular fact is important . . . .' " *Lineberger v. N.C. Dep't of Correction*, 189 N.C. App. 1, 6, 657 S.E.2d 673, 677 (2008) (quoting *West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981)). Facts subject to judicial notice are those

"which are either so notoriously true as not to be the subject of reasonable dispute or 'capable of demonstration by readily accessible sources of indisputable accuracy[.]' " *Lineberger*, 189 N.C. App. at 6, 657 S.E.2d at 677 (quoting *West*, 302 N.C. at 203, 274 S.E.2d at 223).

North Carolina law clearly contemplates that our courts, both trial and appellate, may take judicial notice of documents filed in federal courts. For example, the North Carolina Utilities Commission is permitted by statute to take judicial notice of "decisions of State and federal courts, . . . public information and data published by official State and federal agencies . . . , and such other facts and evidence as may be judicially noticed by justices and judges of the General Court of Justice." N.C. Gen. Stat. § 62-65(b) (2015). We have also held that questions relating to criminal custody and dates of incarceration may warrant the taking of judicial notice of such facts. *See State v. Surratt*, 241 N.C. App. 380, 385, 773 S.E.2d 327, 331 (2015) ("[T]his court elects to take judicial notice of defendant's release date for the indecent liberties conviction . . . . We also take judicial notice of the fact that defendant was not actually released from incarceration on 24 September 1995.").

The facts and documents introduced with the State's motion are "capable of demonstration by reference to a readily accessible source of indisputable accuracy." West, 302 N.C. at 203, 274 S.E.2d at 223. The federal court filings are all retrievable in the form provided by the State from Public Access to Court Electronic Records ("PACER")[4] and, with the exception of Defendant's motion to continue sentencing, they all bear file stamps from the Clerk of the U.S. District Court for the Eastern District of North Carolina or the signature of a district court judge. Further, they all display the file number referenced by Defendant in his brief and displayed on other federal filings already included in the record on appeal.

The documents and the contents thereof also bear upon a fact critical to the disposition of this case: when and whether Defendant was in the custody of the State. Both parties' arguments reflect that the issue

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4. PACER is "an electric public access service that allows users to obtain case and docket information online from federal appellate, district, and bankruptcy courts . . . ." PACER, Public Access to Court Electronic Records, https://www.pacer.gov/ (last visited 19 February 2018). The service "is available to anyone who registers for an account[,]" *id.*, and a PACER account permits attorneys and *pro se* parties to file documents directly with the federal court. Administrative Office of the U.S. Courts, PACER User Manual 24 (June 2017). It is "available 24 hours a day, seven days a week, including weekends and holidays[,]" and "provides real-time access to information entered into the court's database." *Id.* at 24-25.

of State custody is material to the disposition of this appeal and, as set forth *infra* Part II.C., we agree. The documents provided therefore meet the requirements necessary to take judicial notice on appeal upon the State's motion. *Lineberger*, 189 N.C. App. at 6-7, 657 S.E.2d at 677-78 (outlining the requirements for taking judicial notice on appeal but declining to do so where no motion for judicial notice was filed and the fact in question was not important to resolution of the appeal).

Lastly, we note that there is no apparent prejudice to Defendant in taking judicial notice of these documents. Defendant did not oppose the State's motion to take judicial notice, as was his right under our Rules. N.C. R. App. P. 37(a) (2017). Nor did Defendant file a reply brief to the State's appellee brief, which relied on the documents in the motion to take judicial notice in arguing that Defendant's initial brief contained factual errors concerning custody. N.C. R. App. P. 28(h) (2017). Furthermore, both parties provided the MAR court with documents from the Federal Case at the hearing, and several such documents are already included in the record on appeal.[5] Given that the documents provided are subject to judicial notice and in the absence of any apparent prejudice to Defendant, we grant the State's motion and take judicial notice of the provided documents from the Federal Case.

B. Standard of Review

[2] Defendant contends that this appeal is subject to *de novo* review, while the State argues abuse of discretion is the proper standard. The State is correct that, as a general matter, a denial of an MAR is subject to review under the abuse of discretion standard. *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006). However, "[t]his Court reviews the trial court's conclusions of law in an order denying an MAR *de novo*." *State v. Martin*, ___ N.C. App. ___, ___, 781 S.E.2d 339, 344 (2016) (citing *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012)). Thus, "if the issues raised by Defendant's challenge to [the trial court's] decision to deny his [MAR] are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *Jackson*, 220 N.C. App. at

5. Specifically, the judgment in the Federal Case was attached to Defendant's MAR and introduced as an exhibit at the MAR hearing. Defendant's counsel also provided at least two "packet[s] of documents" to the MAR court, but it is unclear from the transcript how many such packets were provided or what was in them. At the very least, Defendant's counsel's comments at the hearing demonstrate that one packet included a document showing that a detainer had been filed against Defendant. However, we are unable to determine from the record and transcripts whether all the documents provided by Defendant's counsel to the MAR court have been included in this appeal.

8, 727 S.E.2d at 329 (first and third alteration in original) (internal citation and quotation marks omitted).

Here, Defendant challenges the trial court's MAR order on legal, rather than factual grounds, asserting that N.C. Gen. Stat. § 15A-1353(a) requires the entry of a commitment order in this action and determines when his sentence for the State Charges begins to run. *See, e.g.*, *State v. Hayes*, ___ N.C. App. ___, ___, 788 S.E.2d 651, 652 (2016) ("issues of statutory construction are questions of law which we review *de novo* on appeal[.]" (internal citation omitted)). Because resolution of Defendant's appeal requires interpretation of the statute in question to resolve whether denial of the MAR was proper, we employ *de novo* review.

C. The Trial Court Erred in Denying Defendant's Request for Entry of a Commitment Order Nunc Pro Tunc Consistent With the Judgment

[3] N.C. Gen. Stat. § 15A-1353 governs orders of commitment upon sentences of imprisonment, which "remand[] a defendant to prison in order to carry out a judgment and sentence." Black's Law Dictionary (10th ed. 2014) (defining "Commitment Document"). Under the plain language of the statute, "[w]hen a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin." N.C. Gen. Stat. § 15A-1353(a).

Defendant argues that the statute's language is mandatory, and requires entry of an order of commitment. We agree. "[O]rdinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]" *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978). Thus, the statute's command that "the court *must* issue an order of commitment setting forth the judgment" mandates entry of such an order upon imposition of a term of imprisonment. N.C. Gen. Stat. § 15A-1353(a) (emphasis added).

Here, the trial court entered its Judgment imposing a term of imprisonment on Defendant, but it failed to enter an order of commitment for N.C. DOC to take custody of Defendant for service of that term. Defendant requested entry of such an order at his MAR hearing, but his motion was denied. Because the trial court was required to enter a commitment order but did not, Defendant was entitled to the "other appropriate relief" of a commitment order entered *nunc pro tunc* 19 May 2009 at his MAR hearing. N.C. Gen. Stat. § 15A-1417(a)(4) (2015).

Defendant is incorrect, however, in asserting that his sentence should be calculated beginning 19 May 2009. The statute provides that "[u]nless otherwise specified in the order of commitment, the date of the order is the date service of the sentence *is to begin*[,]" not the date that the sentence "does begin" or "begins." N.C. Gen. Stat. § 15A-1353(a) (emphasis added). Indeed, we doubt that an order of commitment could conclusively establish the date that a term of imprisonment begins at all, as it is the judgment that authorizes imprisonment and sets forth its length, terms, and conditions. Our Supreme Court has held that:

> A valid judgment of a court of competent jurisdiction is the *real and only authority* for the lawful imprisonment of a person who pleads or is found guilty of a criminal offense. . . . The purpose of a commitment is to advise the prison authorities of the provisions of the judgment. Since a commitment has no validity except that derived from the judgment, to the extent it fails to set forth or certify the judgment accurately the commitment is void and the judgment itself controls.

In re Swink, 243 N.C. 86, 90, 89 S.E.2d 792, 795 (1955) (emphasis added) (citation omitted); *see also State v. McAfee*, 198 N.C. 507, 508-09, 152 S.E. 391, 392 (1930) ("The essential point of a judgment imposed in a criminal action is the punishment and the time when the sentence shall actually begin is not material because it is only directory. *If for any cause the sentence is not executed at the time named the defendant may again be brought before the court and a new period may be prescribed.*" (emphasis added)); *State v. Jackson*, 14 N.C. App. 579, 582, 188 S.E.2d 539, 541 (1972) ("A valid judgment is the only authority for the lawful imprisonment of a person and when the commitment fails to set forth the judgment correctly it is void and the judgment itself controls." (citing *Swink*, 243 N.C. 86, 89 S.E.2d 792)). Thus, if a judgment establishes that a term of imprisonment must be served in the custody of a particular State agency, it follows that such a term cannot begin until custody is actually remitted to that agency or its successor. As such, the commitment order's date setting forth when a term "is to begin," N.C. Gen. Stat. § 15A-1353(a), simply "advise[s]" the authorities as to when custody should be remitted to the designated custodial agency, and its terms cannot vary or depart from the provisions of the underlying judgment. *Swink*, 243 N.C. at 90, 89 S.E.2d at 795. This reading comports with another subsection of the same statute, which establishes that "[u]nless a later time is directed in the order of commitment, . . . the

sheriff must cause the defendant to be placed in custody of the agency specified in the judgment on the day service of [the] sentence is to begin or as soon thereafter as practicable." N.C. Gen. Stat. § 15A-1353(c) (2015).

Our holding is consistent with our Supreme Court's decision in *State v. Cockerham*, 2 Ired. Law 204, 24 N.C. 204 (1842). There, a defendant was sentenced to two months imprisonment "from and after 1 November next[,]" but was not actually taken into custody and imprisoned consistent with that language. *Id.* at 205, 24 N.C. at 205. After those two months had elapsed, the defendant was ordered taken into custody at the next term of court to serve his two month sentence. *Id.* at 204, 24 N.C. at 204. On appeal, our Supreme Court drew essentially the same distinction that we draw between modern judgments and orders of commitment, holding that "[t]he judgment is the penalty of the law, as declared by the court, while the direction, with respect to the time of carrying it into effect, is in the nature of an award of execution[.]" *Id.* at 205, 24 N.C. at 205. On such a distinction, and irrespective of the fact that the two months had elapsed, the Supreme Court held that "[u]pon the defendant appearing in court and his identity not being denied, and it being admitted that the sentence of the court had not been executed, it was proper to make the necessary order for carrying the sentence into execution." *Id.* at 205, 24 N.C. at 205.

Here, the Judgment sentenced Defendant to a minimum of 80 months and maximum of 105 months imprisonment "in the custody of: N.C. DOC[.]" By the very terms of the Judgment, Defendant's sentence requires him to spend at least 80 months in the custody of the N.C. DOC, and such a term necessarily cannot begin to run until he is actually remitted into the agency's custody. Thus, while Defendant is entitled to a commitment order under N.C. Gen. Stat. § 15A-1353(a), neither the date of that order nor the delay in its entry can begin Defendant's sentence in contravention of the express terms of the Judgment. *See McAfee*, 198 N.C. at 508, 152 S.E. at 392 ("Why a commitment was not issued promptly . . . does not appear; *but the delay cannot defeat the object of the prosecution or exempt the defendant from liability to punishment.*" (emphasis added)); *see also Swink*, 243 N.C. at 90, 89 S.E.2d at 795; *Cockerham*, 2 Ired. Law at 205, 24 N.C. at 205; *Jackson*, 14 N.C. App. at 582, 188 S.E.2d at 541. The date Defendant's sentence begins (or began) to run is therefore the date at which he is (or was) actually taken into custody by the N.C. DOC.

Reviewing the record, transcripts, and the documents of which we take judicial notice, it appears Defendant was not remitted into the

custody of the N.C. DOC, let alone State custody, at the time he was sentenced and the Judgment was entered or anytime thereafter. While Defendant was in State custody on the two dates he was arrested for the different State Charges, Defendant was released from custody on bond on the day following each arrest. *See*, *e.g.*, *Burgwyn v. Hall*, 108 N.C. 489, 490, 348,13 S.E. 222, 222 (1891) ("[T]he defendant may, under an order of arrest duly obtained, be arrested and held in custody, unless he shall, as he may do in the way prescribed, give bail . . . ."); *State v. Howell*, 166 N.C. App. 751, 753, 603 S.E.2d 901, 903 (2004) (construing "release" as used in a statute within the article of the Criminal Procedure Act governing bail to mean " 'to set or make free' from the supervision and control of the court, as well as from imprisonment" (citation omitted)). Defendant was next taken into custody by the federal government when he was arrested by an FBI agent on 29 September 2008. The federal government's custody of Defendant continued, as an order of temporary detention pending hearing was entered on 30 September 2008, and Defendant waived the subsequent detention hearing on 15 October 2008. Nothing in the record indicates Defendant was ever released from federal custody, and he did not contest this fact, introduced by the State in its brief and motion to take judicial notice, through a reply brief or opposition to the State's motion.

Defendant's sole basis for arguing that he was in State custody at the time he was sentenced on the State Charges is a statement from the judge at sentencing that "[Defendant's] in custody." We are unpersuaded. First, the transcript of the sentencing hearing appears incomplete, as it begins *in medias res* rather than at the calling of Defendant's case. Second, the transcript failed to capture a bench conference that occurred immediately following this statement. Third, the statement does not disclose whose custody Defendant was in, and fourth, a state court judge cannot, by oral proclamation, place a defendant already in un-relinquished federal custody into state custody. *See*, *e.g.*, *Ponzi v. Fessenden*, 258 U.S. 254, 260-61, 66 L.Ed. 607, 611 (1922) ("[A defendant] may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it. Such a waiver is a matter that addresses itself *solely to the discretion of the sovereignty making it* . . . . In the case at bar, the Federal District Court first took custody of Ponzi. . . . Until the end of his term and his discharge, *no state court could assume control of his body without the consent of the United States*." (citation omitted) (emphasis added)). Thus, absent any indication that the federal

government relinquished or waived custody of Defendant, the trial court was without authority to order the State to assume it.[6]

Indeed, the record below shows that the State did not assume custody of Defendant. As noted by the Defendant, no order of commitment was ever entered directing the sheriff to take Defendant under his control and deliver Defendant to N.C. DOC. Nor did the N.C. DOC take Defendant into custody by other means between his sentencing and the time of the MAR hearing. At that hearing, the State introduced as an exhibit a certified copy of Defendant's "pen pack" maintained by the N.C. DOC, which shows Defendant was last in the agency's custody on 21 July 2006. Defendant's counsel acknowledged at the MAR hearing that the State did not assume custody at the time of sentencing, stating "[s]ometime in May of 2009 he was transferred from court here back to federal – to federal custody to await trial there." Because the evidence shows Defendant was never remitted into the custody of the N.C. DOC and his sentence cannot begin to run consistent with the Judgment until he is so remitted, we hold that Defendant's sentence for the State Charges had not begun to run at the time of the MAR hearing.

[4] Defendant argues that the result of our holding is contrary to the plea agreed to by Defendant and the State, as he pleaded guilty to an "active sentence." However, the designation of a sentence as active has no bearing on the issues raised by Defendant on appeal. The relevant definitional statute governing Defendant's sentencing defines "[a]ctive punishment" as "[a] sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended." N.C. Gen. Stat. § 15A-1340.11 (2015). Such a sentence was imposed on Defendant by the Judgment, and he must serve it. Properly calculating when Defendant's service of that sentence begins is entirely unrelated to whether the sentence is active or suspended.

[5] Defendant cites *Kiendra v. Hadden*, 763 F.2d 69, 72-73 (2nd Cir. 1985), to support his argument that his sentence has already been served. We are not bound by federal circuit court decisions. *See In re Truesdell*, 313 N.C. 421, 428-29, 329 S.E.2d 630, 634-35 (1985). Also, Defendant's reliance on *Kiendra* is otherwise misplaced. The Fourth Circuit discussed but did not adopt *Kiendra* in *United States v. Grant*,

6. While Defendant was present in state court for entry of his plea and sentencing, this alone does not demonstrate a waiver of custody by the United States. *See, e.g.*, *United States v. Evans*, 159 F.3d 908, 912 (4th Cir. 1998) (noting that a writ of habeas corpus *ad prosequendum* allows a federal prisoner to appear in state court to face state criminal charges, but that the United States "does not relinquish its custodial authority over the prisoner when the prisoner is sent to the receiving jurisdiction").

862 F.3d 417 (4th Cir. 2017), when it upheld a district court's denial of a prisoner's request for credit towards a federal sentence. 862 F.3d at 420-21 ("We note at the outset of our analysis that we are not at all sure a federal common law right to credit for time erroneously spent at liberty currently exists. As the First Circuit has noted, legal developments in the decades since *White* [*v. Pearlman*, 42 F.2d 788 (10th Cir. 1930),] cast some doubt on the current validity of the doctrine." (citation omitted)). Finally, two other federal circuit courts have categorically rejected the argument that a defendant should be deemed to have served his sentence as of the date of sentencing due to a delay in commencement. *Little v. Holder*, 396 F.3d 1319, 1321-22 (11th Cir. 2005) ("[A] delay in the commencement of a sentence cannot, by itself, constitute service of that sentence." (citation omitted)); *Leggett v. Fleming*, 380 F.3d 232, 235 (5th Cir. 2004) ("[T]his court has expressly held that a prisoner is not entitled to a credit when there is merely a delay in the execution of one's sentence." (citations omitted)).[7]

Here, there is no indication that the federal government surrendered Defendant to State custody and the State refused to exercise it. Furthermore, the petitioner in *Kiendra* was committed at the time of his federal sentencing to federal custody, and that order was not followed; here, no commitment order was entered, and, even if it had been, it could not have contravened the Judgment's mandate that Defendant serve his sentence in the custody of N.C. DOC. Rather than frustrate the judgments of the state and federal courts in this case, our decision vindicates them. The state court ordered Defendant to serve his sentence in the custody of N.C. DOC prior to the imposition of any federal sentence, meaning it was neither consecutive nor concurrent to the

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7. The facts in *Kiendra* are also distinguishable. There, the petitioner was convicted of a federal crime, with the sentence to begin upon expiration of a state sentence he was then serving. 763 F.2d at 70. The federal government filed a detainer with the state where the petitioner was imprisoned but, when the state authorities presented him to federal marshals, the marshals refused to accept him into their custody. *Id.* at 70. The petitioner was later arrested and convicted again in state court, which, aware of the unserved federal sentence, sentenced defendant to serve his state sentence in a federal penitentiary concurrent with the unserved federal sentence. *Id.* at 70-71. The state presented the petitioner to federal marshals for imprisonment on three more occasions, and the marshals refused custody each time. *Id.* at 71. However, once the petitioner had served his state sentence in state prison rather than the intended federal prison, the marshals took custody of the petitioner and imprisoned him in a federal penitentiary to serve his federal sentence. *Id.* at 71. The *Kiendra* court held that the petitioner should receive credit on his federal sentence running from the date he was first committed by the federal court, as holding otherwise would be contrary to the federal court's intention that the petitioner's sentence begin on the date he was originally committed and to the state court's intention that his state sentence run concurrently with the federal sentence. *Id.* at 72-73.

as-yet non-existent federal sentence.[8] And North Carolina law does not allow time in federal custody to be credited towards a state sentence. *See*, *e.g.*, *State v. Lewis*, 231 N.C. App. 438, 447, 752 S.E.2d 216, 222 (2013) ("Because no statute specifically authorizes credit for time spent in federal custody, the trial court had no discretion under the Structured Sentencing Act to reduce defendant's sentence for his time in federal custody."). Thus, the Judgment is effectuated by Defendant serving his sentence in N.C. DOC custody without consideration of the federal sentence. As to the federal sentence itself, the United States District Court for the Eastern District of North Carolina ordered that sentence "be served consecutively with any state charges the defendant is currently serving time for[,]" obviously evincing an intention that the federal sentence run separate and consecutive with any state sentence, such as the Judgment.

III. CONCLUSION

Defendant is entitled to the appropriate relief of an order of commitment entered *nunc pro tunc* 19 May 2009, the date he was sentenced under the Judgment, and the trial court which initially sentenced Defendant, as well as the trial court presiding at his MAR hearing, erred in failing to do so contrary to a statutory mandate. N.C. Gen. Stat. § 15A-1353(a). However, the Judgment requires Defendant to serve a minimum of 80 months and maximum of 105 months imprisonment in the custody of the N.C. DOC, and his sentence cannot be said to run until he is remitted into the agency's custody. We therefore remand for entry of such an order of commitment, with the instruction that the order state Defendant's sentence is to begin on the date he is released from federal custody.

REMANDED WITH INSTRUCTIONS.

Judges BRYANT and DAVIS concur.

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8. "When multiple sentences of imprisonment are imposed on a person *at the same time* or when a term of imprisonment is imposed on a person who is *already subject to an undischarged term of imprisonment*, *including a term of imprisonment in another jurisdiction*, the sentences may run either concurrently or consecutively, as determined by the court." N.C. Gen. Stat. § 15A-1354 (2009) (emphasis added).

STATE v. WEBB

[258 N.C. App. 361 (2018)]

STATE OF NORTH CAROLINA
v.
MAURICE JASON WEBB, DEFENDANT

No. COA17-612

Filed 6 March 2018

1. Burglary and Unlawful Breaking or Entering—felony breaking or entering—sufficiency of evidence—identity of perpetrator

The trial court did not err by denying defendant's motions to dismiss the charges of felony breaking or entering, felony larceny, and misdemeanor injury to real property where there was sufficient evidence, given by multiple witnesses, that defendant himself perpetrated each offense.

2. Larceny—felony larceny—sufficiency of evidence—value of property taken

The trial court did not err in its jury instruction on felony larceny where the State produced sufficient evidence, from multiple witnesses, that defendant personally committed the crime and that he took property in excess of $1,000.

Appeal by Defendant from judgments entered 25 January 2017 by Judge Ebern T. Watson III in New Hanover County Superior Court. Heard in the Court of Appeals 13 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

MURPHY, Judge.

The issue underlying Maurice Jason Webb-Sholar's[1] (Defendant) arguments on appeal is whether the State put forth sufficient substantial evidence that he *personally* committed the crimes appealed herein. For the reasons that follow, we hold that this case is analogous to *State v. Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325 (2005), and, thus, there

1. Defendant is sometimes referred to as "Maurice Sholar," "Maurice Webb-Sholar," or "Maurice Webb-Scholar" in various court documents. On the Judgments, Defendant's name appears as "Maurice Jason Webb."

was sufficient evidence that Defendant perpetrated the crimes to support a jury finding, of each essential element of the offense charged, and of Defendant being the perpetrator of each offense.

Defendant argues that: (1) there was insufficient evidence that Defendant personally committed the offenses of felony breaking or entering, felony larceny, and misdemeanor injury to real property, and, thus, it was error for the trial court to deny Defendant's motion to dismiss; and (2) as a result of this error, the trial court plainly erred in its jury instructions on felonious larceny. We disagree, and analyze each argument in turn.

Background

During Fall 2015, Defendant introduced himself to Lasonia Melvin as "Jason Young." The two dated "casually" for about one month. Defendant visited her apartment several times throughout the relationship, which was located on the ground floor of an apartment complex in Wilmington.

Defendant asked Melvin about her plans for Thanksgiving. Melvin told Defendant that she and her daughter were traveling out of town. When Defendant asked to accompany Melvin on this trip, she declined. Shortly thereafter, Melvin ended the relationship because Defendant was always asking for money, although Defendant told Melvin he had a job.

The day before Thanksgiving, Melvin and her daughter left her apartment at approximately 5:00 p.m. for their trip out of town. Melvin locked the apartment door when she left, and asked a neighbor, Henrietta McKoy, to watch her apartment. McKoy lived across the parking lot from Melvin. Between 10:00 p.m. and 11:00 p.m., McKoy saw a dark blue or black vehicle backed into the parking space where Melvin parks. At the time, McKoy thought the car belonged to Melvin. McKoy went outside a second time, approximately 30 minutes after first seeing the vehicle, and the vehicle was still parked in the same space.

Around the same time, another neighbor, Matthew Lofty (Lofty), sat outside on his porch, directly above Melvin's apartment. Throughout the night, Lofty saw a four-door, dark blue Hyundai parked and backed into Melvin's parking spot, with the trunk facing Melvin's apartment. Lofty saw Defendant and another unidentified male near Melvin's apartment. Lofty observed Defendant twice that evening: first standing in the parking lot, and second, standing directly in front of Melvin's apartment door. Lofty also noted he saw the unidentified male in the area each time he looked down from the porch. Lofty told police that he saw the

unidentified male and Defendant going in and out of the apartment.[2] Lofty also stated that, sometime during the night, he saw a flat screen television in the open trunk of the dark blue Hyundai.

Heather Wilson (Wilson), who lived with Lofty, exchanged brief pleasantries with Defendant as she smoked on the upstairs porch. Wilson thought Defendant seemed nervous during this exchange. Wilson claimed the sunroof and trunk were open on the vehicle, and that she saw "stuff" in the trunk on at least one occasion.

Over the course of roughly three hours, Lofty observed Defendant and the unidentified male went to and from Melvin's residence four to five times in the dark blue Hyundai. During one of these visits, as Lofty and Wilson watched, Defendant noticed he was being observed, appeared "startled," slammed the trunk closed, entered the passenger side of the vehicle, and slowly pulled out of the parking lot. Both Lofty and Wilson heard a lot of noise throughout the night and would look outside, but could not identify its source.

The next day Wilson and Lofty noticed the door to Melvin's apartment was open, and alerted McKoy, who called the police. When Officer Carly Tate of the Wilmington Police Department arrived on scene, she noticed Melvin's door frame was broken and appeared to have been pried open. Officer Tate entered the apartment and noticed several items were missing or had been "disturbed." Melvin later determined that three TVs (one of which was an older, 55-inch model), a sapphire diamond bracelet, a microwave, two laptops (including her work laptop), an Amazon Fire Stick, several DVDs, and $900 dollars in cash were missing. Melvin's insurance company valued her stolen items at approximately $4,000, and paid her roughly $3,000 after a $1,000 deductible. Sometime later Wilson picked Defendant out of a photo lineup, and Lofty also identified Defendant as the perpetrator.

During the trial, Defendant made a motion to dismiss at the close of the State's evidence, and renewed his motion to dismiss at the close of all evidence. The trial court denied both motions. The trial court instructed the jury on the charges of felony breaking or entering, felony larceny, and misdemeanor injury to real property. The jury subsequently returned a verdict of guilty on all counts. The trial court entered judgments upon

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2. At trial, Officer Carly Tate testified about Lofty's statement without objection. We note that Lofty's statement to police is inconsistent with his trial testimony. At one point in his testimony, Lofty stated that he saw Defendant standing outside and the unidentified male going in and out of the apartment. Later in his testimony, Lofty stated he did not see anyone going back and forth from the apartment.

the verdicts and sentenced Defendant to 11 to 23 months of imprisonment for each felony conviction, consolidated; and a consecutive term of 120 days imprisonment for the injury to real property conviction. Defendant timely appealed in open court.

Analysis

Defendant presented two arguments on appeal: (1) there was insufficient evidence that Defendant personally committed the offenses of felony breaking or entering, felony larceny, and misdemeanor injury to real property, and, thus, it was error for the trial court to deny Defendant's motion to dismiss; and (2) as a result of this error, the trial court plainly erred in its jury instructions on felonious larceny. We disagree and hold that Defendant received a fair trial, free from error.

A. Motions to Dismiss

[1] Defendant argues the State presented insufficient evidence he *personally* broke into or entered Melvin's apartment, *personally* committed larceny, or *personally* injured the apartment door.

We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding, of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

Id. at 523, 644 S.E.2d at 621 (citations, quotation marks, and alterations omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *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 (quotation marks, citations, brackets, and emphasis omitted).

Here, at the State's request, the trial court did not instruct the jury on acting in concert or aiding and abetting. Thus, in order for the jury to find Defendant guilty of felony breaking and entering, felony larceny, and misdemeanor injury to real property, "the State was required to prove that defendant committed the offenses himself." *State v. Haymond*, 203 N.C. App. 151, 168, 691 S.E.2d 108, 122 (2010); *see also State v. McCoy*, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986) ("The court failed to instruct on acting in concert. Accordingly, defendant's conviction may be upheld only if the evidence supports a finding that he personally committed each element of the offense.").[3]

The jury convicted Defendant of felonious breaking or entering, felonious larceny, and injury to real property. The elements of felonious breaking or entering are: "(1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986); *see also* N.C.G.S. § 14-54(a) (2017). For larceny, the State must prove Defendant: "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d

3. We note the logical inconsistency in conducting a de novo review of a motion to dismiss raised during trial retroactively through a filter of the ultimate jury instructions. However, this is the standard that we adopted in our prior published opinions and we are bound to follow this retroactive analysis of a defendant's motion to dismiss. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

810, 815 (1982); *see also* N.C.G.S. § 14-72 (2017). The State charged Defendant with felonious larceny, alleging he took property worth more than $1,000 or acted pursuant to a breaking or entering. *See* N.C.G.S. § 14-72(a), (b)(2). It is a misdemeanor to "willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature[.]" N.C.G.S. § 14-127 (2017).

Defendant cites to *State v. Cunningham*, 140 N.C. App. 315, 536 S.E.2d 341 (2000), in support of his argument. In *Cunningham*, the defendant was convicted of first-degree burglary. *Id.* at 320, 536 S.E.2d at 345. On appeal, Cunningham argued the State failed to present sufficient evidence to support the charge. *Id.* at 320, 536 S.E.2d at 346. The trial court did not instruct the jury as to acting in concert, and, thus, we reviewed for sufficient evidence that Cunningham personally committed the crime. *Id.* at 321-22, 536 S.E.2d at 345.

When reviewing the evidence in *Cunningham*, we noted, "[t]he only evidence with regard to the alleged burglary came from two sources: (1) defendant's own confession . . . and (2) the testimony of Sherry Atwell, the owner of the house and daughter of the victim[.]" *Id.* at 322, 536 S.E.2d at 346. In Cunningham's confession, he did not admit "he broke down or otherwise opened any of the exterior or interior doors." *Id.* at 322, 536 S.E.2d at 347. Indeed, the confession stated another person with Cunningham kicked the door and opened it. *Id.* at 322, 536 S.E.2d at 346. The State asked us to accept certain portions of Cunningham's confession—that he carried a shotgun—and reject the portions of his confession implicating another for the breaking. *Id.* at 322, 536 S.E.2d at 347. The State also pointed to Atwell's testimony, but her testimony only supported constructive breaking, a theory upon which the jury was not instructed. *Id.* at 324, 536 S.E.2d at 347-48. Accordingly, we held that the State failed to present sufficient evidence of a "breaking" and vacated Cunningham's conviction. *Id.* at 321-22, 324, 536 S.E.2d at 345, 347-48.

In contrast, the State argues that the instant case is more analogous to *Ethridge*, 168 N.C. App. 359, 607 S.E.2d 325. In *Ethridge*, the defendant argued the trial court erred by denying his motion to dismiss a number of charges. *Id.* at 362, 607 S.E.2d at 327. Ethridge alleged "the evidence was insufficient to prove [he] was the perpetrator." *Id.* We disagreed and pointed to the following evidence:

> A vehicle registered to [Ethridge] and identified by others as belonging to [Ethridge], was seen at the crime scene. The vehicle, with its tailgate open, was pulled up to the door of the house. A coffee table was seen in the car.

> [Ethridge] was placed . . . next door to the crime scene on the day the offenses occurred.

Id.

Here, Melvin was not at her apartment the day of the robbery. A neighbor, McKoy, saw a vehicle backed up to the victim's patio door. Neighbors told Officer Tate they saw two males "going in and out of the apartment" while outside smoking. One of the men, Defendant, was recognized by neighbors because of his relationship to Melvin. When one of the neighbors, Wilson, spoke to Defendant, he seemed "startled and anxious." Melvin told the officer that only three people knew she was going to be out of town—one of whom was Defendant.

Lofty saw Defendant and another male in the following places: by the victim's apartment, on the front porch, right in front of the apartment door, and then in the parking lot, next to a vehicle. The vehicle "kept coming and going." At one point, Lofty saw Defendant in the driver's side of the vehicle. Defendant "got startled[,]" the two slammed the trunk, and then they left. At some point, Lofty saw a television in the trunk. Lofty saw the other male "standing there" and Defendant would be "gone" at some points. That night, Lofty also heard a lot of noise ("banging on the walls"). The next morning, Lofty's daughter noticed the victim's apartment door was open and crime scene investigators confirmed that the door had been pried open.

Wilson also testified that she saw Defendant and another man parked with a car backed up to the victim's door. She saw "stuff" in the trunk of the car. She testified: "It caught them off guard when we walked out on the porch and they closed the trunk very, very fast. The sunroof was open, [Defendant] was in the driver's seat, the other guy was in the passenger and they took off and went down the road." Wilson saw the vehicle come and go at least four, and maybe five, times.

When the victim called Defendant to ask about that night, he told her he was out of town—a fact contradicted by the several witnesses' testimonies. When Melvin returned home, her 55-inch television was missing—a television so big she said it would take more than one person to carry out.

We conclude there was sufficient evidence Defendant was the perpetrator of the crimes and individually committed the crimes. The case *sub judice* more closely aligns with *Ethridge* than with *Cunningham*. Witnesses saw Defendant driving a car that came to the victim's apartment at least four times. At times, Defendant was standing by the car,

and at other times, witnesses did not see Defendant. Defendant did not have permission to be there. A witness saw a television in the trunk of the car Defendant drove. Televisions were stolen from the victim's apartment. When spoken to, Defendant acted "startled[,]" slammed the trunk, which contained the television, and drove away. Considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, there is sufficient evidence that Defendant perpetrated the crimes. As such, we hold the trial court did not err in denying Defendant's motions to dismiss.

B. Jury Instructions

[2] Next, Defendant argues the trial court plainly erred in its jury instructions on felonious larceny.

"[A]n issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action question is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error exists when: (1) there is an error; (2) that is plain; (3) that affects a substantial right; (4) that must seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* at 515-16, 723 S.E.2d at 332-33. "[P]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error[.]" *Id.* at 517, 723 S.E.2d at 333.

As discussed *supra*, Defendant argues the State presented insufficient evidence that he personally took property worth over $1,000. However, we find that the State produced sufficient evidence Defendant personally committed these crimes, and that he took property in excess of $1,000. As the trial court did not err in its jury instructions on felonious larceny, we need not review whether the alleged error amounted to plain error.

Conclusion

Defendant received a fair trial, free of prejudicial error.

NO ERROR.

Chief Judge McGEE and Judge ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 MARCH 2018)

AMIR v. AMIR No. 17-431	Wake (14CVD6809)	Affirmed in part, remanded in part.
BARNHILL v. FARRELL No. 17-402	Wake (11CVS17551)	Affirmed
CAPPS v. McSWAIN No. 16-1264	Forsyth (16CVS4309)	Reversed
CAUDILL v. HUITT MILLS, INC. No. 16-1281	N.C. Industrial Commission (931518)	Affirmed
IN RE A.G.D. No. 17-719	Durham (16JT77-78)	Vacated
IN RE B.L.A. No. 17-978	Cumberland (12JT332)	Affirmed
IN RE D.A.C. No. 17-889	Haywood (06JA63) (06JA64) (14JA79)	Affirmed in part; Reversed in part; Vacated and remanded in part
IN RE F.S. No. 17-959	Orange (10JA6)	Reversed
IN RE J.D. No. 17-954	Durham (16JB23)	Dismissed
IN RE J.L.S. No. 17-994	Person (12J72-74)	Affirmed
IN RE J.R.G. No. 17-1106	Caldwell (16JT161)	Vacated
IN RE J.W.M. No. 17-777	Harnett (13JT26)	Affirmed
JOHNSON v. HAYNES No. 17-890	Buncombe (15CVS289)	Dismissed
MALONE v. HUTCHISON-MALONE No. 17-241	Durham (06CVD2127)	Affirmed; Remanded for correction of clerical error

McCALL v. MILLION No. 17-403	Watauga (16CVD209)	Vacated and Remanded
McGUIRE v. McGUIRE No. 17-432	Union (12CVD2483)	Affirmed in part; Reversed and Remanded in part
NUNN v. BARO No. 17-798	Surry (14CVS1476)	No Error
O'NEAL v. FOX No. 17-754	Johnston (15CVS3612)	Affirmed
OXENDINE v. LOCKLEAR No. 17-259	N.C. Industrial Commission (Y14644)	Affirmed
PEREZ v. PEREZ No. 17-512	Rowan (15CVD2015)	Reversed and Remanded
STATE v. ADAMS No. 17-601	Durham (11CRS59338-39) (11CRS8963-64)	Dismissed
STATE v. CLOER No. 17-23	Iredell (14CRS54217-19) (16CRS1415)	No Error
STATE v. CROOMS No. 17-317	Wilson (12CRS53186-87) (13CRS82-83) (13CRS85-86) (13CRS88-89)	Vacated in Part and Remanded in Part.
STATE v. DAVIS No. 17-615	Wake (15CRS6349)	Affirmed
STATE v. DAVIS No. 17-385	Brunswick (13CRS680)	No Error
STATE v. EVANS No. 17-840	Onslow (14CRS1110) (14CRS52011) (14CRS52041-42) (14CRS52052) (16CRS2955)	No Error
STATE v. FOX No. 17-711	Rowan (15CRS53604)	Affirmed

STATE v. FREEMAN No. 17-751	Orange (16CRS50130)	Vacated and Remanded.
STATE v. HARRISON No. 17-805	Rockingham (16CRS50479-80) (16CRS701243)	Affirmed
STATE v. HILL No. 17-758	Mecklenburg (15CRS241826-28) (16CRS9095)	No Error
STATE v. JEFFERIES No. 17-775	Cleveland (10CRS50118-20)	No Error
STATE v. McMANNUS No. 17-900	Wake (15CRS207674) (15CRS207675)	Affirmed
STATE v. RUSSELL No. 17-427	Granville (14CRS51118)	No Prejudicial Error
STATE v. SOLOMON No. 17-651	Durham (16CRS55759)	No Error in Part; Vacated and Remanded in Part
TIBBS v. FORD No. 17-936	Mecklenburg (14CVD17086)	Appeal dismissed.

WILLIAM M. BYRON AND DANA T. BYRON, PLAINTIFFS
v.
SYNCO PROPERTIES, INC., A NORTH CAROLINA CORPORATION, AND CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE, DEFENDANTS

No. COA17-318

Filed 20 March 2018

1. Jurisdiction—standing—rezoning—interpretation of session laws and statutes—Protest Petition Statute

Plaintiff landowners did not have standing in a rezoning case to challenge defendant city's interpretation of Session Law 2015-160 and the applicability of the Protest Petition Statute under N.C.G.S. § 160A-385, where plaintiffs conceded their property was neither subject to the proposed change nor was it within 100 feet of the area subject to the rezoning. Plaintiffs were not entitled to avail themselves of the Protest Petition Statute since they were not directly and adversely affected by the rezoning.

2. Jurisdiction—standing—rezoning—constitutional claims—adjoining landowner's property—generalized grievances

Plaintiff landowners in a rezoning case lacked standing to bring constitutional claims where plaintiffs failed to carry their burden of showing they had a constitutionally protected interest in the rezoning of an adjoining landowner's property and their remaining constitutional challenges asserted only generalized grievances.

3. Jurisdiction—standing—transfer of constitutional claims—three-judge panel

The trial court did not err in a rezoning case by concluding that it was not required to transfer plaintiff landowners' constitutional claims to a three-judge panel under N.C.G.S. § 1-267.1(a1) where plaintiffs lacked standing to bring the claims.

Appeal by Plaintiffs from Order entered 23 November 2016 by Judge Yvonne Mims-Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2017.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, and The Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies, for Plaintiffs.

K&L Gates LLP, by Roy H. Michaux, Jr., for Defendant SYNCO Properties, Inc.

Office of the Charlotte City Attorney, by Assistant City Attorney Thomas E. Powers, III, and Senior Assistant City Attorney Terrie Hagler-Gray, for Defendant City of Charlotte.

INMAN, Judge.

Landowners whose property is not directly and adversely affected by a zoning statute do not have standing to bring a declaratory judgment action to challenge the constitutionality of the statute or a municipality's interpretation of the statute.

Plaintiffs William M. Byron and Dana T. Byron ("Plaintiffs"), husband and wife, appeal from a summary judgment order dismissing their declaratory judgment action against defendant SYNCO Properties, Inc. ("SYNCO") and the City of Charlotte (the "City," collectively "Defendants") challenging the rezoning of real property in Charlotte, North Carolina. Plaintiffs contend that, because their complaint alleged facial constitutional challenges to a statute and session laws, the trial court was required to transfer those claims to a three-judge panel in Wake County pursuant to N.C. Gen. Stat. §§ 1-81.1, 1-267.1, and 1A-1, Rule 42(b)(4) (2015). Plaintiffs further challenge the trial court's dismissal of their claims challenging N.C. Gen. Stat. § 160A-385 (2015) and Session Law 2015-160 as moot, as well as its determination that the prior version of N.C. Gen. Stat. § 160A-385 (2013) did not apply to the rezoning based on its interpretation of that session law. Defendants contend that Plaintiffs lacked standing to bring their suit. After careful review, we agree with Defendants that Plaintiffs lacked standing to assert the claims they seek to revive on appeal. As a result, we affirm the order of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

In late 2014, SYNCO filed an application with the City to rezone a tract located in the SouthPark area of Charlotte. On 11 March 2015, several local property owners (the "Petitioners") filed a protest petition (the "Protest Petition") with the City opposing the proposed rezoning pursuant to N.C. Gen. Stat. § 160A-385 (2013) (the "Protest Petition Statute"). Plaintiffs were not among the Petitioners that filed the Protest Petition.

In July 2015, the North Carolina General Assembly passed Session Law 2015-160, which replaced the protest petition procedure in the Protest Petition Statute with a "Citizen Comment" procedure. 2015 N.C. Sess. Laws ch. 160, § 1 (2015) (codified as amended at N.C. Gen. Stat. § 160A-385 (2017)). Per the session law, the amended procedure "bec[ame]

effective August 1, 2015, and applies to zoning ordinance changes initiated on or after that date." *Id.*, § 6.

On 24 September 2015, SYNCO withdrew its initial rezoning application. SYNCO filed a new rezoning application the following day. The new application sought approval for the same uses as those proposed in the initial rezoning application, along with revised building sizes and transportation improvements.

On 19 January 2016, the Charlotte City Council voted unanimously to approve the second rezoning application. The City and SYNCO treated the second application as one not subject to the Protest Petition Statute. Nothing in the record indicates that the Petitioners sought injunctive or other relief requiring the City to recognize the applicability of the Protest Petition to the second rezoning application or to follow the procedures set forth in the Protest Petition Statute. Rather, one of the Petitioners stated in an affidavit that "a change in the state law had invalidated the Protest Petition" and declined to take action to revive the Petition or require its application.

On 25 January 2016, Plaintiffs filed a declaratory judgment action seeking to invalidate the City Council's approval of the rezoning application. After two amendments to the original complaint and the voluntary dismissal of one claim, Plaintiffs' final amended complaint alleged that: (1) Defendants violated N.C. Gen. Stat. § 160A-364 (2015);[1] (2) Defendants made certain misrepresentations and omissions in the rezoning process; (3) Defendants violated the Protest Petition Statute, which they were required to follow per Plaintiffs' interpretation of Session Law 2015-160; (4) the City's actions were *ultra vires*; (5) Session Law 2000-84 was unconstitutional;[2] (6) the City's actions violated Plaintiffs' due process rights; (7) N.C. Gen. Stat. § 160A-383 (2015), which employs the citizen comment procedures rather than protest petition procedures, unconstitutionally deprives the judiciary of judicial power; and (8) N.C. Gen. Stat. § 160A-383 (2015) and Session Law 2015-160's replacement of protest petition procedures with citizen comment procedures deprives Plaintiffs of their constitutional right to petition the government for the redress of grievances.[3]

1. This statute establishes the procedures applicable to the adoption, amendment, or repeal of ordinances by cities and towns, and is unrelated to the issues raised on appeal. N.C. Gen. Stat. § 160A-364.

2. This session law permitted the City to engage in conditional zoning. 2000 N.C. Sess. Laws ch. 84 (2000).

3. These claims are identified in Plaintiffs' final amended complaint as their first, second, third, fourth, fifth, sixth, eighth, and ninth causes of action, respectively.

The parties filed competing motions for summary judgment, and the trial court granted summary judgment against Plaintiffs on 23 November 2016. In the summary judgment order, the trial court held that Plaintiffs had standing to bring their claims, but nonetheless dismissed all claims against Defendants, including Plaintiffs' facial constitutional challenges. The Plaintiffs timely appealed.

II. ANALYSIS

A. Standard of Review

The standard of review on an appeal from summary judgment is *de novo*, and "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." *Atkinson v. City of Charlotte*, 235 N.C. App. 1, 3, 760 S.E.2d 395, 397 (2014) (internal citation and quotation marks omitted). Because standing is a question of law, it, too, is subject to *de novo* review by this Court. *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876 (2016).

B. The Standing Requirements Relevant to Plaintiffs' Appeal

Resolution of this appeal requires distinguishing the different standing doctrines applicable to: (1) zoning ordinance challenges; (2) statutory construction and validity claims; and (3) constitutional challenges to zoning ordinances. "In passing on the validity of an annexation or zoning ordinance, one of the court's first concerns is whether the plaintiff has standing to bring the action." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 138, 544 S.E.2d 821, 823 (2001) (citation omitted). The question of standing "is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re Baby Boy*, 238 N.C. App. 316, 321-22, 767 S.E.2d 628, 631 (2014) (citation and quotation marks omitted).

A rezoning ordinance may be challenged in a declaratory judgment action "only . . . by a person who has a specific personal and legal interest in the subject matter affected *by the zoning ordinance* and who is directly and adversely affected thereby." *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (emphasis added) (citations omitted). Standing to challenge a statute requires that the statute directly and adversely affect the plaintiff. *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 190 N.C. App. 1, 11, 660 S.E.2d 217, 223 (2008) ("A declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be directly and adversely affected *by the statute*[.]" (emphasis added) (internal citation and quotation marks

omitted)). Finally, standing to challenge the constitutionality of a zoning ordinance or statute requires that the plaintiff demonstrate injury or immediate danger of injury to a constitutionally protected interest in the property subject to that ordinance or statute. *See*, *e.g.*, *Coventry Woods Neighborhood Ass'n, Inc. v. City of Charlotte*, 202 N.C. App. 247, 257, 688 S.E.2d 538, 545 (2010) (holding that neighboring property owners could not challenge a rezoning decision on facial or as-applied constitutional and procedural due process grounds because "a change in the treatment of an adjoining tract of property under local land use ordinances that affects the use and enjoyment of [the plaintiffs'] property [does not] implicate[] a constitutionally-protected property interest"); *Templeton v. Town of Boone*, 208 N.C. App. 50, 56, 701 S.E.2d 709, 713-14 (2010) (holding plaintiffs lacked standing to challenge a zoning ordinance on constitutional grounds where the ordinance was not enforced against plaintiffs' properties but only "*affected*" them (emphasis in original)).

The trial court's summary judgment order dismissed *all* of Plaintiffs' claims; however, Plaintiffs argue on appeal only that the trial court: (1) incorrectly concluded that the City was not required to apply the Protest Petition Statute to the rezoning due to its misinterpretation of the effective date of Session Law 2015-160; (2) wrongfully concluded their challenges to certain zoning statutes and session laws were moot; and (3) impermissibly dismissed their constitutional challenges to those zoning statutes and session laws. In effect, then, Plaintiffs seek to revive their declaratory judgment action only as to: (1) the interpretation of Session Law 2015-160 (and by extension the applicability of the Protest Petition Statute); and (2) the constitutionality of the zoning statutes and session laws governing the procedure employed by the City in rezoning.[4] In short, Plaintiffs' appeal challenges the interpretation and constitutionality of the statutes and session laws governing the City's rezoning decision, rather than the inherent validity of the rezoning decision itself. As a result, the question before this Court is not whether Plaintiffs had standing to challenge the rezoning decision, as they sought to do in the claims not at issue on appeal,[5] but whether they had standing to seek a declaratory judgment determining the construction and constitutionality of the

4. Plaintiffs confirmed at oral argument that their only claims on appeal related to their constitutional challenges and the interpretation of Session Law 2015-160.

5. For example, Plaintiffs challenged the rezoning on the grounds that the City's decision constituted an *ultra vires* action that was "not in accordance with . . . adopted land use plans[,]" as well as "arbitrary and without reasonable basis[.]" This claim, in contrast to Plaintiffs' statutory construction and constitutional validity claims, would be subject to the standing analysis employed in a declaratory judgment action challenging a zoning

session laws and statutes governing that rezoning. *Compare Taylor*, 290 N.C. at 620, 227 S.E.2d at 583 ("[T]he validity of a municipal zoning ordinance . . . may be determined . . . under our Declaratory Judgment Act . . . by a person who has a specific personal and legal interest in the subject matter affected *by the zoning ordinance* and who is directly and adversely affected thereby." (emphasis added) (citations omitted)) *with Wake Cares, Inc.*, 190 N.C. App. at 11, 660 S.E.2d at 223 ("A declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be directly and adversely affected *by the statute*[.]" (emphasis added) (internal citations and quotation marks omitted)).

C. Plaintiffs Lack Standing to Challenge the City's Interpretation of Session Law 2015-160 and the Applicability of the Protest Petition Statute

[1] Plaintiffs contend that the City and trial court misinterpreted the words "zoning ordinance changes initiated on or after [1 August 2015]" in Session Law 2015-160. 2015 N.C. Sess. Laws ch. 160, § 6. Specifically, Plaintiffs argue that, because SYNCO filed its first rezoning petition prior to that date, we should hold the rezoning under its second petition was a "zoning ordinance change[ ] initiated" prior to the session law's effective date. *Id.*, § 6. Such a reading would require the City to have followed the Protest Petition Statute in the consideration of SYNCO's rezoning petition and, as a result, render the City's rezoning decision invalid.

As noted *supra*, "[a] declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be directly and adversely affected *by the statute*[.]" *Wake Cares, Inc.*, 190 N.C. App. at 11, 660 S.E.2d at 223 (emphasis added) (internal citations and quotation marks omitted). Thus, the Plaintiffs can only seek a declaratory judgment proclaiming their preferred interpretation of the statute if they are "directly and adversely affected" by its enactment and replacement of protest petition procedures with citizen comments. *Id.* at 11, 660 S.E.2d at 223. Plaintiffs, however, *were never entitled to*

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decision as inherently unlawful. *See, e.g.*, *Taylor* 290 N.C. at 620, 227 S.E.2d at 583 (holding that standing exists in a declaratory judgment action challenging a rezoning as contrary to the established land use plan and as arbitrary and capricious where "challenged by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby" (citations omitted)); *cf. Templeton*, 208 N.C. App. at 54-62, 701 S.E.2d at 713-17 (applying, in a declaratory judgment action, one set of standing requirements to claims challenging the constitutionality of a zoning ordinance itself and a different set of standing requirements to claims alleging violation of a procedural statute governing the zoning decision).

oppose the rezoning by protest petition, as they did not meet the statutory requirements for such a filing under the Protest Petition Statute. The Protest Petition Statute specifically delineated those who had access to such a remedy: "owners of either (i) twenty percent (20%) or more of the area included in the proposed change or (ii) five percent (5%) of a 100-foot-wide buffer . . . ." N.C. Gen. Stat. § 160A-385 (2013). As conceded by Plaintiffs in oral argument before this Court, their property is neither subject to the proposed change in SYNCO's petition, nor is it within 100 feet of the area subject to rezoning. Thus, Plaintiffs, as parties not subject to or able to avail themselves of the Protest Petition Statute, are not "directly and adversely affected" by the unavailability of a statutory procedure they were never entitled to enjoy in the first instance. Nor are they permitted to bring a claim interpreting the language "initiated on" in Session Law 2015-160, as its application concerns only whether qualifying persons able to avail themselves of the Protest Petition Statute could continue to pursue their rights thereunder.

While Plaintiffs argue in their brief that the Protest Petition filed by the Petitioners resulted in "heightened procedural requirements,"[6] they also acknowledge that those requirements are "imposed for the benefit and protection *of the protest petition filer(s)*." (emphasis added). In other words, any perceived procedural or due process benefits were bestowed on Plaintiffs not by the Protest Petition Statute itself, but instead by the Petitioners' filing of a valid Protest Petition. It was, therefore, Petitioners' failure to revive or otherwise pursue the reinstatement of their Protest Petition—not Session Law 2015-160—that injured Plaintiffs.

"Every claim must be prosecuted in the name of the real party in interest[,]" *Goodrich v. Rice*, 75 N.C. App. 530, 536, 331 S.E.2d 195, 199 (1985) (citation omitted), and, by extension, "[a] party has standing to initiate a lawsuit if he is a 'real party in interest[,]' " *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 582 (2004) (citations omitted). When it comes to the interpretation of Session Law 2015-160 and the loss of the protections afforded by the Protest Petition

6. Plaintiffs claim in their briefs that certain ordinances enacted by the City impose these requirements. Specifically, Plaintiffs claim these ordinances impose "additional requirements for notice and public hearing *to the protest petition filer(s)*." (emphasis added). Ignoring the fact that Plaintiffs were not and could not be protest petition filers in this case, several ordinances cited by the Plaintiffs are not included in the record on appeal, and we are prohibited by precedent from taking judicial notice of municipal ordinances. *State v. Pallet*, 283 N.C. 705, 712, 198 S.E.2d 433, 437 (1973). We therefore do not consider those ordinances not present in the record in our resolution of this appeal.

and the Protest Petition Statute, it is the Petitioners, not Plaintiffs, who are the real parties in interest "directly and adversely affected by the statute" and the City's and trial court's interpretations thereof. *Wake Cares, Inc.*, 190 N.C. App. at 11, 660 S.E.2d at 223. Because "[a] declaratory judgment may be used to determine the construction and validity of a statute, but the plaintiff must be directly and adversely affected *by the statute*," *id.* at 11, 660 S.E.2d at 223 (emphasis added) (internal citations and quotation marks omitted), and Plaintiffs are not so affected, we hold they are without standing to pursue their claims requiring the interpretation of Session Law 2015-160.

The prior decisions by this Court relied upon by Plaintiffs are distinguishable and therefore not binding or persuasive. *See Thrash Ltd. Partnership v. Cty. of Buncombe*, 195 N.C. App. 727, 673 S.E.2d 689 (2009); *Frizzelle v. Harnett Cty.*, 106 N.C. App. 234, 416 S.E.2d 421 (1992); *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980). In *Thrash*, we held that the landowner had standing to sue because its land fell within the ambit of the zoning ordinance in question, and "plaintiff's use of its land was limited by the zoning regulations." 195 N.C. App. at 731, 673 S.E.2d at 692. Similarly, in *Frizzelle*, the plaintiff landowners alleged that Harnett County commissioners failed to follow required notice and hearing procedures in enacting a zoning ordinance applicable to the plaintiffs' lands. 106 N.C. App. at 242-43, 416 S.E.2d at 425-26. Finally, in *Lee*, Union County's ordinances required its Board of Commissioners to provide notice and hearing to owners of real property adjoining land subject to a rezoning application; the plaintiffs, who were such owners subject to receive that notice, did not, and challenged the rezoning on procedural grounds. 44 N.C. App. at 612, 261 S.E.2d at 295-96.

Plaintiffs were not entitled to avail themselves of the Protest Petition Statute, the procedural process that Plaintiffs contend they were wrongfully denied. Thus, *Thrash*, *Frizzelle*, and *Lee* are inapposite. *See also Ring v. Moore Cty.*, ___ N.C. App. ___, ___, 809 S.E.2d 11, 14 (2017) (distinguishing *Thrash* where "in this case Plaintiffs have not alleged that the zoning ordinance directly limits the use of their land").

D. Plaintiffs Lack Standing to Bring Their Constitutional Claims

[2] Just as a declaratory judgment action concerning statutory interpretation cannot be maintained by a party without legal standing, "this Court will not determine the constitutionality of a legislative provision in a proceeding in which there is no actual antagonistic interest in the parties." *Nicholson v. State Ed. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (internal citation and quotation marks omitted).

As a result, "[o]nly one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores Co., Inc. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965). Further, when the constitutionality of an ordinance itself is challenged, "a litigant must produce evidence that he has sustained an injury or is in immediate danger of sustaining an injury as a result of enforcement of the challenged ordinance." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (citation omitted).

Here, several of the facial challenges by Plaintiffs concern generalized grievances claiming the City and State governments have acted to: (1) violate the constitutionally mandated separation of powers; or (2) unlawfully restrict judicial power. Plaintiffs also specifically allege that: (1) the rezoning proceeding was quasi-judicial, requiring due process standards which the City and State governments violated; and (2) Session Law 2015-160, N.C. Gen. Stat. § 160A-385 (2015), and the City's actions thereunder deprived the Plaintiffs of a right to petition and access to open courts to seek redress.

Plaintiffs assert their separation of powers and unlawful restriction claims solely as persons with a "general interest as . . . citizen[s] in good government in accordance with the provisions of the Constitution[,]" *Nicholson*, 275 N.C. at 448, 168 S.E.2d at 406 (citations omitted), rather than as those "who [are] in immediate danger of sustaining a direct injury[,]" *Charles Stores*, 263 N.C. at 717, 140 S.E.2d at 375. This is also true of Plaintiffs' specific facial challenges, as: (1) Plaintiffs had no legal right to file a protest petition in this case, and therefore were not deprived of any right to petition or access to open courts by the enactment of Session Law 2015-160 and the application of N.C. Gen. Stat. § 160A-385 (2015); and (2) the property rezoned *was not the Plaintiffs'*. *See*, *e.g.*, *Coventry Woods*, 202 N.C. App. at 256, 688 S.E.2d at 544 (holding that neighbors to a property undergoing rezoning could not bring a facial or as-applied constitutional challenge to the rezoning on procedural due process grounds, as there is no "authority in support of the proposition that they are entitled to constitutional protection against changes in the treatment of adjoining tracts of property under properly-adopted zoning or subdivision ordinances"); *Templeton*, 208 N.C. App. at 56, 701 S.E.2d at 713-14 (2010) ("Without an allegation that the subject zoning ordinance amendments will be or have been enforced against property owned by plaintiffs, plaintiffs have failed to demonstrate that they have 'sustained an injury or [are] in immediate danger of sustaining

an injury' from enforcement of the ordinance amendments against them. Therefore, plaintiffs failed to carry their burden to make sufficient allegations to establish standing to bring their constitutional claims against defendant." (alteration in original) (quoting *Grace Baptist Church*, 320 N.C. at 444, 358 S.E.2d at 375)). Because Plaintiffs do not have a constitutionally protected interest in the rezoning of an adjoining landowner's property, and because their remaining constitutional challenges assert only generalized grievances, we hold these claims were properly dismissed.

E. The Trial Court Was Not Required to Transfer Plaintiffs' Constitutional Claims Due to Their Lack of Standing

[3] Per the language of N.C. Gen. Stat. § 1-267.1, all facial constitutional challenges to acts of the General Assembly must be heard by a three-judge panel in Wake County. N.C. Gen. Stat. § 1-267.1(a1). Where a lawsuit asserting such challenges not before the three-judge panel involves other claims unrelated thereto, the court with jurisdiction and venue over the action:

> shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the . . . three-judge panel *if, after all other matters in the action have been resolved, a determination as to the facial validity of an act . . . must* be made in order to completely resolve any matters in the case.

N.C. Gen. Stat. § 1A-1, Rule 42(b)(4) (emphasis added); *see also* N.C. Gen. Stat. § 1-81.1(a1) (establishing venue for such claims with the three-judge panel and requiring such actions be transferred consistent with Rule 42(b)(4)). In other words, facial constitutional challenges must be transferred to the three-judge panel only if the constitutionality of the statute in question must be resolved in order to conclude the action.

Because we hold that Plaintiffs did not have standing to bring their constitutional challenges as set forth *supra* Part II.D., the transfer of Plaintiffs' constitutional claims to a three-judge panel was not necessary, as "a determination as to the facial validity of [the] act[s]" in question was not required to "completely resolve any matters in the case." N.C. Gen. Stat. § 1A-1, Rule 42(b)(4); *see also* N.C. Gen. Stat. § 1-81.1(a1) (requiring the transfer of claims only if a determination of facial validity is necessary "after all other questions of law in the action have been resolved"). Further, because we hold that Plaintiffs lacked standing, we need not address the merits of their mootness and statutory interpretation arguments.

III. CONCLUSION

Plaintiffs brought multiple claims in their declaratory judgment action, some challenging the propriety of the rezoning itself and others challenging the construction and constitutional validity of certain statutes and session laws. Plaintiffs' appeal challenges only the trial court's dismissal of their constitutional and statutory construction claims. We hold that Plaintiffs lack standing to bring those claims and we affirm their dismissal. Plaintiffs did not argue error in the dismissal of their remaining causes of action; as a result, we affirm the order of the trial court.

AFFIRMED.

Judges BRYANT and DAVIS concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
ROBERT B. STIMPSON; AND BANK OF AMERICA, NATIONAL ASSOCIATION, DEFENDANTS

No. COA17-596

Filed 20 March 2018

1. Highways and Streets—prior pending action doctrine—inverse condemnation

The prior pending action doctrine applied in a Map Act case (N.C.G.S. § 136-44.50) and on these facts defendant landowners' inverse condemnation action served to prevent plaintiff Department of Transportation from proceeding with a direct condemnation action pursuant to N.C.G.S. § 136-103.

2. Highways and Streets—Map Act—dismissal of direct condemnation action—pending inverse condemnation action—right to file counterclaim

The trial court did not abuse its discretion in a Map Act case (N.C.G.S. § 136-44.50) by entering an order dismissing plaintiff Department of Transportation's (DOT) direct condemnation action without prejudice to DOT's right to file a counterclaim in plaintiff's pending inverse condemnation action. DOT would retain its right to bring an action under N.C.G.S. § 136-103 to condemn the property,

or any remaining rights in the property retained by defendant landowner, if resolution of defendant's action left DOT lacking in some right in the property necessary for completion of the project.

Appeal by Plaintiff from orders entered 23 February 2017 and 25 April 2017 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 13 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., Assistant Attorney General J. Aldean Webster, III, Assistant Attorney General Alexandra M. Hightower, and Assistant Attorney General William A. Smith, for Plaintiff-Appellant.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant, T. Paul Hendrick, Timothy Nerhood, W. Kirk Sanders, and Kenneth C. Otis III, for Defendant-Appellee Robert B. Stimpson.

McGEE, Chief Judge.

I. Factual and Procedural History

A. *General*

This appeal involves Article 2E, Chapter 136 of the North Carolina General Statutes, "Transportation Corridor Official Map Act," (the "Map Act"), that has been the source of substantial litigation involving hundreds of real property owners. These "Map Act" cases have been before this Court and our Supreme Court on multiple occasions, and the general factual and procedural history has been repeatedly and thoroughly addressed many times. *See, e.g.*, *Beroth Oil Co. v. N.C. Dep't of Transp.*, 220 N.C. App. 419, 725 S.E.2d 651 (2012) ("*Beroth I*"), *aff'd in part, vacated in part, Beroth Oil Co. v. N.C. Dep't of Transp.*, 367 N.C. 333, 757 S.E.2d 466 (2014) ("*Beroth II*"); *Beroth Oil Co. v. N.C. Dep't of Transp.*, __ N.C. App. __, 808 S.E.2d 488 (2017) ("*Beroth III*"); *see also Kirby v. N.C. Dep't of Transp.*, 239 N.C. App. 345, 769 S.E.2d 218 (2015) ("*Kirby I*"), *aff'd by separate opinion, Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 786 S.E.2d 919 (2016) ("*Kirby II*").

B. *Procedural History of the Present Matter*

The present matter involves real property located in Forsyth County (the "Property") owned by Robert B. Stimpson ("Defendant"). Pursuant to its authority under N.C. Gen. Stat. § 136-44.50 (2015) of the

Map Act, the North Carolina Department of Transportation ("DOT") recorded a Transportation (roadway) Corridor Map for State Project 34839 (the "Corridor Map") with the Register of Deeds, Forsyth County, on 26 November 2008, as part of DOT's Northern Beltway Project (the "Project").[1] The Property was included in the Corridor Map, and thus subject to the provisions of the Map Act related to the Project.[2] Defendant filed a complaint in an earlier action ("Defendant's Action") on 9 May 2016, seeking, *inter alia*, a declaratory judgment that the Property had been taken through inverse condemnation by DOT pursuant to DOT's actions under the Map Act, and requesting DOT be ordered "to purchase [the] Property for the inverse condemnation[.]" Defendant moved for judgment on the pleadings, and the trial court consolidated Defendant's Action with a number of additional related actions pursuant to N.C. Gen. Stat. § 1A-1, Rule 42.[3] *Beroth Oil Co. v. N.C. Dep't. of Transp*, 2016 WL 9234026, *1 (N.C. Super. 2016) ("*Beroth* Order"). With regard to the motion in Defendant's Action, the *Beroth* Order determined that (1) the Property was located in the area of the Project; (2) certain property rights of Defendant's were taken by DOT pursuant to inverse condemnation; (3) the trial court was not prepared to rule on whether the taking constituted a fee simple taking; and (4) the issue of the nature of the taking and damages would be revisited. *Id.* at *1-2. The trial court ordered DOT to comply with the procedural requirements of Article 9, Chapter 136, "Condemnation," for all the plaintiffs; including filing plats, obtaining appraisals, and depositing good faith estimates of the value of the properties involved. *Id.* at *2-3. DOT appealed the *Beroth* Order, but this Court dismissed the appeal as an improper interlocutory appeal. *Beroth III*, __ N.C. App. at __, 808 S.E.2d at 502.

DOT filed the complaint in the present action on 13 December 2016, seeking to take the Property pursuant to its powers of direct

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1. Effective 11 July 2016, all transportation corridor maps were rescinded. Act of July 1, 2016, ch. 90, sec. 17(a), 2016 N.C. Sess. Laws 2016 ("All transportation corridor official maps adopted pursuant to Article 2E of Chapter 136 of the General Statutes, and any amendments thereto, are hereby rescinded, and all restrictions under Article 2E of Chapter 136 of the General Statutes shall no longer apply to properties or portions of properties within the affected transportation corridors.").

2. Two companion cases, with opinions filed concurrently with this opinion, also involve property recorded in the Corridor Map of the Project on 26 November 2008. Those cases are COA17-597, *Dep't of Transp. v. Chapman* and COA17-598, *Dep't of Transp. v. MDC Invs., LLC*.

3. Along with Defendant, other plaintiffs added in the consolidation included the defendants in the companion cases, *Chapman* and *MDC*; the *Beroth* plaintiffs, and the *Kirby* plaintiffs.

condemnation under Article 9, Chapter 136. Defendant filed a motion to dismiss on 11 January 2017 arguing, *inter alia*: "As there is a prior pending action [Defendant's Action] and judgment on the exact property and area and interest/interest valuation, and involving the same parties, the Prior Pending action and judgment for taking precludes [DOT] filing and prosecuting this action." The trial court granted Defendant's motion to dismiss by order entered 23 February 2017. DOT filed a motion for relief from judgment pursuant to Rule 60(b)(6) on 24 March 2017. The trial court entered an order on 25 April 2017 denying DOT's motion to reconsider its 23 February 2017 ruling dismissing the action. DOT appeals.

II. Analysis

A. *Condemnation*

In order to address the relevant issues brought forth in the present case, we review the provisions of Article 9, Chapter 136, which concerns condemnation by DOT, both direct and inverse. *See* N.C. Gen. Stat. §§ 136-103(a) and -111 (2017). It is the duty of DOT to institute an action when it determines condemnation of real property for DOT purposes is necessary. N.C.G.S. § 136-103(a) ("In case condemnation shall become necessary [DOT] shall institute a civil action by filing in the superior court of any county in which the land is located a complaint and a declaration of taking declaring that such land, easement, or interest therein is thereby taken for the use of [DOT]."). When DOT properly initiates an action pursuant to N.C.G.S. § 136-103, the relevant property is deemed condemned, title to the property immediately vests in DOT, and DOT obtains all associated rights. N.C. Gen. Stat. § 136-104 (2017).

However, if DOT fails to initiate condemnation proceedings pursuant to N.C.G.S. § 136-103, a person with an interest in a property may initiate inverse condemnation proceedings to determine whether a taking by DOT has occurred:

> Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of [DOT] and no complaint and declaration of taking has been filed by [DOT] may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project involving the taking, whichever shall occur later, file a complaint in the superior court . . .; said complaint shall . . . allege with particularity the facts which constitute said taking together with the dates that they allegedly occurred; said complaint shall describe the property allegedly owned by

> said parties and shall describe the area and interests allegedly taken. . . . . *The procedure hereinbefore set out shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.*

N.C.G.S. § 136-111 (emphasis added). Therefore, the procedures set forth in Article 9 pertain to takings established pursuant to both N.C.G.S. § 136-103 and N.C.G.S. § 136-111. *See also Berta v. Highway Comm.*, 36 N.C. App. 749, 754, 245 S.E.2d 409, 412 (1978). Although N.C.G.S. § 136-111 does not expressly state when an inverse condemnation taking established pursuant to that section is deemed to have occurred, this Court has held that, once a taking has been established pursuant to N.C.G.S. § 136-111, the taking shall be deemed to have occurred at the time the injury to the property resulting in the taking occurred. *Berta*, 36 N.C. App. at 753–54, 245 S.E.2d at 411–12. Our Supreme Court held in *Kirby II* that, for the properties affected, a taking occurs at the time DOT records corridor maps pursuant to the Map Act. *Kirby II*, 368 N.C. at 856, 786 S.E.2d at 926 ("By recording the corridor maps at issue here, which restricted plaintiffs' rights to improve, develop, and subdivide their property for an indefinite period of time, NCDOT effectuated a taking of fundamental property rights.").

"To prevail on [an] inverse condemnation claim, [the] plaintiffs must show that their 'land or compensable interest therein has been taken.' " *Beroth II*, 367 N.C. at 340, 757 S.E.2d at 472 (citation omitted). In the present case, the *Beroth* Order established that a compensable interest in the Property was taken by DOT through inverse condemnation. *Beroth* Order, 2016 WL 9234026, *2. DOT does not contest that a taking of a compensable interest in the Property occurred pursuant to the 26 November 2008 recordation of the Corridor Map. In an action for either direct condemnation or inverse condemnation, the trial court first makes a determination of all issues other than damages:

> [T]he [trial] judge . . . shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2017). As this Court has stated:

> Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even

> though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. [The inverse condemnation statute] provides the private property owner with a means to compel government action.

Smith v. City of Charlotte, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986) (citations omitted). In order to fulfill the intent of Article 9, the General Assembly has granted the trial court broad discretion to conduct its proceedings in the manner it believes will best achieve the purposes of the Article:

> In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending *shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter* and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

N.C. Gen. Stat. § 136-114 (2017) (emphasis added). We now apply this law to the facts before us.

B. *Defendant's Prior Action*

Defendant's Action, filed 9 May 2016, requested, *inter alia*, that the trial court rule the Property had been taken by DOT upon recordation of the Corridor Map for the Eastern Loop portion of the Project on 26 November 2008. Defendant requested that DOT "be compelled to purchase [the] Property for the inverse condemnation;" and further requested damages for the alleged taking, including compensatory damages, various fees and costs incurred, interest accrued since the alleged 26 November 2008 taking, and reimbursement for "all taxes and expenses paid on the Property from the date of taking[.]"

The decisions in *Kirby I* and *Kirby II*, reversing the ruling of the trial court, held that recordation of the relevant corridor maps effectuated takings by DOT of fundamental property rights of the *Kirby* plaintiffs and remanded the matter for further proceedings. Accordingly, *Kirby II* held that the trial court had improperly dismissed the *Kirby* plaintiffs'

inverse condemnation claims. *Kirby II*, 368 N.C. at 856, 786 S.E.2d at 926. The *Beroth* Order addressed certain outstanding issues related to Defendant, defendants in the companion cases, the *Kirby* plaintiffs, the *Beroth* plaintiffs, and multiple additional plaintiffs. Relying on the *Kirby* opinions, the trial court, *inter alia*, granted Defendant's motion for partial judgment on the pleadings as to DOT's "liability for a taking in inverse condemnation under N.C.G.S. § 136-111 . . ., in accordance with Rule 12(c) of the Rules of Civil Procedure." *Beroth* Order, 2016 WL 9234026 at *4. The trial court stated:

> Using the powers afforded this [c]ourt under N.C.G.S. § 136-114 to fashion such rules and procedures necessary to carry out the object and intent of Article 9 of Chapter 136 of the North Carolina General Statutes, the [c]ourt will establish a procedure and timetable for []DOT to file plats, make deposits with the required statutory interest, and, if any plaintiff rejects []DOT offer, scheduling Section 108 hearings if either party requests it, in order to implement and comply with the requirements of N.C.G.S. § 136-111.

Id. at *1. Although the trial court stated it was "not prepared at this stage of the proceedings to rule that the takings are in the nature of fee simple valuation; . . . so the [trial] court will deny [Defendant's] motion[] at this time in this regard[,]" it further stated that the issue of whether DOT's taking of Defendant's property would be declared a fee simple taking could, and likely would, be addressed "at the Section 136-108 hearing phase." *Id.* at *2.

Pursuant to the authority granted by N.C.G.S. § 136-114, the *Beroth* Order set a specific procedure to follow in preparation for the N.C.G.S. § 136-108 hearing phase, including ordering "that it is now incumbent upon []DOT to comply with N.C.G.S. § 136-111 by filing its plats and making good faith deposits with interest at the statutory rate from the date of taking with the Forsyth County Clerk of Court[.]" *Id.* The trial court set further procedures and timetables for DOT and the plaintiffs to follow. *Id.* at *2-4. The trial court further ruled: "Upon [DOT] filing the plat, making the deposit, delivery of the appraisal, and notice from the property owner that []DOT valuation is rejected, either party may ask for Section 108 hearings if there is a controversy regarding the necessary and proper parties, title to the land, interest taken, or area taken." *Id.* at *4.

As noted above, DOT's appeal of the *Beroth* Order was held to be an improper interlocutory appeal and was dismissed. *Beroth III*, __

N.C. App. at __, 808 S.E.2d at 502. Therefore, the *Beroth* Order remains in force and currently controls on the issues decided therein.[4] As this Court stated in *Beroth III*:

> At this juncture, it is []DOT that *must follow* the [*Beroth* Order] appealed herein and file plats or maps, without further delay, identifying interests and areas taken *to comply with G.S. § 136-111 and with the clear mandates of this Court in Kirby I, and our Supreme Court* in *Kirby II*.
>
> Following this, as per the appealed order, either party may schedule a hearing pursuant to Section 108 from which the trial court would determine any and all issues raised by the pleadings other than the issue of damages. The measure of damages can then be determined by a jury pursuant to N.C. Gen. Stat. § 136-112, to which the trial court shall add interest accrued from the date of the taking to the date of judgment pursuant to N.C. Gen. Stat. § 136-113, as well as reimbursement of costs, disbursements, and expenses pursuant to N.C. Gen. Stat. § 136-119.

Id. at __, 808 S.E.2d at 502 (emphasis added).

C. *The Present Case*

In the present case, DOT filed a declaration of taking and a complaint on 13 December 2016 indicating it was initiating a direct condemnation action against Defendant pursuant to N.C.G.S. § 136-103, and depositing with the trial court the amount of money DOT estimated Defendant was entitled to for the taking of the Property. According to Article 9, *proper compliance* with the provisions of N.C.G.S. § 136-103 causes title to the subject property to immediately vest in DOT. N.C.G.S. § 136-104. However, DOT initiated the present direct condemnation action on 13 December 2016, approximately two and a half months *after* entry of the 29 September 2016 *Beroth* Order. In his motion to dismiss, Defendant argued that, because he filed an action for inverse condemnation pursuant to N.C.G.S. § 136-111 on 9 May 2016, and because Defendant's inverse condemnation action concerns substantially the same parties and subject matter as DOT's 13 December 2016 direct condemnation action, DOT's action must be abated. *See Jessee v. Jessee*, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011) (citations omitted) (" 'Under the law of

4. The *Beroth* Order is not before us, so we make no determinations regarding the correctness of that order in this appeal.

this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action.' "). We note that the trial court's 23 February 2017 order granting Defendant's motion to dismiss DOT's direct condemnation action against Defendant was entered "without prejudice to []DOT's right to file a permissive counterclaim in [Defendant's inverse condemnation action.]"

1. Prior Pending Action Doctrine

[1] "The 'prior pending action' doctrine involves 'essentially the same questions as the outmoded plea of abatement[.]' " *Id.* at 438, 713 S.E.2d at 37 (citation omitted). The doctrine is

> 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?"

Id.

DOT argues there "was no identity of subject matter, issues involved or relief demanded" because Defendant's Action involved "the alleged taking of non-possessory restrictions imposed on the subject property on 26 November 2008 as the result of [DOT's] recording a corridor protection map[,]" whereas DOT's present action involves "the taking of possessory interests (right of way in fee simple, control of access and temporary construction easements) on 13 December 2016" – the date DOT initiated this action pursuant to N.C.G.S. § 136-103.

Defendant's complaint in his 9 May 2016 action alleged that DOT had taken compensable interests in the Property through inverse condemnation; DOT's action sought to take the Property by direct condemnation. There is no dispute concerning the real property involved, only about the nature of the property rights acquired by DOT's 26 November 2008 taking.[5] Defendant's complaint requested "damages . . . arising out of [DOT's] taking by inverse condemnation of [Defendant's] property[.]" DOT's complaint contended that DOT and Defendant could not agree on the value of the Property. Defendant's complaint requested that DOT "be

5. Though DOT, in its brief, speaks of "the alleged taking" in Defendant's Action, that there was a taking on 26 November 2008 has been established by the *Beroth* Order.

compelled to purchase [the] Property for the inverse condemnation" for "just compensation" as determined pursuant to Article 9. DOT's action sought to acquire the Property for $188,500.00, or for whatever amount was determined to be just in the condemnation proceeding.

DOT contends that these facts in this case do not demonstrate a substantial identity of subject matter, issues involved, and relief demanded. DOT bases its argument on the fact that through its direct condemnation action it took the Property in fee simple; that this taking did not occur until 13 December 2016; Defendant's Action involves DOT's taking of Defendant's property rights that result in a "negative easement" affecting the Property; and that the taking involved in Defendant's Action occurred when the Corridor Map was recorded on 26 November 2008. DOT seems to want this Court to ignore Defendant's complaint, and the full extent of the *Beroth* Order, and restrict our analysis to DOT's limited reading of the holdings in *Kirby I* and *Kirby II*.

Defendant seeks to compel DOT to purchase the Property in fee simple through his inverse condemnation action. Although in the *Beroth* Order the trial court did not grant Defendant's motion for judgment on the pleadings in this respect, that issue is still before the trial court in Defendant's prior action:

> To the extent [Defendant] requested the [trial c]ourt to find a taking at fee simple valuation, the [trial c]ourt is not prepared at this stage of the proceedings to rule that the takings are in the nature of fee simple valuation; therefore, . . .the [trial] court will deny [Defendant's] motion[] at this time in this regard. The issue may, and will likely be, revisited at the Section 136-108 hearing phase.

Beroth Order, 2016 WL 9234026 at *2. The trial court further ruled:

> []DOT may issue instructions to its appraisers to make appraisals based on something other than a fee simple taking, such as the concept of a negative easement. While this [c]ourt has *not yet* judicially imposed a fee simple valuation upon []DOT at this juncture, []DOT may ultimately conclude, based on the actual location of the [P]roperty and the fact that [the P]roperty will be graded and covered with asphalt, that it only makes sense to treat the appraisal as a fee simple valuation[.]

Id. at *3 (emphasis added). In preparation for the N.C.G.S. § 136-108 hearing, the *Beroth* Order ruled "that it is now incumbent upon []DOT to

comply with N.C.G.S. § 136-111 by filing its plats and making good faith deposits with interest at the statutory rate from the date of taking with the Forsyth County Clerk of Court[.]" *Id.* at *2.

Pursuant to the broad discretion granted it by the General Assembly through N.C.G.S. § 136-114, the trial court has provided DOT with the opportunity to proceed with a fee simple direct condemnation action alongside Defendant's inverse condemnation action. As evidenced by the relief sought in Defendant's complaint, proceeding to fee simple determination of the condemned land is apparently Defendant's desire as well. *See* N.C.G.S. § 136-108 ("After the filing of the plat, the judge . . . shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."). DOT argues that, pursuant to N.C.G.S. § 136-103, it has the right to file a complaint and declaration of taking for a property at any time, no matter that there exists at that time a prior, ongoing condemnation action concerning the same property. DOT contends that, because it "determined that it [was] in the public interest to condemn whatever interests [Defendant] still has in the subject property[,]" it was authorized to do so. However, the interests, if any, that Defendant maintains in the Property is one of the issues to be determined in Defendant's Action.

If the trial court determines that DOT has acquired, or must acquire, a fee simple interest in the Property pursuant to Defendant's inverse condemnation action, Defendant will retain no remaining property interest in the Property for DOT to directly condemn pursuant to N.C.G.S. § 136-103. DOT fails to convey to this Court any utility in initiating a condemnation action concerning a property already subject to a condemnation action, nor how DOT's action could result in anything other than confusion and delay – as is currently the situation for the Property, as well as the properties involved in the companion appeals. We hold that the prior pending action doctrine applies in this case, and on these facts Defendant's Action served to prevent DOT from proceeding with a direct condemnation action pursuant to N.C.G.S. § 136-103.

2. Alternate Procedures

[2] DOT contends that the General Assembly "did not empower [DOT] to institute a condemnation proceeding by filing a counterclaim in a pending action. The General Assembly did not authorize the courts, in N.C. Gen. Stat. § 136-114 or otherwise, to re-write the unambiguous language of N.C. Gen. Stat. § 136-103." DOT seeks an application of N.C.G.S.

§ 136-103 in isolation, and not as one of multiple sections of Article 9. DOT took compensable property rights from Defendant in 2008 without filing a complaint or declaration of taking as required by N.C.G.S. § 136-103. For this reason Defendant initiated an action pursuant to N.C.G.S. § 136-111: "Remedy where no declaration of taking filed[,]" that states in relevant part: "Any person whose land or compensable interest therein has been taken by an intentional or unintentional act or omission of [DOT] and no complaint and declaration of taking has been filed by [DOT] may . . . file a complaint in the superior court" alleging a taking by inverse condemnation. N.C.G.S. § 136-111. This was the appropriate and sole remedy established in Article 9 available to Defendant in response to DOT's taking of Defendant's property rights absent initiating a direct condemnation action pursuant to N.C.G.S. § 136-103. There is nothing in Article 9 suggesting that, once a plaintiff-property owner acts pursuant to N.C.G.S. § 136-111, precisely because of DOT's failure to act pursuant to N.C.G.S. § 136-103, that DOT can derail the plaintiff's action by initiating an action pursuant to N.C.G.S. § 136-103 while the plaintiff-property owner's N.C.G.S. § 136-111 action is ongoing.

DOT is also incorrect in arguing that bringing a counterclaim in an N.C.G.S. § 136-103 action is not permitted by Article 9. As noted above, N.C.G.S. § 136-114 states:

> In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article *or by the statute governing civil procedure* or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending *shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions* in said courts.

N.C.G.S. § 136-114 (emphasis added). N.C. Gen. Stat. § 1A-1, Rule 13, which applies to the relevant actions in this appeal by the express terms of N.C.G.S. § 136-114, concerns counterclaims. It is unnecessary for this Court to determine whether DOT's counterclaim in Defendant's Action would be best described as "permissive," and likely unhelpful in light of the particular and distinct nature of actions pursuant to Article 9. To the extent that Rule 13 required "amendment" by the trial court to best apply to the facts before it in the present case, N.C.G.S. § 136-114 provided the trial court with that authority. We find the following citation from this Court generally instructive:

> [Our Supreme Court] held that if an action may be denominated a compulsory counterclaim in a prior action, it must be either (1) dismissed with leave to file it in the former case or (2) stayed until the conclusion of the former case. Because the purpose of Rule 13(a) is to combine related claims in one action, "thereby avoiding a wasteful multiplicity of litigation," we believe the option to stay the second action should be reserved for unusual circumstances, not present in the case at bar.

Brooks v. Rogers, 82 N.C. App. 502, 507, 346 S.E.2d 677, 681 (1986) (citations omitted). The purpose of Rule 13(a) is just as relevant in the present case, and we hold that the trial court had the authority to enter its 23 February 2017 order dismissing DOT's direct condemnation action "without prejudice to [DOT's] right to file a . . . counterclaim in the Pending Action[.]" Because of the unique nature of condemnation proceedings, DOT would retain its right to bring an action pursuant to N.C.G.S. § 136-103 to condemn the Property, or any remaining rights in the Property retained by Defendant, if resolution of Defendant's Action leaves DOT lacking in some right in the Property necessary for completion of the Project.

However, DOT instead continues to seek to proceed by its own direct condemnation actions – actions it only decided to file after years of litigation involving hundreds of plaintiffs who have been seeking the same resolution through inverse condemnation actions, some of which were filed over seven years ago. We do not believe the General Assembly contemplated Article 9 to permit direct condemnation actions and inverse condemnation actions concerning the same property to be litigated simultaneously, and we find nothing in Article 9 or elsewhere granting DOT that right. We therefore affirm the 23 February 2017 order dismissing DOT's 13 December 2016 action.

DOT also argues that "the trial court abused its discretion in denying [DOT's] motion for relief from [the 23 February 2017] judgment" pursuant to Rule 60(b)(6). DOT's argument is wholly predicated on its argument that the trial court erred in dismissing its 13 December 2016 action. In light of our decision affirming the 23 February 2017 order, we also affirm the trial court's 25 April 2017 order denying DOT's 24 March 2017 motion to reconsider the 23 February 2017 order.

AFFIRMED.

Judges ELMORE and MURPHY concur.

DURHAM COUNTY, ON BEHALF OF TERRANCE ADAMS, PLAINTIFF
v.
ALMA ADAMS, DEFENDANT

No. COA17-929

Filed 20 March 2018

1. Child Custody and Support—child support—complaint dismissed

The trial court did not abuse its discretion by dismissing plaintiff's complaint for child support through Durham County Child Support Services where the parties had a separation agreement and there had not been a substantial change in circumstances affecting the welfare of the child. Plaintiff did not cite North Carolina case law or statute in arguing that he was denied his right to seek a child support order; federal law is not binding on the Court of Appeals.

2. Child Custody and Support—plaintiff's income—consideration

The trial court did not err by referencing plaintiff's income since that information was relevant to plaintiff's claim for child support.

3. Child Custody and Support—separation agreement—incorporation into divorce decree

In an action by plaintiff through Durham County Child Support Services for child support, there was no evidence to show that the trial court failed to properly incorporate a separation agreement into a divorce order. Plaintiff admitted that he asked for the separation agreement, which stated that the parties would share child care expenses equally, to be made a part of the divorce decree.

4. Attorney Fees—child support claim—frivolous

The facts supported the trial court's conclusion that plaintiff's complaint for child support through the Durham County Child Support Services was frivolous. The trial court also reasonably and properly considered the fees defendant incurred in awarding defendant attorney fees.

Appeal by Plaintiff from orders entered 19 April 2017 and 1 May 2017 by Judge Fred Battaglia in Durham County District Court. Heard in the Court of Appeals 22 February 2018.

Peterkin Law Firm, PLLC, by Timothy J. Peterkin, for Plaintiff-Appellant.

Foil Law Offices, by N. Joanne Foil and Britney R. Weaver, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Terrance Adams ("Plaintiff") appeals a child support order and an order awarding attorneys' fees to Alma Adams ("Defendant"). Plaintiff argues the trial court erred in dismissing Plaintiff's complaint for child support because Plaintiff had a statutory right to seek a child support order. Plaintiff also argues the trial court erred in awarding Defendant attorneys' fees because Plaintiff's child support action was not frivolous. We conclude the trial court properly dismissed Plaintiff's complaint for child support since Plaintiff and Defendant's Separation Agreement covering child support had been incorporated into the divorce order in a prior ruling by the trial court, and Plaintiff admitted there was no substantial change in circumstances. We also conclude the trial court did not abuse its discretion in awarding Defendant attorneys' fees.

I. Factual and Procedural Background

Plaintiff and Defendant were married on 4 June 2005. One minor child was born of the marriage on 13 April 2009. On or about 8 April 2013, the couple separated. The parties entered into a Separation and Property Settlement Agreement ("the Agreement") on 8 April 2013. This Agreement provides the parties have joint legal and physical custody of the minor child. The terms of this Agreement provided the parties split all expenses related to caring for the minor child, including day care and medical expenses. The Agreement does not otherwise mention child support.

Plaintiff served Defendant with a summons and complaint for absolute divorce on 16 April 2014, and the trial court entered judgment on 19 May 2014. On 18 April 2016, the parties entered into a Modified Parenting Agreement. This modified agreement states it "is not intended to replace the terms of the Separation Agreement incorporated as an Order of the Court by Judge James T. Hill on May 19, 2014 in full."

On 12 July 2016, Plaintiff retained the public services of Durham County Child Support Services in order to establish a child support order against Defendant.

Plaintiff's child support complaint contained several false statements including: (1) the complaint provided the parties were married on 4 June 2006, when in fact they were married on 4 June 2005; (2) the

complaint lists the parties' date of separation as 31 May 2014, when in fact the parties separated on 8 April 2013; (3) the complaint alleges the minor child had received or was then receiving public assistance when in fact the minor child has never received public assistance; and (4) the complaint states Defendant should be ordered to provide medical coverage or support for the minor child, when in fact Defendant has provided medical insurance for the minor child since his birth.

On 26 September 2016, Defendant filed an answer and counterclaim. Defendant denied Plaintiff's false statements in the Answer portion and also asserted counterclaims for child support and specific performance.

On 22 September 2016 and 27 September 2016, Defendant's counsel sent two letters to Mary Drake, the assigned case worker who verified Plaintiff's complaint, at Durham County Child Support Enforcement Agency requesting Plaintiff's 2015 W-2 form. Defendant did not receive a response from either letter. On 7 October 2016, Defendant's counsel issued a discovery request to Plaintiff, in care of Attorney Nathan L. McKinney (who signed the Child Support Complaint), and Defendant again received no response.

On 3 November 2016, Defendant's counsel spoke with the Assistant County Attorney. The Assistant County Attorney informed Defendant's counsel the Durham County Child Support Enforcement Agency does not respond to discovery or deposition notices because the County Attorney represents the Child Support Enforcement Agency and not Plaintiff. Defendant's Counsel then sent all discovery requests directly to Plaintiff. Plaintiff did not respond to Defendant's discovery requests and Defendant's counsel elected to depose Plaintiff on 30 November 2016.

During the deposition, Plaintiff acknowledged he received the discovery requests, but chose not to provide the information prior to the deposition. Included in Defendant's discovery requests were questions relating to Plaintiff's wife and Plaintiff's W-2 forms for the past two years. Plaintiff produced a W-2 form at the deposition. However, Plaintiff redacted much of the information on the W-2 form. Plaintiff also refused to answer questions related to the redacted information during his deposition. Also in his deposition, Plaintiff stated he sought the services of Durham County Child Support Enforcement Agency to secure child support to assist him with paying for the minor child's track-out camps, as well as before and after school care costs. Plaintiff acknowledged already having a court order reflecting the cost share responsibility of these expenses.

Additionally, Plaintiff admitted during his deposition there were no substantial changes in circumstances affecting the needs of the minor child since the entry of the court order incorporating the Agreement. Plaintiff moved forward with the child support suit because the Agreement "was a bad situation for [him], and [he] needed to get out of it."

On 1 December 2016, Defendant filed a Motion for Attorneys' Fees. In that motion, Defendant stated:

> [Counsel for Defendant] has been informed through Durham County Assistant Attorney . . . that Plaintiff . . . retained the Agency to secure child support to assist him with paying for the minor child's track out camps, and before and after school care. The average monthly amount paid by Plaintiff . . . for said childcare is $318.00 per month. Upon learning of this exact figure, Defendant . . . sent Plaintiff . . . a text message informing him that she would be sending him a check for half of the childcare costs for November and December 2016. Plaintiff . . . sent a text message back to Defendant . . . telling her not to send the money to him and also not to pay the provider directly. . . . Defendant . . . mailed payment to Plaintiff . . . despite his stated refusal to accept it.
>
> . . . .
>
> Plaintiff . . . has necessitated the filing of this action for attorney's fees due to his frivolous suit against Defendant and his unwillingness to provide needed documentation, and also his stated refusal to accept payment from Defendant.
>
> Upon information and belief, Plaintiff['s] wife, Kameeleon Johnson, works at Durham County Child Support Enforcement and has been a driving factor behind this suit and behind [Plaintiff's] refusal to cooperate. At his deposition, Plaintiff . . . refused to answer any questions involving his wife, even including stating her name and place of employment.

After a hearing on 19 January 2017, the trial court entered an order on child support on 19 April 2017. In that order the trial court concluded Plaintiff has "unclean hands in this action," and Plaintiff's complaint for child support is a "frivolous suit." The trial court dismissed Plaintiff's complaint for child support with prejudice.

In an order entered 1 May 2017, the trial court found "Plaintiff's Complaint for Child Support was a frivolous lawsuit without merit which forced the Defendant to incur substantial attorney's fees in defense." The trial court concluded Plaintiff "filed the frivolous Complaint for Child Support without even reading the Complaint," and forced Defendant to "incur substantial attorney's fees." The trial court ordered Plaintiff to pay "$9,000.00 of Defendant's attorney's fees."

Plaintiff timely appealed.

II. Standard of Review

In reviewing a child support order, this Court's review "is limited to a determination [of] whether the trial court abused its discretion." *Johnston Cty. ex rel. Bugge v. Bugge*, 218 N.C. App. 438, 440, 722 S.E.2d 512, 514 (2012) (*Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)).

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Under this *de novo* review this Court will determine:

> (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Brown v. Brown, 112 N.C. App. 614, 617, 436 S.E.2d 404, 406 (1993) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)).

"[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper[.]" *Turner* at 165, 381 S.E.2d at 714.

III. Analysis

[1] Plaintiff first argues the trial court denied Plaintiff his statutory right to seek a child support order when the trial court dismissed Plaintiff's complaint. At the outset we note Plaintiff's brief fails to cite any case law or North Carolina statute in support of his contention the trial court

denied his statutory right to seek a child support order when the trial court dismissed his complaint. Rather, Plaintiff cites federal law 42 U.S.C. § 654, which is persuasive authority and not binding on this Court.

The trial court found the parties' "separation agreement is dually enforceable through the divorce judgment[.]" Furthermore, the trial court found "that there has been no substantial change in circumstances affecting the welfare of the child, and therefore that no - - there should be no changes to the award of what is contained in the judgment as incorporated in the separation agreement." We therefore conclude the trial court did not abuse its discretion in dismissing Plaintiff's complaint for child support.

[2] Plaintiff next argues the trial court "improperly referenced" Plaintiff's income because such a fact is "irrelevant and suggests the court was implementing an income test for access to Child Support Services, when no such requirement exists." Under N.C. Gen. Stat. § 50-13.4(c), the trial court properly evaluated Plaintiff's income to determine if the amount of support paid for the minor child meets the reasonable needs of the child. Additionally, our State Supreme Court has stated the trial court should evaluate the relative ability of the parties to pay support when it makes a child support order. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). We conclude the trial court did not err in referencing Plaintiff's income since that information was relevant to Plaintiff's claim for child support.

[3] Plaintiff next challenges the validity of the separation agreement's incorporation into the divorce decree. Plaintiff admitted in his brief and in his deposition he asked for the parties' separation agreement, which stated the parties would equally share child care expenses, to be made a part of the divorce order.

> [W]henever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Walters v. Walters, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). There is no evidence tending to show the trial court failed to properly incorporate

the separation agreement into the divorce order. This argument is without merit.

Plaintiff also contends he did not need to show a substantial change in circumstances in order to modify the child support order because there was not a prior child support order in place. As discussed *supra*, we conclude the trial court properly incorporated the separation agreement into its divorce order. Therefore, a valid child support order exists. This argument is without merit.

[4] Finally, Plaintiff contends the trial court improperly awarded Defendant attorneys' fees since Plaintiff's complaint for child support was not frivolous.

"A claim is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it]." *Griffith v. N.C. Dep't of Corr.*, 196 N.C. App. 173, 174, 675 S.E.2d 72, 73 (2009). Here, the trial court found as fact Plaintiff's complaint was frivolous. The trial court also found numerous errors in the complaint: (1) the incorrect date of marriage; (2) the incorrect date of separation; and (3) a false statement regarding the minor child receiving public assistance in the past or presently. The trial court also found Plaintiff never saw a copy of the complaint until the date of his deposition, and the complaint requested Defendant to provide the minor child's medical coverage when in fact Defendant has provided medical insurance for the minor child since birth. The trial court also found Plaintiff failed to "take action" to correct these errors.

Finally, the trial court found "Defendant's counsel had to expend considerable time in investigating Plaintiff's claims and the false accusations in his complaint, including having to take Plaintiff's deposition and review considerable documentation." Additionally, Plaintiff admitted there was an existing court order to provide for the support of the minor child when Plaintiff filed his complaint.

These facts support the trial court's conclusion Plaintiff's complaint was frivolous.

The trial court evaluated the fees Defendant incurred in having to defend against Plaintiff's frivolous suit. Counsel for Defendant informed the trial court her legal fees totaled $17,013.85. In its order, the trial court determined Defendant's counsel's hourly rate was reasonable "for the area given for her level of experience and expertise." The trial court did not require Plaintiff to pay the total amount incurred, but ordered Plaintiff to pay $9,000.00. We conclude the trial court therefore

reasonably and properly considered the evidence of Defendant's fees in calculating Defendant's award.

Plaintiff cannot show the trial court abused its discretion in awarding Defendant attorneys' fees in this case.

AFFIRMED.

Judges DIETZ and ZACHARY concur.

ENGILITY CORPORATION, PLAINTIFF
v.
PAUL NELL, ET AL., DEFENDANTS

No. COA17-984

Filed 20 March 2018

1. Appeal and Error—notice of appeal—motion to quash and objective order—untimely—writ of certiorari

A petition for certiorari was granted in an appeal from an order granting plaintiff's motion to quash and for a protective order.

2. Appeal and Error—interlocutory orders—costs and attorney fees—amount undetermined

An appeal of an order allowing plaintiff's motion to quash, granting a protective order, granting related costs and attorney fees was dismissed as interlocutory where the trial court did not certify its order as immediately appealable and the amount of the costs and fees was not determined.

3. Civil Procedure—Rule 60 motion—denied—no abuse of discretion

There was no abuse of discretion in the denial of defendants' Rule 60(b) motion that sought relief from an order quashing a subpoena. Between the denial of defendants' motion for relief and the appeal, the discovery defendants sought was provided.

Appeal by defendants from orders entered 20 February 2017 and 3 April 2017 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 February 2018.

Whiteford, Taylor & Preston LLP, by C. Allen Foster and Eric C. Rowe, for plaintiff-appellee.

Vann Attorneys, PLLC, by Joseph A. Davies, and Marino Finley LLP, by Daniel Marino, Tillman J. Finley and Kathrynn Benson, pro hac vice, for defendant-appellants.

TYSON, Judge.

Paul Nell, Torch Hill Investment Partners, LLC, The Allies Corporation, and Andrew Blair ("Defendants") appeal from an order granting Engility Corporation's ("Plaintiff") motion to quash and for protective order. Defendants also appeal from an order denying their Rule 60 motion for relief. We dismiss the appeal pertaining to the order granting Plaintiff's motion to quash as untimely and interlocutory. The trial court's order denying Defendants' motion for relief is affirmed.

I. Background

A. Subpoena

Plaintiff filed suit against Defendants in Fairfax County, Virginia (the "Virginia Case"). Some of the allegations arose from the Plaintiff's attempted sale of International Resource Group ("IRG"), a subsidiary of its international business. In early January 2017, Research Triangle Institute, Inc. ("RTI") purchased IRG.

On 11 January 2017, Defendants requested the Durham County superior court to issue a subpoena to RTI pursuant to the Uniform Depositions and Discovery Act. N.C. Gen. Stat. § 1F-3 (2017). This request was based upon a previously issued Virginia subpoena and sought to obtain documents related to the pending Virginia Case.

Plaintiff objected to the request for third-party discovery and filed a motion to quash the Virginia subpoena to RTI in Fairfax County, on 9 February 2017. Plaintiff and RTI requested Defendants allow them to postpone the production of documents until after the motion concerning the Virginia subpoena was resolved. Defendants refused.

On 14 February 2017, RTI sent Defendants a letter of objection to the subpoena, and again requested to delay production, pending the outcome of the hearing in Virginia. That same day, Plaintiff filed a motion to quash and for protective order in Durham County, arguing

> the information requested from RTI [was] repetitive of discovery requests already made to Plaintiff, is in the process

> of being provided by Plaintiff to Defendants, serves no purpose other than to unduly burden RTI and is the subject of a pending motion to quash in the Circuit Court of Fairfax County, VA, the venue of the related action.

This motion was served upon Defendants by first class and electronic mail on 14 February 2017. Defendants deny ever receiving the motion via first class mail. No hearing was held on Plaintiff's motion. The superior court granted Plaintiff's motion to quash the subpoena and allowed monetary sanctions on Defendants in an order dated 20 February 2017 (the "February order"). In an order dated 3 March 2017, the Fairfax County circuit court denied Plaintiff's motion to quash the Virginia subpoena to RTI. The Virginia circuit judge ruled the court lacked jurisdiction over subpoenas issued to out-of-state entities.

After receiving a copy of the February order from Plaintiff via email, Defendants filed a Rule 60 motion for relief on 9 March 2017. After a hearing, the superior court denied Defendants' motion for relief on 3 April 2017 (the "April order").

Defendants filed notice of appeal of both the February order and the April order on 20 April 2017.

B. Post-Appeal

Defendants served Plaintiff with their proposed record on appeal on 29 June 2017. Plaintiff responded with its objections and proposed amendments on 28 July 2017. After much discussion between the parties, Defendants filed the record on appeal on 13 September 2017. Neither party sought judicial settlement to settle the record.

On 17 September 2017, Defendants filed a motion for retroactive extension of time to file the record on appeal or for alternative relief under Rule 25. Plaintiff opposed Defendants' motion, and submitted a motion to dismiss the appeal on 27 September 2017. Defendants' motion to extend the time to file was allowed by this Court, and Plaintiff's motion was referred to this panel on 27 October 2017.

Defendants filed a petition for writ of certiorari on 10 October 2017, which was also referred to this panel on 27 October 2017. On 13 October 2017, an order of nonsuit was entered in the Virginia Case, and the underlying case between Plaintiff and Defendants was dismissed. Plaintiff included this order in its response to Defendants' petition for writ of certiorari on 24 October 2017. Defendants requested this Court to take judicial notice of the order from the Virginia Case on 2 February 2018.

II. Issues

Defendants argue the superior court abused its discretion by granting Plaintiff's motion to quash and for protective order three days after it was filed, without waiting for Defendants' response, and without providing a hearing, notice of a hearing, or notice that the motion would be reviewed without a hearing. Defendants assert the trial court also erred by granting the motion and argue Plaintiff purportedly did not have standing to file the motion and it was untimely. Finally, Defendants argue the superior court abused its discretion in denying their Rule 60 motion for relief.

III. February Order

A. Appellate Jurisdiction

[1] The first matter before us is the 20 February order granting Plaintiff's motion to quash and for protective order. Plaintiff argues Defendants failed to give timely notice of appeal and the appeal must be dismissed. Defendants delayed filing this notice of appeal until 20 April 2017. Defendants filed a petition for writ of certiorari on 10 October 2017.

We allow Defendants' petition and issue the writ pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 21(a)(1) ("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 . . . .").

B. Timeliness of the Appeal

[2] "As a general rule, discovery orders are interlocutory and therefore not immediately appealable." *Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003) (citations omitted). "The prohibition against appeals from interlocutory orders prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Feltman v. City of Wilson*, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618-19 (2014) (citation and quotation marks omitted). An interlocutory order may be immediately appealable if it affects a substantial right. *Hudson-Cole Dev. Corp. v. Beemer, Inc.*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999) (citation omitted).

> It is well settled that a judgment which determines liability but which leaves unresolved the amount of damages is interlocutory and cannot affect a substantial right:

> [i]f . . . [such a] partial . . . judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages.

Steadman v. Steadman, 148 N.C. App. 713, 714, 559 S.E.2d 291, 292 (2002) (quoting *Johnston v. Royal Indemnity Co.*, 107 N.C. App. 624, 625, 421 S.E.2d 170, 171 (1992)).

Here, the February order allows Plaintiff's motion to quash, grants a protective order, and orders Defendants to bear the costs related to the discovery sought and pay reasonable attorney's fees. The superior court did not certify its order as immediately appealable under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017).

The amount of any costs and fees that may be imposed remains undetermined at this time. "[I]f we were to allow this appeal, we would be required to visit the [costs and] fees issue twice: one appeal addressing, in the abstract, whether plaintiff may recover [costs and] fees at all and, if we upheld the first order, a second appeal addressing the appropriateness of the actual monetary award." *Triad Women's Ctr., P.A. v. Roger*s, 207 N.C. App. 353, 358, 699 S.E.2d 657, 660 (2010).

In order to avoid a "fragmentary, premature and unnecessary" appeal, we dismiss the purported appeal of the February order as interlocutory until the amount of costs and fees, if any, is imposed. *Feltman*, 238 N.C. App. at 250, 767 S.E.2d at 618.

IV. April Order

A. Appellate Jurisdiction

The order denying Defendants' Rule 60 motion for relief was entered 3 April 2017. Defendants timely appealed on 20 April 2017. The April order was a final judgment of a superior court from which an appeal of right may be taken to this Court. N.C. Gen. Stat. § 7A-27(b)(1) (2017).

B. Standard of Review

"A trial court's discovery ruling is reviewed for abuse of discretion, and will be overturned only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision[.]" *Friday Investments v. Bally Total Fitness*, __ N.C. __, __, 805 S.E.2d 664, 669 (2017) (internal citations and quotation marks omitted).

C. Abuse of Discretion

[3] Defendants filed a motion seeking relief from the February order quashing the subpoena pursuant to Rule 60(b)(1) and (b)(6). *See Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975) (holding Rule 60(b) motions only apply to final, not interlocutory, judgments or orders). Defendants argue the February order should be vacated under (b)(1) as it "was entered by mistake and in contravention of the procedures established by the Court, resulting in surprise to Defendants" and the "lack of hearing, notice of a hearing, or any opportunity to respond and the entry of the Order in expedited fashion" also justify relief under (b)(6). Defendants argue, and Plaintiff admits, the February order was irregular, due to the lack of prior notice or hearing provided to the parties.

"A judgment rendered in violation of the rules respecting procedural notice is irregular." *Collins v. Highway Commission*, 237 N.C. 277, 284, 74 S.E.2d 709, 715 (1953). "An irregular judgment is not void," and "stands as the judgment of the court unless and until it is set aside by a proper proceeding." *Id.* (citations omitted). "A party seeking to set aside an irregular judgment may properly do so by filing a motion for relief from judgment pursuant to Rule 60(b)(6)." *Brown v. Cavit Sci., Inc.*, 230 N.C. App. 460, 464, 749 S.E.2d 904, 908 (2013) (citations omitted).

"In order for a defendant to succeed in setting aside a . . . judgment under Rule 60(b)(6), he must show: (1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002) (citations omitted). Defendants argue their lack of ability to respond to the February order, the entry of the order in "an expedited fashion" without notice or hearing, and the entry of the order inhibiting their ability to pursue discovery and imposing sanctions against them were enough to constitute "extraordinary circumstances." *See id.* Defendants raise no arguments concerning the other two prongs required to set aside a judgment under Rule 60(b)(6).

Between the denial of Defendants' motion for relief and this appeal, the discovery Defendants sought was provided and the Virginia Case has been dismissed. The issue of the sanctions, as discussed above, is not timely nor properly before this Court. Without a showing of a "meritorious defense," the February order remains undisturbed. *See Sellers v. Rodriguez*, 149 N.C. App. 619, 625, 561 S.E.2d 336, 340 (2002). Defendants have failed to show any abuse of discretion in the trial court's denial of their 60(b) motion. Defendants' arguments are overruled.

V. Conclusion

We allow Defendants' petition and issue the writ of certiorari to consider Defendants' challenges to the February order, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 21(a)(1). Without a final order assessing the costs and fees, if any, to be awarded to Plaintiff, the appeal of the February order is interlocutory, untimely, and is dismissed. *Feltman*, 238 N.C. App. at 250, 767 S.E.2d at 618.

Defendants failed to show a meritorious defense or any abuse of the trial court's discretion to support setting aside the February order. *See Sellers*, 149 N.C. App. at 625, 561 S.E.2d at 340. We dismiss the appeal of the February order and remand. The April order is affirmed. *It is so ordered.*

DISMISSED IN PART, AFFIRMED IN PART, AND REMANDED.

Chief Judge McGEE and Judge DILLON concur.

PATRICIA K. HOLTON, PLAINTIFF
v.
GEORGE F. HOLTON, JR., DEFENDANT

No. COA17-467

Filed 20 March 2018

1. Civil Procedure—dismissal motion—Rule 12(b)(6)—equitable distribution—spousal support

Although defendant and the trial court failed to identify which civil procedure rules supported either the dismissal motion or the trial court's dismissal of particular claims in an equitable distribution and spousal support case, N.C.G.S. § 1A-1, Rule 12(b)(6) was the civil procedure rule underlying the trial court's dismissal of plaintiff's complaint.

2. Pleadings—improper dismissal with prejudice—equitable distribution and spousal support

The trial court erred by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(1) plaintiff wife's equitable distribution (ED) and spousal support (SS) claims with prejudice where the allegations of her

complaint were adequate to plead a claim for rescission of the parties' separation agreement under N.C.G.S. § 1A-1, Rule 12(b)(6). The complaint provided defendant with sufficient notice of the allegedly invalid execution of the separation agreement despite plaintiff's failure to enumerate a separate rescission claim. Although plaintiff acknowledged that she signed the separation agreement, the fact she sought ED and SS implied that those claims were predicated upon an assertion that the agreement was invalid.

3. Civil Procedure—dismissal—conversion to summary judgment motion—consideration of matters outside pleadings

The trial court's dismissal of plaintiff's complaint for equitable distribution and spousal support was reviewed as one of summary judgment since it considered matters outside the pleading. Defendant was not entitled to judgment as a matter of law where the pleadings raised genuine issues of material fact as to the validity of the separation agreement.

Appeal by plaintiff from orders entered 24 August 2016 and 11 January 2017 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 27 November 2017.

Law Offices of Wesley S. White, by Wesley S. White, for plaintiff-appellant.

Arnold and Smith, PLLC, by Peter E. McArdle, for defendant-appellee.

ELMORE, Judge.

Patricia K. Holton (plaintiff) appeals from an order dismissing with prejudice her complaint against her ex-husband, George F. Holton, Jr. (defendant), on grounds that her claims for equitable distribution (ED) and spousal support were waived by the parties' prior separation and property settlement agreement (hereinafter, the "separation agreement"). Plaintiff also appeals from an order denying her motions for a new hearing or, in the alternative, to set aside the dismissal order.

Because the trial court's dismissal of plaintiff's complaint was either premised upon its erroneous Rule 12(b)(6) dismissal of her claim for rescission of the separation agreement, or its improper Rule 12(b)(6) dismissals of her ED and spousal support claims, we reverse. In light of our holding, we dismiss as moot plaintiff's appeal from the subsequent order denying her motions for relief from the dismissal order.

I. Background

On 22 May 2015, plaintiff filed a complaint against defendant seeking ED, postseparation support, and attorneys' fees. In her complaint, she acknowledged that she signed the separation agreement but raised allegations challenging its validity on grounds of lack of mental capacity, duress, fraud, and unconscionability. But she never enumerated a separate claim for relief in the form of rescission of the separation agreement.

On 25 June 2015, defendant filed an answer in which he moved to dismiss plaintiff's complaint and for Rule 11 sanctions on grounds that her right to seek ED and spousal support were waived by the separation agreement. On 7 August 2015, plaintiff filed a response to defendant's motions, alleging that when she signed the separation agreement, "she was on medication that affected her mental capacity"; that defendant "forced her to sign the agreement, taking her to an attorney's office (that he had hired), and telling her to 'sign here' "; that she "did not understand the agreement, what it purported to do, or what her rights where [sic]"; that "[s]he did not, and was not allowed to consult with her own attorney prior to executing the agreement"; and that "the agreement was procured by fraud on the part of [defendant] in that it omitted a substantial marital asset from the provisions: Namely his retirement[.]" Therefore, on the grounds of lack of mental capacity, duress, fraud, and unconscionability, plaintiff requested that the trial court "conduct an evidentiary hearing to determine whether or not grounds exist for setting aside the Separation Agreement that the Defendant is relying on in filing his motion to dismiss." However, plaintiff's requested evidentiary hearing was neither further pursued nor ever conducted.

On 9 September 2015, without leave of court, plaintiff filed an amended complaint. The factual allegations of that complaint were identical to those in her original complaint but she added a fourth claim for relief in the form of rescission of the separation agreement.

On 8 February 2016, the trial court heard defendant's motions to dismiss and for Rule 11 sanctions. At the hearing, plaintiff orally moved for retroactive leave to amend her complaint to add the rescission claim. By written order entered 6 June 2016, the trial court denied defendant's motions and plaintiff's oral motion. In its order, the trial court found that plaintiff's "original complaint contains facts alleged sufficient to proceed on a rescission claim" and thus concluded that plaintiff's "claims are properly before the Court, and [she] may proceed on those claims," and that her "claim for rescission relates back to the original complaint . . . ." In denying plaintiff's oral motion for retroactive leave to amend

her complaint, the trial court determined that "should Plaintiff desire to proceed on an amended complaint, she must file a motion for leave of court, but the Plaintiff's claims can move forward as originally pled." Plaintiff never later moved for leave to amend her complaint.

On 29 June 2016, defendant filed an amended motion to dismiss the complaint. He acknowledged that the trial court had previously denied his first dismissal motion due to plaintiff's potential rescission claim but asserted affirmative defenses that, since that time, the rescission claim was now barred by the expiration of the applicable statutory limitation period, and plaintiff failed to timely prosecute that claim. Defendant also asserted that, absent rescission of the parties' separation agreement that barred plaintiff from seeking ED and spousal support, the trial court lacked jurisdiction over her complaint. Defendant filed written notice that the matter was scheduled to be heard on 21 July 2016.

On 20 July 2016, plaintiff filed a response to defendant's amended motion to dismiss in which she asserted that the trial court's prior dismissal order established the "law of the case" that her original complaint was adequate to plead a claim for rescission, which was therefore timely asserted.

On 21 July 2016, the day defendant noticed his amended dismissal motion hearing, defendant's counsel was present and plaintiff's counsel appeared telephonically. While the transcript of that hearing is absent from the appellate record, the record discloses that the trial court rescheduled the hearing with both parties' consent.

On 3 August 2016, the day the hearing was rescheduled, defendant and his counsel were present but neither plaintiff nor her counsel appeared. According to the four-page transcript of that hearing, the trial court found that plaintiff's complaint did put defendant "on notice of a motion to rescind" but that "no motion to rescind or hearing was officially filed." The trial court noted defendant's argument that the statute of limitation had now expired on plaintiff's potential rescission claim. In ruling to grant defendant's dismissal motion, the trial court reasoned:

> [THE COURT]: . . . So the Court is going to at this point because [plaintiff's counsel] is not present - - he was on the phone when we scheduled this hearing for the Court to hear further argument on this issue - - the Court is going to grant [defendant's] Motion to Dismiss.
>
> . . .

> [THE COURT]: And the Court will note that . . . procedurally there was [sic] some missteps here. And so . . . Plaintiff[ ] cannot prevail and the Motion to Dismiss is granted.

In its written order entered 24 August 2016, the trial court noted that "neither Plaintiff nor Plaintiff's counsel [were] present despite being properly noticed to appear" and made the following relevant findings:

> 2. Prior to the parties' divorce judgment . . . , the parties executed a Separation Agreement and Property Settlement Agreement (hereinafter the "Separation Agreement") on April 18, 2013.
>
> 3. On May 22, 2015, Plaintiff filed a Complaint which included claims for Equitable Distribution and Post-Separation Support. Those claims, however, had been previously waived in the parties' separation agreement.
>
> 4. Even though Plaintiff's Complaint did not include a claim for rescission of the parties' separation agreement, the Court has previously opined that her vague reference to the circumstances surrounding the contract was enough to survive Defendant's prior Motion to Dismiss.
>
> 5. But since the time the Court denied Defendant's prior Motion to Dismiss, the Statute of Limitations has expired on Plaintiff's claim for rescission. Plaintiff has made no efforts to advance a potential claim for rescission of the parties' separation agreement.
>
> 6. Plaintiff never filed a Motion to Amend her original Complaint. It is too late to file a claim for rescission of the parties' separation agreement.
>
> 7. Moreover, Plaintiff failed to take steps to challenge the validity of the parties' agreement within a reasonable time following the execution of that agreement, and she has ratified the agreement by her actions.
>
> 8. The Court does not have subject matter jurisdiction over the equitable distribution and post-separation support claims filed by Plaintiff. Those claims were resolved via the parties' separation agreement.
>
> 9. The Court grants Defendant's Amended Motion to Dismiss Plaintiff's claims for equitable distribution and

> post-separation support. Since the parties are divorced and since those claims have already been resolved by the parties' separation agreement, they cannot be refiled.

Based on these findings, the trial court concluded that "[w]ithout rescission of the parties' separation agreement, Plaintiff cannot maintain claims for spousal support or equitable distribution against the Defendant" and thus granted defendant's amended dismissal motion and dismissed with prejudice plaintiff's complaint. Plaintiff timely appealed from this order.

Meantime, on 5 August 2016, two days after the rescheduled hearing on defendant's amended dismissal motion and before entry of the 26 August dismissal order, plaintiff filed, purportedly under Rule 60(b), a "Motion for re-hearing on Defendant's amended motion to dismiss; Motion in the alternative to vacate/set aside order for dismissal." After a 9 November 2016 hearing, the trial court denied plaintiff's motions by written order entered 11 January 2017. Plaintiff timely appealed from this order.

II. Alleged Errors

On appeal, plaintiff contends the trial court erred by dismissing with prejudice her action on the ground that she adequately pled and timely asserted a claim for rescission of the parties' separation agreement. Thus, she argues, the trial court had no basis for dismissing her complaint under Rule 12(b)(1) for lack of jurisdiction over the subject matter of her ED and spousal support claims. She also contends that the trial court erred by denying her Rule 60(b) motions for a new hearing and to set aside the dismissal order. Because we ultimately reverse the trial court's dismissal order, we dismiss plaintiff's appeal from the Rule 60(b) order as moot and thus need not address the propriety of that order. *See Harbin Yinhai Tech. Dev. Co. v. Greentree Fin. Grp., Inc.*, 196 N.C. App. 615, 626, 677 S.E.2d 854, 861 (2009) ("Because we are reversing the order of dismissal, the issue of whether the trial court should have set aside the order of dismissal is moot.").

III. Analysis

Plaintiff contends the trial court erred by dismissing under Rule 12(b)(1) her ED and spousal support claims on the ground that she adequately pled in her complaint, and thus timely asserted, a claim for rescission of the separation agreement. Defendant contends that because plaintiff never adequately pled a rescission claim before the applicable three-year statutory limitation period had expired, the

trial court correctly determined it lacked subject-matter jurisdiction over her ED and spousal support claims and thus properly dismissed her complaint.

A. Standard and Scope of Review

[1] At the outset we note that the failures of both defendant and the trial court to identify which civil procedure rule or rules supported either the dismissal motion or the trial court's dismissal of particular claims muddies appellate review. Both parties cite to Rule 12(b)(1) in the standard of review sections of their briefs, because the trial court found that it lacked subject-matter jurisdiction over plaintiff's ED and spousal support claims on the grounds that those claims were waived by the separation agreement. However, plaintiff notes, and we agree, that it is unclear under which subsection of Rule 12(b) her action was dismissed. But plaintiff reasons that, under either Rules 12(b)(1) or 12(b)(6), the same review standard applies. While we apply a *de novo* standard when reviewing either a Rule 12(b)(1) or 12(b)(6) dismissal, identifying the precise civil procedure rule underlying a dismissal is critical because it dictates our scope of review.

Rule 12 requires that Rule 56 standards apply to a Rule 12(b)(6) motion for failure to state a claim when the trial court considers matters outside the pleading. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2015) (providing that if, upon a Rule 12(b)(6) motion, the trial court considers "matters outside the pleading . . . , the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.] . . ."); *see also Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979) ("A Rule 12(b)(6) motion to dismiss for failure to state a claim is . . . converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." (citation omitted)). However, Rule 12 does not mandate summary judgment review based on a Rule 12(b)(1) motion on jurisdictional grounds when the trial court considers matters outside the pleadings; rather, "[i]n considering a motion to dismiss for lack of subject matter jurisdiction, it is appropriate for the court to consider and weigh matters outside of the pleadings." *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 44 n.3, 776 S.E.2d 29, 33 n.3 (2015) (citation and quotation marks omitted); *see also Cunningham v. Selman*, 201 N.C. App. 270, 280, 689 S.E.2d 517, 524 (2009) ("Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." (citation, quotation marks, and brackets omitted)).

We thus turn to defendant's amended dismissal motion and the dismissal order for clarity.

In his amended dismissal motion, defendant asserted that plaintiff's potential rescission claim was now statutorily time-barred, implicating Rule 12(b)(6); that she failed to timely prosecute that claim, implicating Rule 41(b); and that, "[w]ithout rescission of the parties' agreement, Plaintiff cannot maintain any claims against" him, implicating either Rule 12(b)(1), on the grounds that the trial court lacked subject-matter jurisdiction over the remaining claims in her complaint, or Rule 12(b)(6), on the grounds that in light of the separation agreement, plaintiff's complaint fails to state valid claims upon which relief could be granted. In its dismissal order, the trial court found that plaintiff failed to plead a rescission claim before expiration of the applicable statutory limitation period, implicating Rule 12(b)(6); that plaintiff failed to timely prosecute her potential rescission claim, implicating Rule 41(b); that, because the separation agreement waived her rights to seek ED and spousal support, it lacked jurisdiction over the subject matter of the claims in her complaint, implicating Rule 12(b)(1); and that without rescission of the parties' separation agreement, plaintiff cannot maintain ED and spousal support claims, implicating Rule 12(b)(6).

As to the rescission claim, although the trial court's findings indicate that it may have determined under Rule 41(b) that plaintiff failed to timely and effectively prosecute that claim, neither the transcript nor the order contains findings addressing "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice[,]" as required to effectuate a valid dismissal under Rule 41(b). *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001) (reversing a Rule 41(b) dismissal with prejudice for failure to prosecute a claim where the trial court failed to address these three factors). Accordingly, we conclude the trial court must have dismissed the rescission claim under Rule 12(b)(6).

As to the remaining claims, the trial court's order indicates that it found it lacked subject-matter jurisdiction over the ED and spousal support claims but it dismissed plaintiff's complaint with prejudice, and a dismissal under Rule 12(b)(1) must be made without prejudice, since a trial court without jurisdiction would lack authority to adjudicate the matter. *See Flower v. Blackbeard Sailing Club, Ltd.*, 115 N.C. App. 349, 353, 444 S.E.2d 636, 639 (1994) ("Because we affirm the dismissal based on lack of subject matter jurisdiction we vacate that part of the

judgment dismissing the complaint with prejudice."). We therefore conclude the trial court's dismissal must have been based on Rule 12(b)(6) grounds that, in light of the separation agreement waiving plaintiff's right to seek ED and spousal support, plaintiff's complaint failed to state valid claims for ED and postseparation support. Moreover, to the extent that the trial court dismissed plaintiff's complaint under Rule 12(b)(1) for lack of jurisdiction over the subject matter of her ED and spousal support claims as barred by the separation agreement, such a dismissal would have necessarily been predicated upon its Rule 12(b)(6) dismissal of the rescission claim, or upon its Rule 12(b)(6) dismissals of the ED and spousal support claims. It follows that Rule 12(b)(6) was the pivotal civil procedure rule underlying the trial court's dismissal of plaintiff's complaint.

B. Review Standard

We review *de novo* a Rule 12(b)(6) dismissal of a claim. *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). The scope of our review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* (citations and quotation mark omitted). Our "system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017) (citation and quotation mark omitted). But dismissal is proper "if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *State Emps. Ass'n of N.C.*, 364 N.C. at 210, 695 S.E.2d at 95 (citation omitted).

C. Rescission Claim was Adequately Pled under Rule 12(b)(6)

[2] The gravamen of plaintiff's argument is that the trial court erred by dismissing her complaint with prejudice on grounds that the allegations of her complaint were adequate to plead a claim for rescission of the separation agreement, which would therefore render its dismissal of her complaint improper. We agree.

Rule 8(a)(1) of our Rules of Civil Procedure requires that complaints include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2015). Additionally, Rule 9 provides that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake

shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2015). A complaint sufficiently states a claim upon which relief can be granted when

> 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.

Wray, ___ N.C. at ___, 802 S.E.2d at 902 (citation and quotation marks omitted).

Marital separation agreements are contracts and are similarly subject to rescission due to lack of mental capacity, duress, or fraud, and are unenforceable on grounds of unconscionability. *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270 (2000) ("Separation and/or property settlement agreements are contracts and as such are subject to rescission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence. Furthermore, these contracts are not enforceable if their terms are unconscionable." (citations omitted)).

In her complaint, plaintiff only enumerated separate claims for post-separation support, ED, and attorneys' fees. But she acknowledged that she signed a prior separation agreement and alleged the following:

> 25. After the parties['] separation, Defendant/Husband caused the Plaintiff/Wife to sign an unconscionable and one-sided "separation agreement."
>
> 26. This agreement was signed at such a time when Plaintiff/Wife was on post-surgery medications that affected her memory and reasoning.
>
> 27. Plaintiff/Wife barely has a memory of signing the agreement.
>
> 28. The agreement omits marital assets favors [sic] Defendant/Husband to an unconscionable degree.

Under our notice-pleading standard, the allegations of plaintiff's complaint were adequate for her rescission claim to survive a Rule 12(b)(6) dismissal for failure to allege sufficient facts to state a claim. Despite not enumerating a separate rescission claim, when accepting the factual allegations surrounding the execution of the separation agreement as true, and liberally construing plaintiff's complaint, we conclude that

her complaint provided defendant sufficient notice of the transaction—the allegedly invalid execution of the separation agreement—to produce a claim for rescission of that agreement. Furthermore, that plaintiff acknowledged she signed the separation agreement but nonetheless sought ED and spousal support implies that those claims were predicated upon an assertion that the agreement was invalid. Plaintiff's complaint therefore adequately put defendant on notice of her potential rescission claim. Because plaintiff sufficiently pled a rescission claim, and her complaint revealed no law or facts that necessarily defeated that claim, the trial court could not have properly dismissed her rescission claim under Rule 12(b)(6) for failure to allege sufficient facts.

Further, as the trial court correctly determined in its June 2016 order denying defendant's first dismissal motion, because the allegations of plaintiff's complaint were adequate for her rescission claim to survive Rule 12(b)(6) scrutiny, that claim was thus asserted when she filed her 22 May 2015 complaint. Since her complaint was initiated within the three-year statutory limitation period applicable to a claim for rescission of a contract executed on 18 April 2013, the rescission claim was timely asserted and was not statutorily barred under Rule 12(b)(6).

Therefore, to the extent the trial court dismissed plaintiff's complaint under Rule 12(b)(1) based on its determination that it lacked jurisdiction over the subject matter of the ED and spousal support claims because plaintiff never adequately pled nor timely asserted a rescission claim under Rule 12(b)(6), its order must be reversed.

D. Other Rule 12(b)(6) Grounds

[3] To the extent that the trial court dismissed plaintiff's complaint under Rule 12(b)(1) based on Rule 12(b)(6) grounds other than the sufficiency of allegations to support a rescission claim, or under Rule 12(b)(6) grounds that plaintiff's complaint failed to state claims for relief because the separation agreement waived her right to assert such claims, the trial court's order establishes that it considered matters outside the pleading, and thus its dismissal ruling is properly reviewed as one of summary judgment on appeal. *See*, *e.g.*, *Weaver v. Saint Joseph of the Pines*, *Inc.*, 187 N.C. App. 198, 204–06, 652 S.E.2d 701, 707–08 (2007) (concluding that attachments to an answer, a reply with attachments, and an affidavit were "matters outside the pleading" converting a dismissal arising from a Rule 12(b)(6) motion into an order of summary judgment for purposes of appellate review).

A document attached to and incorporated within a complaint is not considered a matter outside the pleading. *See Eastway Wrecker Serv.*,

Inc. v. City of Charlotte, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings." (citation omitted)). Additionally, a document that is the subject of a plaintiff's action that he or she specifically refers to in the complaint may be attached as an exhibit by the defendant and properly considered by the trial court without converting a Rule 12(b)(6) motion into one of summary judgment. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001) ("[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." (citation omitted)).

However, where a plaintiff simply refers to a document that was not the subject of his or her action, and the defendant attaches that document or an affidavit concerning that document to support a Rule 12(b)(6) or Rule 12(c) motion, the trial court's consideration of that document converts the motion into one for summary judgment. *See Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 31, 732 S.E.2d 614, 617–18 (2012) (holding that a Rule 12(c) motion was properly converted into one of summary judgment where the plaintiff asserting a negligence action against the town merely referenced in his complaint an insurance policy allegedly waiving the town's governmental immunity, the town attached an endorsement to that policy and an insurance adjustor's affidavit to support its motion, and the trial court relied on those attachments to support its ruling on the motion); *see also Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 243, 742 S.E.2d 803, 809 (2013) (holding that a Rule 12(c) motion was not converted into one of summary judgment where the trial court considered an insurance policy attached to the defendant-insurer's pleading on the ground that the plaintiff referenced the policy in his complaint and it was the subject of the plaintiff's action in which he sought a judicial declaration of the rights and obligations of the parties pursuant to their respective insurance policies). Additionally, "[o]ur case law has consistently treated submission of affidavits as a matter outside the pleadings." *Horne*, 223 N.C. App. at 30, 732 S.E.2d at 617 (citations omitted).

Here, the trial court's order establishes that it considered matters outside the pleadings, which were not the subject of plaintiff's action, in dismissing the complaint. Specifically, it found that the separation agreement was executed on 18 April 2013 and waived plaintiff's right to seek ED and postseparation support. These findings establish that the trial

court either considered and relied on the terms of the separation agreement, which the record indicates was neither attached as an exhibit to the complaint nor defendant's first or second dismissal motion, or defendant's affidavit supporting his first dismissal motion, in which he asserted that plaintiff's claims were waived by the 18 April 2013 separation agreement. Both of these documents were matters outside the pleading that would have converted defendant's Rule 12(b)(6) motion into one of summary judgment.

While the trial court could have looked to matters outside the pleading to dismiss plaintiff's ED and spousal support claims under Rule 12(b)(1) without mandating summary judgment review, such a dismissal would necessarily be predicated on the Rule 12(b)(6) grounds that either plaintiff failed to plead a valid rescission claim, or that she was not entitled to relief because her ED and spousal support claims were waived by the separation agreement. Because the latter determination was necessarily based on the terms of the separation agreement itself or defendant's affidavit, the trial court's dismissals of plaintiff's ED and spousal support claims must be reviewed under the summary judgment standard.

We review *de novo* a trial court's summary judgment ruling. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment "is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). "All facts asserted by the adverse party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted).

Here, the allegations in plaintiff's verified complaint challenged the validity of the separation agreement on grounds of lack of mental capacity, duress, and unconscionability. In defendant's first verified responsive pleading, he denied these allegations and moved to dismiss her complaint by asserting the affirmative defenses that the separation agreement resolved the parties' marital estate and waived their statutory rights to seek ED and spousal support. As these pleadings raise genuine issues about the validity of the separation agreement, defendant was not entitled to judgment as a matter of law on the ground that plaintiff's ED and spousal support claims were waived in the separation agreement, and the matter was not appropriate for summary judgment. *See Brown v. Lanier*, 60 N.C. App. 576–77, 578, 299 S.E.2d 279, 281 (1983) (reversing and remanding summary judgment order where the plaintiff's complaint

pled a negligence claim and the defendant raised the affirmative defense of release, even though the plaintiff "failed to specifically plead the fraud he relie[d] on in avoidance of the release" defense); *see also id.* at 578, 299 S.E.2d at 281–82 ("The materials on file clearly show that, while the parties are in agreement that plaintiff did in fact sign the release, there are genuine disputes as to whether he knew what he was signing and as to whether the release was obtained by misrepresentation or fraud."). We therefore reverse the trial court's order dismissing plaintiff's complaint. In light of our holding, we dismiss as moot plaintiff's appeal from the subsequent order denying her motions for relief from the dismissal order. *Harbin Yinhai Tech.*, 196 N.C. App. at 626, 677 S.E.2d at 861.

IV. Conclusion

The trial court improperly dismissed plaintiff's rescission claim under Rule 12(b)(6). If the trial court's dismissal of plaintiff's complaint was made under Rule 12(b)(1) and predicated upon its erroneous Rule 12(b)(6) dismissal of her rescission claim, its order must be reversed. If the trial court's dismissals of the ED and spousal support claims were made under Rule 12(b)(6) on the ground that her complaint failed to state a claim for relief because the separation agreement waived her right to assert such claims, because the record establishes that the trial court considered matters outside the pleading in reaching its ruling, those dismissals are properly reviewed under the summary judgment standard. Because the pleadings raised genuine issues of material fact as to the validity of the separation agreement, defendant was not entitled to judgment as a matter of law and the trial court's dismissal of plaintiff's complaint with prejudice must therefore be reversed. In light of reversing the dismissal order, we dismiss as moot plaintiff's appeal from the subsequent order denying her motions for relief from the dismissal order.

REVERSED IN PART; DISMISSED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

IN RE A.A.S.

[258 N.C. App. 422 (2018)]

IN THE MATTER OF A.A.S., A.A.A.T., J.A.W.

No. COA17-834

Filed 20 March 2018

1. Termination of Parental Rights—no-merit brief—no error

Where the trial court ordered termination of a father's parental rights to his two minor children and his counsel filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d), the Court of Appeals reviewed the case and concluded that the trial court did not err in determining that grounds existed to terminate his parental rights and that it was in the children's best interests to do so.

2. Termination of Parental Rights—permanency planning order—appeal—reunification not eliminated

The Court of Appeals did not consider the merits of a mother's arguments related to the trial court's permanency planning order for her minor children because the order did not explicitly or implicitly eliminate reunification as a permanent plan and thus did not meet the requirements for appeal under N.C.G.S. § 7B-1001(a).

3. Termination of Parental Rights—grounds for termination—willfulness and failure to make reasonable progress

The trial court's order terminating a mother's parental rights as to two of her minor children was supported by sufficient evidence and findings of fact showing willfulness and failure to make reasonable progress.

4. Termination of Parental Rights—grounds for termination—neglected juvenile—likelihood of repeated neglect

The trial court's order terminating a mother's parental rights as to one of her minor children was supported by sufficient evidence and findings of fact showing that the minor was a neglected juvenile and that there was a likelihood of repeated neglect.

Judge MURPHY concurring as to Respondent-Father and concurring in the result only without separate opinion as to Respondent-Mother.

Appeal by Respondents from order entered 25 April 2017, and appeal by Respondent-Mother from order entered 2 August 2016, by Judge J.H. Corpening, II, in District Court, New Hanover County. Heard in the Court of Appeals 19 February 2018.

Rebekah W. Davis for Respondent-Appellant Mother.

Peter Wood for Respondent-Appellant Father.

Jennifer G. Cooke for Petitioner-Appellee New Hanover County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Catherine R.L. Lawson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Mother and Respondent-Father (together, "Respondents") appeal from order entered 25 April 2017 terminating their parental rights as to their minor children A.A.S., A.A.A.T., and J.A.W. (together, "the children"). Respondent-Mother also appeals the trial court's permanency planning order entered 2 August 2016 requiring concurrent plans of adoption and reunification. Respondent-Father's appeal relates only to A.A.S. and A.A.A.T., as he is not the biological father of J.A.W. J.A.W.'s purported father has failed to submit to a paternity test or respond to contact from the parties. He is not a party in this action.

Respondent-Father's appellate counsel filed a no-merit brief, pursuant N.C. R. App. P. 3.1(d) following a stated thorough review of the record. Counsel demonstrated he informed Respondent-Father of his right to personally file a brief within thirty days. Counsel asks this Court to conduct an independent review of the record for possible error. Respondent-Father has failed to file his own written arguments.

I. Factual and Procedural Background

Respondents moved to North Carolina in June 2015 when A.A.A.T. was about eight months old and J.A.W. was about three years old. A.A.S. had not yet been born. After moving to North Carolina, the family was homeless for around two weeks and resided in a Salvation Army shelter ("the shelter"). While at the shelter, Respondent-Father was observed shaking A.A.A.T. on 3 June 2015. Soon thereafter, Respondent-Mother was seen hitting J.A.W. on the head and dragging him by his shirt. As a result of a domestic violence incident between Respondents, the family was discharged from the shelter. The New Hanover County Department of Social Services ("DSS") filed a neglect and dependency petition on 10 June 2015 and assumed non-secure custody of A.A.A.T. and J.A.W.

Respondents were required to complete Comprehensive Clinical Assessments and to participate in parenting classes. Respondent-Mother completed the assessment on 2 July 2015 and was diagnosed with "major depressive disorder, recurrent moderate." The assessment recommended that Respondent-Mother undergo a psychological evaluation and continue parenting classes. The psychological evaluation was completed on 7 October 2015 and found that Respondent-Mother had an IQ of 57, which "places her below the 1st percentile . . . and is described as extremely low intelligence." The psychological evaluation recommended that, after parenting classes, Respondent-Mother receive follow-up, one-on-one instruction in a therapy setting. Finally, the psychological evaluation noted that Respondent-Mother's level of intellectual functioning "will necessarily slow the rate and degree of adaptive change that can occur" and that "regular contact and consistent support is essential."

Respondent-Father completed his Comprehensive Clinical Assessment on 10 September 2015 and received a psychological evaluation on 21 October 2015. The evaluation found that Respondent-Father was "extremely low functioning" and "struggled on a measure of common sense, judgment and moral reasoning." The psychologist noted that "the combination of two individuals with limited cognitive abilities may be problematic, especially when tasks arise that are complex and/or require the input/contributions from both parents."

A.A.S. was born to Respondents on 30 December 2015. DSS filed a Juvenile Petition on 31 December 2015 alleging neglect due to the lack of progress made by Respondents in a prior case and the continued injurious environment. DSS was awarded non-secure custody of A.A.S. and she was adjudicated a neglected juvenile on 10 February 2016.

A permanency planning hearing involving all three children was held on 14 July 2016 and the trial court entered an order on 2 August 2016 ("the 2 August 2016 order"). The 2 August 2016 order found that both DSS and the guardian ad litem recommended a primary plan of adoption with a concurrent plan of reunification. The trial court made numerous findings of fact supporting a plan of adoption, including that Respondent-Mother had ignored the medical needs of the children, was not financially stable, was not cooperative in following her case plan, had continually tested positive for drugs, and that her parenting skills had not sufficiently improved. As a result, the trial court ordered that the permanent plan would be adoption with a concurrent plan of reunification and that DSS should proceed with a termination of parental rights action.

A subsequent permanency planning hearing was held on 15 December 2016 and an order was filed on 4 January 2017 ("the 4 January 2017 order"). This order maintained the prior custody arrangement and noted that DSS had made reasonable and appropriate efforts to implement the permanent plan.

DSS filed a Petition to Terminate Parental Rights of Respondents on 15 August 2016. DSS alleged in the petition that there were sufficient facts to warrant a determination that grounds existed for the termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), (5), (6), and (7) (2015), and hearings were held on 19 January 2017 and 24 February 2017 ("the termination hearings"). The trial court entered an order terminating Respondents' parental rights on 25 April 2017 ("the 25 April 2017 order").

II. Analysis

A. Respondent-Father's Appeal

[1] Counsel for Respondent-Father filed a no-merit brief on his behalf, pursuant to N.C. R. App. P. 3.1(d), stating "[t]he undersigned counsel has made a conscientious and thorough review of the [r]ecord on [a]ppeal . . . . Counsel has concluded that there is no issue of merit on which to base an argument for relief and that this appeal would be frivolous." Counsel asks this Court to "[r]eview the case to determine whether counsel overlooked a valid issue that requires reversal." Additionally, counsel demonstrated that he advised Respondent-Father of his right to file written arguments with this Court and provided him with the information necessary to do so. Respondent-Father failed to file his own written arguments.

Consistent with the requirements of Rule 3.1(d), counsel directs our attention to two issues: (1) whether the trial court erred in concluding that grounds existed to terminate Respondent-Father's parental rights and (2) whether the trial court abused its discretion in determining that it was in the children's best interests to terminate Respondent-Father's parental rights. However, counsel acknowledges he cannot make a non-frivolous argument that no grounds existed sufficient to terminate Respondent-Father's parental rights or that it was not in the children's best interests to terminate his parental rights.

We do not find any possible error by the trial court. The 25 April 2017 order includes sufficient findings of fact, supported by clear, cogent, and convincing evidence to conclude that at least one statutory ground for termination existed under N.C.G.S. § 7B-1111(a)(1). *See In re Taylor*,

97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). Moreover, the trial court made appropriate findings on each of the relevant dispositional factors and did not abuse its discretion in assessing the children's best interests. N.C. Gen. Stat. § 7B-1110(a) (2015). *See In re S.R.*, 207 N.C. App. 102, 109-10, 698 S.E.2d 535, 541 (2010). Accordingly, we affirm the trial court's order as to the termination of Respondent-Father's parental rights.

B Respondent-Mother's Appeal — Cessation of Reunification Efforts

[2] Respondent-Mother first argues that the trial court failed to make essential findings after it "implicitly eliminated reunification as a permanent plan and ceased reunification efforts" in the 2 August 2016 order. N.C. Gen. Stat. § 7B-906.2(b) (2015) requires that at a permanency planning hearing, a trial court must adopt concurrent permanent plans and identify a primary and secondary plan. Reunification must remain one of the identified plans unless the trial court "made findings under [N.C. Gen. Stat. § 7B-901(c) (2015)] or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b). While reunification remained one of the two permanent plans, Respondent-Mother argues that it is self-contradictory to commence termination of parental rights and continue to work towards reunification. Respondent-Mother argues that the court, therefore, implicitly eliminated reunification as a concurrent permanent plan without making the necessary findings of fact.

DSS argues that Respondent-Mother is not entitled to an appeal of the 2 August 2016 order because it does not meet the criteria in N.C. Gen. Stat. § 7B-1001(a) (2015). Only the following final orders may be appealed to this Court in abuse, neglect, and dependency cases, pursuant to N.C.G.S. § 7B-1001(a):

> (1) Any order finding absence of jurisdiction.
>
> (2) Any order, including the involuntary dismissal of a petition, which in effect determines the action and prevents a judgment from which appeal might be taken.
>
> (3) Any initial order of disposition and the adjudication order upon which it is based.
>
> (4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.

(5) An order entered under G.S. 7B-906.2(b) with rights to appeal properly preserved, as follows:

a. The Court of Appeals shall review the order eliminating reunification as a permanent plan together with an appeal of the termination of parental rights order if all of the following apply:

1. A motion or petition to terminate the parent's rights is heard and granted.

2. The order terminating parental rights is appealed in a proper and timely manner.

3. The order eliminating reunification as a permanent plan is identified as an issue in the record on appeal of the termination of parental rights.

b. A party who is a parent shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order.

c. A party who is a custodian or guardian shall have the right to immediately appeal the order.

(6) Any order that terminates parental rights or denies a petition or motion to terminate parental rights.

DSS argues that because reunification remained a concurrent plan, the 2 August 2016 order failed to meet the criteria for appeal set forth in N.C.G.S. § 1001(a). We agree.

This Court has previously held that "where a trial court failed to make any findings regarding reasonable efforts at reunification, the trial court's directive to DSS to file a petition to terminate [a parent's] parental rights implicitly also directed DSS to cease reasonable efforts at reunification." *In re A.E.C.*, 239 N.C. App. 36, 42, 768 S.E. 166, 170 (2015) (citing *In re A.P.W.*, 225 N.C. App. 534, 741 S.E.2d 388, *disc. review denied*, 367 N.C. 215, 747 S.E.2d 251 (2013)). However, *In re A.E.C.* and the other cases cited by Respondent-Mother were decided prior to 1 October 2015, when N.C. Gen. Stat. § 7B-906.2 was enacted. *See* N.C. Sess. Law 136 (2015). N.C.G.S. § 7B-906.2(a) requires the trial court to:

> [A]dopt one *or more* of the following permanent plans the court finds is in the juvenile's best interest:

> (1) Reunification as defined by G.S. 7B-101.
>
> (2) Adoption under Article 3 of Chapter 48 of the General Statutes.
>
> . . .
>
> (6) Reinstatement of parental rights pursuant to G.S. 7B-1114.

N.C.G.S. § 7B-906.2(a) (2015) (emphasis added). N.C.G.S. § 7B-906.2(b) continues by requiring the trial court to order "the county department of social services to make efforts toward finalizing the primary and secondary permanent plans . . . ."

At the permanency planning hearing, Respondents and the trial court discussed that efforts towards reunification would continue. During closing arguments, Respondent-Father's trial counsel argued: "And we also request that reunification[,] with perhaps the concurrent plan of adoption[,] but that [reunification remain] a primary or at least a 51% plan and that they be afforded more time." The trial court acknowledged when setting a permanent plan of adoption with a concurrent plan of reunification that:

> The significance to that change is that services remain in place. The change of law that has a concurrent plan. So because reunification is still part of the plan, services still in place, counseling is still in place . . . . And because it's not over until it's over. And it's not over yet.

The text of N.C.G.S. § 7B-906.2 clearly contemplates the use of multiple, concurrent plans including reunification and adoption. During concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan. N.C.G.S. § 7B-906.2(b). Under the new statutory framework of concurrent planning, the 2 August 2016 order did not explicitly or implicitly eliminate reunification as a permanent plan. As a result, the 2 August 2016 order failed to meet the requirements for appeal under N.C.G.S. § 7B-1001(a) and we are unable to review Respondent-Mother's first two arguments on appeal as they relate only to the 2 August 2016 order. *See In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888 (2005).

C. Grounds for Termination

Respondent-Mother's final two arguments are that the 25 April 2017 order did not establish grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a). Under N.C.G.S. § 7B-1111(a), only a single ground

is required to support the termination of parental rights. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

1. Standard of Review

Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015) (citing *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984)). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen.[ ]Stat. § 7B–1111(a)." *In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014). A trial court's conclusions in the adjudication stage are reviewed to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. *In re A.B.*, 239 N.C. App. at 160, 768 S.E.2d 575. Findings of fact supported by ample and competent evidence are binding on appeal; however, the trial court's conclusions of law are reviewed *de novo*. *Id.* This standard of review applies to Respondent-Mother's final two arguments.

2. N.C. Gen. Stat. § 7B-1111(a)(2)

[3] Respondent-Mother's third argument is that the 25 April 2017 order did not establish grounds to terminate her parental rights as to A.A.A.T. and J.A.W. under N.C.G.S. § 7B-1111(a)(2) because the evidence and the findings of fact did not show willfulness and she had made "reasonable progress." Under N.C.G.S. § 7B-1111(a)(2) a trial court may terminate parental rights upon finding: (1) a child has been willfully left by the parent in foster care or placement outside of the home for over twelve months, and (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *See In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005).

> A finding of willfulness does not require a showing of fault by the parent. Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.

Id. at 465, 615 S.E.2d at 396 (internal citations omitted) (internal quotation marks omitted).

When the 25 April 2017 order was entered, A.A.A.T. and J.A.W. had been in nonsecure custody for twenty-one months. The guardian ad litem reported Respondent-Mother had missed several visitations, complained of having to "put on a show" for DSS, and displayed "lack of skill" when dealing with A.A.A.T. The guardian ad litem concluded that "there has been no significant progression in parenting skills observed[.]" In addition, Respondent-Mother tested positive for marijuana on the majority of her drug screens, failed to submit samples for drug testing several times, and submitted a diluted sample. Respondent-Mother's therapist testified that "when [Respondent-Mother] showed up, she did participate; however, I could never – I never knew when she would be there."

Respondent-Mother argues that "the court did not have the evidence it needed in order to conclude that the mother's behavior was willful or that her progress was not reasonable" because she "did not have the benefit of reasonable efforts at reunification." "Reasonable efforts" is defined as "[t]he diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-101(18) (2015).

Trial courts are required to make written findings of fact as to whether the department of social services made reasonable efforts towards reunification at permanency planning hearings. N.C.G.S. § 7B-906.2. However, no such findings of fact are required in orders terminating parental rights. Nevertheless, there is ample evidence in the record showing that DSS used reasonable efforts towards reunification. *See In re Rholetter*, 162 N.C. App. 653, 662, 592 S.E.2d 237, 242-43 (2004). Social workers from DSS testified at the termination hearings that they: (1) created and implemented case plans for Respondents, (2) provided bus passes to Respondents, (3) organized and supervised visitation between Respondents and the children, and (4) arranged for drug screens of Respondents. Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification. Because DSS made reasonable efforts towards reunification, Respondent-Mother's argument that "the court did not have the evidence it needed in order to conclude that [her] behavior was willful or that her progress was not reasonable" is unavailing.

The 25 April 2017 order contained the following findings of fact related to the willfulness finding:

> 20. The Respondent-Parents failed to demonstrate their ability to engage in safe and appropriate visitation on

> multiple occasions. At times, visits would go well, and Respondent-Parents were able to apply things learned in their parenting classes. However, progress was short lived.
>
> . . .
>
> 23. That Respondents have not complied with their respective Family Services Case Plans or the Adjudication and Disposition Order and subsequent Orders of the Court in a consistent and adequate manner so as to justify reunification of the children with them and are engaged in ongoing neglect. . . .
>
> 24. The Respondents have willfully, and not due solely to poverty, left [J.A.W. and A.A.A.T.] in placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances was made in correcting those conditions which led to the children's removal, in that: The children were removed from Respondents on June 10, 2015 and have resided in out of home placement since removal. In that time period, Respondents have not made sufficient progress to enable the safe granting of unsupervised visitation, trial home placement or reunification by the Court in the period prior to the filing of this petition as detailed in the preceding Findings of Fact in this Order.

Under these facts, despite Respondents' "sporadic efforts," there was clear, cogent, and convincing evidence to support the trial court's findings that Respondents willfully left A.A.A.T. and J.A.W. in foster care for more than twelve months and had failed to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *See In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995) ("Extremely limited progress is not reasonable progress"); *In re B.S.D.S.*, 163 N.C. App. 540, 545-46, 594 S.E.2d 89, 92-94. These findings were sufficient to support the trial court's termination of Respondents' parental rights with respect to A.A.A.T. and J.A.W.

3. N.C. Gen. Stat. §§ 7B-1111(a)(1) and (6)

[4] Respondent-Mother's final argument on appeal is that the trial court failed to establish grounds necessary to terminate her parental rights as to A.A.S., A.A.A.T., and J.A.W. under N.C.G.S. § 7B-1111(a)(1) and (6). As discussed above, there were sufficient grounds to terminate Respondent-Mother's parental rights as to A.A.A.T. and J.A.W. under

N.C.G.S. § 7B-1111(a)(2). Here, we discuss whether there were adequate grounds to terminate Respondent-Mother's parental rights as to A.A.S. N.C.G.S. § 7B-1111(a)(1) provides for the termination of parental rights upon finding "[t]he parent has . . . neglected the juvenile." A neglected juvenile is one "who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15) (2015). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997).

At the time of the termination hearings, A.A.S. had not been in Respondent-Mother's custody for about thirteen months. "Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). In cases such as this, parental rights may be terminated upon "evidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001) (citing *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227 (1984)).

A.A.S. was originally adjudicated a neglected juvenile on 10 February 2016. In that order, Respondents and DSS stipulated that A.A.S. was a neglected juvenile. Specifically, that order found that A.A.S. did not "receive proper care, supervision, or discipline," and that she "live[d] in an environment injurious to [her] welfare." The court pointed to "reasons of domestic violence, parenting issues, mental health issues, and stability" to support that finding.

Having established a history of prior neglect, the trial court was required to establish "by clear and convincing evidence a probability of repetition of neglect if [A.A.S.] were returned to [her] parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000). Trial courts may point to a parent's "present inability to parent" or "failure to provide a living environment suitable" for children to support a probability of repeated neglect. *In re White*, 81 N.C. App. 82, 90, 344 S.E.2d 36, 41 (1986). In this case, a DSS social worker testified that "the visitations were horrible in a way I've never experienced," and that Respondents were unable to perform simple parenting tasks such as changing a diaper. Another social worker testified that Respondent-Mother was seen "jerking" the children.

In the 25 April 2017 order, the trial court made the following findings of fact with respect to the likelihood of repetition of neglect:

13. . . . Respondents need an additional support person to assist them in parenting safely. Without adequate support the Respondent-Parents . . . are incapable of parenting [the children]. The Respondent-Parents have been unable to identify suitable relative or community supports to provide such support.

15. . . . [Respondent-Mother's] monthly expenses require supplemental income, and she consistently reported to [DSS] her need to work in order to maintain her household. She currently lacks transportation and relies on bus transportation. She is currently unemployed. . . . [Respondent-Mother] has failed to maintain consistent employment. . . . As of January 2016, [DSS] began requesting random drug screens once per month. Each random drug screen was positive for marijuana up to June 2016. On May 17, 2016, she submitted to a random drug screen with diluted results. . . .

20. The Respondent-Parents failed to demonstrate their ability to engage in safe and appropriate visitation on multiple occasions. . . . [DSS] has consistently intervened during scheduled visitations due to yelling, inappropriate discipline and other immediate safety concerns. . . . [Respondent-Mother] continually said, "no one was going to tell her what to do" during her visits. . . . [Respondent-Mother] acknowledges pulling [the children] by the arm during scheduled visitation, but she does not feel that such contact is inappropriate since it is not her intent to hurt [the children].

23. That Respondents have not complied with their respective Family Services Case Plans or the Adjudication and Disposition Order and subsequent Orders of the Court in a consistent and adequate manner so as to justify reunification of the children with them and are engaged in ongoing neglect. In the event that legal custody were restored to them, there would be the likelihood of repetition of neglect. . . . [Respondent-Mother] neglected [the children] by her lengthy history of instability, mental illness, cognitive limitations, and her failure to adequately address any of these issues during the time her children have been in the legal custody of [DSS]. . . . Sufficient improvements

> in parenting have not been made in order to justify safe placement with a parent.

Respondent-Mother argues that the above findings of fact were not supported by the evidence because she was not offered adequate reunification services that were appropriate to her needs. As addressed above, the efforts of DSS were reasonable in this case.

There was competent evidence to support the trial court's findings and the findings were sufficient for the trial court to determine that A.A.S. was a neglected juvenile and that there was a likelihood of repeated neglect. *In re D.M.W.*, 173 N.C. App. 679, 688-89, 619 S.E.2d 910, 917 (2005), *rev'd per curiam per the dissent*, 360 N.C. 583, 635 S.E.2d 50 (2006) (finding a parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect). Since we find that termination was proper on this ground, we need not address Respondent-Mother's argument that termination was improper under N.C.G.S. § 7B-1111(a)(6).

The trial court's order terminating Respondents' parental rights as to A.A.S., A.A.A.T., and J.A.W. is affirmed.

AFFIRMED.

Judge BRYANT concurs.

Judge MURPHY concurs as to Respondent-Father and concurs in the result only without separate opinion as to Respondent-Mother.

IN RE E.D.

[258 N.C. App. 435 (2018)]

IN THE MATTER OF E.D.

No. COA17-693

Filed 20 March 2018

Mental Illness—involuntary commitment—examination by second physician—mandatory

The trial court's involuntary commitment order was vacated because respondent did not receive an examination by a second physician as mandated by N.C.G.S. § 122C-266(a). Respondent was not required to show prejudice to obtain this relief.

Appeal by respondent from order entered 5 January 2017 by Judge Dan Nagle in Wake County District Court. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for respondent-appellant.

DAVIS, Judge.

North Carolina law requires that a person who has been involuntarily committed to a mental health facility be examined by a physician within 24 hours of arrival at such a facility. In this case, the respondent was examined by a psychologist — rather than a physician — following her arrival at an inpatient mental health facility. The issue before us in this appeal is whether this statutory violation automatically requires us to vacate the trial court's order authorizing her continued commitment without the need for her to show that she was actually prejudiced by the violation. Because we conclude that no showing of prejudice was required under these circumstances, we vacate the trial court's order.

Factual and Procedural Background

On 26 December 2016, Yolanda Diaz filed an affidavit and petition for the involuntary commitment of her sister, E.D. ("Respondent") in which she alleged that Respondent was mentally ill and dangerous to herself or others. A Wake County magistrate found that reasonable grounds existed to believe the facts alleged in the petition were true and ordered Respondent to be held for examination.

Respondent was transported to UNC Hospitals at 8:00 p.m. on 26 December 2016. The following day, she was examined by Dr. Katie Cheng. Dr. Cheng then completed a form labeled Examination and Recommendation to Determine Necessity for Involuntary Commitment. On this form, Dr. Cheng stated that in her opinion Respondent was mentally ill and dangerous to herself or others. Dr. Cheng recommended that she be committed to an inpatient treatment facility for a period of 15 days.

As a result of Dr. Cheng's recommendation, Respondent was transferred to UNC Wakebrook Psychiatric Services ("UNC Wakebrook") later that same day. On 27 December 2016, a second examination of Respondent was conducted by Allison H. Williams, a psychologist. Williams formed the opinion that Respondent was mentally ill and a danger to herself or others and recommended inpatient commitment for a period of five to ten days. Respondent remained at UNC Wakebrook for the next nine days while awaiting an involuntary commitment hearing.

A hearing was held on 5 January 2017 in Wake County District Court before the Honorable Dan Nagle. Following the hearing, the trial court entered an order concluding that Respondent was mentally ill and a danger to herself or others. The court ordered that she be committed to UNC Wakebrook for a period of inpatient treatment not to exceed 30 days. Respondent filed written notice of appeal on 27 January 2017.[1]

Analysis

N.C. Gen. Stat. § 122C-266 provides, in pertinent part, as follows:

> (a) Except as provided in subsections (b) and (e), within 24 hours of arrival at a 24-hour facility described in G.S. 122C-252, the respondent shall be examined by a physician. This physician shall not be the same physician who completed the certificate or examination under the provisions of G.S. 122C-262 or G.S. 122C-263. The examination shall include but is not limited to the assessment specified in G.S. 122C-263(c).

N.C. Gen. Stat. § 122C-266(a) (2017). Thus, the statute plainly provides that involuntarily committed persons must be examined by a physician within one day of their arrival at a 24-hour facility.

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1. We note that although Respondent's commitment period has expired, her 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).

On appeal, Respondent asserts that because her 27 December 2016 examination was conducted by a psychologist rather than a physician, N.C. Gen. Stat. § 122C-266(a) was violated. It is well established that "[a]lleged statutory errors are questions of law[.]" *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721, *disc. review denied*, 365 N.C. 193, 707 S.E.2d 246 (2011). We review questions of law *de novo*. *Id.* Under the *de novo* standard, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

The State concedes that a violation of N.C. Gen. Stat. § 122C-266(a) occurred in this case. However, the State makes two arguments as to why the trial court's order should not be vacated. First, the State contends that Respondent has not adequately preserved this issue for appellate review. Second, it asserts that Respondent has failed to show that she was actually prejudiced by the error. We address each argument in turn.

I. Preservation

As an initial matter, the State asserts that Respondent has not properly preserved the issue she seeks to raise on appeal. The State contends that she waived the right to appellate review of this issue by failing to raise it before the trial court at the 5 January 2017 hearing.[2]

Relying primarily on our decision in *In re Moore*, 234 N.C. App. 37, 758 S.E.2d 33, *disc. review denied*, 367 N.C. 527, 762 S.E.2d 202 (2014), the State argues that N.C. Gen. Stat. § 122C-266(a) merely confers a waivable right upon the subject of an involuntary commitment proceeding. In *Moore*, a respondent sought to challenge on appeal the sufficiency of the factual basis for his involuntary commitment as set out in the affidavit initiating the commitment. *Id.* at 41-42, 758 S.E.2d at 36-37. Because the respondent "failed to raise the issue of the sufficiency of the affidavit during the first involuntary commitment hearing," this Court held that he had failed to preserve the argument for appeal. *Id.* at 42, 758 S.E.2d at 37. We note, however, that *Moore* did not involve N.C. Gen. Stat. § 122C-266 — the statute at issue in the present appeal.

In arguing that this issue should be deemed preserved despite her failure to assert it in the trial court, Respondent directs our attention to *In re Spencer*, 236 N.C. App. 80, 762 S.E.2d 637 (2014), *disc. review denied*, 367 N.C. 811, 767 S.E.2d 529 (2015), in which this Court interpreted

2. Respondent does not dispute the fact that she failed to raise this issue during her involuntary commitment hearing.

N.C. Gen. Stat. § 122C-266(a) as a statutory mandate. *Id.* at 84-85, 762 S.E.2d at 640. In *Spencer*, the respondent was committed to Holly Hill Hospital following an initial examination performed by a physician in which it was determined that he was mentally ill and in need of inpatient treatment. *Id.* at 82, 762 S.E.2d at 639. Three days later, a hearing was held in which a psychiatrist — who qualified as a "physician" for purposes of N.C. Gen. Stat. § 122C-266(a) — testified that he had examined the respondent within 24 hours of his arrival at Holly Hill and believed that inpatient treatment of the respondent was necessary. Following the hearing, the trial court entered an involuntary commitment order. *Id.*

On appeal to this Court, the respondent asserted that N.C. Gen. Stat. § 122C-266(a) had been violated because no written record existed of the second examination or the psychiatrist's findings resulting from that examination. *Id.* at 84, 762 S.E.2d at 640. As a result, he argued, the trial court's order should be vacated because "the record [did] not demonstrate that he was examined by a second physician within twenty-four hours of being admitted to Holly Hill Hospital, in violation of N.C. Gen. Stat. § 122C-266." *Id.*

We determined that the issue was, in fact, preserved as a matter of law, stating that when a statutory mandate is violated the right to assert that issue on appeal is preserved despite the party's failure to object below. We stated that "the purpose of the second examination pursuant to N.C. Gen. Stat. § 122C-266 is to protect the rights of a respondent who has been taken to a medical facility immediately prior thereto to insure that he was properly committed." *Id.* at 85, 762 S.E.2d at 640 (citation, quotation marks, and brackets omitted).

Thus, *Spencer* stands for the proposition that the second examination requirement contained in N.C. Gen. Stat. § 122C-266(a) is a statutory mandate — the violation of which is automatically preserved as an issue on appeal regardless of whether the respondent objects in the trial court. Accordingly, we reject the State's preservation argument.

II. Need for Showing of Prejudice

The State's final argument is that Respondent is not entitled to relief because she has failed to show that she was actually prejudiced by the fact that her second examination was not conducted by a physician. We disagree.

In *In re Barnhill*, 72 N.C. App. 530, 325 S.E.2d 308 (1985), this Court addressed the physician examination requirement under former N.C. Gen. Stat. §§ 122-58.3 and -58.6 — predecessor statutes to N.C. Gen. Stat. § 122C-266. In *Barnhill*, a physician executed an affidavit recommending

inpatient commitment of the respondent, but no evidence existed that a second physician had conducted an examination of the respondent as required by statute. *Id.* at 531-32, 325 S.E.2d at 309. At the respondent's hearing, the physician who submitted the affidavit for the initial commitment simply testified that he had transferred the respondent to the care of a second physician. No evidence was offered that the second physician had actually conducted an examination of the respondent. *Id.* at 532, 325 S.E.2d at 309. We vacated the trial court's involuntary commitment order, stating the following:

> Petitioner contends that the record shows compliance with statutory provisions in that Dr. Blackburn testified that "I gave respondent under the care of Dr. Gomez, as I am not a psychiatrist." The above-quoted testimony contains the sole reference in this record to Dr. Gomez. We think it clear beyond peradventure that this testimony falls far short of establishing that a second qualified physician performed the examination required by G.S. 122-58.6. Our courts have held that the requirements of G.S. 122-58.3 must be followed diligently. Because the record shows that the statutory requirements were not complied with, we hold the order entered by the court must be vacated.

Id. (internal citations, quotation marks, ellipsis, and brackets omitted). Nothing in *Barnhill* supports the proposition that a showing of prejudice is necessary by a respondent who failed to receive a statutorily required second examination.

In attempting to demonstrate that such a showing of prejudice is, in fact, required, the State seeks to rely on *Spencer*. As noted above, in *Spencer* although no written records existed documenting the fact that a second physician had examined the respondent within 24 hours of his admission as required by N.C. Gen. Stat. § 122C-266(a), the undisputed evidence showed that such a second examination had actually been performed. We affirmed the trial court's commitment order, stating as follows:

> Here, respondent concedes that Dr. Saeed's testimony illustrates that he conducted an examination of respondent on 23 July 2013, the day after he was admitted to Holly Hill Hospital. Dr. Saeed's testimony indicated that he believed respondent to be mentally ill with a diagnosis of schizophrenia. Dr. Saeed also stated throughout his testimony that respondent was a danger to himself because he refused to take necessary medication, was unable to care

> for himself, and was unable to limit his fluids in order to keep his sodium level normal. On appeal, respondent does not contest the substance of Dr. Saeed's testimony, nor does he argue that he was improperly committed based on any insufficiency of Dr. Saeed's examination. Reviewing the record, we are unable to find that respondent was prejudiced by the absence of a written record of Dr. Saeed's findings. Based on the foregoing, we reject respondent's argument that the involuntary commitment order should be vacated.

Spencer, 236 N.C. App. at 85, 762 S.E.2d at 640.

The issue in *Spencer* was significantly different than the question presented here. Unlike the present case, it was undisputed in *Spencer* that the second physician examination required by N.C. Gen. Stat. § 122C-266 *had* occurred in that the respondent was examined by a second physician within 24 hours of his arrival at the facility. Thus, although no documentation evidencing the second examination could be located, no dispute existed as to the fact that the examination had been conducted. Under those circumstances, this Court simply held that the respondent had not been prejudiced by the missing documentation.

Spencer cannot be read as standing for the entirely separate proposition that in cases where — as here — the second examination requirement of N.C. Gen. Stat. § 122C-266(a) clearly has not been followed, a respondent must nevertheless show prejudice stemming from her failure to receive a second examination. Thus, we believe *Spencer* should be limited to its facts.

Our holding today is that in cases where a respondent does not receive an examination by a second physician as mandated by N.C. Gen. Stat. § 122C-266(a), the respondent is *not* required to make a showing of prejudice resulting from the statutory violation in order to have the trial court's order authorizing her continued commitment vacated. In the present case, because Respondent has established precisely such a statutory violation, the trial court's involuntary commitment order must be vacated.

Conclusion

For the reasons stated above, we vacate the trial court's 5 January 2017 order.

VACATED.

Judges CALABRIA and TYSON concur.

IN RE Z.D.

[258 N.C. App. 441 (2018)]

IN THE MATTER OF Z.D.

No. COA17-876

Filed 20 March 2018

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings

The trial court's findings were insufficiently specific to support termination of a mother's parental rights to her child on the ground of failure to make reasonable progress, pursuant to N.C.G.S. § 7B-1111(a)(2), because the findings did not address the mother's conduct or the circumstances over the fifteen months preceding the termination hearing.

2. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings were insufficient to support termination of a mother's parental rights to her child on the ground of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), because the trial court made no findings regarding the mother's situation and condition at the time of the termination hearing in order to show a likelihood of repetition of neglect.

3. Termination of Parental Rights—grounds for termination—dependency—sufficiency of findings

The trial court's findings were insufficient to support termination of a mother's parental rights to her child on the ground of dependency, pursuant to N.C.G.S. § 7B-1111(a)(6), because the trial court made no findings regarding the mother's ability to care for her child at the time of the hearing; in addition, the evidence was insufficient to support the finding that the mother had a current incapability that would continue for the foreseeable future.

Judge BRYANT dissenting.

Appeal by Respondent-Mother from order entered 11 May 2017 by Judge Joseph M. Buckner in District Court, Orange County. Heard in the Court of Appeals 22 February 2018.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for Petitioner-Appellees.

Peter Wood for Respondent-Appellant Mother.

No brief for Guardian ad Litem.

McGEE, Chief Judge.

Where the evidence and findings of fact do not support the trial court's conclusion of law that grounds existed for termination of Respondent-Mother's parental rights, we reverse the trial court's order. Respondent-Mother ("Respondent") appeals from the trial court's order terminating her parental rights as to her son ("her son," "the son," or "the child") in this private termination action. Grounds for the termination were neglect, failure to make reasonable progress to correct the conditions that led to the removal of the son from Respondent's care, and dependency.

I. Facts and Procedural History

The Orange County Department of Social Services ("DSS") received a report on 4 October 2010 alleging that (1) Respondent was neglecting her son due to Respondent's mental health issues and drug use, (2) Respondent was leaving her son in unsafe situations in the home, and (3) Respondent was choosing unsafe childcare arrangements. Three days later, on 7 October 2010, Respondent left her son with a woman while she went to the grocery store. Respondent had just met the woman earlier that day. Respondent did not return to the woman's home to pick up her son, and later that evening family members located the son at the woman's home and he was placed with caretakers. Respondent was involuntarily committed to the hospital the next day. Respondent was later released from the hospital, and Child Protective Services provided in-home services.

Respondent was admitted to the UNC psychiatric clinic in January 2011 and was diagnosed with bipolar 1 disorder. DSS filed a juvenile petition on 25 January 2011, alleging that the child was a dependent and neglected juvenile. In an order entered 22 March 2011, the trial court adjudicated the child dependent but did not consider or rule upon the petition's neglect allegations. The trial court granted temporary custody to the child's "initial kinship" caregivers. Respondent received outpatient mental health services from February 2011 to March 2012. Respondent was then referred to the UNC Chatham Assertive Community Treatment ("ACT") Team, and has continued to work with the ACT Team.

After a review hearing on 2 June 2011, the trial court found that the caregivers were no longer able to care for the child and placed him in

DSS custody. DSS subsequently placed the child in a kinship placement with Mr. and Mrs. J ("Petitioners"), who were friends of Respondent. The trial court granted legal custody of the child to Petitioners on 8 August 2012 and he has remained in their care since that time. The trial court granted Respondent a minimum of one hour of supervised visitation every two weeks and relieved DSS and the guardian ad litem of further responsibility in the case.

Petitioners moved to Pennsylvania in 2014 and Respondent's visitation was changed to one week of visitation every three months at Petitioners' home. Respondent's visits went well, but she continued to struggle with mental health issues. From 2011 to 2015, Respondent was admitted for multiple psychiatric hospitalizations, both voluntary and involuntary. Despite Respondent's hospitalizations, Petitioners were committed to returning the child to Respondent's care.

However, on 17 July 2015, Petitioners filed a motion to modify visitation, alleging that the visitation schedule at the time was not in the child's best interest. In an order entered 7 October 2015, the trial court modified visitation to no longer require that Petitioners allow Respondent to stay in their home during visits, but continued the visitation schedule in all other respects.

Respondent was last hospitalized due to her mental illness in November 2015 and, since her release in December 2015, Respondent has remained symptom free from her bipolar disorder. However, Petitioners filed a petition to terminate Respondent's parental rights as to her son on 21 June 2016. The petition alleged the grounds of (1) neglect, (2) failure to make reasonable progress to correct the conditions that led to the son's removal from Respondent's care, and (3) dependency. N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017). After a hearing on 17 April 2017, the trial court entered an order on 11 May 2017 terminating Respondent's parental rights on all three alleged grounds. Respondent appeals.

II. Analysis

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* (citation and quotation marks omitted). We review *de novo* whether a trial court's findings support its conclusions. *See In re S.N.*,

X.Z., 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

The trial court must make "*specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). The trial court's ultimate findings "must arise 'by processes of logical reasoning from the evidentiary facts' found by the court." *In re A.B.*, ___N.C. App. ___, ___, 799 S.E.2d 445, 450 (2017) (quoting *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002)); *see also In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) ("[A] trial court must make adequate evidentiary findings to support its ultimate finding of willful intent." (citation omitted)).

In the present case, the trial court made the following evidentiary findings of fact in support of its conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) to terminate Respondent's parental rights:

> 7. Petitioners have known Respondent since she was a teenager and are intimately familiar with Respondent's mental health issues and treatment. Respondent has a bipolar diagnosis. Since the [child] was placed with the caregivers in 2010, Respondent has had multiple episodes related to her mental illness that have left her incapable of properly caring for the [child]. Petitioners have had intimate knowledge of these episodes.
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> 10. However, Respondent's behavior during visits in Pennsylvania was consistently concerning and demonstrated an ongoing and continuing inability to provide proper care. In 2015, this [c]ourt changed the visitation order to no longer require Petitioners to house Respondent during her quarterly visits. Respondent's behavior in their home was disturbing and was adversely impacting the [child]. Respondent has not always acted in the [child's] best interest during visits. By way of example, during one visit, Respondent indicated she was hungry. Petitioners allowed Respondent to take the [child] to a restaurant. Respondent bought and ate food, but Respondent did not buy anything for the [child]. By way of further example, the [child] has directed Respondent to end a visit early so

that she might rest. While Petitioners have felt comfortable leaving the [child] with Respondent in their home for short unsupervised periods of time during visits, Petitioners have never felt Respondent was capable of supervising the [child] for any extended period of time.

11. Respondent has been working with the UNC ACT ("Assertive Community Treatment") team for several years, since at least before Petitioners attempted to reunite the [child] with Respondent in 2013. ACT provides "wrap-around" services for individuals with significant mental health concerns. Even with the provision of these intense services, Respondent is unable to provide proper care for the [child]. Dr. VanderZwaag testified Respondent would be capable of parenting the [child] with assistance, but Dr. VanderZwaag has never observed Respondent with the [child]. Dr. VanderZwaag acknowledged Respondent was last hospitalized due to her mental health illness in December 2015, more than five years after this case began due to similar mental health concerns.

12. Petitioners have observed Respondent over the course of many years, and Petitioners have an intimate familiarity with Respondent's parenting abilities. Petitioners are convinced Respondent lacks the ability to properly care for the [child]. Petitioners would not hesitate to reunite the [child] with Respondent if they thought otherwise. Petitioners have allowed Respondent to have "extra" visitation outside of the court-ordered schedule. Petitioners did not file the termination petition lightly. The [c]ourt believes Petitioners and accepts their testimony as true.

The trial court then made the ultimate findings of fact that:

13. Respondent has neglected the [child] and there is a reasonable probability Respondent would neglect the [child] if he were returned to her care.

14. Respondent has willfully left the [child] in placement outside the home for more than twelve months without showing to the satisfaction of this [c]ourt that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the [child].

> 15. Respondent is incapable of providing for the proper care and supervision of the [child], such that the [child] is a dependent juvenile within the meaning of [N.C.]G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future. Respondent lacks an appropriate alternative child care

A. *Reasonable Progress*

[1] Respondent first asserts the trial court erred in terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), which provides that the court may terminate parental rights upon a finding that a parent has "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2017).

Respondent contends the trial court's findings of fact are insufficient to support its ultimate finding that she failed to make reasonable progress in correcting the conditions that led to her son's removal in that the findings are vague and incomplete and do not address her progress or lack of progress leading up to the termination hearing. Therefore, Respondent contends the findings of fact are insufficient to support the trial court's conclusion that grounds existed to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(2). We agree.

The trial court must perform a two-part analysis to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). *In re O.C. & O.B.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396.

A parent's reasonable progress "is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006). In the

present case, however, the trial court did not make any findings regarding Respondent's conduct or circumstances over the fifteen months prior to the termination hearing.

According to unchallenged finding of fact 3, the child was removed from Respondent's care due to Respondent's mental health issues and drug use, and DSS's concern for the child's care and well-being. However, a review of the record and transcript shows that the trial court based its termination of Respondent's parental rights primarily on the issue of her mental health. Indeed, the trial court did not make any findings regarding Respondent's progress or lack of progress in correcting her past drug use or the condition of her home at the time of the hearing. The trial court essentially relied on three findings of fact in order to support its ultimate finding and conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate Respondent's parental rights. These findings, however, are insufficiently specific to support the ultimate finding that Respondent failed to make reasonable progress.

In finding of fact 7, although the trial court found that Respondent had multiple episodes relating to her mental illness since her diagnosis in 2011, the finding fails to include any information pertaining to what constituted an "episode" and the nature of the "episodes," including Respondent's condition and behavior during an episode. The finding also lacks any details regarding how many or how often Respondent had episodes, when the last episode occurred, or how the episodes "left her incapable of properly caring for [her son]."

In finding of fact 10, the trial court found that Respondent's behavior during her visits with Petitioners was "consistently concerning" and "disturbing." However, the trial court failed to find with any particularity what behavior it found to be "concerning" and "disturbing[,]" and whether this behavior related in any manner to Respondent's mental health and her ability to care for her son.

In finding of fact 11, the trial court found that "[e]ven with the provision of [the ACT] intense services, Respondent is unable to provide proper care for [her son]." However, the trial court made no finding as to why or how, despite these services, Respondent was not able to provide proper care for her son or what specifically she was doing or not doing to address her mental health issues.

The trial court's findings demonstrate only that Respondent has had multiple "episodes" since 2010 due to her mental health issues, that her last hospitalization was in December 2015, that Respondent has been working with the UNC ACT team for several years, and that she had

exhibited some form of "concerning" and "disturbing" behavior during visits. We conclude that these findings are insufficient to support the trial court's ultimate finding that, at the time of the termination hearing in April 2017, Respondent willfully left her son in Petitioners' care without making reasonable progress to correct the conditions that led to his removal from her care. The findings fail to address any progress or lack of progress by Respondent in correcting the conditions that led to her son's removal in the months prior to the termination hearing.

Indeed, the evidence tended to show that Respondent had made significant progress in addressing her mental health issues. Respondent's psychiatrist testified that Respondent had "shown progressive improvement overall," noting that although Respondent did have some episodes of illness over the past five years, she had been free of all mood symptoms since the time of her last discharge in December 2015. The evidence further showed that, although Respondent was at risk for future episodes, as is the nature of a bipolar diagnosis, she had shown a growing understanding of bipolar illness and her response to medications, had been stable for the fifteen months prior to the termination hearing, and had been working with her psychiatrist about recognizing early warning signs and interventions in order to prevent further episodes. Respondent's psychiatrist testified that Respondent was committed to working on her mental health and in making changes to improve her mental health stability, and that her overall prognosis was very good.

Further, the evidence showed Respondent had been living in an apartment for nearly four years, was in good standing with the housing authority, had a part-time job, and received additional income through disability. The evidence also showed that Respondent was free from drug use and that her history of substance use was "related [primarily] to . . . mood symptoms (i.e. lack of judgment and insight associated with mania) and unrelated to an enduring pattern of disordered use."

Petitioners testified Respondent behaved inconsistently during the visits in their home in Pennsylvania, stating that some visits went well, while in other visits Respondent was "less bubbly" and in a depressed mood, was "off," or was less engaged with her son. However, Petitioners presented no further evidence of Respondent's lack of reasonable progress in addressing her mental health issues and they presented no evidence regarding Respondent's current drug use, employment, or housing condition. Thus, we conclude Petitioners failed to present sufficient evidence to meet the statutory requirement of clear, cogent, and convincing evidence that Respondent had not made reasonable progress in correcting the conditions that led to the removal of her son from her care.

Because the evidence and findings were insufficient to support the trial court's ultimate finding that Respondent failed to make reasonable progress, we hold the findings do not support the conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate Respondent's parental rights. Therefore, the trial court erred in terminating Respondent's parental rights on this ground.

B. *Neglect*

[2] Respondent next argues the findings of fact were insufficient to support termination on the ground of neglect because the trial court made no findings regarding Respondent's situation and condition at the time of the termination hearing in order to show a likelihood of repetition of neglect. We agree.

A trial court may terminate parental rights upon a finding that the parents have neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C.G.S. § 7B-1111(a)(1). In relevant part, N.C. Gen. Stat. § 7B-101(15) (2017) defines a neglected juvenile as one "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care[.]"

"Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). The trial court must consider "evidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect." *Id.* (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984)).

Although the child was not previously adjudicated neglected, in finding of fact 3, the trial court found that, on 7 October 2010, Respondent left her son with a woman she had just met earlier that day, and that Respondent did not return to the woman's home to pick up her son. Respondent does not challenge this finding, and it is now binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). This finding supports the trial court's ultimate finding that Respondent had previously neglected her son. The evidentiary findings, however, are insufficient to support the trial court's ultimate finding that there was a reasonable probability that the child would be neglected if returned to Respondent's care.

In finding of fact 7, the trial court discussed Respondent's mental health history, including her bipolar diagnosis and found that she "has had multiple episodes related to her mental illness" since 2010. In finding of fact 10, the trial court found that Respondent's behavior during her visits in Pennsylvania "was consistently concerning" and "disturbing[,]" "adversely impact[ed] the [child,]" and "demonstrated an ongoing and continuing inability to provide proper care." The trial court found in finding of fact 11 that "[e]ven with the provision of [the ACT team] intense services, Respondent is unable to provide proper care for [her son]."

The trial court's ambiguous findings provide little light on the circumstances and condition of Respondent's mental health issues at the time of the termination hearing or the impact they had on the child. Although the trial court found that Respondent's behavior adversely impacted her son, the court's findings are not sufficiently specific to determine what behavior Respondent was exhibiting and how that behavior negatively impacted her son.

The terms "concerning" and "disturbing" are subjective and, without further explanation detailing the specific behavior in question and how that behavior impacted Respondent's ability to care for her son, this finding is insufficient to show a likelihood that the child would be neglected if returned to Respondent's care. For example, while one individual may find swearing to be concerning or disturbing behavior, this behavior does not necessarily pertain to a parent's inability to provide proper care for a child.

The trial court further found that Respondent did not always act in the child's best interests during visits. In support of this finding, the trial court found that on one occasion Petitioners allowed Respondent to take her son to a restaurant where Respondent purchased food for herself but did not buy food for him. During another visit, Respondent appeared tired and her son told her to go back to the hotel early so that she might rest. However, the finding provides no detail regarding when these instances occurred.

At most, the trial court's findings show that Respondent has had "multiple" episodes since 2010, has exhibited some type of "concerning" or "disturbing" behavior during some visits, did not purchase food for her son at a restaurant on one occasion for an unknown reason, and was tired during one visit. These findings lack any specificity regarding Respondent's inability to provide proper care at the time of the termination hearing in order to support a finding of a likelihood of repetition of

neglect if her son was returned to her care. Therefore, we hold the findings are insufficient to support the trial court's ultimate finding and conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

Further, the probability of repetition of neglect in this case is not shown by clear, cogent, and convincing evidence. Mr. J testified that Respondent's visits in Pennsylvania went well, but sometimes she was less engaged or had a depressed mood. Although the visits were supervised, Petitioners did leave Respondent alone with her son for an hour or two at a time. Mr. J testified that Respondent's last visit in December 2016 was "a little choppy" because she arrived tired and showed up late the next day. Additionally, Mr. J testified that Respondent was "off" in making good decisions for her son, explaining that sometime "last year," Respondent chose to get portraits done of her son rather than purchase pull-ups for him, and on one occasion she did not purchase food for him at a restaurant, though he did have a bite of the food from her plate.

Mrs. J testified that "almost a year" ago, she stopped allowing Respondent to phone her son because Respondent refused to pick a particular day of the month to call. Mrs. J further testified that during some visits Respondent was "absolutely wonderful" and "so awesome with [her son]" but during some visits "she just wasn't there."

Petitioners' evidence pertained primarily to conduct occurring at least six months prior to the hearing. This lack of temporal proximity simply does not support a finding that Respondent was incapable of providing proper care at the time of the termination hearing and that there was a likelihood of repetition of neglect. The most recent example of Respondent's inability to care for her son was that she appeared tired at the December 2016 visit. Petitioners presented no evidence of Respondent's inability to properly care for her son at the time of the hearing other than their assertions that they did not believe Respondent was capable. This is not clear, cogent, and convincing evidence to support a finding that "there is a reasonable probability Respondent would neglect [her son] if he were returned to her care."

Because the evidence and findings are insufficient to support a finding that the child is likely to be neglected if returned to Respondent's care, we hold the trial court erred in terminating Respondent's parental rights on the ground of neglect.

C. *Dependency*

[3] Pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), a court may terminate parental rights on the ground that the parent is incapable of providing

for the proper care and supervision of the child and the incapability will continue for the foreseeable future. N.C.G.S. § 7B-1111(a)(6). The incapability under this statute "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." *Id.* "In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re T.B.*, *C.P.*, *& I.P.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (citations and quotation marks omitted).

Respondent argues the trial court erred in terminating her parental rights on the ground of dependency because the trial court failed to make any specific findings regarding Respondent's ability to care for her son at the time of the hearing. Respondent also argues that the evidence was insufficient to support the finding that she had a current incapability that would continue for the foreseeable future. We agree.

The trial court found in findings of fact 7, 10, and 12 that Respondent was unable to provide proper care for the child. However, this determination is more properly a conclusion of law as it requires the application of legal principles to the facts of the case, and as such must be supported by sufficient evidentiary findings. *See* N.C. Gen. Stat. § 7B-101(9) (2017); *Guox v. Satterly*, 164 N.C. App. 578, 583, 596 S.E.2d 452, 455, *disc. review denied*, 359 N.C. 188, 606 S.E.2d 906 (2004); *see also In re B.W.*, 190 N.C. App. 328, 335, 665 S.E.2d 462, 467 (2008) ("If a contested 'finding' is more accurately characterized as a conclusion of law, we simply apply the appropriate standard of review and determine whether the remaining facts found by the court support the conclusion.") (citations omitted).

For the same reasons discussed in sections A and B above, we hold the trial court's findings are insufficient to support its ultimate finding and conclusion that Respondent was incapable of providing for the proper care of her son and that such incapability would continue for the foreseeable future. As stated previously, the trial court failed to include any detailed findings pertaining to Respondent's progress or lack of progress in addressing her mental health concerns over the fifteen months prior to the termination hearing. Rather the findings regarding Respondent's mental health and parenting abilities pertain more to the historic facts of the case that occurred at least a year prior to the hearing, and the order contains no specific findings regarding Respondent's condition, mental health, and alleged incapability at the time of the hearing.

In support of Petitioners' assertion that, at the time of the termination hearing, Respondent was incapable of caring for her son, they testified to specific events occurring a year before the termination hearing. The only support occurring within six months of the termination hearing was that Respondent appeared tired at the December 2016 visit and arrived late to Petitioners' home the following morning. Petitioners did not present any evidence that Respondent was not following her mental health treatment recommendations. The uncontradicted evidence of Respondent's psychiatrist showed that Respondent was participating and following her ACT services, was committed to her treatment, and had been symptom free for over a year. Thus, we hold Petitioners failed to present clear, cogent, and convincing evidence to support the trial court's finding that Respondent was currently incapable of caring for her son and that such incapability would continue for the foreseeable future. *Cf. Matter of A.L.L.*, ___ N.C. App. ___, ___, 802 S.E.2d 598, 609 (2017) (upholding the trial court's termination of the mother's parental rights based on dependency, holding that evidence of the mother's "longstanding mental health conditions and her repeated failures to follow recommendations for treatment necessary to care for her children safely constituted clear, cogent, and convincing evidence to support the trial court's findings of dependency").

Because we hold that the evidence and findings were insufficient to support the trial court's ultimate finding and conclusion that grounds existed to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), the trial court erred in terminating Respondent's parental rights on the ground of dependency.

III. Conclusion

The trial court's findings were insufficient to support its ultimate findings and conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), or (6). Accordingly, we reverse the trial court's order terminating Respondent's parental rights as to her son.

REVERSED.

Judge STROUD concurs.

Judge BRYANT dissents with separate opinion.

BRYANT, Judge, dissenting.

Because I believe the evidence and findings were sufficient to support the trial court's ultimate finding that respondent failed to make reasonable progress in correcting the conditions which led to the child's removal to the satisfaction of the trial court, I would hold the findings support the conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate respondent's parental rights. Thus, for the following reasons, I respectfully dissent.

"If the trial court's findings of fact 'are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.' " *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 906 (2009) (quoting *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). We review whether a trial court's findings of fact support its conclusions of law *de novo*. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002) (citation omitted). "The trial court is 'subject to reversal for abuse of discretion only upon a showing . . . that the challenged actions are manifestly unsupported by reason.' " *In re J.L.H.*, 224 N.C. App. 52, 57, 741 S.E.2d 333, 337 (2012) (alteration in original) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Here, in support of its conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) to terminate respondent's parental rights, the trial court made the following evidentiary findings of fact:

> 7. Petitioners have known Respondent since she was a teenager and are intimately familiar with Respondent's mental health issues and treatment. Respondent has a bipolar diagnosis. Since the juvenile was placed with the caregivers in 2010, Respondent has had multiple episodes related to her mental illness that have left her incapable of properly caring for the juvenile. Petitioners have had intimate knowledge of these episodes.
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> 10. However, Respondent's behavior during the visits in Pennsylvania was consistently concerning and demonstrated an ongoing and continuing inability to provide proper care. In 2015, this Court changed the visitation order to no longer require Petitioners to house Respondent during her quarterly visits. Respondent's behavior in their

home was disturbing and was adversely impacting the juvenile. Respondent has not always acted in the juvenile's best interest during visits. By way of example, during one visit, Respondent indicated she was hungry. Petitioners allowed Respondent to take the juvenile to a restaurant. Respondent bought and ate food, but Respondent did not buy anything for the juvenile. By way of further example, the juvenile has directed Respondent to end a visit early so that she might rest. While Petitioners have felt comfortable leaving the juvenile with Respondent in their home for short unsupervised periods of time during visits, *Petitioners have never felt Respondent was capable of supervising the juvenile for any extended period of time.*

11. Respondent has been working with the UNC ACT ("Assertive Community Treatment") team for several years, since at least before Petitioners attempted to reunite the juvenile with Respondent in 2013. ACT provides "wrap-around" services for individuals with significant mental health concerns. Even with the provision of these intense services, Respondent is unable to provide proper care for the juvenile. Dr. VanderZwaag testified Respondent would be capable of parenting the juvenile with assistance, but Dr. VanderZwaag has never observed Respondent with the juvenile. Dr. VanderZwaag acknowledged Respondent was last hospitalized due to her mental health illness in December 2015, more than five years after this case began due to similar mental health concerns.

12. Petitioners have observed Respondent over the course of many years, and Petitioners have an intimate familiarity with Respondent's parenting abilities. Petitioners are convinced Respondent lacks the ability to properly care for the juvenile. Petitioners would not hesitate to reunite the juvenile with Respondent if they thought otherwise. Petitioners have allowed Respondent to have "extra" visitation outside of the court-ordered schedule. Petitioners did not file the termination petition lightly. The Court believes Petitioners and accepts their testimony as true.

(Emphasis added). The trial court then made ultimate findings of fact:

13. Respondent has neglected the juvenile and there is a reasonable probability Respondent would neglect the juvenile if he were returned to her care.

> 14. Respondent has willfully left the juvenile in placement outside the home for more than twelve months without showing to the satisfaction of this Court that reasonable progress under the circumstances has been made in correcting the conditions which led to the removal of the juvenile.
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> 15. Respondent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future. Respondent lacks an appropriate child care arrangement.

Respondent does not contest that she willfully left her child in placement outside the home for more than twelve months; indeed, it has been over five years. Instead, respondent contends—and the majority agrees—that the trial court's findings of fact are insufficient to support its ultimate finding that she failed to make reasonable progress in correcting the conditions that led to the child's removal. She challenges the findings as being "vague" and "incomplete," arguing that they do not address her progress or lack of progress leading up to the termination hearing. As a result, the majority has determined that the findings of fact are insufficient to support its conclusion that grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). I respectfully disagree.

To terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), "the trial court must perform a two-part analysis." *In re O.C. & O.B.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396 (2005) (citing *In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003)).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464–65, 615 S.E.2d at 396.

"Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *Id.* at

465, 615 S.E.2d at 396 (quoting *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001)). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the child[ ]." *Id.* (quoting *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995)).

According to unchallenged Finding of Fact No. 3, the child was removed from respondent's care due to respondent's mental health issues and drug use and DSS's concern for the juvenile's care and well-being. A review of the record and transcript indicates the competent evidence also supports the trial court's other findings of fact.

In Finding of Fact No. 7, the trial court found that respondent has had multiple episodes relating to her mental illness since her diagnosis in 2011. Respondent argues the finding fails to include any information pertaining to what constituted an "episode" and the nature of the "episodes," including respondent's condition and behavior during one.

However, the transcript reveals that the latest episode respondent experienced was "a manic episode," for which she was hospitalized and involuntarily committed. From these facts, the trial court could reasonably infer that these episodes, including the one she suffered fifteen months prior, were of a dangerous nature—at least one resulted in her hospitalization and involuntarily commitment. *See In re W.R.D.*, ___ N.C. App. ___, ___, 790 S.E.2d 344, 347 (2016) ("To support an involuntary commitment order, the trial court is required to 'find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is *dangerous to himself or others*.' " (emphasis added) (citation omitted) (quoting *In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863–64 (1993)). Thus, we conclude the competent evidence supports the trial court's Finding of Fact No. 7, which finding is also sufficiently specific to support the trial court's ultimate findings and conclusions of law. *See In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) ("[A] trial court must make adequate evidentiary findings to support its ultimate finding . . . ." (citation omitted)).

In Finding of Fact No. 10, the trial court found that respondent's behavior during her visits was "consistently concerning" and "disturbing." Respondent argues the trial court failed to find with any particularity what behavior it found to be "concerning" and "disturbing[,]" and whether this behavior related in any manner to respondent's mental health and her ability to care for the child.

To the contrary, the trial court included a specific example of respondent's behavior that the trial court found to be "disturbing"—the

fact that respondent took the juvenile to a restaurant and purchased food only for herself. By arguing that the trial court was insufficiently particular in making this finding, respondent is essentially asking this Court to reweigh the evidence, in other words, reconsider the evidence in making a determination of what constitutes "disturbing" or "concerning" behavior. This Court should decline to engage in such reweighing of the evidence.

Here, the competent evidence supports the trial court's Finding of Fact No. 10. At the hearing, the petitioner caregivers testified as follows regarding respondent's behavior:

> Q. . . . [Y]ou said earlier she was in and out of the hospital. Was she out of the hospital and into a hospital at any time when you were in Pennsylvania?
>
> A. Yes, she was.
>
> Q. When was that?
>
> Q. I think in 2015. But I remember she was in -- in the hospital in -- at UNC, but they felt that was too long a timespan in the psychiatric care. And then she had to go to a long -- longer term hospitalization.
>
> Q. How do you know that? She told you that?
>
> A. Yes, she told us.
>
> Q. Did that interfere with any of her visits?
>
> A. I think we had two. We -- we -- she had to skip a visit at the time.
>
> Q. When was the last visit you had with her? Or when was the last time -- she was in Pennsylvania to visit [the child]?
>
> A. Last Christmas 2016.
>
> Q. How did that visit go?
>
> A. That visit was a little choppy. She -- she -- on the day she was to be there at 5:00 -- at -- at noon, it was 2:30 we were calling her to say where are you, where are you? And the day before that she seemed too tired that [the child] had to say well, why don't you just go home and go to sleep?

. . . .

Q. During that visit did you -- your opinion change about whether you'd feel comfortable leaving [the child] with her as a full-time caregiver?

A. Yeah, it's -- it's one of those times we felt this -- this won't -- this won't work. It wouldn't work to -- to -- to leave her because the difficult thing is -- is -- it's not knowing which [respondent] were -- we have. We know [respondent] by nature is a very caring about her son. But in terms of her engagement and doing the things that are necessary in making the right decisions, it's -- we feel it's off in deciding -- like the prior visit she would decide that taking portraits for the son is more important than getting him say pull-ups to keep him from soiling his bed. . . .

. . . .

A. . . . [W]e suggested to her -- well, see [the child] was soiling his bed and we -- we -- we get him pull-ups and we -- and we said well, why don't you get him some pull-ups. Just invest a little bit in getting some pull-ups. But she said I only have money to have portraits done, so I can't get -- you know, the pull-ups is not something I can get.

And so -- and so it happened that the day that she went to do the portrait, she couldn't do that at the time because they didn't have appointment and she took him out to -- she went with him, because she felt she was hungry, she went and -- and sat and ate. And -- and so [the child] said well, I'm hungry now when he -- when they returned. And she said well, that you -- did you eat with your mom and he said well, he had some bite[s] from her meal, but she ate and did not provide food for him at the time. So it's just -- that's what I mean by not knowing which [respondent] is going to show up.

. . . .

Q. In your opinion, can she be a full-time caregiver to [the child]?

A. No, not at this time I don't think so.

Q. Do you feel pretty confident about that?

A. Yes.

The other petitioner caregiver testified as follows regarding respondent's progress:

> Q. Do you have concerns about [respondent's] behavior that you've witnessed during [her] visits [with the child]?
>
> A. I've witnessed [respondent] not being the same [respondent] each time. She's always a little different. Sometimes she's very attentive. Like one visit I thought let's just send him home right away, because she was so awesome with him. She helped him with his homework and she was -- she was loving and she did all the right things and she disciplined him.
>
> And then the next one, she was totally out to lunch. It was like a totally different person compared to the person that was there before. And it -- and it's been consistent like that. Some days -- some visits she'd be -- she'd be absolutely wonderful and some visits she just wasn't there.
>
> Q. Are there any specific instances of behavior that you found troubling?
>
> A. Well, the last one, because it's in my mind so clearly is when she drove and she got in a little later than she thought. So she went to -- and slept and then she woke up and came over to the house and [the child] felt that she was tired. And he suggested that she go home. And -- and he told me, he said, you know, I told my mom that she's tired and she has to go home. And I said, oh, okay. You know, what am I going to say? [The child] loves his mother dearly. He knows his mother. He doesn't believe that his mother can take care of him, but he cares very much about her wellbeing.
>
> So the next day, we were waiting for her to come and at 2:30 I called and I said well, aren't you going to come and have time with [the child]? And she was just getting up. So by the time she did come, it was a little bit later. But [the child] happened to be sick that day. So she was able to stay longer with him. And she even -- I had to go out and she stayed with him for two hours. I had set up everything so that it was pretty simple for her to -- to -- to do.

> I mean, I had dinner ready for her to make and I had -- I had his -- his stuff altogether and so it was pretty straightforward.
>
> . . . .
>
> Q. Would you support the mother having custody of [the child] if you thought she could do it?
>
> A. If I thought she could do it, I would definitely support that, yes.
>
> Q. I gather you do not think she can do it?
>
> A. I do not think she can do it at this time.

The testimonial evidence above shows that even as late as December 2016, respondent's last visit with the juvenile, she had not progressed to the point where she could take custody and care of the child.

In Finding of Fact No. 11, the court found that "[e]ven with the provision of [the ACT] intense services, Respondent is unable to provide proper care for the juvenile." Respondent argues the trial court made no finding as to why or how, despite these services, respondent was not able to provide proper care for the child or what specifically she was doing or not doing to address her mental health issues. Respondent's argument to the contrary, the testimony excerpted above is competent evidence that illustrates that respondent continued to exhibit signs of mental instability and was not able to provide proper care for the child—petitioners, whom the trial court specifically found it "believed" and that whose trial testimony it accepted "as true," testified that respondent could not properly care for the child at the time of the hearing. There was simply no evidence before the trial court that respondent had made reasonable progress—for over five years—in correcting the conditions that led to removal of the child.

The competent evidence supports the trial court's Findings of Fact Nos. 10 and 11, which in turn support the trial court's ultimate finding and conclusion that respondent has willfully left the child in placement outside the home for more than twelve months without showing reasonable progress has been made under the circumstances. Because the evidence and findings were sufficient to support the court's ultimate finding that respondent failed to make reasonable progress in correcting the conditions which led to the child's removal to the satisfaction of the court, I would hold the findings support the conclusion that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate respondent's

parental rights. Therefore, there was no abuse of discretion by the trial court in ordering the termination of respondent's parental rights.

Accordingly, I would affirm the trial court's order terminating respondent's parental rights to the child. I respectfully dissent from the majority opinion.

PEGGY BREWINGTON JACOBS, Plaintiff

v.

EVELYN BREWINGTON, Co-Executrix of the Estate of Ernest Harold Brewington, Sr., and SABRINA BREWINGTON, Co-Executrix of the Estate of Ernest Harold Brewington, Sr., Defendants

No. COA17-8

Filed 20 March 2018

Wills—devise to pay relative's bank loan—creditor—estoppel

The trial court did not err by concluding that plaintiff sister was entitled to a devise from her brother's estate for the sum required to pay off a bank loan, where the co-executrixes of decedent's estate were estopped from claiming that plaintiff was a creditor of the estate based on their affidavit averring that the estate had no creditors.

Appeal by defendants from judgment entered 5 August 2016 by Judge James M. Webb in Superior, Court, Cumberland County. Heard in the Court of Appeals 16 May 2017.

Ray Law Firm PLLC, by Steven J. O'Connor, for plaintiff-appellee.

McCoy Wiggins Cleveland & McLean PLLC, by Richard M. Wiggins, for defendant-appellant.

STROUD, Judge.

Plaintiff's brother, Ernest Harold Brewington, Sr., died on 19 May 2013, leaving a holographic will. The holographic will provided in relevant part, "All insurance proceeds will go in a trust account after the following . . . 5. Pay the note @ BB&T that's in my sister Peggy's name[.]" On 21 June 2013, letters testamentary were issued to defendants to serve as co-executrixes of the decedent's estate. On 26 September 2013,

plaintiff presented her claim under the will to defendants, requesting payment of the BB&T loan, which she specifically identified by loan number, principal balance, and per diem interest owed. On 25 November 2013, defendants rejected plaintiff's claim "in full" "pursuant to N.C. Gen. Stat. § 28A-19-1 et seq." North Carolina General Statute § 28A-19-1 *et seq.* is in Article 19 of our General Statutes entitled, "CLAIMS AGAINST THE ESTATE" which is in Chapter 28A entitled, "ADMINISTRATION OF DECEDENTS' ESTATES[.]" *See generally* N.C. Gen. Stat. Chap. 28A, Art. 19 (2013).

On 13 August 2015, plaintiff filed a "COMPLAINT BY LEGATEE TO RECOVER LEGACY[.]" Plaintiff alleged that she was entitled to receive payment under the her brother's will of the sum required to pay off the BB&T loan. Plaintiff requested the trial court to compel payment from defendants, the co-executrixes of her brother's estate. Defendants answered plaintiff's complaint, alleging plaintiff was a *creditor* of the estate and had received "$38,593.07 in life insurance proceeds[.]" Defendants' implicit position was that plaintiff's only possible claim was as a creditor under the estate and not as a legatee, and payment of the debt had been fulfilled in part with the $38,593.07 payment. Defendants also requested dismissal under North Carolina Rule of Civil Procedure 12(b)(6) and argued plaintiff's claim was barred by the "[a]pplicable" statute of limitations because "Plaintiff's claim is properly treated as that of a creditor[,]" although the answer did not cite a particular statute.

On 7 October 2015, the trial court denied defendant's motion to dismiss. After a bench trial, on 5 August 2016, the trial court entered an order with many findings of fact, none of which are challenged on appeal. Relevant to the issue on appeal, the trial court found "[t]he only note at BB&T that plaintiff had at the time of decedent's death . . . had a balance at or about . . . $86,230.48 with interest at 4.1% per annum[.]" The trial court concluded that "[t]he will of the decedent in Section 5.E. made an indirect devise to the plaintiff by directing that decedent's funds were to be used to pay a debt owned by the plaintiff to a third party, Branch Banking and Trust Company, which debt was Branch Banking & Trust Company Loan . . . in the name of the plaintiff." The trial court found:

> Defendants filed an Affidavit of Notice to Creditors on September 25, 2013 which stated that no copy of the Notice to Creditors required by G.S. 28A-14-1 had been mailed or personally delivered because, after making a reasonable effort, within the time allowed by law, they were satisfied that there were no persons, firms or corporations having unsatisfied claims against the estate of the decedent. The

> defendants did not mail or deliver to plaintiff a Notice to Creditors as is described in N.C Gen. Stat. §28A-14-1.

The trial court concluded that "[t]he rejection of the creditor's claim filed by the plaintiff and the statute of limitations applicable to such claim, N.C. Gen. Stat. § 28A-19-3, does not bar the claim of an heir or devisee to their respective shares or interests in a decedent's estate." The trial court entered judgment for plaintiff and ordered defendants, the co-executrixes of the estate, to pay $91,949.07 with interest. Defendants appeal.

Defendants argue that the trial court erred in determining plaintiff "was entitled to indirect devise" because she was a creditor of the estate. Whether plaintiff was a creditor of the estate is a question of law we review *de novo* on appeal. *Spears v. Betsy Johnson Mem'l Hosp.*, 210 N.C. App. 716, 719, 708 S.E.2d 315, 318 (2011) ("[I]ssues involving statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." (citation and quotation marks omitted)). Defendants have not challenged any of the trial court's findings of fact supporting its conclusion of law that plaintiff was not a creditor of the estate, and we agree with the trial court's conclusion.

We are unaware of any North Carolina authority which discusses or interprets what constitutes an "indirect devise." A devise would usually be classified as a specific devise, a general devise, or a residuary devise. *See* N.C. Gen. Stat. § 28A-15-5 (2013).

> The general rules for determining whether a bequest is general or specific in nature are relatively clear, but their proper application to the innumerable variations in wording and circumstances presented by testators to the courts is much less certain. A specific legacy is defined as a gift of a particular fund or object -- a particular thing or money specified and distinguished from all of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor. In order to avoid having to apply the principle of ademption, courts usually presume that the testator intended to create a general legacy when he fails to make his intention clear. The tendency of the courts is to hold that a bequest is not specific unless the intent clearly appears in the will.
>
> A general bequest is defined as a gift of property which does not specify the exact unit of property which the legatee is to receive.

Edmundson v. Morton, 332 N.C. 276, 283–84, 420 S.E.2d 106, 111 (1992) (citations and quotation marks omitted).

The classification of a devise is normally not a disputed issue unless the estate is not sufficient to satisfy all devises, in which case devises abate in a particular order, depending upon the type of devise. *See generally* N.C. Gen. Stat. § 28A-15-5. Abatement is not an issue here, since there is no indication that the decedent's estate was insufficient to satisfy all devises and debts. Whether the direction to pay the BB&T debt owed by plaintiff was a general devise, a specific devise, or an "indirect devise," as the trial court described it, the issue here is only whether it was some form of devise. Defendants have argued only plaintiff is instead a *creditor*.

We also note that defendants' claim is contradicted by their own sworn affidavit. On 25 September 2013 defendants filed an "AFFIDAVIT OF NOTICE TO CREDITORS" – Form AOC-E-307, Rev. 3/07 under North Carolina General Statutes §§ 28A-14-1, -14-2, averring the estate had no creditors. "Our Courts have continuously recognized that a party may not assert a particular position in an action, and then assert a contrary position in subsequent proceedings after having accepted the benefits." *Meehan v. Meehan*, 116 N.C. App. 622, 626, 448 S.E.2d 851, 853 (1994). "[J]udicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the same or related litigation." *Price v. Price*, 169 N.C. App. 187, 191, 609 S.E.2d 450, 452 (2005) (citation and quotation marks omitted). Because defendants' affidavit averred the estate had no creditors, and the trial court so found, they are now estopped from claiming plaintiff is a creditor in this lawsuit to recover under the estate. *See generally id.*

Defendants' only other argument on appeal is that plaintiff's claim was barred by the statute of limitations for creditors under North Carolina General Statute § 28A-19-16 which defendants contend was "within three months after the written rejection of the claim." But since plaintiff is not a creditor, any statute of limitations applicable to creditors does not apply to her. Defendants have not alleged or argued any other statute of limitations would bar her claim.

We affirm the trial court's judgment.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

JAMIE FERNANDEZ MARTINEZ, Administrator of the Estate of MARIA J. FERNANDEZ JIMENEZ, Plaintiff

v.

WAKE COUNTY BOARD OF EDUCATION, Defendant. North Carolina Industrial Commission, I.C. No. TA-24792 EDUARDO FERNANDEZ JIMENEZ, Plaintiff

v.

WAKE COUNTY BOARD OF EDUCATION, Defendant. North Carolina Industrial Commission, I.C. No TA-24793 JAMIE FERNANDEZ MARTINEZ, Plaintiff

v.

WAKE COUNTY BOARD OF EDUCATION, Defendant

No. COA17-475

Filed 20 March 2018

1. Appeal and Error—interlocutory orders—denial of motion to dismiss—governmental immunity—substantial right

The Court of Appeals had jurisdiction in a Tort Claims Act case to hear defendant Board of Education's appeal of an interlocutory order denying its motion to dismiss that were grounded on governmental immunity since they affected a substantial right and were immediately appealable.

2. Tort Claims Act—jurisdiction—administrative negligence claims—school bus accident

The Industrial Commission erred in a Tort Claims Act case by denying defendant Board of Education's motion to dismiss various administrative negligence claims arising from the death of a 14-year-old girl who was struck by an oncoming vehicle while crossing the street to board her school bus. Pursuant to *Huff v. Northampton County Board of Education*, 259 N.C. 75 (1963), the Industrial Commission lacks jurisdiction over any claims other than those falling within the express language of N.C. Gen. Stat. § 143-300.1.

Appeal by defendant from order entered 20 January 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2017.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and Law Offices of James Scott Farrin, by Marie D. Lang, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, Assistant Attorney General

Alexander G. Walton, and Special Deputy Attorney General Christina S. Hayes, for defendant-appellant.

Tin Fulton Walker & Owen, PLLC, by Sam McGee, and Maginnis Law, PLLC, by T. Shawn Howard, for North Carolina Advocates for Justice, amicus curiae.

DAVIS, Judge.

In this appeal from an action brought under North Carolina's Tort Claims Act, we consider the scope of the Industrial Commission's jurisdiction over negligence claims related to the operation of school buses. The Wake County Board of Education (the "Board") appeals from an order entered by the Commission denying their motion to dismiss various claims arising from the death of Maria J. Fernandez Jimenez, a 14-year-old girl who was struck by an oncoming vehicle while crossing the street to board her school bus.

In its 20 January 2017 order, the Industrial Commission concluded that it possessed jurisdiction under the Tort Claims Act to hear not only (1) the plaintiffs' claims for negligence on the part of the school bus driver and maintenance personnel but also (2) their claims against various administrators within the Wake County Public School System alleging negligence in the development and design of school bus routes as well as in making various hiring, training, and staffing decisions. Because we conclude that the Industrial Commission lacks jurisdiction over this latter category of claims, we reverse the Commission's 20 January 2017 order and remand for further proceedings.

Factual and Procedural Background

On 25 March 2013, Maria lived with her parents and her brother Eduardo in Garner, North Carolina. Their home was located on North Carolina Highway 50, a divided two-lane road with a posted speed limit of 55 miles per hour. Maria and Eduardo both attended Garner Magnet High School, a Wake County public school. The two siblings were transported to and from school each day on a school bus.

The bus stop for Maria was located across the street from her home and required her to cross Highway 50 prior to boarding the bus. Upon picking up Maria and Eduardo, the school bus would then travel southbound on Highway 50 for about a quarter of a mile before turning around and passing directly in front of their house while traveling northbound.

On 25 March 2013, Gloria Smith was the school bus driver assigned to Maria's route. That morning, Smith stopped at the designated school bus stop across from Maria's house at approximately 6:32 a.m. Maria began crossing the street as Smith stopped the school bus. Around the same time, a vehicle driving along Highway 50 at a speed of approximately 50 miles per hour failed to stop for the school bus and fatally struck Maria as she was crossing the road.

Pursuant to N.C. Gen. Stat. § 143-300.1, several of Maria's family members and her estate brought an action under the Tort Claims Act in the Industrial Commission against the Board. In accordance with N.C. Gen. Stat. § 143-297, they filed in conjunction with their complaint affidavits naming various Board employees whose alleged negligent acts formed the basis for their claims against the Board. In addition to Smith, the individuals listed in the affidavits as having allegedly committed negligent acts and omissions contributing to Maria's death included Anthony Tata, Superintendent of the Wake County Public School System ("WCPSS"); Stephen Gainey, Interim Superintendent of WCPSS; Drew Cook, Principal of Garner Magnet High School; Donald Haydon, Jr., Chief Facilities and Operations Officer of WCPSS; Robert E. Snidemiller, Jr., Senior Director of Transportation for WCPSS; and unnamed maintenance personnel employed to maintain WCPSS school buses.

With regard to Smith, Plaintiffs asserted that she was negligent in (1) failing to report to her supervisor that the assigned bus stop was dangerous and that a safer alternate stop existed; (2) instructing Maria and Eduardo to cross the street prior to her arrival at the bus stop; (3) failing to activate her flashers upon arriving at the bus stop; (4) failing to warn Maria of the oncoming vehicle that struck her; and (5) failing to conduct a prior inspection of the bus she was operating. Plaintiffs further alleged that unnamed maintenance workers were negligent in failing to ensure regular maintenance, inspection, and repair of the bus being operated by Smith, including its warning lights, signs, and safety signals.

With respect to the WCPSS administrators named in the affidavits, Plaintiffs alleged that they had been negligent regarding (1) the development and design of the bus route and bus stop to which Maria was assigned; (2) the organization and staffing of the WCPSS transportation department; (3) the failure to ensure the proper working order of school buses and their warning systems; (4) the failure to sufficiently instruct and train school bus drivers; (5) the failure to adequately instruct Maria's family members regarding the safest

way in which to reach their assigned bus stop; and (6) the failure to ensure a safe means for Maria to board the school bus.[1]

On 1 May 2015, the Board filed a motion to dismiss Plaintiffs' administrative negligence claims pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground that "a tort claim cannot be filed in the North Carolina Industrial Commission against individuals who are not the driver, transportation safety assistant, or monitor of a public school bus." The Board did not move to dismiss the negligence claims premised upon the conduct of Smith or the unnamed maintenance personnel. On 18 May 2015, Deputy Commissioner J. Brad Donovan entered an order granting the Board's motion to dismiss, stating in pertinent part as follows:

> In the instant case, plaintiffs allege sufficient facts regarding negligence on the part of the bus driver to survive a motion to dismiss these claims. In fact, [the Board] has not moved to dismiss any more than the claims of negligent route planning and design. Accordingly, the ruling of the undersigned allowing [the Board's] Motion to Dismiss is limited to the alleged negligence on the part of members of the school board in the development, design, establishment, implementation, designation and assignment of routes and school bus stops and instruction, training and education of bus drivers and others.

Plaintiff appealed the deputy commissioner's decision to the Full Commission. On 20 January 2017, the Full Commission issued an order vacating Deputy Commissioner Donovan's order and denying the Board's motion to dismiss. The Board filed a timely notice of appeal to this Court.

Analysis

The Board's sole argument on appeal is that the Commission erred in denying its motion to dismiss Plaintiffs' administrative negligence claims. It contends that the Industrial Commission possesses jurisdiction under the Tort Claims Act *only* for claims arising from the negligence of school bus drivers, bus monitors, transportation safety assistants, and maintenance personnel.

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1. Throughout this opinion, we refer collectively to this category of claims against the WCPSS administrators as the "administrative negligence claims."

I. Appellate Jurisdiction

[1] As an initial matter, we must determine whether this Court possesses jurisdiction over the Board's interlocutory appeal. The Board's appeal is based on the denial of their motions under Rules 12(b)(1) and (2) in which they asserted the lack of both personal jurisdiction and subject matter jurisdiction with respect to the administrative negligence claims. In this appeal, the Rule 12(b)(1) and Rule 12(b)(2) motions raise a common question — that is, whether the Board is subject to suit in the Industrial Commission with regard to Plaintiffs' administrative negligence claims.

It is well settled that "[a] county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990) (citation omitted), *disc. review improvidently allowed*, 329 N.C. 691, 406 S.E.2d 579 (1991). "According to well-established North Carolina law, governmental immunity is an immunity from suit rather than a mere defense to liability. For that reason, this Court has held that denial of dispositive motions such as motions to dismiss that are grounded on governmental immunity affect a substantial right and are immediately appealable." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 363, 731 S.E.2d 245, 248 (2012) (internal citations, quotation marks, brackets, and ellipsis omitted). Therefore, we possess jurisdiction to hear the Board's appeal.

II. Jurisdiction of Industrial Commission under N.C. Gen. Stat. § 143-300.1

[2] In order to analyze the Board's arguments, it is helpful to first review the basic principles surrounding a local school board's potential waiver of its immunity. As noted above, due to their status as governmental entities, local boards of education are immune from tort liability absent a waiver of their governmental immunity. The North Carolina General Assembly has provided for the waiver of their immunity in two ways.

First, the Tort Claims Act waives the governmental immunity of school boards for certain types of negligence claims specified therein. The relevant portion of the Tort Claims Act dealing with claims arising from the operation of school buses is N.C. Gen. Stat. §143-300.1. This statute states, in pertinent part, as follows:

> (a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims

> against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel or as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle. . . .

N.C. Gen. Stat. § 143-300.1(a) (2017).

Second, the General Assembly has authorized local boards of education to waive their governmental immunity from other types of tort claims through the purchase of liability insurance. Pursuant to N.C. Gen. Stat. § 115C-242, local boards can elect to waive their governmental immunity from tort actions in North Carolina's superior courts by purchasing liability insurance. That statute provides, in relevant part, as follows:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.
>
> . . . .
>
> Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.

N.C. Gen. Stat. § 115C-42 (2017).

We have held that — per the statute's concluding proviso — N.C. Gen. Stat. § 115C-42 "by its own terms, apparently does not apply to the type of claims which are covered by G.S. 143-300.1[.]" *Smith v. McDowell Cty. Bd. of Educ.*, 68 N.C. App. 541, 543 n.1, 316 S.E.2d 108, 110 n.1 (1984). Therefore, the statutory framework erected by the General Assembly does not provide for concurrent jurisdiction between the Industrial Commission and North Carolina's superior courts. *See Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 251, 608 S.E.2d 80, 86 (2005) ("[I]f a plaintiff's claim against a Board of Education falls within the scope of N.C. Gen. Stat. § 143-300.1, then N.C. Gen. Stat. § 115C-42 excludes the claim from the waiver of immunity. Without a waiver of immunity, the Board of Education cannot be sued in superior court."), *rev'd on other grounds*, 360 N.C. 321, 626 S.E.2d 263 (2006).

As a result of these statutes, two principles are apparent: (1) the governmental immunity of local school boards no longer exists for claims falling within N.C. Gen. Stat. § 143-300.1 and such claims must be brought in the Industrial Commission; and (2) all other tort claims against school boards not similarly covered by the Tort Claims Act are barred unless the school board has opted to purchase liability insurance that provides coverage for the specific claim being asserted and in such cases the claim must be brought in superior court.

Based on the statutory language of N.C. Gen. Stat. § 143-300.1(a), it is evident that the Industrial Commission possesses jurisdiction over claims alleging negligence by school bus drivers, monitors, transportation safety assistants, or maintenance personnel. The question in this appeal, however, is whether the Industrial Commission also possesses jurisdiction over claims brought pursuant to § 143-300.1 that arise from the negligent acts of administrators. If so, then the Industrial Commission properly denied the Board's motion to dismiss in the present case. If not, then the Board's motion to dismiss should have been granted.

Our Supreme Court has made clear that "[t]he state and its governmental units cannot be deprived of the sovereign attributes of immunity except by a plain, unmistakable mandate of the General Assembly. In addition, State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (internal citations, quotation marks, and brackets omitted). "When we review a statute that operates to waive governmental immunity, the statute must not only be strictly construed, but also be given its plain meaning and enforced as written, so long as its language is clear and unambiguous." *Id.* at 615, 781 S.E.2d at 286 (internal citations omitted).

In analyzing the parties' respective arguments in this appeal, we recognize at the outset that we are not writing on a clean slate. The seminal case from our Supreme Court addressing the scope of the Industrial Commission's jurisdiction to hear claims related to the operation of school buses pursuant to N.C. Gen. Stat. § 143-300.1 is *Huff v. Northampton County Board of Education*, 259 N.C. 75, 130 S.E.2d 26 (1963). In *Huff*, two high school students riding a school bus operated by the Northampton County Board of Education were involved in a fight that was broken up by the bus driver. Although the driver had been instructed to report any misconduct on the school bus to the principal of the high school, he failed to report this incident. *Id.* at 76, 130 S.E.2d at 27. Seven months later, the same two students got into another altercation, and one of the students seriously wounded the other with a knife. On that day, a substitute bus driver with no knowledge of the prior altercation was driving the bus. *Id.* at 77, 130 S.E.2d at 27.

The victim filed claims in the Industrial Commission pursuant to N.C. Gen. Stat. § 143-300.1 alleging negligence on the part of the two bus drivers as well as by the school principal for failing to have a bus monitor present on the date of the stabbing. *Id.* at 79-80, 130 S.E.2d at 29. The Commission determined that "the plaintiff did not suffer any damages by any negligent act or omission of the defendant County Board of Education, nor were the damages suffered by the plaintiff reasonably foreseeable by the said Board of Education." *Id.* at 77, 130 S.E.2d at 27.

On appeal, our Supreme Court affirmed the Commission's decision. In ruling that the plaintiff could not prevail on her claims arising from the alleged negligence of the school principal, the Court stated as follows:

> An award against a county board of education under the provisions of the Tort Claims Act *may not be predicated on the negligent act or omission of a school principal or the county board of education*, but if an award is made it must be based on the negligent act or omission *of the driver* of a public school bus who was employed at the time by the county or city administrative unit of which such board was the governing body.

Id. at 77, 130 S.E.2d at 28 (emphasis added).

With regard to the victim's claims of bus driver negligence, the Court determined that the evidence was "insufficient to support a finding that the negligent acts or omissions of . . . the drivers of the school bus involved, on the occasions complained of, were the proximate cause of the plaintiff's injuries." *Id.* at 80, 130 S.E.2d at 29. The Court then

reiterated that allegations of negligence on the part of other employees cannot be brought in the Industrial Commission:

> [A]s heretofore pointed out, the Tort Claims Act does not authorize a recovery against a county board of education for the negligent act or omissions of its agents, servants and employees *except for a claim based upon a negligent act or omission of a driver* of a school bus employed by the board from which recovery is sought.
>
> A county board of education, unless it has duly waived immunity from tort liability . . . , is not liable in a tort action or proceeding involving a tort except such liability as may be established under our Tort Claims Act.

Id. at 79, 130 S.E.2d at 29 (emphasis added and citation and quotation marks omitted).

Thus, the only logical reading of *Huff* is that the types of administrative negligence claims at issue in the present appeal cannot be brought in the Industrial Commission under N.C. Gen. Stat. § 143-300.1. To the contrary, *Huff* makes clear that only the limited types of claims expressly referenced in the statutory text may be brought under N.C. Gen. Stat. § 143-300.1.

Plaintiffs contend, however, that the Supreme Court's ruling in *Huff* was modified by its later decision in *Newgent v. Buncombe County Board of Education*, 114 N.C. App. 407, 442 S.E.2d 158 (1994) (Orr, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 340 N.C. 100, 455 S.E.2d 157 (1995). In *Newgent*, an elementary school student was struck and killed by an automobile while crossing a busy highway in order to reach his bus stop. *Id.* at 410, 442 S.E.2d at 160. Prior to the accident, the school bus driver assigned to the child's route would "drive by . . . the side on which the deceased child lived, traveling in a southerly direction. She would turn the school bus around and travel the same route in a [n]ortherly direction" before picking up the child on the side of the highway opposite where he lived. *Id.*

The administrator of the child's estate filed a claim under the Tort Claims Act against the local school board in the Industrial Commission alleging that the bus driver had been negligent in "failing to inform the principal and decedent's parents of facts [she] observed and alternative routes [she] should have taken while operating the bus in the course of her employment." *Id.* No theory of negligence was asserted against any school board employee other than the driver. The panel majority in

this Court held that the Commission lacked jurisdiction over this claim because the bus driver could not "be considered to have been operating the bus at the time of the negligent acts complained of[.]" *Id.* at 409, 442 S.E.2d at 159.

In a dissenting opinion ultimately adopted by our Supreme Court, however, then-Judge Orr determined that the Commission did possess jurisdiction. *Id.* Judge Orr explained his reasoning as follows:

> [A]t the time [the bus driver] was operating the bus in the course of her employment, she saw the decedent, an elementary aged child, cross the busy road twice on his own, and she could allegedly see that the bus stop was in an area of limited visibility for a pedestrian. Further, while she was operating the bus in the course of her employment, every morning [she] would drive by Frisbee Road in a southerly direction. If [she] had picked up decedent while she was traveling in a southerly direction instead of turning the bus around and picking him up while she was driving the bus in a northerly direction, decedent would not have had to cross the highway and thus be exposed to the danger of crossing the highway.
>
> The alleged acts and omissions of failing to inform the principal and decedent's parents arose out of events that occurred while [the bus driver] was operating the bus in the course of her employment. . . . While the majority relies on the language of N.C. Gen. Stat. § 143-300.1 requiring that the driver be operating the public school bus "at the time of the alleged negligent act or omission" to defeat plaintiff's claim based on a lack of jurisdiction, I find the affidavit sufficient to set out facts arising from the actual operation of the school bus[.]

Id. at 411-12, 442 S.E.2d at 160-61. Judge Orr further stated his belief that the legislature did not intend for N.C. Gen. Stat. § 143-300.1 "to preclude the Industrial Commission from hearing tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." *Id.* at 409, 442 S.E.2d at 159.

Thus, *Newgent* broadened the circumstances under which a school bus driver could be held liable under N.C. Gen. Stat. § 143-300.1. However, the fatal flaw in Plaintiffs' argument is that *Newgent* did not

involve claims premised upon a theory of negligence against any school board employee other than the bus driver herself. Accordingly, it did not authorize — or, for that matter, even address — the type of administrative negligence claims foreclosed by *Huff* and at issue in the present appeal.

This Court has applied the principles set out in *Newgent* in two published decisions. *Stein* involved the failure of a school bus driver and bus monitor to report a conversation the bus monitor overheard on a school bus in which two juveniles with behavioral disabilities discussed a plan to commit armed robbery and murder. *Stein*, 168 N.C. App. at 245, 608 S.E.2d at 82. Although the bus monitor informed the bus driver of the conversation, neither the driver nor the monitor informed anyone else associated with the school system of the juveniles' statements. One week later, the two juveniles participated in a crime in which two persons were robbed and shot. *Id.* at 245-46, 608 S.E.2d at 82.

The victims filed suit in superior court against the Asheville City Board of Education alleging that the bus driver and monitor were negligent in failing to report the conversation they had overheard. *Id.* at 251, 608 S.E.2d at 86. The trial court dismissed the claims, holding that they were required to have been brought in the Industrial Commission. In affirming the trial court's ruling, we stated as follows:

> Plaintiffs argue that the statute does not apply because their claims do not arise as a result of any mechanical or other defect in the bus caused by a negligent act or omission of the driver.
>
> The plain language of the statute, however, makes it applicable not only to mechanical defects affecting the bus, but also claims arising "as a result of any alleged negligent act or omission" of a driver or monitor.
>
> . . . .
>
> *Huff*, *Newgent*, and our review of other cases involving N.C. Gen. Stat. § 143-300.1 establish that the Industrial Commission possesses jurisdiction over plaintiffs' claims against the Asheville Board.

Id. at 250, 608 S.E.2d at 85 (citation omitted). Notably, no administrative negligence claims were asserted by the plaintiffs in *Stein*.

The second published case from this Court applying *Newgent* is *Stacy v. Merrill*, 191 N.C. App. 131, 664 S.E.2d 565 (2008). In *Stacy*, an elementary school student riding his bicycle home from school lost

control and fell into the path of a moving school bus, resulting in his death. *Id.* at 132, 664 S.E.2d at 566. The child's father filed a civil action against the Alamance-Burlington Board of Education and several of its administrators in superior court. The complaint alleged, in pertinent part, the following negligent acts:

> (1) designing a pedestrian, bicycle and vehicular traffic plan with no clearly marked pedestrian or bicycle lanes, with no fence, sidewalk, curb or other structure to separate pedestrian and bicycle traffic and vehicular traffic; (2) failing to supervise the elementary school children leaving the school campus; (3) failing to supervise or provide adequate training of bus drivers . . . ; (4) failing to provide a reasonably safe exit route for the students at Andrews Elementary; (5) failing to ensure a safe, alternate means of travel between home and school for students who were not provided transportation by defendants; and (6) failing to teach children who were not provided transportation the safe manner in which to walk, ride, and travel in order to avoid injury and/or death.

Id. at 133, 664 S.E.2d at 566.

On the same day that the plaintiff filed the lawsuit in superior court, he also filed an action under the Tort Claims Act in the Industrial Commission. *Id.* at 133, 664 S.E.2d at 566-67. In that proceeding, he alleged that the child's death was the result of negligence on the part of the school bus driver. *Id.* at 133, 664 S.E.2d at 567.

In the lawsuit filed in superior court, the trial court dismissed the plaintiff's claims for lack of jurisdiction. On appeal, this Court upheld that ruling. *Id.* at 134, 664 S.E.2d at 567. Citing *Newgent*, we summarily stated — without any mention of *Huff* or any explanation of how administrative negligence claims could be encompassed within the narrow language of N.C. Gen. Stat. § 143-300.1 — that "[u]nder the facts alleged in their amended complaint, plaintiffs' claims are inseparably connected to events occurring at the time a school bus driver was operating the bus in the course of his employment, and thus fall within the scope of N.C. Gen. Stat. 143-300.1." *Id.* at 136, 664 S.E.2d at 568 (citation, quotation marks, and brackets omitted).[2]

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2. We further held in the alternative that even assuming *arguendo* the Industrial Commission did not have exclusive jurisdiction, the board had not purchased liability insurance covering the plaintiff's claims and, therefore, the board's governmental immunity had not been waived.

Having reviewed the relevant case law, we now apply the principles contained therein to the present case. All of the parties to this appeal submit that confusion exists within the bench and bar as to the proper scope of the Industrial Commission's jurisdiction over administrative negligence claims in connection with the operation of school buses. We believe the source of this confusion is that our decision in *Stacy* cannot be reconciled with the Supreme Court's ruling in *Huff*. Quite simply, *Huff* makes clear that the Industrial Commission lacks jurisdiction over any claims other than those falling within the express language of N.C. Gen. Stat. § 143-300.1, meaning that the types of administrative claims asserted by Plaintiffs here cannot be brought in the Industrial Commission under the Tort Claims Act. *Stacy*, however, reaches the opposite result.

As a general proposition, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *see also State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004) ("While . . . a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.").

However, it is equally clear that "this Court has no authority to reverse existing Supreme Court precedent." *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014); *see also Mahoney v. Ronnie's Rd. Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996) ("[I]t is elementary that we are bound by the rulings of our Supreme Court[.]" (citation omitted)), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997).

In *Respess*, we declined to follow a prior decision of this Court where the decision "directly conflicts with prior holdings of . . . our Supreme Court and therefore does not control our decision in the instant case." *Respess*, 232 N.C. App. at 625, 754 S.E.2d at 700-01; *see State v. Jones*, __ N.C. App. __, __, 802 S.E.2d 518, 523 (2017) ("We have examined [two Court of Appeals decisions] and conclude that these cases fail to follow the binding precedent established by [our Supreme Court], and as a result, do not control the outcome in the present case."); *see also Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (holding that this Court lacks authority to overrule decisions of our Supreme Court and possesses a "responsibility to follow those decisions, until otherwise ordered by the Supreme Court"). Based on those cases, it is clear that where a prior ruling of this Court is in conflict with binding Supreme

Court precedent, we must follow the decision of the Supreme Court rather than that of our own Court.

Accordingly, we are compelled to follow *Huff* instead of *Stacy* because *Huff* is a decision from our Supreme Court that has never been overruled. The only way that the holding in *Huff* would not be binding upon us would be if *Newgent* constituted a change in the law on this issue by the Supreme Court, thereby expressly or implicitly overruling *Huff*. However, that is not the case. As discussed above, *Newgent* dealt solely with the issue of bus *driver* negligence. The alleged negligent acts or omissions in *Newgent* that arose out of and were inseparably connected to the operation of the bus at the time of the accident were on the part of the driver herself. Administrative negligence claims simply were not at issue in *Newgent*.

Thus, while *Newgent* had the effect of broadening the extent to which a school board may be found liable in the Industrial Commission under N.C. Gen. Stat. § 143-300.1 based on a theory of bus driver negligence, it had no effect on the entirely separate question of where administrative negligence claims filed in conjunction with the operation of a school bus must be brought. Based on *Huff*, these claims can only be asserted in superior court — assuming that the board has waived its governmental immunity through the purchase of liability insurance.

Because it is clear that *Huff* mandates our reversal of the Industrial Commission's order denying the Board's motion to dismiss, our analysis could end there. However, we take this opportunity to explain why this result faithfully applies the language actually used by the General Assembly in N.C. Gen. Stat. § 143-300.1.

As noted above, in construing a statute courts must look first to the plain meaning of the statutory language. *See Sharpe v. Worland*, 137 N.C. App. 82, 85, 527 S.E.2d 75, 77 ("We preface our analysis by noting that statutory interpretation begins with the plain meaning of the words of the statute. Where the plain meaning of the statute is clear, no further analysis is required. Where the plain meaning is unclear, legislative intent controls." (internal citations omitted)), *disc. review denied*, 352 N.C. 150, 542 S.E.2d 228 (2000).

N.C. Gen. Stat. § 143-300.1 sets out the exclusive circumstances under which the Industrial Commission possesses jurisdiction to hear claims against local boards of education arising from the operation of a school bus. Based on its clear text, the statute confers jurisdiction upon the Industrial Commission over claims alleging two discrete theories of negligence: (1) claims that arise as the result of a mechanical defect

based on the negligence of maintenance personnel; and (2) claims that arise "as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus[.]" N.C. Gen. Stat. § 143-300.1(a). Nowhere in this statutory language is there any indication that claims based on separate theories of negligence relating to administrative matters such as the design of bus routes or staffing decisions within the school system are meant to be included therein.

Reading N.C. Gen. Stat. § 143-300.1 to nevertheless encompass such claims would require this Court to judicially rewrite the statute — a power that courts clearly lack. *See Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 (1998) ("Where there is no contention that the actions of the legislature violate constitutional safeguards, we are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning." (citation omitted)). Indeed, this Court has previously stated that "the wording . . . in G.S. 143-300.1 particularly, is clear and unambiguous." *Smith*, 68 N.C. App. at 545, 316 S.E.2d at 111.

Plaintiffs and amicus curiae make various policy arguments in support of their contention that the administrative negligence claims at issue should be adjudicated in the Industrial Commission based primarily on their concerns about the potentially preclusive effect of governmental immunity on their ability to bring such claims in superior court. But such policy decisions are solely within the purview of the General Assembly. *See*, *e.g.*, *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) ("The General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." (quotation marks omitted)); *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126-27, 723 S.E.2d 352, 358 (2012) (holding that "this Court is not in the position to expand the law" and that "the numerous policy considerations presented by the issue raised in this case . . . [are] more appropriately addressed to our Legislature"); *see also Jones v. City of Durham*, 183 N.C. App. 57, 64, 643 S.E.2d 631, 636 (2007) ("Any change in [the governmental immunity] doctrine should come from the General Assembly." (citation, quotation marks, and brackets omitted)).

Therefore, we conclude that the Industrial Commission lacked jurisdiction to hear Plaintiffs' administrative negligence claims. Accordingly, we hold that the Commission erred in denying the Board's motion to dismiss those claims.

Conclusion

For the reasons stated above, we reverse the 20 January 2017 order of the Industrial Commission and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

PIEDMONT NATURAL GAS COMPANY, INC., PETITIONER-APPELLANT
v.
SAMUEL L. KINLAW, RESPONDENT-APPELLEE

No. COA17-619

Filed 20 March 2018

1. Appeal and Error—interlocutory orders—grant or refusal of new trial

Although the appeal of a grant of a new trial is from an interlocutory order, an appeal may be taken from every judicial order that grants or refuses a new trial under N.C.G.S. § 1-277(a).

2. Evidence—cross-examination—sales price of nearby property—private condemnation

The trial court did not err in a private condemnation action by granting a landowner's motion for a new trial on the issue of just compensation where the trial court improperly allowed cross-examination on the sales price of nearby property.

3. Trials—limiting instruction—private condemnation—sales price of nearby property—new trial

The trial court did not abuse its discretion in a private condemnation case by concluding that its error in allowing cross-examination on the sales price of nearby property was not cured by a limiting instruction. The alleged sales price was stated four times during cross-examination of the sole witness at trial and was the only sales price heard by the jury. The evidence was also allowed to remain before the jury without a limiting instruction until immediately prior to closing arguments.

4. Appeal and Error—burden on appeal—grant of motion for new trial

Where the trial court granted a landowner's motion for a new trial, the appealing gas company failed to carry its burden of demonstrating that the trial court abused its discretion in granting the new trial.

Appeal by Petitioner from an order entered on 7 June 2016 by Judge J. Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 10 January 2018.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LPP, by William H. Moss, for Petitioner-Appellant.

The Odom Firm, PLLC, by David W. Murray, and Williamson, Walton & Scott, LLP, by C. Martin Scott II, for Respondent-Appellee.

ZACHARY, Judge.

Petitioner-Appellant Piedmont Natural Gas Company, Inc. ("PNG") appeals from an order granting the motion for a new trial filed by Respondent-Appellee Samuel L. Kinlaw ("Mr. Kinlaw"). For the reasons that follow, we affirm.

Factual and Procedural Background

On 12 April 2012, PNG commenced a private condemnation action against Mr. Kinlaw, seeking a 2.71 acre permanent easement for an underground natural gas transmission line, together with temporary construction easements totaling 1.31 acres. Both the permanent and temporary easements cross a 60-acre tract of farmland owned by Mr. Kinlaw.

On 17 May 2013, the Clerk of Superior Court for Robeson County entered a consent judgment providing that PNG would receive the easements it sought and would make a nonrefundable payment to Mr. Kinlaw of $240,000, but that Mr. Kinlaw would retain the right to appeal the amount of compensation for the taking of the easements in a jury trial. Mr. Kinlaw filed a notice of appeal the same day.

The issue of the amount of compensation that PNG owed to Mr. Kinlaw for the taking of the easements was tried beginning on 7 March 2016 before the Honorable J. Gregory Bell. Prior to trial, the trial court granted Mr. Kinlaw's motion *in limine*, "limit[ing] any reference to any

sale or sales price for any property without the Court first conducting a *voir dire* of the sale or sales price to determine its relevance, comparability and admissibility."

Mr. Kinlaw's evidence consisted solely of his testimony and exhibits supporting his opinion of the amount of just compensation to which he was entitled for PNG's taking of the easements. On direct examination, Mr. Kinlaw testified that, based upon his experience and research, the highest and best use of the subject property immediately prior to the taking on 12 April 2012 was for residential development. Mr. Kinlaw further testified that, although the highest and best use of most of the property would remain residential development after the taking, the highest and best use for some of his property after the taking would be for agricultural use. His opinion was that the property had a value of $2,400,000 immediately prior to the taking, but a value of only $1,670,000 after the easements were granted. Accordingly, Mr. Kinlaw sought just compensation of $730,000, the difference in value according to his opinion and calculations.

During cross-examination, Mr. Kinlaw was questioned, over his objection, about the sale of a nearby property referred to by the parties as the "Snake Road property." Although Mr. Kinlaw denied knowing the sales price of the Snake Road property and denied making handwritten notations on a copy of the deed for the Snake Road property, PNG was allowed to cross-examine Mr. Kinlaw over objection about the handwritten notes on a copy of the Snake Road deed indicating a sales price of $3,638 per acre. Mr. Kinlaw was also cross-examined about the similarity of his handwriting and the handwritten notes on the Snake Road deed. Aside from Mr. Kinlaw's property, the Snake Road property was the only other specific property for which evidence of a per-acre value or sales price was introduced.

PNG did not offer any evidence. On 10 March 2016, the jury returned a verdict finding that the sum of $200,000 would be just compensation for the taking of Mr. Kinlaw's property by PNG. On 12 May 2016, the trial court entered judgment for Mr. Kinlaw in that amount. On 18 May 2016, Mr. Kinlaw filed a motion for a new trial, which was heard on 26 May 2016. Thereafter, on 7 June 2016, the trial court entered an order granting Mr. Kinlaw's motion. PNG filed its "Motion for Findings of Fact and Conclusions of Law, or, in the Alternative, Motion to Reconsider Granting of Respondent's Motion for New Trial," which was denied by the trial court on 11 August 2016. PNG has appealed to this Court from the order granting Mr. Kinlaw a new trial.

Interlocutory Nature of Appeal

[1] An order "is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, Rule 54(a) (2016). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). An order granting a new trial is interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, pursuant to N.C. Gen. Stat. § 1-277(a), "[a]n appeal may be taken from every judicial order . . . [that] grants or refuses a new trial." N.C. Gen. Stat. § 1-277(a) (2016).

Standard of Review

It is well-established that "an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citations omitted). A trial court's discretionary order "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Trial Court's Decision to Grant a New Trial

[2] The order granting Mr. Kinlaw a new trial does not contain findings of fact or conclusions of law. However, the parties agree that the disputed evidentiary issue at trial and at the hearing on Mr. Kinlaw's motion for a new trial was the propriety of allowing PNG to cross-examine Mr. Kinlaw about the sales price per acre of the Snake Road property, as indicated in handwritten notes on a copy of the deed for the property. On appeal, PNG argues that the trial court properly permitted cross-examination on this subject and that the court abused its discretion when it granted a new trial. We disagree.

We first consider whether PNG was properly allowed to cross-examine Mr. Kinlaw at trial about handwritten notes on a copy of the Snake Road property deed indicating the alleged sales price of the property. We conclude that, on the facts of this case, it was error to allow this cross-examination.

The parties do not dispute that at a trial on the issue of just compensation for a taking, the parties may offer evidence of the price paid at voluntary sales of *comparable* properties as evidence of the value of the property that has been subject to the taking. *North Carolina State Highway Commission v. Helderman*, 285 N.C. 645, 653-54, 207 S.E.2d 720, 726 (1974). The issue in the present case is under what circumstances a party may elicit the sales price of property that has not been determined to be comparable.

The leading case on this issue is *Duke Power Company v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980). In *Winebarger*, our Supreme Court ordered a new trial for the defendants where improper references were made regarding values and sales prices of noncomparable properties during cross-examination of the defendants' expert witnesses. *Winebarger*, 300 N.C. at 59-61, 265 S.E.2d at 229-30. The Court held that "[a] witness who expresses an opinion on property value may be cross-examined with respect to his *knowledge* of values of nearby properties for the limited purpose of testing the worthiness of his opinion, or challenging his credibility, even if those properties are not similar to that involved in the litigation." *Winebarger*, 300 N.C. at 61, 265 S.E.2d at 231 (emphasis in original) (citation omitted). *Winebarger* drew a sharp distinction between cross-examination on the extent of a witness's knowledge of the sales price of property that had not been determined to be comparable and cross-examination as to the specific prices of property:

> [W]hile a witness' *knowledge*, or lack of it, of the values and sales prices of certain noncomparable properties in the area may be relevant to his credibility, the specific dollar amount of those values and prices will rarely if ever be so relevant. The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit is at best mere surplusage. At worst it represents an attempt by the cross-examiner to convey to the jury information which should be excluded from their consideration.

Winebarger at 64-65, 265 S.E.2d at 231-32 (emphasis in original). *Winebarger* also emphasized the limitations of this cross-examination:

> Under these limited impeachment circumstances, . . . *it is improper for the cross-examiner to refer to specific values*

> *or prices of noncomparable properties in his questions to the witness.* Moreover, if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted. If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues. In such a rare case, however, the cross-examiner must be prepared to take the witness' answer as given.

Winebarger at 66, 265 S.E.2d at 232-33 (internal citations omitted) (emphasis added).

In the present case, we conclude that it was error for the trial court to allow PNG to cross-examine Mr. Kinlaw about the sales price of the Snake Road property.

First, there was no foundation for the use of the sales price of the Snake Road property. The trial court ruled prior to trial that, before allowing examination on the value of specific property, the trial court would conduct a *voir dire* examination to determine whether the property was comparable to Mr. Kinlaw's property. Property is "comparable" if it is "similar in nature, location, and condition to the condemnee's land." *State v. Johnson*, 282 N.C. 1, 21, 191 S.E.2d 641, 655 (1972). In this case, the trial court did not determine whether the Snake Road property was comparable to Mr. Kinlaw's property. Absent a showing that a particular property is comparable to the property at issue, "there [is] no foundation for the use of [a] witness's statement of its sales price as competent circumstantial evidence of the value of land." *Board of Trans. v. Chewning*, 50 N.C. App. 670, 671-72, 274 S.E.2d 902, 904 (1981). Where no such showing or determination was made at trial, this Court has viewed the properties as "noncomparable" in deciding whether the sales price was properly introduced or referenced. *See, e.g.*, *Id.*; *Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980); *Dep't of Transp. v. Burnham*, 61 N.C. App. 629, 634, 301 S.E.2d 535, 538 (1983) (Where there was no determination or showing of comparability at trial, "[i]t was an error for the court to permit cross-examination of [the expert witness] as to the price for which [another property] was sold."). Thus, the specific sales

price for the Snake Road property was not properly admissible as competent circumstantial evidence of the value of Mr. Kinlaw's land.

In addition, PNG's questions were not proper impeachment of Mr. Kinlaw and his knowledge of land values. While Mr. Kinlaw stated that he was aware of the sale of the Snake Road property, he denied knowing the sales price, stating, "I think [the buyer] traded some, or bought some from the [sellers], or something. I really don't know." Despite this denial, PNG then made a reference to the price of the Snake Road property in the next question to Mr. Kinlaw, asking, "And you know that Mr. John Barker bought this property that's right down Snake Road for around $3,500 an acre. Isn't that correct?". It is clearly improper to refer to specific sales prices of noncomparable properties in questions to a witness on cross-examination. *See Winebarger*, 300 N.C. at 66, 265 S.E.2d at 232-33. Furthermore, as our Supreme Court held in *Winebarger*, "if the witness responds that he *does not know or remember* the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted." *Id.* Here, the impeachment of Mr. Kinlaw as to his knowledge, or lack thereof, of the sales price of the Snake Road property should have ended when he stated that he did not know the sales price, and PNG's questions exceeded the bounds of relevancy.

Moreover, the underlying basis of PNG's cross-examination did not constitute competent evidence of the sales price of the Snake Road property. PNG's cross-examination on this issue was based solely upon handwritten notations of a sales price on a copy of a deed that had been produced during discovery. No evidence was adduced as to the accuracy of these notes or whether they reflected the actual sales price of the Snake Road property.

The only allowable purpose for which PNG might have cross-examined Mr. Kinlaw about the handwritten notes was to impeach Mr. Kinlaw's testimony that he did not know the sales price of the Snake Road property. However, because Mr. Kinlaw denied that he had made the notes on the deed, PNG could not properly cross-examine Mr. Kinlaw on the collateral issue of the similarity of the notes to other examples of Mr. Kinlaw's handwriting. As our Supreme Court held in *Carver v. Lykes*, 262 N.C. 345, 137 S.E.2d 139 (1964):

> The "utmost freedom of cross-examination" to test a witness' knowledge of values . . . does not mean that counsel may ask the witness if he doesn't know that a certain individual sold his property for a stated sum with no proof

> of the actual sales price other than the implication in his question. Where such information is material it is easy enough to establish by the witness himself, whether a certain property has been sold to his knowledge and, if so, whether he knows the price. If he says he does not know, his lack of knowledge is thus established by his own testimony and doubt is cast on the value of his opinion. If he asserts his knowledge of the sale and, in response to the cross-examiner's question, states a totally erroneous sales price, is the adverse party bound by the answer or may he call witnesses to establish the true purchase price? *Unless per chance the purchase price of the particular property was competent as substantive evidence of the value of the property involved in the action, it would seem that the party asking the question should be bound by the answer. To hold otherwise would open a Pandora's box of collateral issues.*

Carver, 262 N.C. at 356-57, 137 S.E.2d at 148 (1964) (quoting *Barnes v. Highway Commission*, 250 N.C. 378, 395, 109 S.E.2d 219, 233 (1959)) (emphasis added). In urging us to reach a contrary result, PNG argues that this case is distinguishable from *Winebarger* because Mr. Kinlaw "asserted his knowledge" of the sales price of the Snake Road property by producing the deed in discovery. However, Mr. Kinlaw denied making the handwritten notes on the deed or knowing the sales price. As discussed above, even where a witness "asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, [the witness] may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues." *Winebarger*, 300 N.C. at 66, 265 S.E.2d at 232-33 (citing *Carver*, 262 N.C. at 356-57, 137 S.E.2d at 148 (1964)). However, in such a case, "the cross-examiner must be prepared to take the witness' answer as given." *Id.*

For the reasons discussed above, we conclude that Mr. Kinlaw could properly be asked whether he was familiar with the sales price of other properties in the vicinity of his property, including the Snake Road property. However, it was error to allow cross-examination on the purported sales price, given that (1) there was no determination that the Snake Road property was a comparable property; (2) Mr. Kinlaw denied any knowledge of the sales price; (3) no competent evidence was

introduced that the notes accurately stated the sales price; and (4) Mr. Kinlaw denied making the handwritten notes on the Snake Road deed.

The sole basis of PNG's argument that the trial court abused its discretion by awarding Mr. Kinlaw a new trial is that the trial court ruled correctly that the cross-examination was admissible. Given that we have concluded that the trial court erred by allowing this cross-examination, we reject this argument. In addition, N.C. Gen. Stat. § 8C-1, Rule 403 (2016) provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As a result, even if the challenged cross-examination were admissible, it would be within the trial court's authority to determine that the evidence should have been excluded and that its admission warranted a new trial.

Effect of Curative Instruction

[3] PNG argues that even if the trial court erred by allowing cross-examination on the sales price of the Snake Road property, the error was cured by the limiting instruction given to the jury. Generally, there is a "presumption that the jury followed the letter and intent of the judge's instructions." *Winebarger*, 300 N.C. at 67, 265 S.E.2d at 233. However, our Supreme Court has also stated:

> Whether an instruction to disregard or give limited consideration to evidence cures an error potential in its admission must always depend upon the nature of the evidence admitted and the circumstances of the case. If the evidence admitted is obviously prejudicial, and especially if it is emphasized by repetition or by allowing it to remain before the jury for an undue length of time, it may be too late to cure the error by withdrawal or cautionary instructions.

Id. (citation and quotation marks omitted). In this case, the alleged sales price of the Snake Road property was stated four times in PNG's cross-examination of the sole witness at trial, and was the only sales price heard by the jury. Moreover, that evidence was allowed to remain before the jury without a limiting instruction until immediately prior to closing arguments, which took place the afternoon following Mr. Kinlaw's cross-examination. This was sufficient to allow the trial judge to determine that, in his discretion, a new trial was warranted. The trial court did not

abuse its discretion by failing to conclude that its error was cured by the limiting instruction.

Prejudice

[4] Finally, PNG argues that the trial court's order granting a new trial must be reversed on the grounds that Mr. Kinlaw failed to show that, in the absence of the cross-examination on the sales price of the Snake Road property, the result of the trial would have been different. We disagree.

PNG correctly notes that in order to "obtain relief on appeal, an appellant must not only show error, but . . . must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1, 14, 712 S.E.2d 257, 266 (2011) (quoting *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996)) (quotation marks omitted). As the appellant, it is PNG's burden to establish that the trial court's ruling was an abuse of discretion. The trial court granted Mr. Kinlaw's motion for a new trial, and therefore Mr. Kinlaw does not have the burden of proof on appeal. PNG must show that the trial court's ruling was "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. PNG has failed to demonstrate that the trial court, which presided over this trial and was in the best position to determine whether Mr. Kinlaw was prejudiced by the evidentiary ruling, abused its discretion in granting Mr. Kinlaw a new trial.

Conclusion

For the reasons discussed above, we conclude that the trial court did not abuse its discretion by granting Mr. Kinlaw a new trial and that its order should be affirmed.

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

STATE v. BENITEZ

[258 N.C. App. 491 (2018)]

STATE OF NORTH CAROLINA
v.
JUAN CARLOS BENITEZ, DEFENDANT

No. COA14-542-2

Filed 20 March 2018

1. Constitutional Law—effective assistance of counsel—failure to challenge confession—appropriate adult present during juvenile interrogation—objectively reasonable determination—good faith

The trial court did not err by denying murder defendant juvenile's motion for appropriate relief based on alleged ineffective assistance of counsel, where his attorney failed to seek suppression of his confession on the ground that an appropriate adult was not present during his interrogation as required by N.C.G.S. § 7B-2101(b). The attorney made an objectively reasonable determination at that time that defendant's uncle would qualify as his guardian, even though he was incorrect, and he acted diligently and in good faith in his representation of defendant.

2. Confessions and Incriminating Statements—by juvenile—knowing and intelligent waiver of rights—experience, education, background, and intelligence

The trial court made insufficient findings of fact addressing whether a juvenile defendant's waiver of rights at age 13 was knowingly and intelligently made based on defendant's experience, education, background, and intelligence, pursuant to N.C.G.S. § 7B-2101(d), and the order denying his motion to suppress was remanded for further findings of fact.

Appeal by defendant from judgment entered 20 May 2013 by Judge Douglas B. Sasser and order entered 21 January 2016 by Judge C. Winston Gilchrist in Superior Court, Lee County. Heard in the Court of Appeals 6 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STROUD, Judge.

After the denial of his motions to suppress, defendant pled guilty to first degree murder; he appealed and also filed a motion for appropriate relief with this Court. In 2014, this Court allowed defendant's motion for appropriate relief, reversed the denial of his motions to suppress, and vacated his judgment. The State petitioned the Supreme Court for discretionary review and ultimately that Court vacated this Court's opinion and ordered that defendant's motion for appropriate relief be remanded for consideration by the trial court. On remand, the trial court denied defendant's motion for appropriate relief. Defendant now appeals the denial of his motion for appropriate relief. On defendant's appeal before us, because defendant's attorney made an objectively reasonable determination that defendant's uncle would qualify as his "guardian[,]" a term not defined in the applicable statutes, and therefore did not seek suppression of defendant's statement on that ground, he did not provide ineffective assistance of counsel in failing to argue his rights under North Carolina General Statute § 7B-2101(b), and his MAR was properly denied.

Furthermore, during the remand, the Supreme Court specifically tolled the time for appeal of the motion to suppress with instructions for this Court to hear such appeal or terminate it, based upon the determination of defendant's MAR. Because defendant did not prevail with his MAR, we have also addressed his arguments regarding denial of his motions to suppress. Defendant argues he did not make a knowing and intelligent waiver of his rights during police interrogation. Because the trial court failed to address key considerations in determining whether defendant made a knowing and intelligent waiver, we remand the order denying defendant's motion to suppress for further findings of fact.

I. Procedural Background

Because this appeal addresses the interrogation of defendant and his attorney's effectiveness as counsel, we will not repeat the factual details of defendant's first degree murder charge and conviction but will instead focus on the procedural background of this case which led to this appeal. In 2007, defendant, age 13, provided a signed statement to the Lee County Sheriff's Office stating he had "shot the lady as she was sleeping on the couch in the head." Defendant's uncle, with whom defendant had been living, was present during the interrogation. On 14 August 2007 — only two weeks after the interrogation – the trial court on its own motion entered an order appointing the director of the Lee County Department of Social Services as guardian of the person for defendant pursuant to North Carolina General Statute § 7B-2001. In the

order appointing the guardian, the district court found that "the juvenile appeared in court with no parent, guardian or custodian but he lived with an uncle who did not have legal custody of him" and "[t]hat the mother of the juvenile resides in El Salvador and the father of the juvenile is no where to be found and based on information and belief lives in El Salvador." In 2009, defendant was indicted for first degree murder and was prosecuted as an adult.

Although there was other evidence that defendant had shot the victim, his signed statement was the most direct evidence of premeditation as an element of first degree murder. Prior to his trial, defendant made separate motions to suppress his statements based upon alleged violations of his right to counsel and his right to remain silent and upon his claim he had not knowingly and voluntarily waived his Miranda rights. In December of 2012, the trial court denied defendant's motions to suppress, and the trial court found that defendant's uncle was present during the questioning; the uncle was defendant's custodian; an interpreter was provided; and neither defendant nor his uncle "indicated any lack of understanding of what was being said" when defendant agreed to waive his rights. In 2013, defendant pled guilty to first degree murder but preserved his right to challenge the denial of his motions to suppress.

In 2014, defendant filed a motion for appropriate relief ("MAR") with this Court arguing he had been provided ineffective assistance of trial counsel because his attorney did not challenge the admission of his confession because his uncle was not his "parent, guardian, custodian, or attorney[,]" and therefore his rights under North Carolina General Statute § 7B-2101(b) were violated as no appropriate adult had been present during his custodial interrogation. In an unpublished opinion, this Court allowed defendant's MAR, reversed the denial of defendant's motions to suppress, and vacated defendant's judgment.

The State petitioned for discretionary review, and our Supreme Court vacated the Court of Appeals' opinion and remanded the case to this Court for remand to the trial court to conduct an evidentiary hearing on the MAR; the entire Supreme Court order reads:

> This case has come before the Court by way of the State's Petition for Discretionary Review pursuant to N.C.G.S. § 7A–31.
>
> Pursuant to N.C.G.S. § 15A–1418, the decision of the Court of Appeals is vacated and this Court now ORDERS this case remanded to the Court of Appeals for remand to the Superior Court, Lee County, for an evidentiary hearing

to make findings of fact necessary to determine whether the trial counsel's actions fell below an objective standard of reasonableness, *see State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998) (remanding a motion for appropriate relief to the trial court with instructions to conduct an evidentiary hearing), and, if so, whether defendant was prejudiced by any deficient performance by his trial counsel.

The time periods for perfecting or proceeding with the appeal are tolled. The Superior Court, Lee County, is ordered to transmit its order on the motion for appropriate relief within 120 days so that the Court of Appeals may proceed with the appeal or enter an order terminating the appeal, as appropriate.

By order of the Court in Conference, this 24th day of September, 2015.

State v. Benitez, 368 N.C. 350, 777 S.E.2d 60 (2015).

The trial court then held an evidentiary hearing on the MAR and entered an order with these findings of fact regarding defendant's uncle and his attorney's knowledge and investigation regarding his uncle's status:

1. Attorney Fred D. Webb of Sanford, North Carolina, was duly appointed to represent the defendant upon the defendant being charged with murder in Juvenile Court in the District Court of Lee County and continued to represent the defendant through the Superior Court proceedings in Lee County wherein the defendant entered a plea agreement as is of record.

. . . .

4. Defendant's Uncle, Jeremias-Cruz, advised Mr. Webb that the defendant was Mr. Cruz's sister's son, and that by agreement with defendant's mother, the defendant had lived with him ever since the defendant came to North Carolina from El Salvador; for approximately 1½ years before the defendant was arrested. Defendant had no parent, custodian or guardian other than Jeremias Cruz living in the United States.

5. Mr. Cruz provided the sole support for the defendant, had provided the defendant with his own room in Mr. Cruz's house, provided food for the defendant, provided clothing for the defendant, provided medical

care for the defendant, enrolled the defendant in the Lee County school system and had otherwise provided all the needs of a juvenile the defendant's age.

6. Attorney Webb had learned from the conferences with Mr. Cruz and with the defendant that Mr. Cruz had provided all the above referenced care for the defendant and had been accepted as a guardian by the Lee County School system to enroll the defendant in school.

7. Attorney Webb had obtained documentation from the Lee County Schools and Lee County Health Department showing that Mr. Cruz had appeared before each of these entities and been accepted as the guardian of the defendant Juan C. Benitez.

8. Mr. Cruz considered himself to have legal custody of the defendant since he had sole physical custody of the defendant by agreement with his sister and Mr. Cruz had advised others including Detective Brandon Wall on the day the defendant was arrested before the interview of defendant, that he was the defendant's uncle, that the defendant lived with him . . ., that he was defendant's legal guardian or custodian and Juan had lived with him for about a year and a half and Mr. Webb had seen this in discovery provided by the State.

9. The defendant's uncle Jeremias Cruz signed or was listed as a parent or guardian on numerous documents some of which are dated January 2006; those documents were obtained and received by Attorney Webb.

. . . .

12. After learning of the evidence of the relationship of Jeremias Cruz and the defendant, Attorney Webb had a member of his staff, early in his representation of the defendant, research the issue of who is a parent, guardian or custodian under NCGS 7B-2101, and Attorney Webb reviewed the cases of State v. Jones and State v. Oglesby as written by the Court of Appeals.

. . . .

15. Prior to the evidentiary hearing on defendant's Motion to Suppress Defendant's statement, Attorney Webb read the Supreme Court of North Carolina's opinion in State v. Oglesby.

. . . .

18. Attorney Webb, in the exercise of professional judgment, formed the opinion that Oglesby as decided by the Supreme Court was not inconsistent with the Court of Appeals opinion in Jones in that the same factors were discussed in determining if a person qualified as an approved person under NCGS 7B-2101, those factors being whether the person ever had custody of the juvenile, whether the juvenile stayed with or lived with the person for a considerable length of time, whether the person signed school paperwork, fed and clothed the juvenile, provided medical and other necessary care for the juvenile.

19. Based upon the case law as interpreted by Attorney Webb and the facts of this case regarding the Uncle Jeremias Cruz and the defendant, Attorney Webb made the decision that Uncle Jeremias Crus would be the appropriate person under 7B-2101 and believed his interpretation of the law as it existed was correct. Attorney Webb therefore did not identify or raise at the suppression hearing any issues as to whether Jeremias Cruz was the parent, custodian, or guardian of Defendant. On direct appeal, the Court of Appeals determined that Jeremias Cruz was not the "guardian" of the defendant.

20. Attorney Webb's file does not contain any copy of, nor any reference to, the Court of Appeals decision in the case of In re M.L.T.H. Given the existence of Oglesby, counsel was not under any duty to find the M.L.T.H. opinion or the dicta contained in a footnote of that opinion stating that Oglesby "imp[l]iedly" overruled Jones. The decision in M.L.T.H. was filed in November, 2009, and did not become final until 2010. . . .

21. . . . the evidence does not establish that Attorney Webb read M.L.T.H. before the hearing on the motion to suppress. The court finds as a fact that Attorney Webb was mistaken in his belief that he had reviewed M.L.T.H. prior to the suppression hearing. . . .

> 22. At the time of the suppression hearing[,] Attorney Webb knew that Jeremias Cruz had assumed responsibility for the care and upbringing of the defendant. Attorney Webb conducted a preliminary review of the cases and the law relating to the issue of who could be a "parent, guardian or custodian" under the applicable statute, including the Supreme Court's decision in Oglesby. These cases were understood by Attorney Webb, in the reasonable exercise of his best professional judgment, to support the conclusion, which was consistent with the realities of defendant's actual living situation, that Jeremias Cruz was acting as defendant's "guardian" within the meaning of N.C. Gen. Stat. 7B-2101. . . .
>
> . . . .
>
> 25. Attorney Webb's representation of defendant, viewed at the time of counsel's representation, and not merely through hindsight, was objectively reasonable.

The trial court then concluded that Attorney Webb did not provide ineffective assistance of counsel as counsel's performance was not deficient nor was defendant prejudiced. The trial court denied defendant's MAR; it is from this order and the denial of defendant's motion to suppress that defendant's appeal is now before us.

II. MAR

[1] Defendant argues the trial court erred when it denied his MAR. Defendant contends he did not receive effective assistance from his counsel because Attorney Webb failed to challenge his confession on the ground that an appropriate adult was not present during his interrogation.

> When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court. However, if the issues raised by Defendant's challenge to the trial court's decision to deny his motion for appropriate relief are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to the court's order.

State v. Marino, 229 N.C. App. 130, 139–40, 747 S.E.2d 633, 640 (2013) (citations, quotation marks, and brackets omitted).

Defendant's MAR was based upon ineffective assistance of counsel, and thus we must also consider that standard.

> To obtain relief for ineffective assistance of counsel, the defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. The defendant's burden of proof requires the following:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002) (citations and quotation marks omitted).

Defendant does not challenge the trial court's findings of fact regarding his relationship with his uncle but only its conclusions of law regarding ineffective assistance of counsel.[1] We must first consider

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1. Defendant's brief does mention three findings of fact made in the order denying defendant's motion to suppress, regarding whether defendant knowingly and intelligently waived his rights, and we will address those findings of fact as necessary in the portion of this opinion addressing the motion to suppress. Defendant then extends his argument regarding the order denying his motion to suppress by claiming that order was not sufficient, and thus on remand the trial court should have made more factual findings addressing the insufficiency of that order. But the trial court did not have jurisdiction on remand to reconsider defendant's motion to suppress and any "insufficienc[ies]" in it. The Supreme Court specifically remanded to the trial court for consideration of the MAR. The Supreme Court also tolled the time of appeal of the motion to suppress based upon the

whether Attorney Webb's representation "was deficient" in that he "made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Quick*, 152 N.C. App. at 222, 566 S.E.2d at 737.

In his MAR, defendant contends that his trial counsel rendered IAC because an objectively reasonable attorney would have argued that no person approved by North Carolina General Statute § 7B–2101(b) was present when defendant was interrogated; defendant also contends that had his counsel made this argument, the trial court would have been obligated to suppress his statements and, further, defendant would not have pled guilty to first degree murder.

North Carolina General Statute § 7B-2101 governs interrogation procedures of juveniles. *See* N.C.G.S. § 7B-2101. In 2007, when defendant was interrogated, the portion of the statute relevant to this issue provided as follows:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.
>
> (b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set

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determination made in the MAR. Thus, ultimately, the trial court only had jurisdiction to address the MAR while this Court has both the jurisdiction to address the original appeal of the motion to suppress and the MAR now appealed.

> out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

Id. (emphasis added).[2]

This issue is based upon the definition of a "guardian" under North Carolina General Statute § 7B–2101(b); the applicable statutes do not define the term, and in our research we have not found any cases clearly defining that term as applied in this particular statute. But to determine if defendant's counsel made a legal error at all, we must consider how a person may qualify as a "guardian" under North Carolina General Statute § 7B–2101(b).[3] Most instructive on the term "guardian" in this context is *State v. Oglesby* wherein our Supreme Court determined the defendant's aunt was not his "guardian" within the meaning of North Carolina General Statute § 7B–2101:

> Clearly, defendant was entitled by N.C.G.S. § 7B–2101(a)(3) to have a "parent, guardian, or custodian" present during his interrogation. However, an "aunt" is not an enumerated relation in the statute, and an interpretation of the term "guardian" to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word. *See Black's Law Dictionary* 566 (abr. 7th ed. 2000) (defining "guardian" as "[o]ne who has the *legal* authority and duty to care for another's person or property" (emphasis added)). We are bound by well-accepted rules of statutory construction to give effect to this plain and unambiguous meaning and we therefore decline any attempt to ascertain a contrary legislative intent.

361 N.C. 550, 555–56, 648 S.E.2d 819, 822 (2007).

The State, citing *State v. Jones*, 147 N.C. App. 527, 556 S.E.2d 644 (2001), points out that in construing the term "guardian" this Court had previously determined that the "[l]egal authority [described by Black's Law Dictionary] is not exclusively court-appointed authority, but is

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2. Subsection (b) of North Carolina General Statute § 7B-2101 was amended in 2015 to raise the age from 14 to 16; see N.C. Gen. Stat. § 7B-2101, Editor's Note (2017), under either version of the statute, defendant fell within the protection of subsection (b).

3. We have adopted some of the following analysis nearly verbatim from the vacated Benitez opinion. *See State v. Benitez*, 238 N.C. App. 363, 768 S.E.2d 201 (Dec. 31, 2014) (No. COA14-542) (unpublished) ("*Benitez I*"); *vacated*, 368 N.C. 350, 777 S.E.2d 60 (2015).

rather any authority conferred by the government upon an individual." The State also notes that the Court in *Oglesby* explained the defendant's particular relationship with his aunt indicating the factual circumstances could change the analysis. However, we agree with a prior panel's conclusion in dicta that the Supreme Court's decision in *Oglesby* implicitly overruled *Jones*:

> In *State v. Jones*, 147 N.C. App. 527, 538, 556 S.E.2d 644, 651 (2001), *disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002), this court held that presence of a thirteen year old defendant's aunt satisfied the requirements of N.C. Gen. Stat. § 7A–595, because the defendant lived with his aunt, "was dependent upon her for room, board, education, and clothing", and the aunt was "defendant's guardian within the spirit and intent of N.C.G.S. § 7A–595 . . . ." However, the aunt was not the defendant's legally appointed guardian or custodian. *Id.* at 539, 556 S.E.2d at 652. The North Carolina Supreme Court in *State v. Oglesby* expressly held that a person in the position of a guardian could not be treated as a guardian for purposes of N.C. Gen. Stat. § 7B–2101, impliedly overruling *State v. Jones*.

In re M.L.T.H., 200 N.C. App. 476, 486 n.6, 685 S.E.2d 117, 124 n.6 (2009) (emphasis in original).

In *Oglesby*, the Supreme Court did not simply reference "legal authority[,]" but rather narrowed the necessary inquiry into whether the relationship was one "established by legal process[.]" 361 N.C. at 555–56, 648 S.E.2d at 822. We conclude that the Supreme Court's requirement of "legal process" necessarily means that the individual's authority was established through a court proceeding. *See generally* Black's Law Dictionary at 979, 1325 (9th ed. 2009) (noting for "legal process" "SEE PROCESS" and defining "process" as "[t]he proceedings in any action or prosecution"). However, we need not decide precisely what the Supreme Court meant by "legal process[,]" *Oglesby*, 361 N.C. at 555 , 648 S.E.2d at 822, as we conclude that, at a minimum, the legal authority held by a "guardian," within the meaning of North Carolina General Statute § 7B–2101(b), requires authority gained through some legal proceeding. *See id*; *see also* Black's Law Dictionary at 979, 1325.

The trial court's unchallenged findings of fact on remand show that defendant's uncle had not obtained legal authority over defendant through any legal proceeding. The findings establish that defendant had lived with Mr. Cruz for at least a year, and Mr. Cruz was accepted as

defendant's guardian by the school system and was listed on or signed several documents as defendant's parent or guardian; these findings are not sufficient to support a determination that Mr. Cruz was defendant's "guardian" for purposes of North Carolina General Statute § 7B–2101(b); thus, at the very least, there was a violation of the statute when law enforcement interrogated defendant with only his uncle present on his behalf.

But an error of law alone is not sufficient to find ineffective assistance of counsel because

> the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.
>
> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's

> perspective at the time. Because of the difficulties inherent in making the evaluation, 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. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland v. Washington, 466 U.S. 668, 688–89, 80 L. Ed. 2d 674, 693 (1984) (citations and quotation marks omitted).

Here, in his MAR, defendant included an affidavit from his trial counsel acknowledging that his sole strategy in the trial court was to suppress defendant's statements to law enforcement and that his failure to argue a violation under North Carolina General Statute § 7B-2101(b) "was not a strategic decision on the part of counsel, but was the result of oversight." The trial court's findings on remand address the details of Attorney Webb's representation of defendant as follows:

> 13. Attorney Webb's file contains a memorandum of law from his associate Monica Magnuson which references State v. Jones and the original Court of Appeals decision in State v. Oglesby.
>
> 14. Attorney Webb's associate Monica Magnuson shepardized the decisions in State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644 (2001) and State v. Oglesby to check the validity of these cases.
>
> 15. Prior to the evidentiary hearing on defendant's Motion to Suppress Defendant's statement, Attorney Webb read the Supreme Court of North Carolina's opinion in State v. Oglesby.
>
> 16. The Supreme Court decision in Oglesby, 361 N.C. 550, 648 S.E.2d 819 (2007), reversed the Court of Appeals decision suppressing a statement made by the accused; the Supreme Court allowed the use of the statement at trial. The Supreme Court in Oglesby did not mention State v. Jones anywhere in the majority opinion. The opinion did not expressly overrule Jones. The earlier decision in Jones is only discussed in the Oglesby dissent, which has

no precedential value. Counsel did not read the dissent in Oglesby and did not thereby act unreasonably.

17. Citing Black's Law Dictionary, the majority decision in Oglesby stated that the definition of a "guardian" for purposes of 7B-2101 was "one who has the authority and duty to care for another's person. . . ."The Supreme Court went on to apply its definition of guardian to the facts of the case in a manner consistent with the test set forth in Jones:

> From the testimony of defendant's aunt, it is apparent that she never had custody of defendant, that defendant had only stayed with her on occasion but not for any considerable length of time, and that she had never signed any school papers for him. . . . . Moreover, the only evidence which could possibly support a contrary finding of fact is the aunt's testimony that she was 'a mother figure' to defendant. However, this does not amount to the legal authority inherent in a guardian or custodial relationship. 361 N.C. at 556.

18. Attorney Webb, in the exercise of professional judgment, formed the opinion that Oglesby as decided by the Supreme Court was not inconsistent with the Court of Appeals opinion in Jones in that the same factors were discussed in determining if a person qualified as an approved person under NCGS 7B-2101, those factors being whether the person ever had custody of the juvenile, whether the juvenile stayed with or lived with the person for a considerable length of time, whether the person signed school paperwork, fed and clothed the juvenile, provided medical and other necessary care for the juvenile.

19. Based upon the case law as interpreted by Attorney Webb and the facts of this case regarding the Uncle Jeremias Cruz and the defendant, Attorney Webb made the decision that Uncle Jeremias Cruz would be the appropriate person under 7B-2101 and believed his interpretation of the law as it existed was correct. Attorney Webb therefore did not identify or raise at the suppression hearing any issue as to whether Jeremias Cruz was the parent, custodian or guardian of Defendant. On direct appeal, the

Court of Appeals determined that Jeremias Cruz was not the "guardian" of the defendant.

20. Attorney Webb's file does not contain any copy of, nor any reference to, the Court of Appeals decision in the case of In re M.L.T.H. Given the existence of Oglesby, counsel was not under any duty to find the M.L.T.H. opinion or the dicta contained in a footnote of that opinion stating that Oglesby "impliedly" overruled Jones. The decision in M.L.T.H. was filed in November, 2009, and did not become final until 2010. Defendant Benitez was charged in this case in August, 2007. Attorney Webb was appointed to represent defendant in August 2007. The case proceeded through numerous hearings on competency, on transfer to Superior Court, and on defendant's motion to suppress before defendant entered his guilty plea. Defendant's case was thereafter appealed to the Court of Appeals. Attorney Webb's representation then terminated. Appellate counsel first raised the issue of Attorney Webb's alleged ineffective assistance of counsel on direct appeal. After the Court of Appeals decision in Benitez, petition for discretionary review was thereafter granted by the Supreme Court, and the case was remanded to the Superior Court of Lee County. On remand, Attorney Webb testified at the evidentiary hearing now in question in December of 2015. Attorney Webb has therefore been involved with this case for approximately eight and one half years. The length, complexity and procedural history of this case are sufficient to challenge the memory of any individual.

21. The court is satisfied that Attorney Webb read In re M.L.T.H. at some time well before the MAR evidentiary hearing in December 2015. However, the evidence does not establish that Attorney Webb read M.L.T.H. before the hearing on the motion to suppress. The court finds as a fact that Attorney Webb was mistaken in his belief that he had reviewed M.L.T.H. prior to the suppression hearing. The court is completely convinced based on the evidence and on the court's opportunity to view and evaluate the demeanor of the witness that all of Attorney Webb's testimony was offered in good faith.

22. At the time of the suppression hearing. Attorney Webb knew that Jeremias Cruz had assumed responsibility for

the care and upbringing of the defendant. Attorney Webb conducted a preliminary review of the cases and the law relating to the issue of who could be a "parent, guardian or custodian" under the applicable statute, including the Supreme Court's decision in Oglesby. These cases were understood by Attorney Webb, in the reasonable exercise of his best professional judgment, to support the conclusion, which was consistent with the realities of defendant's actual living situation, that Jeremias Cruz was acting as defendant's "guardian" within the meaning of N.C. Gen. Stat. 7B-2101. Attorney Webb did not thereafter pursue the issue of whether Jeremias Cruz was defendant's "guardian", but engaged in extensive preparation and litigation of other issues relating to the admissibility of defendant's confession. These issues actually litigated during the defendant's case included whether defendant was competent to make a knowing, voluntary and intelligent waiver of his juvenile Miranda rights and whether sufficient interpretive services were provided to defendant during his interrogation. Attorney Webb offered expert evidence on and zealously pursued these issues.

23. Defendant did not offer any expert or opinion testimony that Attorney Webb's performance fell below an objective standard of reasonableness. However, for purposes of this case, the court assumes that such evidence is not required.

24. Defendant did not offer any evidence of "prevailing professional norms or of Bar Association standards or the like" which were violated by Attorney Webb in his representation of defendant. As such norms and standards are not determinative, but merely guides to evaluating what is reasonable under Strickland v. Washington, 466 U.S. 668 (1984) and its progeny, the court assumes, without deciding, that specific evidence of such norms and standards is not required for defendant to meet his burden.

25. Attorney Webb's representation of defendant, viewed at the time of counsel's representation, and not merely through hindsight, was objectively reasonable.

The trial court then made the following conclusions of law:

> 1. Attorney Webb's actions in not raising an argument in the motion to suppress that the defendant's statement at the Sheriff's Department should be suppressed because defendant did not have a parent, guardian, custodian, or attorney present were reasonable at the time and did not fall below an objective standard of reasonableness.
>
> 2. In the alternative, even if Attorney Webb reviewed, or should have reviewed, the opinion in M.L.T.H. before the hearing on the motion to suppress, Attorney Webb's representation still did not fall below an objective standard of reasonableness. In re M.L.T.H. held that 7B-2101 required that a juvenile could not be advised that he had a right to have a "parent, custodian, guardian, attorney or any other person" present during custodial interrogation. There was no contention by either side in M.L.T.H. that the other person present during interrogation in fact met the definition of a "guardian". Further, the only express reference to the Supreme Court's decision in Oglesby overruling State v. Jones occurs in dicta in footnote 6 of M.L.T.H. Finally, the body of the M.L.T.H. opinion cites State v. Jones with apparent approval. ("Cases which have addressed this situation focus on the legal authority of the person over the juvenile. . . . [citing Oglesby and State v. Jones][)]" In re M.L.T.H., 200 N.C. App. 476, 488 (2009). These factors do not establish, either alone or in combination with the other facts found, that Attorney Webb's service, viewed from the perspective of that time, was objectively unreasonable.
>
> 3. In the alternative, even if trial counsel's actions were objectively unreasonable, the defendant was not prejudiced by any deficient performance by his trial counsel. Defendant has not met his burden of showing that, had counsel's performance not been deficient, there is a reasonable probability that he would not have entered a guilty plea and received a sentence of life with parole.
>
> 4. In the alternative, any violation of the defendant's statutory rights under NCGS 7B-2101 to have a parent, guardian, custodian, or attorney present under the facts stated herein would not be a substantial violation warranting suppression of the statement pursuant to NCGS 15A-974.

Thus, the trial court did not find that defendant's trial counsel had a strategic reason for failing to file a motion to suppress based upon North Carolina General Statute § 7B-2101 but instead that his actions were objectively reasonable at the time -- considering the state of the law -- and that he acted diligently and in good faith in his representation of defendant. The trial court's findings of fact demonstrate the court's efforts "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. Defendant's trial counsel did make a legal error, but it was not an "objectively unreasonable" error at the time.[4] Because we have determined that the trial court correctly concluded that defendant's counsel's representation was "reasonable at the time and did not fall below an objective standard of reasonableness[,]" we need not address the trial court's alternative conclusions of law regarding prejudice and lack of a substantial violation of defendant's rights under North Carolina General Statute § 15A-974. The MAR order is affirmed.

III. Motion to Suppress

[2] Because defendant did not prevail on his current appeal of his MAR and the Supreme Court left the jurisdiction of this Court open to consider defendant's original appeal of his motion to suppress, we now turn to that appeal. We also turn back to defendant's 2014 brief and his reply brief for the basis of his argument regarding the denial of his motion to suppress. Defendant did file a supplemental brief and a supplemental reply brief in 2016, but the focus of those briefs is the second appeal regarding the MAR.

Defendant made three arguments in his 2014 briefs in the appeal of his motion to suppress. Most of defendant's brief was devoted to his primary argument regarding violation of his rights under North Carolina General Statute § 7B-2101(b), but we have already addressed that argument in relation to the trial court's order on remand for the MAR. Defendant's second argument was that "the trial court erred by denying . . . [defendant's] motion to suppress his statement at the Lee

4. We also note the trial court's finding that "[d]efendant did not offer any expert or opinion testimony that Attorney Webb's performance fell below an objective standard of reasonableness. However, for purposes of this case, the court assumes that such evidence is not required." We agree expert evidence is not necessarily required for every claim of IAC, though we note some evidence from practicing attorneys as to the standards of practice is often helpful, particularly in cases such as this where the issue is the interpretation of case law rather than a more blatant error such as a failure to prepare for a hearing at all.

County Sheriff's Department because his waiver of right was not knowing and intelligent." (Original in all caps.) Defendant's third argument is related to the second: in the alternative, he contends that "the trial court erred by failing to make findings of fact to resolve material conflicts in the evidence" regarding whether defendant "knowingly and intelligently waived his rights." (Original in all caps.) Since both of defendant's remaining arguments address the trial court's findings of fact regarding knowing and voluntary waiver and the sufficiency of the evidence to support those findings, we will address them together.

North Carolina General Statute § 7B-2101(d) includes an additional requirement before evidence of a statement by a juvenile may be admitted as evidence: "Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d) (2007).

To determine if a defendant has "knowingly and voluntarily" waived his right to remain silent, the trial court must consider the totality of the circumstances of the interrogation, and for juveniles, this analysis includes the "juvenile's age, experience, education, background, and intelligence, and [evaluation] into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights":

> [T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.
>
> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings

> given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare v. Michael C., 442 U.S. 707, 724–25, 61 L. Ed. 2d 197, 212 (1979) (citations and quotation marks). Defendant argues that the trial court failed to make sufficient findings of fact to address the factors required by the "totality-of-the-circumstances approach" mandated by the United States Supreme Court. *Id.* at 725, 61 L. Ed. 2d at 212. This approach requires "inquiry into all of the circumstances surrounding the interrogation" and "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights." *Id.*

Furthermore,

> A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
>
> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults. Addressing the specific context of police interrogation, we have observed that events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. Describing no one child in particular, these observations restate what any parent knows—indeed, what any person knows—about children generally.

J.D.B. v. North Carolina, 564 U.S. 261, 272–73, 180 L. Ed. 2d 310, 323-24 (2011) (citations, quotation marks, and ellipses omitted).

Defendant does not challenge any of the trial court's findings of fact in the order denying his motion to suppress, so all of its findings are binding on appeal. *See State v. Osterhoudt*, 222 N.C. App. 620, 626, 731 S.E.2d 454, 458 (2012) ("Any unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal."

(citation and quotation marks omitted)). As to binding findings of fact, we must note at the outset that defendant's competency to stand trial was an issue in this case; ultimately, in 2012, the trial court entered an order determining defendant was competent to stand trial. In addition, all of the testimony and evidence from the competency hearing was also admitted for purposes of the hearing on the motion to suppress which is at issue in this appeal. The competency order found:

> 3. That the Defendant does suffer from a mental illness or defect however there is insufficient evidence with respect to the requirement of adaptive functioning to determine the exact nature of that mental illness or defect as regard to those prongs of the test for mental retardation.
>
> 4. The Court further finds that based upon testimony of Brian David, a supervisor at the Richmond Detention Center that the Defendant gets along well with the other inmates, communicates well, and serves as a Trustee at the facility.
>
> 5. That the Defendant has shown the ability to respond in a reasonable and rational manner to questions regarding the proceedings, and the Defendant[']s situation, and the ability to assist defense counsel.

At the time of the competency order, defendant would have been 18 years old and thus an adult, but he was 13 at the time of the interrogation, so the determination of defendant's competency has little weight in the analysis of defendant's knowing and intelligent waiver at age 13.[5] But the finding that defendant "suffer[s] from a mental illness or defect" but does not meet the "test for mental retardation" is a relevant finding of fact which we cannot ignore when reviewing the denial of defendant's

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5. Defendant devotes a substantial part of his argument to the background of his competency evaluation leading up to the hearing and order regarding his competency to stand trial, but we will not address this in detail. The competency order was not appealed and in the suppression order on appeal, the trial court was considering a different question. It does not appear the trial court heavily relied on the competency order in its order denying defendant's motion to suppress, but even if it did rely in part on the competency order, neither order addressed defendant's "experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights" at the time of the interrogation when he was 13. *Fare*, 442 U.S. at 725, 61 L. Ed. 2d at 212.

motion to suppress based upon a knowing and intelligent waiver of his rights.[6]

Based upon the record and the extensive evaluations of defendant, it appears defendant's "mental illness or defect" existed since before defendant was age 18 and the "mental illness or defect" is relevant to any consideration of his "experience, education, background, and intelligence, and [ ] whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights." *Fare*, 442 U.S. at 725, 61 L. Ed. 2d at 212. The competency order's finding did not identify the "mental illness or defect" or describe its impact upon defendant's abilities or understanding but seems only to have determined that defendant did not meet "the test for mental retardation."

Much of the order denying defendant's motion to suppress is devoted to law enforcement's initial encounters with defendant, leading up to his "transfer" to the Sheriff's Office. As to the interrogation, the order then finds:

> 12. Lee County Detective Clint Babb met with Defendant's Uncle Jeremiah Cruz who was the Defendant's custodian, the Defendant, and Spanish interpreter Celinda Carney at the Lee County Sheriff's Office.
>
> 13. The Defendant who was 13 years old at the time was duly advised of his juvenile rights in the presence of his uncle and the juvenile rights were interpreted by Celinda Carney. Celinda Carney was retained by the Lee County Sheriff's Office to assist them with interpreting in this matter. Celinda Carney had never interpreted in a criminal matter before.

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6. To be accurate we have used the terminology as used in the record of this case, but we note that the terminology used by mental health professionals for mental retardation has changed since the 2012 order was entered. The United State Supreme Court noted in 2014 that "[p]revious opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et al., The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts;" the manual is often referred to by its initials "DSM," followed by its edition number, *e.g.*, "DSM–5." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013)." *Hall v. Florida*, 572 U.S. ___, ____, 188 L. Ed. 2d 1007, 1014 (2014).

14. Detective Babb and Ms. Carney testified the Defendant understood all questions asked and Defendant responded appropriately to all questions.

15. The Defendant acknowledged he understood each right read to him and initialed each one to indicate he understood each item as shown on the rights form admitted to evidence.

16. The Defendant agreed to waive his rights and signed the waiver indicating same. Neither Defendant nor [hi]s uncle at anytime indicated any lack of understanding of what was being said.

17. The Defendant began responding to questions and at some point advised Detective Babb through the interpreter Ms. Carney that he would tell Ms. Carney what happened but not Detective Babb.

18. Detective Babb advised Ms. Carney to tell the Defendant whatever he told Ms. Carney she was going to tell Detective Babb and Ms. Carney did so and the Defendant agreed to tell her anyway. Detective Babb left the interview room leaving the Defendant with Ms. Carney.

19. Defendant told Ms. Carney the information contained in his written signed statement after Detective Babb left the room and she relayed same to Detective Babb as she indicated she would.

20. Detective Babb went over what the Defendant told Ms. Carney with the Defendant and Defendant agreed that it was correct.

21. The Defendant told the same story again in the computer room, Defendant was read the statement again from the computer screen and Ms. Carney read the statement to the Defendant in printed form, and the defendant acknowledged the statement as accurate and signed it, and the Defendant's uncle was present with him throughout the process.

22. Each witness indicated that the Defendant was never threatened, coerced or otherwise harassed and all conversations were done in a conversational tone without yelling.

> 23. None of the witnesses in the presence of the Defendant from the point of contact with the Defendant saw any signs of the Defendant being confused or otherwise not understanding what was being asked or instructed.

The findings of fact in the motion to suppress *do* address defendant's age and "the circumstances surrounding the interrogation[,]" but not defendant's "experience, education, background, and intelligence" or "whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.*

The absence of findings regarding defendant's "experience, education, background, and intelligence" and "capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights[,]" *id.*, is especially concerning since the trial court had already found defendant suffers from an unnamed "mental illness or defect" and had before it "all of [the] testimony and evidence" from the competency hearing, including an evaluation from Dr. Antonio Puente in 2008 when defendant was only 14 years old. Dr. Puente's evaluation was the first done, when defendant was not much older than at the time of the interrogation. Dr. Puente found "the diagnosis is mild retardation with organic deficits limiting his ability to understand and appreciate the complexities involved with the alleged incident, as well as his own legal situation." Dr. Puente also did a follow-up evaluation in 2011, again diagnosing defendant with "Mild Mental Retardation." Because all of the testimony and evaluations presented at the competency hearing were included as part of the evidence for the hearing on the motion to suppress, the trial court had before it *extensive* evidence regarding defendant's "experience, education, background, and intelligence" and "capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* The trial court must evaluate the evidence, consider its weight, and make the required findings, but here it simply did not. *See generally id.*, 442 U.S. at 724–25, 61 L. Ed. 2d at 212.

This case has gone on for a long time. When it started, defendant was a 13 year old child. When defendant entered his plea, he was nearing his 20th birthday. At the time of the filing of this opinion, defendant is 24 years old. Nonetheless, we must remand for the trial court to make additional findings of fact addressing whether defendant's waiver of rights *at age 13* was knowing and intelligently made, taking into account the evidence regarding defendant's "experience, education, background, and intelligence" and evaluation of "whether he has the capacity to

understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving these rights." *Id.* These considerations under *Fare* are not technicalities but are essential to any conclusion of whether defendant knowingly and intelligently waived his right to remain silent. *See generally id.* The trial court's order did not properly address the constitutional arguments before it in defendant's motion to suppress, and thus remand is necessary at this late stage in defendant's ongoing criminal proceedings. Certainly the trial court may consider later evaluations and events in its analysis of defendant's knowing and intelligent waiver at age 13 but should take care not to rely too much on hindsight. Hindsight is reputed to be 20/20, but hindsight may also focus on what it is looking for to the exclusion of things it may not wish to see. The trial court's focus must be on the relevant time period and defendant's circumstances at that time as a 13 year old boy who required a translator and who suffered from a "mental illness or defect" and not on the 10 years of litigation of this case since that time. The trial court must make findings as to defendant's mental state and capacity to understand the *Miranda* warnings at age 13, including the nature of his "mental illness or defect[,]" and the impact, if any, this condition had on his ability to make a knowing and intelligent waiver. *See generally id.*

IV. Conclusion

Although defendant's trial counsel made a legal error by not seeking suppression of defendant's statement based upon his wrongful determination that defendant's uncle was his "guardian" as defined by North Carolina General Statute § 7B-2101, and thus a proper person to be present during his interrogation, the trial court correctly determined on remand that this error was objectively reasonable at the time. We affirm the order denying defendant's MAR.

Because the trial court failed to address the key considerations in determining whether defendant had knowingly and intelligently waived his rights during police interrogation, we must remand the order denying defendant's motion to suppress for further findings of fact. We note that both the State and defendant have already presented evidence regarding these issues, but if either the State or defendant should request that the trial court allow presentation of further evidence or argument on remand, the trial court may in its sole discretion either allow or deny this request.

AFFIRMED in part; REMANDED in part.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
TODD ERIC BODERICK

No. COA17-691

Filed 20 March 2018

1. Constitutional Law—North Carolina—right to jury—bench trial

The trial court erred in a first-degree murder case by holding a bench trial based on the parties' stipulations where defendant was arraigned before 1 December 2014 and was not constitutionally permitted to waive his right to a trial by jury under N.C. Const. Art. I, § 24 (2014).

2. Constitutional Law—right to jury—fact finder improperly constituted—automatic reversal

Defendant was entitled to a new trial in a first-degree murder case where the fact-finder was the trial court rather than twelve unanimous jurors, meaning the verdict was rendered by an "improperly constituted" fact-finder for purposes of N.C. Const. art. I, § 24 (2014). Automatic reversal was required.

3. Constitutional Law—right to counsel—forfeiture—appointed counsel—new trial

Defendant's forfeiture of appointed counsel in a first-degree murder case, based on his consistent pattern of egregious misconduct toward his appointed counsel during his first trial, ended when defendant accepted appointed counsel on appeal. The trial court's prior forfeiture determinations would not carry over to defendant's new trial that was granted on appeal.

Appeal by defendant from judgments entered 23 March 2016 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

ZACHARY, Judge.

Defendant Todd Eric Boderick appeals from the denial of his motion to dismiss and from judgments entered upon his convictions for first-degree murder and felony child abuse following a bench trial. After a thorough review of the record and applicable law, we vacate and remand for a new trial.

I. Factual and Procedural Background

Defendant and Krishay Mouzon ("the mother") had a daughter ("the child") born on 25 April 2012. Defendant and the mother had custody of the child, and the mother had two additional children of whom she did not have custody. Defendant and the mother lived with the child in various hotels.

On 27 October 2012 at approximately 9:27 p.m., police and the fire department responded to a call at the hotel where defendant, the mother, and the child were living. The emergency responders found the child, who was then six-months old, unresponsive. The child was rushed to the hospital and pronounced dead shortly thereafter. Defendant was charged with murder on 13 November 2012.

Medical examiner Thomas Owens, M.D. performed the child's autopsy and testified as the State's expert in the field of forensic pathology at defendant's trial. Dr. Owens opined that the child died from severe brain injury and bleeding that was caused by non-accidental "blunt-force head trauma[.]" According to Dr. Owens, the pattern of injury and bleeding "indicate[d] . . . global-type activity[,] . . . the whole head or the body being violently moved or shaken back and forth. As opposed to, if there was a fall or a single impact in just one little spot[.]"

Dr. Owens testified that the child's time of death was 10:13 p.m. on 27 October 2012, and that in his opinion, the fatal injuries looked recent, probably having been inflicted "anywhere from a couple of hours to as much as maybe a day" before the child's death. He also found indications of prior brain trauma in the child that had likely occurred "a couple of weeks" ago.

Dr. Owens found additional non-lethal injuries, including significant bruising and abrasions at various stages of healing on the child's head and body. The child also had thirty-eight rib fractures that had been inflicted on at least three different occasions; some occurring around one or two months ago, others about one week ago, and one that was "more than likely less than a day or two" old. Most of the child's rib fractures were in "areas [that] are extremely difficult to fracture[.]" Dr. Owens testified that the nature of the child's fractures was "clearly

indicative of pressure from fingertips when a child is held or squeezed during an episode of shaking."

When asked what "a child experiencing these types of hemorrhages [would] feel," Dr. Owens testified that:

> [A] person who has experienced [this] type of trauma often becomes immediately noticeably more lethargic. They are not themselves. They are not responding as they normally would. They may still seem conscious, but they do not interact with the world around them in a normal fashion.
>
> So there would be less eye opening. . . . They're very quiet.
>
> Again, they may become completely unresponsive. There are some brain stem reflexes, like suckling, that could still occur, but the children don't usually feed normally. They don't actually take a whole bottle, you know, or actually swallow.

At defendant's trial, the mother testified that she first noticed the child was not behaving normally on the morning of 26 October 2012, roughly a day-and-a-half before the child was pronounced dead. The night before, on 25 October 2012, the mother left the child alone in their hotel room with defendant. No one else was in the room with defendant and the child when the mother left and returned that evening. When the mother left the room, defendant had the child sitting on his lap. The mother came back about twenty minutes later and found the child lying on her stomach on the bed. The mother kissed the child, but the child did not respond and her eyes remained closed. The mother testified that she never put the child on her stomach because she would immediately start to cry, and that this was the first time that she had seen the child sleeping on her stomach. By the time the mother went to bed that evening, the child had not moved and was still sleeping.

The mother awoke the next morning on 26 October 2012 around 9:45 a.m. The mother testified that she picked the child up and that the child's body was limp, explaining, "When I picked her up her head would go down and her body would just be weak," and that the child's head would fall forward. The child's eyes were still closed the morning of 26 October 2012, and the mother tried unsuccessfully to open the child's eyes several times throughout the day. She tried to feed the child four times on 26 October 2012, but the child only ate one-third of what she

would normally eat. The child remained limp throughout the day on 26 October 2012, and did not make any noise or move on her own. Neither defendant nor the mother sought medical attention for the child on 26 October 2012. The mother testified that she "just thought [the child] was sick," and that when she told defendant that she thought the child was sick, defendant "didn't say anything."

The mother left defendant and the child alone in the hotel room again on 26 October 2012 for about ten minutes around 7:00 p.m. The mother returned to find the child in the same position on the bed as when she had left. The mother asked defendant if he had shaken the child, and defendant indicated that he had not. The mother told defendant that if the child did not get better soon that she wanted to take the child to the doctor that night. Defendant did not respond, and they did not take the child to the doctor that evening.

When the mother awoke on the morning of 27 October 2012, the child was in the same position as when she went to bed the night before. The child had made no noise overnight, and that day only ate one-third of what she would normally eat. The child's body was still limp, and she did not open her eyes. On the evening of 27 October 2012, the mother left the child with defendant alone in the hotel room around 6:00 p.m. for roughly ten minutes. The child had not moved when the mother came back. The mother left the child alone with defendant once more for ten minutes that evening around 7:50 p.m. The mother testified that the child was on top of the bed's comforter under a towel when the mother left, but was under the covers when the mother returned.

About thirty minutes later, around 8:30 p.m. on 27 October 2012, the mother testified that she noticed the child was not breathing. Defendant checked and confirmed that the child was not breathing. The mother testified, "then I asked [defendant] can I call, can I call the paramedics. And he told me to wait till the next day." The following exchange took place on direct examination:

> Q. Was there any discussion about what to tell the police when you called them the next day?
>
> A. Yes, sir.
>
> Q. Okay. What—tell me about that discussion.
>
> A. He told me to tell them that [my other child] was holding her, and she dropped her.
>
> Q. And when he told you to tell the police that [your other daughter] dropped [her], what did you say?

A. I didn't say anything.

. . .

Q. How long did [this conversation] take?

A. It took 20 minutes.

. . .

Q . . . So what's being talked about during this 20 minutes?

A. He's just telling me to wait till the next day. All this is going on in the same conversation. Telling me to wait till the next day. Tell them that [my other daughter] dropped her. And I'm just standing there listening to him. Then I asked him if I could use the phone to call the paramedics at this time.

Q. And what did he say?

A. He just gave me the phone.

Q. And what did you do?

A. I called the paramedics.

The mother testified that she had never hit, thrown, or dropped the child, and had not caused any of her injuries. The mother also testified that she did not know how the child had received her fatal injuries. However, the mother said that she knew of at least one occasion a month earlier where defendant had left scars on the child's face. The mother did not witness that incident, but testified that right after it happened, defendant told her that he had put his hand over the child's mouth because she was crying. When she examined the child, she saw cuts on the child's face and blood on the child's pillow.

Defendant was indicted for murder on 13 November 2012 and for felony child abuse on 20 May 2013. As explained in Section IV below, defendant was eventually found to have forfeited his right to court-appointed counsel. Defendant's jury trial began on 14 March 2016, and defendant represented himself with the assistance of standby counsel. The trial court declared a mistrial on 16 March 2016. The same day, the parties stipulated to defendant's waiver of his right to a jury trial and the trial court consented to conducting a bench trial. Judge Robert T. Sumner presided over defendant's bench trial and found defendant guilty of first-degree murder and felonious child abuse on 23 March 2016. Judge Sumner sentenced defendant to life without parole and a

consecutive 110-144 months' imprisonment. Defendant entered oral notice of appeal in open court.

On appeal, defendant argues (1) that the trial court erred in denying his motion to dismiss because the State's evidence was insufficient to support an inference that defendant inflicted the child's lethal injuries; (2) that the trial court was not authorized to hold a bench trial because the constitutional amendment allowing waiver of a jury trial did not go into effect until after defendant was arraigned; (3) that defendant's conduct did not rise to the egregious level supporting forfeiture of counsel, or in the alternative, that defendant's forfeiture should have been reconsidered in light of his changed conduct; and (4) that the trial court effectively denied defendant expert assistance when it denied his motion for a continuance.

II. Waiver of Jury Trial

As further discussed in Section IV below, defendant represented himself at trial. At trial, just before jury selection was about to begin, defendant requested that the trial court conduct a bench trial instead of a jury trial. Judge Sumner declined to hold a bench trial, stating that "a jury trial [is] a very fundamental right that is, in a case like this, almost absolutely necessary." During jury selection, however, one of the potential jurors abruptly announced that she had seen defendant in the newspaper and that he had robbed her boyfriend's home. Noting "the gasp [he] heard from the back and from the other jurors," the State concurred in a motion for a mistrial. Judge Sumner declared a mistrial, and at that point the possibility of a bench trial was revisited. In light of the mistrial and the "efforts the last several days to obtain a fair and impartial jury," Judge Sumner said that he would consent to a bench trial based on the written stipulation of both parties. The parties so stipulated, and defendant's bench trial began on 18 March 2016. Judge Sumner found defendant guilty of first-degree murder and felony child abuse.

The trial court's authority to consent to the bench trial derived from a recent amendment to Article I, Section 24 of the North Carolina Constitution. However, defendant argues that the constitutional amendment permitting waiver of a jury trial only applies to defendants who are arraigned on or after 1 December 2014. Defendant was arraigned on 27 February 2014. Accordingly, defendant contends that the trial court was not permitted to consent to a bench trial and that, therefore, his convictions must be vacated. We agree.

A. Discussion

[1] North Carolina has historically mandated trial by jury in all criminal cases. *See* N.C. Const. Art. I, § 24 (2014). "Unlike the right to a jury trial established by the Sixth Amendment of the U.S. Constitution, the right to a jury trial pursuant to Article I, Section 24" could not be waived. *State v. Bunch*, 196 N.C. App. 438, 440, 675 S.E.2d 103, 104 (2009), *affirmed*, 363 N.C. 841, 689 S.E.2d 866 (2010). However, on 4 November 2014, North Carolina voters approved a ballot measure to amend the North Carolina Constitution. The amendment allows criminal defendants in non-capital cases to waive their right to a jury trial and to opt instead for a bench trial. As amended, Article I, Section 24 of the North Carolina Constitution now provides:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial *de novo*.

N.C. Const. art. I, § 24 (2017). The original Session Laws that authorized the ballot measure provided that "[i]f the constitutional amendment . . . is approved by the voters, [it] becomes effective December 1, 2014, and applies to criminal cases arraigned in superior court on or after that date." 2013 N.C. Sess. Laws 300-399, § 5.

The constitutional amendment was codified at N.C. Gen. Stat. § 15A-1201(b), which provides:

> A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact . . . shall be heard and judgment given by the court.

N.C. Gen. Stat. § 15A-1201(b) (2017). 2015 N.C. Sess. Laws 289-215, § 1 subsequently amended N.C. Gen. Stat. § 15A-1201 to provide the

procedures for a defendant's waiver of his right to a trial by jury. 2015 N.C. Sess. Laws. 289-215, § 1; N.C. Gen. Stat. § 15A-1201(c)-(f) (2015). The amended statute became effective on 1 October 2015. 2015 N.C. Sess. Laws. 289-215, § 4.

Because § 15A-1201 was amended to include additional procedures for waiving the right to a jury trial, the State argues that the Article I, Section 24 amendment now applies to any defendant seeking to waive his right to a jury trial on or after the date that the *statutory* amendment went into effect: 1 October 2015, with the date of the defendant's arraignment no longer being of any relevance. However, the purpose of the statutory amendment was to supplement § 15A-1201 with additional procedures for a defendant's waiver of his right to trial by jury. That the new procedures for waiving the right to a jury trial went into effect on 1 October 2015 does not change the effective date of the constitutional amendment itself. *See State v. Swink*, ___ N.C. App. ___, ___, 797 S.E.2d 330, 332 (2017) ("The amended statute became effective on 1 December 2014 and applied 'to criminal cases arraigned in superior court on or after that date.' "). The official commentary to Section 15A-1201 reiterates this principle. *See* N.C. Gen. Stat. § 15A-1201 (Official Commentary) ("Session Laws 2013-300, s. 4, effective December 1, 2014, added 'waiver of jury trial' in the section heading; . . . Session Laws 2015-289, s. 1, effective October 1, 2015, added 'procedure for waiver' in the section heading[.]"). Accordingly, a trial court may consent to a criminal defendant's waiver of his right to a jury trial only if the defendant was arraigned on or after 1 December 2014. However, if the defendant was arraigned prior to 1 December 2014, the pre-amendment version of Article I, Section 24 will govern his trial procedures—that is, the defendant may not be convicted "but by the unanimous verdict of a jury[.]" N.C. Const. art. I, § 24 (2014). This is the case despite the defendant's and the State's attempt to stipulate otherwise. *See e.g.*, *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971).

In the instant case, while there is no indication that defendant requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941, he was indeed arraigned on 24 February 2014.[1] Therefore, because defendant was arraigned before 1 December 2014, he was not constitutionally permitted to waive his right to a trial by jury.

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1. After defendant was appointed standby counsel, the State stated, "Your Honor, [defendant] was on for arraignment today. If I may just go ahead and arraign him?" The trial court allowed, and the State read the arraignments and the indictment. Defendant stood mute and the trial court entered pleas of not guilty.

B. Standard of Review to be Applied in the Instant Case

[2] We next address whether defendant's convictions must be vacated, or whether defendant must establish that he was prejudiced as a result of his waiver of a jury trial.

Citing *State v. Swink*, the State argues that a "defendant would have to be able to show both that the trial court violated the statute and that such violation prejudiced him" in order for the defendant to be granted a new trial on the grounds that he was not permitted to waive his right to a jury trial under § 15A-1201. *Swink*, ___ N.C. App. at ___, 797 S.E.2d at 332. The State argues that defendant is not entitled to a new trial because he cannot show prejudice, while defendant argues that the "denial of the right to trial by jury of twelve is reviewed as structural error." Because the trial court's error in this case was a structural error, defendant maintains that "no showing of prejudice is required" for him to be entitled to a new trial.

In *Swink*, the defendant was required to show that he was prejudiced by his waiver of a jury trial because the defendant was arraigned after 1 December 2014. Therefore, the defendant's right to a jury trial was no longer constitutional, but had instead become statutory. *Id.* at ___, 797 S.E.2d at 333 ("But the cases defendant cites involve fatal constitutional errors depriving the defendant of his or her constitutional right to a jury trial, rather than the intentional waiver of a statutory right to a jury trial, which is what is at issue here.") (citations omitted).

In contrast to the defendant in *Swink*, at the time defendant was arraigned, amended Article I, Section 24 had not gone into effect and had not been codified. Thus, the error that defendant asserts on appeal regarding the waiver of his right to a jury trial is constitutional in nature, rather than statutory. The applicable version of Article I, Section 24 required that defendant not "be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24 (2014). However, defendant was not convicted by the unanimous verdict of a jury. Where the error under the previous version of Article I, Section 24 involves a verdict that was rendered by an "improperly constituted" fact-finder—or in other words, anything less than twelve unanimous jurors—the error is said to be structural and automatic reversal is mandated. *State v. Wilson*, 192 N.C. App. 359, 368-69, 665 S.E.2d 751, 756 (2008) (citing *State v. Poindexter*, 353 N.C. 440, 545 S.E.2d 414 (2001); *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997); and *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971)). Because the fact-finder in the present case was "improperly constituted" for purposes of N.C. Const. art. I,

§ 24 (2014) in that it consisted of a single trial judge rather than twelve unanimous jurors, "automatic reversal is required." *Id.* at 367, 665 S.E.2d at 755. Despite the trial court's patient efforts to accommodate defendant, defendant is entitled to a new trial, by jury.

III. Trial Court's Denial of Defendant's Motion to Dismiss and Motion for a Continuance

Because we determine that defendant is entitled to a new trial for the above reasons, we need not address defendant's alternative argument that he is entitled to a new trial because he was effectively denied expert assistance when the trial court denied his motion for a continuance. Likewise, we do not address the trial court's denial of defendant's motion to dismiss for insufficient evidence.

IV. Forfeiture of Counsel

[3] During the three and a half years leading up to his trial, defendant engaged in a consistent pattern of misconduct with regard to his court-appointed counsel. Misconduct of a certain degree will "justify a forfeiture of a defendant's right to counsel." *State v. Blakeney*, ___ N.C. App. ___, ___, 782 S.E.2d 88, 94 (2016) (citation and quotation marks omitted). While there is no bright-line rule as to the particular behavior that will justify forfeiture, "forfeiture has generally been limited to situations involving 'severe misconduct[.]' " *Id.* This often involves situations in which the defendant engages in:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Id.

In the instant case, defendant's behavior satisfied all of these categories: as the State points out, defendant "fir[ed] or threaten[ed] to fire three separate lawyers, call[ed] them liars, accus[ed] them of ethical violations, report[ed] one to the Bar, curs[ed] at one in open court, ha[d] to be forcibly brought into court, refus[ed] to meet with his attorneys, question[ed] the court's jurisdiction, refus[ed] to answer the court's inquiries, and [was] held in contempt. . . ." After defendant refused to cooperate with, and attempted to fire, his third appointed attorney, the

trial court found that defendant had forfeited his right to court-appointed counsel. The trial court appointed Calvin Coleman as standby counsel.

On the first day of defendant's trial, and after the trial court had reconsidered the issue of counsel on two previous occasions, defendant insisted that he had finally come to understand the seriousness of the situation and asked Judge Sumner to appoint Mr. Coleman as his attorney, rather than as his standby counsel. Mr. Coleman did not object to the possibility, and told Judge Sumner that he had "seen a maturity over the last year or so" on the part of defendant. However, Mr. Coleman told the court that he would not be ready to go forward with trial that day if re-appointed. Judge Sumner denied the motion for counsel based on the prior forfeiture orders, reasoning that defendant had continued to show an "indifference . . . to frustrate the orderly process of the trial." After defendant's mistrial was declared, Mr. Coleman asked that the prior forfeiture findings "be reconsidered based upon [defendant's] present actions." Judge Sumner declined to reconsider, stating that "There's no question in my mind that he's forfeited the right to counsel." Consequently, defendant represented himself at his bench trial, with Mr. Coleman assisting on a standby basis.

On appeal, defendant contends (1) that his initial conduct did not rise to the egregious level warranting forfeiture of his constitutional right to court-appointed counsel, and (2) that the forfeiture orders should have been reconsidered in light of defendant's changed conduct. However, we do not address these arguments. For the reasons explained in Section II, *supra*, defendant is entitled to a new trial based on grounds wholly independent from forfeiture.

Nonetheless, where a defendant is found to have forfeited his right to counsel, "a break in the period of forfeiture occur[s] when counsel [is] appointed to represent [the] [d]efendant on appeal following his initial conviction." *State v. Boyd*, 205 N.C. App. 450, 455, 697 S.E.2d 392, 395 (2010). Because defendant accepted "the appointment of counsel on appeal following his . . . trial and allow[ed] appointed counsel to represent him throughout the [present] appellate process[,]" the trial court's prior forfeiture determinations will not carry over to defendant's new trial. *Id.* at 455-56, 697 S.E.2d at 395. Thus, defendant's forfeiture ended with his first trial. If, going forward, defendant follows the same pattern of egregious behavior toward his new counsel, the trial court should conduct a fresh inquiry in order to determine whether that conduct supports a finding of forfeiture.

V. Conclusion

For the reasons expressed herein, defendant is entitled to a new trial, before a jury.

NEW TRIAL.

Judges CALABRIA and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JOSEPH CHARLES BURSELL

No. COA16-1253

Filed 20 March 2018

1. Appeal and Error—preservation of issues—constitutional objection—satellite-based monitoring—Rule of Appellate Procedure 2

Defendant in properly preserved a constitutional objection to the imposition of satellite-based monitoring (SBM) under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), even though he did not clearly reference the Fourth Amendment in his objection. His objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicated defendant's rights under *Grady* to a Fourth Amendment reasonableness determination. Further, even if his objection was inadequate, the Court of Appeals in its discretion would invoke North Carolina Rule of Appellate Procedure 2 under the particular circumstances of this case in order to review its merits.

2. Satellite-Based Monitoring—lifetime—reasonable search—hearing

The trial court erred by imposing lifetime satellite-based monitoring on defendant without conducting a required hearing under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), to determine whether such monitoring would amount to a reasonable search under the Fourth Amendment. The Court of Appeals vacated the SBM order without prejudice to the State's ability to file a subsequent SBM application.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 10 August 2016 by Judge Ebern T. Watson III in New Hanover County Superior Court. Heard in the Court of Appeals 3 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Defendant Joseph Charles Bursell appeals from an order requiring him to enroll in North Carolina's satellite-based monitoring (SBM) program for the remainder of his natural life. He argues that the trial court erred by imposing lifetime SBM without conducting the required *Grady* hearing to determine whether such monitoring would amount to a reasonable search under the Fourth Amendment. We agree and vacate the SBM order without prejudice to the State's ability to file a subsequent application for SBM.

I. Background

On 10 August 2016, defendant pled guilty to statutory rape and indecent liberties with a child after having sex with Anna,[1] a thirteen-year-old female, when he was twenty years old, in violation of N.C. Gen. Stat. § 14-27.7A(a) (recodified at N.C. Gen. Stat. § 14-27.25(a) (2015) (effective Dec. 1, 2015)) and N.C. Gen. Stat. § 14-202.1. The trial court consolidated the offenses into one judgment and imposed a sentence in the presumptive range of 192 to 291 months in prison. The trial court also ordered defendant to enroll in lifetime sex offender registration and in lifetime SBM. The evidentiary basis for defendant's plea as presented by the State tended to show the following facts.

On 11 November 2015, Anna's mother reported to the New Hanover County Sheriff's Department that Anna had snuck out of the house the night before and was missing. Responding detectives began searching for Anna at her friends' houses. One friend provided Anna's Facebook account and password, and a detective saw some messages between her and another person, later identified as defendant. Anna's friends also reported that they had seen Anna and defendant meet multiple

1. A pseudonym is used to protect the minor's identity.

times at a local ice skating rink. That afternoon, an employee at Wave Transit Station in Wilmington called 9-1-1 to report that there were three young people in the area. Responding patrol officers identified two of the people as defendant and Anna, who were then interviewed by the New Hanover County Sheriff's Department.

During her interview, Anna reported that after she met defendant, they started communicating online, and she snuck out of her house on the night of 10 November 2015 to be with him. Defendant attempted to rent them a hotel room, but he only had cash, and both hotels only accepted credit cards. She and defendant then had sex in the parking lot and talked about leaving town together, before they were picked up at the bus station. In defendant's interview, he admitted to having sex with Anna and corroborated her version of the events.

After the trial court accepted defendant's plea and rendered its sentence on the offenses, the State applied for the imposition of lifetime registration and SBM. Defense counsel objected to both registration and SBM. After the trial court found defendant had committed an aggravating offense under the registration and SBM statutes, it summarily concluded that defendant "require[s] the highest possible level of supervision and monitoring" and ordered that he enroll in lifetime registration and be subject to lifetime SBM. Over defendant's objections to the registration and SBM orders, the trial court acknowledged that his guilty plea was contingent upon reserving his right to appeal those orders. Defendant later filed timely written notice of appeal from both orders.

II. Analysis

On appeal, defendant contends the trial court violated his Fourth Amendment rights by ordering he enroll in lifetime SBM without making the required *Grady* determination that such monitoring would be a reasonable search. *See Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015). The State concedes that the trial court erred under *Grady* and, therefore, its order should be vacated and the case should be remanded for a new SBM hearing. However, as a threshold matter, the State argues that because defendant failed to raise a Fourth Amendment objection on *Grady* grounds when he objected to the imposition of SBM at sentencing, he has waived his right to appellate review of this issue.

A. Issue Preservation

[1] The State contends that, although defendant objected at sentencing to the orders of registration and SBM, because he neither referenced

Grady nor "raise[d] any objection that the imposition of SBM . . . effected an unreasonable search in violation of the Fourth Amendment," this issue is not preserved for appellate review. We disagree.

Generally, "[c]onstitutional errors not raised by objection at trial are deemed waived on appeal." *State v. Edmonds*, 212 N.C. App. 575, 577, 713 S.E.2d 111, 114 (2011) (citation omitted). However, where a constitutional challenge not "clearly and directly presented to the trial court" is implicit in a party's argument before the trial court, it is preserved for appellate review. *See State v. Murphy*, 342 N.C. 813, 822, 467 S.E.2d 428, 433 (1996) (deeming preserved a constitutional challenge "not specifically argued" nor "clearly and directly presented to the trial court" but "implicit in the defendant's argument" and thus "implicitly presented to the trial court"); *see also State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 674–75 (2014) (deeming preserved a constitutional challenge not directly presented to the trial court where "[i]t [was] apparent from the context that the defense attorney's objections were made in direct response to the trial court's ruling to remove all bystanders from the courtroom—a decision that directly implicates defendant's constitutional right to a public trial"). Our Rules of Appellate Procedure similarly provide that a timely objection, even absent an articulation of the specific grounds of that objection, will preserve an issue for appellate review when those grounds are contextually apparent. N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, . . . stating the specific grounds for the ruling the party desired the court to make *if the specific grounds were not apparent from the context*." (emphasis added)).

Here, the plea hearing transcript reveals that, after the State's application of lifetime registration and SBM, defense counsel raised the following objections:

> [DEFENSE]: . . . I would object on two grounds. I know the status of the law is pretty clear as to the register, [sic] but for purposes of preserving any record if that were to change, I would submit that it is insufficient under Fourth Amendment grounds and due process grounds to place him on the registry in its entirety. Alternatively, that the lifetime requirement be a little excessive in this case and would ask you to alternatively consider putting him on the 30-year list.
>
> As to satellite-based monitoring, I think *the Court needs to hear some additional evidence other than the*

> *[recitation] of the facts from the attorney or from the district attorney as to satellite-based monitoring. And since that evidentiary issue has not been resolved, there isn't any statements from the victim or otherwise from law enforcement that you ought not to order satellite-based monitoring in this case, and that the registry alternative would satisfy those concerns. . . .*

(Emphasis added.) The trial court responded:

> [THE COURT]: . . . All noted exceptions made on the record by [defense counsel] on behalf of the defendant as to his *constitutional standing*, as to the standing of the current law, and as to the future references in implication that you have made in your arguments. All those are noted for the record. *All of those at this point in time are taken under consideration by the Court.*

(Emphasis added.) After the trial court rendered its findings to support its orders of lifetime registration and SBM, defense counsel objected again:

> [DEFENSE]: . . . [W]e will file our written notice of appeal for the findings for the registry and the satellite-based monitoring, but . . . . I do want to put on the record we do note our exception and objection to both of those in open court[.] . . .

The trial court responded:

> THE COURT: It's noted that you are making your plea contingent upon reserving your ability to file any actionable appeals that might be relevant to this cause.

As in *Murphy* and *Spence*, although defendant did not clearly and directly reference the Fourth Amendment when objecting to the State's application for SBM, nor specifically argue that imposing SBM without a proper *Grady* determination would violate his constitutional rights, it is readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM. Although defendant only referenced the Fourth Amendment during his objection to the State's lifetime registration application, he specifically argued during his objection to the State's SBM application that it needed to present additional evidence beyond the factual basis

for his plea before the trial court could impose SBM, and implicit in those grounds was an argument that ordering lifetime SBM in this case without first making a proper *Grady* determination would violate his Fourth Amendment rights. Defendant explicitly argued that "the Court needs to hear some additional evidence other than the [recitation] of the facts from the attorney or from the district attorney as to satellite-based monitoring" and noted further that "there isn't any statements from the victim or otherwise from law enforcement[,]" implicating a challenge to the sufficiency of evidence relevant for the trial court to make findings to support *Grady*'s required fact-specific, totality-of-the-circumstances determination of the Fourth Amendment reasonableness of imposing lifetime SBM. We thus hold that defendant's constitutional *Grady* challenge was preserved.

Assuming, *arguendo*, this objection was inadequate to preserve a constitutional *Grady* challenge for appellate review, in our discretion we would invoke Rule 2 to relax Rule 10's issue-preservation requirement and review its merits.

Under Rule 2 of our Rules of Appellate Procedure, "[t]o prevent manifest injustice to a party[ ] . . . either court of the appellate division may[ ] . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative[.] . . . N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citations and quotation marks omitted). "[W]hether a particular case is one of the rare 'instances' appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether 'substantial rights of an appellant are affected.' " *Id.* (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). The case-specific decision of whether to invoke Rule 2 rests in the discretion of the panel assigned to hear the case and is not constrained by precedent. *Cf. Id.* at 603, 799 S.E.2d at 603 ("[P]recedent cannot create an automatic right to review via Rule 2.").

In *State v. Bishop*, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017) (No. 17-55), we elected not to invoke Rule 2 to review an unpreserved constitutional *Grady* argument with respect to SBM because "the law governing preservation of this issue was settled at the time [the defendant] appeared before the trial court" and because the defendant did not timely appeal the SBM order. *Id.*, slip op. at 5; *see also id.*, slip op.

at 1, 4–5 (reasoning that the defendant's 29 June 2016 sentencing hearing occurred "months *after* this Court issued" its 15 March 2016 decisions in *State v. Blue*, ___ N.C. App. ___, 783 S.E.2d 534 (2016), and *State v. Morris*, ___ N.C. App. ___, 783 S.E.2d 528 (2016)). Here, defendant's 10 August 2016 sentencing hearing also occurred after the laws governing the State's burden in applying for SBM was settled. But unlike in *Bishop*, defendant's counsel here objected to SBM as unreasonable and without evidentiary support, and defendant timely appealed the SBM order. Also, unlike in *Bishop*, the State here concedes reversible error.

It is axiomatic that a constitutional right is a "substantial right." In view of the gravity of subjecting someone for life to a potentially unreasonable search of his person in violation of his Fourth Amendment rights, especially when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error, even if this argument was unpreserved, in our discretion we would invoke Rule 2 to relax Rule 10(a)(1)'s issue-preservation requirement in order to prevent manifest injustice to defendant.

B. Merits

[2] The State concedes that if defendant's *Grady* error was properly preserved, the trial court erred by not analyzing " 'the totality of circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations' " before imposing SBM. *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527 (quoting *Grady*, 575 U.S. at ___, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462); *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529 (same). The State thus argues that the order should be vacated and the case remanded for a new SBM hearing. *See Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 530. We agree there was *Grady* error and vacate the order. "*Blue* and *Morris* made clear that a case for [SBM] is the State's to make," *State v. Greene*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 6 (Oct. 3, 2017) (No. 17-311), and, importantly, that a trial court must make the required *Grady* determination before imposing SBM.

In *Greene*, we held that where the defendant clearly and distinctly preserved an objection to SBM on *Grady* grounds, the appropriate remedy when the State fails to carry its burden of producing sufficient evidence to permit the trial court to make its required *Grady* determination

is not to remand the case for a new SBM hearing, *id.*, slip op. at 5–7, which would effectively allow the State to " 'try again' by applying for yet another [SBM] hearing[,]" *id.*, slip op. at 7; *see also id.* slip op. at 5 (reasoning that "the nature of the State's burden was no longer uncertain at the time of the defendant's [14 November 2016 SBM] hearing" (citation omitted)). Here, defendant's SBM objection at sentencing, while contextually adequate to preserve his right to appellate review of his constitutional *Grady* argument, was not argued on *Grady* grounds as clearly and distinctly as in *Greene*. Also, defendant's sentencing hearing occurred earlier than the SBM hearing in *Greene*. We thus hold that the proper remedy in this case is to vacate the SBM order without prejudice to the State's ability to file a subsequent SBM application.

III. Conclusion

Defendant properly preserved at sentencing a constitutional objection on *Grady* grounds to the imposition of SBM. But even if his objection was inadequate to preserve a *Grady* challenge for appellate review, in our discretion we would invoke Rule 2 under the particular circumstances of this case in order to review its merits. Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State's ability to file a subsequent SBM application.

VACATED.

Judge INMAN concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent. Defendant's appeal should be dismissed because he failed to preserve his constitutional argument pursuant to Rule 10(a)(1), and our appellate rules should not be suspended pursuant to Rule 2.

I. Preservation

"[A] party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2017). This Court has ruled "[c]onstitutional errors not raised by objection at trial are deemed waived

on appeal." *State v. Edmonds*, 212 N.C. App. 575, 577, 713 S.E.2d 111, 114 (2011) (citations omitted). "[I]ssues and theories of a case not raised below will not be considered on appeal . . . ." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co, LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008).

Defendant failed to properly preserve his objection to satellite-based monitoring ("SBM"). While Defendant objected to placement on the sex offender registry for life instead of the thirty-year list on constitutional grounds, the same cannot be said of defense counsel's argument for satellite-based monitoring. Defense counsel stated:

> As to this issue, I would object on two grounds. I know the status of the law is pretty clear as to the register, but for purposes of preserving any record if that were to change, I would submit that it is insufficient under Fourth Amendment grounds and due process grounds to place [Defendant] on the *registry* in its entirety. Alternatively, that the lifetime requirement be a little excessive in this case and would ask you to alternatively consider putting him on the 30-year list.

(Emphasis added).

Regarding SBM, defense counsel stated to the trial court:

> As to satellite-based monitoring, I think the Court needs to hear some additional evidence other than the [recitation] of the facts from the attorney or from the district attorney as to satellite-based monitoring. And since that evidentiary issue has not been resolved, there isn't any statements from the victim or otherwise from law enforcement that you *ought not to order satellite-based monitoring in this case, and that the registry alternative would satisfy those concerns*. And we leave it at that, your Honor.

(Emphasis added). Despite stating that counsel was objecting on "two grounds," the content of the objection failed to allege an independent constitutional ground for appeal in regards to SBM.

The importance of issue preservation cannot be understated. Our Supreme Court has stated "[t]he requirement expressed in Rule 10([a]) that litigants raise an issue in the trial court before presenting it on

appeal goes to the heart of the common law tradition and our adversary system." *Dogwood*, 362 N.C. at 195, 657 S.E.2d at 363 (citation, quotation marks, and brackets omitted). Further, the implication of constitutional rights does not relax the burden upon Defendant to properly preserve an issue for appellate review, and it is treated as any other issue in regards to Rule 10. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003). Defendant's failure to properly preserve his objection precludes review by this Court.

II. Suspension of Appellate Rules

I would decline to consider the issue raised on appeal by Defendant through the invocation of Rule 2 because it is not necessary to "prevent manifest injustice to a party" or "expedite decision in the public interest." N.C.R. App. P. 2 (2017); *see also Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364.

"Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court *and only in such instances*." *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (emphasis added) (citation omitted). "[W]hether an appellant has demonstrated that his matter is the *rare case* meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017) (emphasis added).

This Court has recently declined to invoke Rule 2 where Defendant failed to properly preserve a Fourth Amendment argument in relation to SBM hearings. *See State v. Bishop*, ___ N.C. App. ___, 805 S.E.2d 367 (2017). Much like the defendant in *Bishop*, Defendant here "is no different from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review." *Id.* at ___, 805 S.E.2d at 369-70. In other words, Defendant's argument on appeal is not an exceptional circumstance, standing alone, that would justify our review. Further, the "inconsistent application of Rule 2 . . . leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Id.* at ___, 805 S.E.2d at 370 (citation and quotation marks omitted).

Before an appellate court can invoke Rule 2, we are required to look at specific facts and circumstances that would justify suspension of the rules, including but not limited to whether a substantial right of the appellant is affected. *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602-03.

I do not disagree with the majority that Defendant's participation in lifetime SBM after his term of imprisonment may indeed affect a substantial right. Individuals participating in the lifetime SBM program are subject to monitoring and tracking, amounting to Fourth Amendment searches. *State v. Bowditch*, 364 N.C. 335, 350-51, 700 S.E.2d 1, 11 (2010).

However, it is difficult to conclude that a manifest injustice exists where the penalty may not actually be imposed. Defendant can petition the North Carolina Post-Release Supervision and Parole Commission to terminate the lifetime SBM requirement. *See* N.C. Gen. Stat. § 14-208.43 (2017). A decision by the commission to terminate lifetime SBM would render the impact upon Defendant's substantial right moot.

For the foregoing reasons, I would dismiss Defendant's appeal and decline to suspend the appellate rules.

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. COA16-965

Filed 20 March 2018

1. Obstruction of Justice—investigation of sexual abuse of child—parent pressuring child to recant allegations

The trial court did not err by denying defendant mother's motion to dismiss a charge of felony obstruction of justice where defendant pressured her daughter to lie and recant a sexual abuse charge against her adoptive father by coaching her on what to say to investigators, even after admitting that the daughter was abused. Viewing the evidence in the light most favorable to the State, defendant actively punished her daughter, verbally abused her, and turned her immediate family against her in order to get her to recant.

2. Obstruction of Justice—felony obstruction of justice—deceitful actions intending to defraud

There was sufficient evidence to support the conclusion that defendant's actions in pressuring her daughter to recant allegations of sexual abuse against her adoptive father were committed with the deceit and intent to defraud necessary to elevate the charges to felony obstruction of justice under N.C.G.S. § 14-3(b). Defendant

told her daughter to lie in order to halt any investigation into the abuse.

3. Obstruction of Justice—felony obstruction of justice—access to interview child—parental interference

The trial court erred by denying defendant mother's motion to dismiss a charge of felony obstruction of justice where no evidence supported the superseding indictment's charge that defendant denied the sheriff's department and child protective services access to her daughter throughout the course of the child sexual abuse investigation. Defendant's presence at the interviews, her interruptions during the interviews, and her decision to end one of the interviews did not constitute denial of access to her daughter.

4. Accomplices and Accessories—accessory after the fact—omission—failure to report child sexual abuse

The trial court erred by denying defendant mother's motion to dismiss a charge of accessory after the fact based on her failure to report her husband's sexual abuse of their daughter. Although North Carolina mandates reporting of actual or suspected child abuse and criminalizes a breach of this duty as a misdemeanor under N.C.G.S. § 7B-301, defendant was not charged with violating that statute.

Judge INMAN concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 15 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Jarvis John Edgerton, IV, for Defendant.

McGEE, Chief Judge.

Mardi Jean Ditenhafer ("Defendant") was convicted of two counts of felony obstruction of justice and one count of felony accessory after the fact to sexual activity by a substitute parent. Defendant contends the trial court erred in denying her motions to dismiss the charges and in its instruction to jurors regarding accessory after the fact. We uphold Defendant's conviction for obstruction of justice by causing her daughter to recant the report of sexual abuse, but we vacate Defendant's

conviction for obstruction of justice based on denying investigators access to the daughter. We also vacate Defendant's conviction for being an accessory after the fact for her failure to report a crime.

I. Factual and Procedural History

The evidence at trial tended to show that in 2013, Defendant was married to William Ditenhafer ("William"). The couple had two children, a daughter ("the daughter") and a younger son ("the son"). The daughter is Defendant's biological daughter and was adopted by William when she was in the third grade. The son is the biological son of Defendant and William.

The relationship between William and the daughter was initially positive. However, in middle school, the daughter's grades began to drop as a result of self-esteem issues, and she began to harm herself. William punished the daughter for her dropping grades with corporal punishment, which "scared [her] a lot with his anger and his yelling, um, and the spankings." The daughter tried to bring her self-esteem and self-harming issues to the attention of Defendant, but Defendant grew angry with the daughter and claimed the daughter was only seeking attention. As a result of her parents' anger at her, the daughter believed she was a painful burden on the family.

During eighth grade, the daughter began sending sexually suggestive pictures of herself by text message to a boy. William discovered the photos, and he and Defendant grounded the daughter. Rather than seek professional counseling for the daughter, William, with Defendant's knowledge, began to give the daughter full-body massages under the guise of improving her self-image. William gave the massages to the daughter once a week while she was covered only by a towel.

After one of the massages, the daughter took a shower to remove oil from her body. After the shower, as the daughter was walking to her room with a towel wrapped around her body, William called her into the living room where he was seated on the couch. A television displayed several suggestive photographs that the daughter had again sent to the boy by text message. William told the daughter he had been looking at the photos and that they "turned [him] on." He then gave the daughter an ultimatum: either stimulate his penis with her hand or he would show the photos to Defendant and have the daughter sent to jail. The daughter began to cry and refused for several minutes, but ultimately relented. William then took off his pants and instructed the daughter to drop her towel. He guided her hand along his penis until he ejaculated. William made the daughter touch his penis at least twice a week thereafter.

William's abuse of the daughter eventually expanded to include making her perform fellatio on him on at least three occasions, and he gave her a book with instructions on how to perform sex acts. The daughter did not tell Defendant about these incidents because she feared Defendant would not believe her and would punish her.

The daughter turned sixteen on 27 November 2012. Thereafter, William had vaginal intercourse with her on multiple occasions. He also penetrated her vagina with vibrators and his fingers several times and attempted anal penetration on several occasions. He also bought her sexually suggestive clothing to wear for him, took sexually suggestive videos and photographs of her in those outfits and various stages of undress, and sent her explicit email messages requesting sexually suggestive photographs from her. The daughter attempted to hint to Defendant that she was being abused by leaving her undergarments in Defendant's and William's bed; when confronted, William told Defendant that the daughter had just been napping in their room. Defendant grew upset with the daughter for taking naps in her bed, making the daughter once again fearful of telling her mother the truth.

William's abuse further exacerbated the daughter's self-harming. She began to cut parts of her body that William told her were attractive, such as her shoulders and bellybutton. The daughter attempted suicide several times by slicing her wrists, taking pills, and attempting to drown herself. When Defendant noticed the daughter's bandaged wrists after one such attempt, she told the daughter that she thought it was just another ploy for attention.

In the spring of 2013, when she was sixteen, the daughter visited her biological paternal aunt ("the aunt") in Arizona. The night before she was to fly home, the daughter informed the aunt that she was being sexually abused and raped by her adoptive father. The aunt and the daughter called Defendant to tell her of the abuse and informed Arizona law enforcement. Rather than feeling supported after the call to her mother, the daughter felt that Defendant was "angry at [her]."

A short time after reporting the abuse to the aunt, the daughter flew home to North Carolina and was picked up at the airport by Defendant. Defendant told the daughter she did not believe her, that she needed to recant, and that she needed to stop lying because "it was going to tear apart the family and it was just going to end horribly and that [the daughter] didn't need to do this." The daughter reiterated to her mother that the abuse occurred.

The daughter and Defendant met with Susan Dekarske ("Ms. Dekarske") with Wake County Child Protective Services ("CPS") and Detective Stan Doremus ("Detective Doremus") with the Wake County Sheriff's Department ("WCSD") on 11 April 2013 in Defendant's home. The daughter described William's abuse of her. CPS, William, and Defendant entered into a safety agreement whereby William was removed from the home during the investigation into the abuse. The daughter started seeing a therapist, Elizabeth Guarnaccia ("Ms. Guarnaccia"). The daughter met with CPS and WCSD several times over the following months with Defendant present or within listening distance. On almost a daily basis, Defendant pressured the daughter to recant her allegations, including yelling at her, threatening to have her involuntarily committed to a psychiatric hospital, calling her crazy and a "manipulative bitch," and telling the son that his sister was crazy. Defendant told the daughter that she "was tearing apart her family and destroying her family and that William was going to go to jail . . . and [the son] was going to turn into a drug addict and drop out of high school" as a result of the daughter's reports of abuse.

Defendant severed the daughter's contact with her family in Arizona and told her she would never see them again. Defendant later cancelled a trip the daughter had planned to take to Arizona, as well as a family trip to a Disney theme park, telling the daughter her allegations of abuse were "going to [cause the family to] lose our money and . . . our stuff and the animals[.]" Defendant then told the daughter they could go to Disney if she recanted her allegations against William. At one point, Defendant told the daughter Defendant had breast cancer and that the daughter needed to recant to relieve the stress it was putting on Defendant. Defendant also began to videotape the daughter, demanding that she recant on film. Defendant also monitored all the daughter's phone calls and texts. Defendant told the daughter she wished William could come back to the home. Finally, Defendant used the above facts and assertions to turn the daughter's grandmother and the son against the daughter.

As a result of Defendant's conduct, the daughter did not feel safe at home, and considered leaving. Her thoughts of suicide returned. Ms. Dekarske testified that "[f]or the majority part of the investigation, [the daughter] continued to inform [her] that [Defendant] was pressuring her to recant the story[,]" and Ms. Guarnaccia testified that "[the daughter] said that her mother [Defendant] asked her to lie to [Ms. Guarnaccia], to CPS, to the detectives, that her mother did not believe her and wanted

her to recant because [the abuse] didn't happen." Defendant denied to Ms. Dekarske that she was coercing the daughter to recant.

Defendant's attempts to influence the investigation into the daughter's abuse were not limited to her treatment of the daughter. Defendant and the daughter met with Ms. Dekarske and Detective Doremus on 21 June 2013. Detective Doremus testified that Defendant was seated "[s]houlder to shoulder" with the daughter, and with "her hand on [the daughter's] thigh virtually the whole time[.]" He further testified that "[i]t appeared to [him] as though [] [D]efendant was answering the questions for [the daughter]. The questions that were being asked of [the daughter], as soon as [the daughter] opened her mouth to talk, Defendant would answer the questions." At one point, Defendant told Detective Doremus that "there is some truth to everything that [the daughter] says but not all of it is true." Defendant also told Ms. Dekarske that "she believe[d] [the daughter] in regards to what she had disclosed; however, she still did not believe it was William who did that to her." Defendant openly expressed discomfort with the investigation at the conclusion of the interview and told Detective Doremus that she would not permit the daughter to speak with him alone. When Detective Doremus informed her that she could not prohibit such a meeting, Defendant reiterated that she was not going to authorize the daughter to meet with Detective Doremus alone.

On 11 July 2013, the daughter was scheduled to meet with Ms. Dekarske and Detective Doremus at CPS's offices and, as Defendant drove the daughter to the meeting, the daughter told Defendant that she was going to recant because she could no longer handle the pressure of Defendant's constant scolding. Defendant then began to "coach" the daughter, telling her what she should say. Defendant allowed the daughter to meet with Ms. Dekarske and Detective Doremus outside of her presence.

In the meeting, the daughter told Ms. Dekarske and Detective Doremus that, while riding to the meeting, she had told Defendant she would recant but that she would not do so because the allegations of abuse were true. As the meeting continued, the daughter received text messages from Defendant asking what was happening and how long the meeting would take. As a result of the daughter's statement, the text messages, and his prior interactions with Defendant, Detective Doremus knew at this point in the interview that "we had probably a limited amount of time to talk to her before [Defendant] pulled her out of that meeting[.]" Detective Doremus asked the daughter about emails, printouts, and other evidentiary documents indicating William's abuse of the daughter. Defendant soon entered the room and interrupted the

interview. Detective Doremus testified that Defendant sat down at the table with "a smirk on her face" and when he informed Defendant that the daughter had not recanted, Defendant "became angry." Ms. Dekarske and Detective Doremus showed Defendant documentary evidence of explicit and sexually suggestive emails sent to the daughter from their home's internet provider. Defendant grew irate, said the emails "[don't] explain anything[,]" and terminated the interview.

Defendant continued to pressure the daughter to recant her allegations of abuse and, on 5 August 2013, following a meeting in her home with Defendant and Ms. Dekarske, the daughter recanted her report of abuse. In the meeting, Defendant had sought clarification from Ms. Dekarske concerning her obligation to cooperate with local law enforcement. As Ms. Dekarske was pulling out of the driveway, the daughter approached her car window and told Ms. Dekarske that she had made up everything. The daughter spoke in a "very robotic [manner], saying something [as if it had] been rehearsed for her to say." Ms. Dekarske saw Defendant watching her and the daughter from a window.

Two days later, the daughter contacted Detective Doremus by phone and recanted her report of abuse. During the call, Detective Doremus heard a third person on the line. The daughter later e-mailed a recantation to Detective Doremus, with Defendant "prompt[ing] [the daughter] on what to write, and [the daughter] typ[ing] it up in [her] e-mail." Detective Doremus followed up with the daughter in person at her school on 29 August 2013. The daughter told Detective Doremus at the outset of the meeting that she was not supposed to speak to him, to which he responded: "Don't worry. I'm not going to ask you any questions." He explained to her that the investigation into her abuse was ending as a result of her recantation and there would be no prosecution.

In a therapy session with Ms. Guarnaccia on 10 October 2013, and attended by Defendant, the daughter once more recanted her report of abuse, telling Ms. Guarnaccia that she was recanting not because the abuse did not occur, but instead because she "didn't like what [she] was doing to [her] family." The daughter's explanation upset Defendant and the daughter then denied the abuse outright. Ms. Guarnaccia later informed Ms. Dekarske that the daughter had told her: "I am recanting, but [the abuse] did happen."

By Thanksgiving 2013, William was back in the family home. His abuse of the daughter resumed within a week, "just like [it] never stopped." The daughter felt she could not report the abuse to Defendant again because of Defendant's previous response and conduct in the prior investigation.

In early February 2014, William demanded sex from the daughter, who was then seventeen. She "zoned out" and complied, allegedly coerced out of fear of William because "he was still angry and big, and [she] didn't want to get hurt, and [she] didn't want what happened with [her] family to happen again." As William and the daughter were engaged in intercourse on Defendant's and William's bed, Defendant walked into the bedroom and witnessed the abuse. The daughter ran into another room.

Defendant began to interrogate her naked and crying daughter, asking if this was her first time having sex or if she had previously lost her virginity. The daughter told Defendant she had previously had sex with her boyfriend, and testified that she was afraid to tell her mother that her prior allegations against William were true. Defendant had witnessed William's abuse of the daughter on the same day that she was scheduled to meet with Detective Doremus to pick up a cell phone that had been searched for evidence in the earlier investigation. After questioning her daughter, Defendant had her get dressed and accompany her to a McDonald's restaurant where the exchange with Detective Doremus was to occur. Detective Doremus had arrived early, and watched Defendant and the daughter park. After parking, the daughter told Defendant that everything she had reported in the earlier investigation was true, to which Defendant replied: "I'm not sure if I believe you or not[.]" Detective Doremus watched Defendant and the daughter argue for a few minutes, and then exited his vehicle to retrieve the cell phone from the trunk. Defendant met him at the rear of his car, took the phone, and left. Defendant said nothing to Detective Doremus about the abuse she had witnessed earlier that same day. Defendant did not tell Detective Doremus about the conversation she had just had with her daughter, in which the daughter asserted the truth of the prior allegations of abuse.

Defendant then left the McDonald's restaurant to take the daughter back home, where she planned to leave her with William and the son while Defendant was at work. The daughter protested, and Defendant allowed her to spend the night at a friend's house instead. Defendant picked up her daughter the following morning and returned her to the home with William. Defendant permitted William to stay in the home for another month before requiring him to move.

On 19 March 2014, more than a month after the abuse and after William moved out of the house, Defendant called William's brother and told him she had witnessed William's abuse of the daughter. William's brother told Defendant she needed a lawyer, and she asked him why. She then told him she would talk to an attorney. Defendant continued to talk to William's brother, telling him at various times that the daughter

and William "were in therapy" and that the lawyer had advised her she "was doing everything correctly and . . . to not involve anyone else or the authorities because that would cost . . . more money and time." Defendant also told him she was hopeful that William could move back home. Defendant spoke with the daughter several times about allowing William to move back in the future, and told her daughter not to report the abuse because "it was family business."

After Defendant witnessed William abusing the daughter, Defendant told the daughter she "forg[ave] her" and that they should gather up all the pillows and sheets on Defendant's bed from the day she witnessed the abuse and "anything else that [William] might have used with [the daughter]." After collecting the linens, Defendant tossed them into the backyard with the family dog because he liked to chew things up. Eventually, Defendant and the daughter threw the items away.

William's brother sent an email to CPS in late April 2014 to report William's abuse of the daughter. The next day, CPS interviewed him, and he informed Defendant that CPS was again involved. Defendant responded that she knew CPS had spoken with the daughter and the son, and called CPS's new investigation "a nightmare." She later called her brother-in-law, was "very angry" with him, accused him of reporting the abuse to CPS, and reiterated that the investigation "was a nightmare."

Following the report by William's brother, a CPS assessor met the daughter at her school and the daughter denied the abuse reported by William's brother "[b]ecause it's what [she] was told to do by [Defendant]." The daughter called Defendant to alert her that a new CPS investigation was underway. Defendant picked her up from school and then travelled to the son's school to prevent CPS from meeting with him, but the assessor had already begun her interview with the son without prior notice to Defendant. The assessor testified at trial that, in the course of the interview, Defendant:

> burst into the conference room and grabbed [the son] and said, "Absolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening."
>
> She said [to the son], "Go get your book bag. I'm signing you out of school."
>
> . . .
>
> She was very angry. She was very angry and just said, "I have nothing to say to you. I have nothing to say to you." And she just grabbed [the son] and walked out.

Two days later, on 30 April 2014, Defendant agreed to speak to CPS at her home. Despite heavy rain, wind, and thunder, Defendant refused to allow the CPS assessor inside, and insisted that the interview take place outside the home. Rather than confirm the abuse she had witnessed firsthand, Defendant informed the assessor that she was separated from William and that he was no longer allowed in the house "to avoid any more lies from [the daughter]." She told the assessor that CPS and its agents were not permitted to speak to her children at school unless a parent or attorney was present, and that the only place she would authorize contact would be outside her home. The assessor then discussed alternative temporary living arrangements for the children. At no point in the interview did Defendant state that she witnessed William's abuse of the daughter. In fact, Defendant never disclosed that information to CPS in the course of its investigation.

Warrants for Defendant's arrest were issued on 1 May 2014 for felony obstruction of justice and felony accessory after the fact to William's abuse of the daughter. A grand jury issued two indictments on those charges on 20 May 2014, charging Defendant with one count of accessory after the fact and one count of felony obstruction of justice. The grand jury returned a superseding indictment on 9 September 2014 for one count of accessory after the fact to sexual activity by a substitute parent. The superseding indictment for accessory after the fact alleged that Defendant "unlawfully, willfully and feloniously did knowingly assist William . . . in escaping detection, arrest or punishment by not reporting the incident after he committed the felony of Sexual Activity by a Substitute Parent."

Defendant moved for a bill of particulars concerning the indictment for obstruction of justice, which was denied by the trial court after the State agreed to resubmit the charge to the grand jury to resolve any deficiencies in the initial indictment. The State returned a superseding indictment for felony obstruction of justice on 10 March 2015, which alleged two separate counts:

> I. . . . [D]efendant . . . unlawfully, willfully, and feloniously obstructed justice with deceit and intent to defraud and obstruct an investigation into the sexual abuse of a minor to wit: [] [D]efendant facilitated and encouraged [the] daughter . . . to recant allegations of sexual abuse against [William]. . . .
>
> II. . . . [D]efendant . . . unlawfully, willfully, and feloniously obstructed justice with deceit and intent to defraud

> and obstruct an investigation into the sexual abuse of a minor to wit: [] [D]efendant denied [WCSD] and [CPS] access to [the] daughter . . . throughout the course of the investigation . . . .

Defendant was tried on two charges of felony obstruction of justice and one charge of accessory after the fact on 26 May 2015. After the close of evidence, Defendant moved to dismiss each charge for insufficient evidence and for "a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient[.]" The trial court denied Defendant's motions. A jury found Defendant guilty on all counts. Defendant gave notice of appeal in open court.

II. Analysis

Defendant argues on appeal that the trial court erred in: (1) denying her motions to dismiss the two charges of obstruction of justice for insufficiency of the evidence; (2) denying her motion to dismiss the accessory after the fact charge for insufficiency of the evidence; and (3) failing to limit Defendant's culpable conduct in its jury instruction for accessory after the fact to her failure to report abuse. While we hold that the trial court properly denied her motion to dismiss the charge of obstruction of justice for pressuring her daughter to recant, we agree with Defendant that the trial court erred in failing to dismiss the remaining charges.

A. Motion to Dismiss the Charge of Obstruction of Justice by Pressuring the Daughter to Recant

[1] We review a denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Cousin*, 233 N.C. App. 523, 529, 757 S.E.2d 332, 338 (2014) (citation omitted). Such review is focused on "whether there is substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Our Supreme Court has defined substantial evidence as "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). Such substantial evidence may be "direct, circumstantial, or both[,]" *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988), and we consider it "in the light most favorable to the State with every reasonable inference drawn in the State's favor." *Cousin*, 233 N.C. App. at 529-30, 757 S.E.2d at 338

(citing *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)).

Obstruction of justice is generally a common law misdemeanor committed by one who performed "acts which obstruct, impede or hinder public or legal justice[.]" *State v. Wright*, 206 N.C. App. 239, 242, 696 S.E.2d 832, 835 (2010) (citation and quotation marks omitted). However, N.C. Gen. Stat. § 14-3(b) (2015) states that "[i]f a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony." The elements of felony obstruction of justice are therefore (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud. *See*, *e.g.*, *Cousins*, 233 N.C. App. at 531, 757 S.E.2d at 339 (holding no error in denying a motion to dismiss a charge of felony obstruction of justice where there was sufficient evidence the defendant "(1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating [a crime] (3) with deceit and intent to defraud").

This State's appellate courts have recognized " 'a policy against parties deliberately frustrating and causing undue expense to adverse parties gathering information about [wrongdoing.]' " *Wright*, 206 N.C. App. at 242, 696 S.E.2d at 835 (quoting *Henry v. Deen*, 310 N.C. 75, 87-88, 310 S.E.2d 326, 334-35 (1984)). Thus, a person obstructs justice, in either the civil or criminal context, " '[w]here, as alleged here, a party deliberately [acts] to subvert an adverse party's investigation of [wrongdoing.]' " *Wright*, 206 N.C. App. at 242, 696 S.E.2d at 835 (quoting *Henry*, 310 N.C. at 87-88, 310 S.E.2d at 334-35) (first alteration in original).

Defendant argues there was insufficient evidence of any willful intent on the part of Defendant to obstruct justice in encouraging the daughter to recant. Specifically, Defendant contends that "the only 'purpose' the State's evidence showed [Defendant] acted with was the purpose of getting [the daughter] to tell what [Defendant] believed was the truth[,]" and that "[t]he State's evidence does not support a conclusion that [Defendant] was encouraging [the daughter] to recant with the willful intent to . . . hinder the investigation of [the daughter's] allegations." We disagree.

The daughter testified at length about Defendant's actions pressuring her to recant. The State's evidence showed that Defendant did more than simply encourage the daughter to tell the truth — an act that certainly would not constitute obstruction of justice on its own. Defendant directed the daughter specifically to aver that William had not, as a

matter of fact, abused her. When the daughter did not make the specific factual statement to investigators desired by Defendant, Defendant actively punished her, verbally abused her, and turned her immediate family against her. Defendant did so even after she admitted to Detective Doremus and Ms. Dekarske that she believed the daughter had been abused. Defendant coached the daughter on what to say in person, on the telephone, and in emails in order to recant.

This evidence was sufficient to allow a reasonable juror to infer that Defendant's conduct was designed to effect a particular outcome — the end of the criminal and administrative investigation that Defendant believed was "tearing apart her family and destroying her family" and "going to [cause the family to] lose [their] money and . . . stuff and the[ir] animals" — directly contrary to the State's investigative aims of determining whether abuse had occurred and who perpetrated any abuse. Even after Defendant witnessed first-hand William's abuse of the daughter, she declined to report the abuse because it "would cost them more money and time" and later described the subsequent CPS investigation into that abuse as "a nightmare." Viewing all the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference drawn therefrom, it was reasonable for the jury to find that Defendant intended to obstruct justice when she pressured the daughter to recant, and the trial court did not err in denying the motion to dismiss the charge for lack of sufficient evidence of this element of the offense.

[2] Defendant next contends that there was insufficient evidence to support the conclusion that Defendant's actions were committed with deceit and the intent to defraud necessary to elevate the charges to felony obstruction of justice under N.C. Gen. Stat. § 14-3(b). However, as detailed above, Defendant told Detective Doremus and Ms. Dekarske that she believed the daughter had been abused by someone but nonetheless pressured her into recanting in order to halt any investigation into that abuse. Ms. Guarnaccia testified the daughter told her that Defendant "*asked [the daughter] to lie to [Ms. Guarnaccia], to CPS, to the detectives* . . . . [The daughter] felt she was under a lot of pressure and felt she had to lie." (emphasis added). When confronted by Ms. Dekarske about her coercive conduct, Defendant denied pressuring the daughter. Once again, viewing all the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference drawn therefrom, it was sufficient to allow a reasonable inference that Defendant acted with the deceit and intent to defraud necessary to commit felony common law obstruction of justice.

B. Defendant's Motion to Dismiss the Felony Obstruction of Justice Charge for Denial of Access

[3] Defendant next argues that, because she never denied any request from CPS or WCSD for an interview with the daughter, no evidence supported the superseding indictment's second charge that Defendant obstructed justice by "den[ying] [WCSD] and [CPS] access to [the daughter], throughout the course of the investigation." We agree.

Defendant is correct that the State presented no evidence of a specific instance in which Defendant expressly denied a request by WCSD or CPS to interview the daughter. Indeed, Ms. Dekarske testified that Defendant "allowed me access to [the daughter] and also to speak with [her]. There was never a time that [Defendant] did not allow me access to [the daughter]." Similarly, the State concedes that Defendant allowed Detective Doremus to meet with the daughter on multiple occasions without Defendant being present, and there is no evidence in the record demonstrating that a request to interview, meet, or contact the daughter by Detective Doremus was ever denied by Defendant.

The State nevertheless argues that WCSD and CPS were denied "full access" because Defendant was present in many interviews. But the delineation between "access" as alleged in the indictment and "full access" as advanced by the State on appeal would create an unworkable distinction in our jurisprudence. If WCSD and CPS believed that Defendant's presence in any interview constituted interference, they could have asked Defendant to leave. If Defendant, in exercising her rights as a parent, refused such a direct request, WCSD and CPS could have sought a court order compelling her nonattendance. N.C. Gen. Stat. § 7B-303(a) (2015) ("If any person obstructs or interferes with an assessment . . . the director may file a petition naming that person as respondent and requesting an order directing the respondent to cease the obstruction or interference."). Detective Doremus appeared well aware of WCSD's and CPS's ability to do so, telling Defendant outright that she could not prohibit his speaking with the daughter alone.

In short, there is no evidence that tends to show Defendant ever "denied [WCSD] and [CPS] access to [the] daughter . . . throughout the course of the investigation" as alleged in the indictment. Defendant complied with every request for CPS, counselors and WCSD to interview the daughter. Though she was present at many interviews and unilaterally ended one, she was within her rights as a parent to do so, and neither WCSD nor CPS sought to mitigate or curtail such conduct by Defendant. In the light most favorable to the State, the evidence was insufficient to

send the felony obstruction of justice charge for denial of access, as set forth in the indictment, to the jury, and the trial court erred in denying her motion to dismiss this count. In vacating Defendant's conviction for obstruction of justice, we do not decide whether Defendant's acts of interference — including speaking over the daughter to answer investigators' questions, telling investigators that the daughter was not to be believed, and abruptly removing the daughter from one interview after learning that she was not recanting and was being asked to authenticate material documentary evidence — could have supported an obstruction charge. But that conduct was not within the scope of the plain meaning of denying investigators "access" to the daughter, as alleged in the indictment.

C. Defendant's Motions to Dismiss the Accessory After the Fact Charge

[4] Defendant identifies two grounds for this Court to hold that the trial court erred in denying her motion to dismiss the accessory after the fact charge. First, she argues that merely failing to report a crime does not render a defendant an accessory after the fact, and the State therefore failed to prove any *actus reus*. Second, and assuming that Defendant's failure to report was not culpable conduct, Defendant argues that evidence that she destroyed evidence and discouraged others from reporting abuse is a fatal variance from the conduct alleged in the charging document. We agree with Defendant's first argument and therefore do not reach her fatal variance argument.

N.C. Gen. Stat. § 14-7 provides that "[i]f any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, . . . such person shall be guilty of a crime[.]" N.C. Gen. Stat. § 14-7 (2015). To support a conviction under the statute, the State must prove three elements: "(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (citations omitted). "[P]ersonal assistance in any manner so as to aid a felon in escaping arrest or punishment is sufficient to support a conviction as an accessory." *State v. Brewington*, 179 N.C. App. 772, 776, 635 S.E.2d 512, 516 (2006) (citations omitted).

Defendant takes no issue with the sufficiency of the State's evidence as to the first two elements — the commission of a felony and her

knowledge of the perpetrator.[1] She instead argues that merely failing to report a crime, in and of itself, is not enough to support a conviction for accessory after the fact. Both Defendant and the State, which disagrees with Defendant's argument, cite our Supreme Court's decision in *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257 (1942), as dispositive of the issue.

In *Potter*, the defendant witnessed an assault and drove the assailant away from the scene of the crime in his car. *Id.* at 154, 19 S.E.2d at 258. The defendant was interrogated by police, and denied that the assault had occurred and that he had given a ride to the perpetrator. *Id.* at 155, 19 S.E.2d at 258. The defendant was convicted as an accessory after the fact. *Id.* On appeal, our Supreme Court noted that "one [is not] an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof[.]" *Id.* at 156, 19 S.E.2d at 259 (internal quotation marks and citation omitted). The Court further explained, however, that

> the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact.

Id. (internal quotation marks and citation omitted). As a result, the Supreme Court upheld the conviction. *Id.*

The State contends the above language in *Potter* criminalizes the inaction or omission of failing to report in the present case. We disagree. *Potter* involved affirmative actions on the part of the defendant who rendered personal assistance to the perpetrator, including acting as a getaway driver and denying any knowledge of a crime to police when asked by police. *Id.* at 154-55, 19 S.E.2d at 258. Subsequent cases similarly criminalize only such active conduct. *See*, *e.g.*, *State v. Hicks*, 22 N.C. App. 554, 557, 207 S.E.2d 318, 320 ("Merely concealing knowledge regarding the commission of a crime or falsifying such knowledge does not cause a person to become an accessory after the fact."), *cert. denied*, 285 N.C. 761, 209 S.E.2d 286 (1974); *Earnhardt*, 307 N.C. at 69,

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1. William was arrested and ultimately pleaded guilty to six felony charges arising from his abuse of the daughter. *In re W.C.D.*, 793 S.E.2d 286, No. COA16-351, 2016 WL 6695866 *1 (N.C. Ct. App. Nov. 15, 2016). William is currently serving a minimum of 192 months and a maximum of 291 months in prison from his guilty plea. *Id.* at *1. Therefore, there is no issue as to the felony underlying the accessory after the fact charge against Defendant, and she raised none on appeal.

296 S.E.2d at 653 (holding evidence that defendant was "concocting a tale" supported a charge of accessory after the fact).

The dissenting opinion cites *State v Wright*, 206 N.C. App. 239, 696 S.E.2d 832 (2010) to support the position that this Court has upheld omissions as felonies. While the defendant in *Wright* did fail to report certain campaign contributions — an omission — he also actively filed a campaign disclosure form that was "not complete, true, and correct." *Id.* at 248, 696 S.E.2d at 838. It was both the concealment and the filing of an incomplete report that lead to his indictment and subsequent conviction for obstruction of justice, not merely his omission.

Here, the indictment charging Defendant as an accessory after the fact "by not reporting" William's abuse of the daughter is contrary to our precedent. And while it is true that North Carolina mandates reporting of actual or suspected child abuse and criminalizes a breach of this duty as a misdemeanor, N.C. Gen. Stat. § 7B-301 (2015), Defendant was not charged with violation of this statute in her indictment. As written, the indictment in the present case fails to allege any criminal conduct on the part of Defendant, and we hold that the trial court erred in denying Defendant's motion to dismiss this charge.

Our decision vacating Defendant's conviction for accessory after the fact is based upon the failing in the indictment, which alleges a crime based upon a mere omission, contrary to precedent. We do not address whether Defendant's affirmative acts, such as destroying physical evidence of William's sexual activity with the daughter and of telling investigators that the later report of abuse was just "more lies" by the daughter, would support an accessory charge, because those activities are plainly beyond the scope of the charge stated in the indictment.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying Defendant's motion to dismiss her charge for felony obstruction of justice by pressuring the daughter to recant. However, we do hold that the trial court erred in denying Defendant's motions to dismiss the remaining charges for felony obstruction of justice and accessory after the fact.

NO ERROR IN PART, REVERSED IN PART.

Judge TYSON concurs.

Judge INMAN concurs in part and dissents in part with separate opinion.

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

I concur in the majority's holdings regarding Defendant's convictions for felony obstruction of justice. With respect to the second obstruction charge, I write separately to note that the conviction was precluded by the specific language of the indictment rather than by the ample evidence that could otherwise support the elements of this offense. I respectfully dissent from the majority's holding reversing the trial court's denial of Defendant's motion to dismiss the charge of accessory after the fact to William's felony sexual activity by a substitute parent.

A. Felony Obstruction of Justice by Denying Access

By answering investigators' questions directed to her minor daughter, telling investigators that her daughter was not to be believed, and abruptly removing her daughter from an interview after learning that investigators were asking her about documentary evidence the daughter could authenticate, Defendant engaged in conduct that "prevent[ed], obstruct[ed], impede[d], or hinder[ed] public or legal justice." *State v. Wright*, 206 N.C. App. 239, 242, 696 S.E.2d 832, 835 (2010) (citation and quotation marks omitted). Defendant's conduct deprived the investigators of interviews free from such interference, not only by interrupting their questions, but also by intimidating her daughter from making more forthright disclosures. Defendant also obstructed the investigation by prohibiting her daughter from speaking with an investigator just hours after seeing William engaging her in sexual intercourse. But Defendant was not charged with obstructing officers in any of these ways. She was instead indicted for obstruction by "denying [investigators] access to her daughter . . . throughout the course of the investigation." As the majority correctly notes, Defendant generally allowed investigators access to her daughter. Accordingly, the evidence did not establish that Defendant committed the obstruction offense under the theory alleged in the indictment. Nor could the jury convict Defendant for the illegal conduct established by the evidence but not charged in the indictment, as "[i]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) (holding the trial court plainly erred by instructing the jury on a purpose theory not charged in the indictment, rather than the purpose alleged in the charging document); *cf. State v. Tirado*, 358 N.C. 551, 576, 559 S.E.2d 515, 533 (2004) (no plain error where trial court instructed on the purpose theory charged in the indictment in addition to an unindicted purpose theory, because the evidence supported both theories).

B. Accessory After the Fact

I respectfully dissent from the majority's holding reversing Defendant's conviction as an accessory after the fact to William's felony sexual activity by a substitute parent. In not reporting the abuse she observed first hand, Defendant not only violated a positive statutory duty, but she did so for the purpose of helping the perpetrator escape detection, arrest, or punishment for his crime. Defendant's unlawful omission for the purpose of assisting the perpetrator, as alleged in the indictment, satisfies the elements of the accessory offense.

Defendant was indicted for accessory after the fact for "unlawfully, willfully[,] feloniously [and] knowingly assist[ing] William . . . in escaping detection, arrest or punishment by not reporting the incident . . . of felony Sexual Activity by a Substitute Parent." The elements of the accessory offense are: "(1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony." *State v. Cousins*, 233 N.C. App. 523, 531, 757 S.E.2d 332, 339 (2014) (citations and quotation marks omitted). Here, Defendant is guilty of accessory after the fact if "not reporting the incident . . . of felony Sexual Activity by a Substitute Parent" constitutes rendering "personal assistance" to William. The majority holds that it does not because there is no precedent holding that the passive omission of not reporting a crime, as opposed to an affirmative act concealing a crime, satisfies the element of rendering personal assistance. I acknowledge that this is a case of first impression. But the nature of the omission here—not only a crime in itself, but committed for the purpose of protecting the predator—meets the elements of the accessory offense.

"[P]ersonal assistance in *any* manner so as to aid a felon in escaping arrest or punishment is sufficient to support a conviction as an accessory." *State v. Brewington*, 179 N.C. App. 772, 776, 635 S.E.2d 512, 516 (2006) (citations omitted) (emphasis in original). In *State v. Potter*, 221 N.C. 153, 19 S.E.2d 257 (1942), the Supreme Court recognized the following:

> [O]ne [is not] an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof, nor will the act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment

> of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact.

221 N.C. at 156, 19 S.E.2d at 259 (internal citation and quotation marks omitted). Although generally, neither withholding information concerning a crime nor falsely denying knowledge thereof constitutes the unlawful rendering of personal assistance to a felon in and of itself, the *Potter* decision carved out an exception to this rule. Specifically, *Potter* held that such conduct may rise to the level of personal assistance as an accessory when done "for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear . . . ." *Id.* at 156, 19 S.E.2d at 259 (internal citation and quotation marks omitted).

The majority's hesitance to classify an omission as "personal assistance" supporting criminal culpability as an accessory is understandable. Fundamentally, however, the law criminalizes omissions just as well as positive acts. The law also elevates omissions constituting a violation of a legal duty from misdemeanors to felonies in other contexts. Indeed, we have held that such an omission may constitute a separate felony independent of a misdemeanor violation of the statute creating the legal duty to act.

In *Wright*, 206 N.C. App. 239, 696 S.E.2d 832, the defendant was required by North Carolina election law to disclose all campaign contributions. 206 N.C. App. at 240, 696 S.E.2d at 834. Despite this duty, the defendant failed to disclose $150,350 in campaign contributions and $76,892 in transfers from the campaign to himself. *Id.* at 240, 696 S.E.2d at 834. When these omissions were brought to his attention, the defendant failed to file amended reports. *Id.* at 240, 696 S.E.2d at 834. Although the relevant campaign finance statute at the time, N.C. Gen. Stat. § 163-278.27 (2009), made such omissions a misdemeanor, the defendant was instead indicted for and found guilty of felony obstruction of justice. *Id.* at 244-45, 696 S.E.2d at 836-37. The indictment in *Wright* alleged that the defendant "*fail*[*ed*] *to report* the contributions and expenditures," and the judge instructed the jury that the defendant obstructed justice if the defendant "*failed to properly report* receipt of these campaign contributions[.]" *Id.* at 246-47, 696 S.E.2d at 838 (emphasis added). This Court upheld the conviction, including elevation of the charge from misdemeanor to felony obstruction of justice under N.C. Gen. Stat. § 14-3(b) (2009). *Id.* at 245-46, 696 S.E.2d at 837. We rejected the defendant's

argument that he should have been charged only with a misdemeanor violation of the campaign finance statute, rather than the more severe crime of felony obstruction of justice, holding that the choice of which charge to bring was within the discretion of the district attorney. *Id.* at 245, 696 S.E.2d at 837.

As noted by the majority, Defendant had a positive legal duty to disclose the abuse of her daughter pursuant to N.C. Gen. Stat. § 7B-301 (2015), and the statute criminalizes such an omission. I agree that a mere violation of this statute, standing alone, would not constitute the rendering of personal assistance to a felon sufficient to satisfy the elements of accessory after the fact. For example, a teacher who has cause to suspect the abuse of a child by another person but who fails to report it for reasons unrelated to the perpetrator is merely guilty of a misdemeanor under N.C. Gen. Stat. § 7B-301(b), and would not be an accessory. Likewise, a parent who suspects her child has been abused but fails to report it for reasons other than protecting the perpetrator is guilty of the misdemeanor but not the felony accessory offense. This case, by contrast, involves a distinctive and far more pernicious crime of omission.

The State introduced evidence that Defendant witnessed William's abuse of the daughter first-hand and violated her duty to report it for the specific purpose of helping William escape punishment for the very crime she was under a duty to report. When Defendant eventually informed her brother-in-law of the abuse, she told him that reporting it to law enforcement was not necessary because she "was doing everything correctly" and that "involv[ing] anyone else or the authorities . . . would cost [Defendant's family] more money and time." When CPS contacted Defendant after her brother-in-law reported the abuse, Defendant categorized the latest report as "more lies from [the daughter]." For months after witnessing the abuse herself, Defendant expressed to both her brother-in-law and the daughter a desire to reunite with William. These facts, when considered in the context of her earlier actions and statements that the investigation "was tearing apart her family and destroying her family and that William was going to go to jail[,]" support a reasonable inference that Defendant avoided reporting the abuse to authorities for the purpose of benefitting William. Finally, the evidence of additional acts committed by Defendant, including destroying the bed linens, although beyond the scope of the indictment, also supports a reasonable inference that her failure to report the abuse to law enforcement was for the purpose of helping her husband escape prosecution. *See, e.g.*, *State v. Houston*, 169 N.C. App. 367, 372-73, 610 S.E.2d 777, 781-82 (2005) (holding that evidence of other uncharged criminal conduct

was properly admitted under Rule 404(b) of the North Carolina Rules of Evidence to show the defendant's intent). Just as this Court held the violation of a statutory duty by omission could constitute an independent felony offense in *Wright*, I would hold Defendant's violation of N.C. Gen. Stat. § 7B-301(b), done for the purpose of helping William escape detection, arrest, or punishment for abusing their daughter, constitutes "personal assistance in [a] manner sufficient to support a conviction as an accessory." *Brewington*, 179 N.C. App. at 776, 635 S.E.2d at 516 (citations omitted).

In sum, based on the record evidence, a reasonable jury could find—and this jury did—that Defendant, by not reporting William's abuse of the daughter, violated a positive legal duty "for the purpose of giving some advantage to the perpetrator of the crime" and therefore rendered personal assistance to William as an accessory in violation of N.C. Gen. Stat. § 14-7 (2015). *Potter*, 221 N.C. at 156, 19 S.E.2d at 258.

C. Conclusion

For the reasons explained, I concur in the majority opinion upholding Defendant's conviction for obstruction of justice by pressuring her daughter to recant the report of abuse and reversing the trial court's denial of Defendant's motion to dismiss the charge of obstruction of justice by denial of access. I respectfully dissent, however, from the majority decision to reverse the trial court's denial of Defendant's motion to dismiss the accessory after the fact charge. Because Defendant violated a positive statutory duty for the purpose of assisting a sexual predator escape prosecution for his crime, I would hold that the State presented sufficient evidence to submit the accessory charge to the jury.

STATE v. QUINONES

[258 N.C. App. 559 (2018)]

THE STATE OF NORTH CAROLINA
v.
TONY LUIS QUINONES, DEFENDANT

No. COA17-415

Filed 20 March 2018

Possession of Stolen Property—stolen motor vehicle—jury instruction—possession—operating a stolen vehicle

The trial court did not commit plain error in a possession of a stolen motor vehicle case by instructing the jury that the possession element could be satisfied if the jury found defendant was operating the stolen vehicle.

Appeal by defendant from judgment entered 26 October 2016 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 5 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Anne Bleyman for defendant-appellant.

BERGER, Judge.

On October 26, 2016, a Wake County jury found Tony Luis Quinones ("Defendant") guilty of possession of a stolen motor vehicle. Defendant was sentenced to nine to twenty months in prison, and appeals arguing that the jury instruction provided by the trial court contained an incorrect statement of law. We disagree.

Factual and Procedural Background

On April 20, 2016, Raleigh Police Officer Shane Pekich observed a white Lexus SUV near the intersection of South State Street and Bragg Street. Officer Pekich determined that the vehicle matched the description of a white Lexus SUV that had been reported stolen earlier that day. The vehicle approached the intersection with the right turn signal activated; however, the vehicle turned left onto South State Street and accelerated at a high rate of speed past Officer Pekich. Officer Pekich saw the vanity license plate on the white Lexus, which matched the personalized license plate of the white Lexus that had been reported stolen.

Officer Pekich pursued the white Lexus and radioed for assistance. The white Lexus was traveling approximately sixty miles per hour in a thirty-five mile-per-hour zone. The vehicle came to a stop after running a red light and nearly being struck by another vehicle. Officer Pekich observed an individual dressed in white on the driver's side of the car fleeing the scene. Defendant was wearing a white t-shirt when he was apprehended and arrested shortly after abandoning the car and fleeing on foot. An officer at the scene observed that only the driver's door had been left open.

Defendant asked Officer Pekich if they caught anyone else, and gave the description of another individual he contended was involved in the theft of the automobile. Defendant also described the clothing the other individual had on, which included a "black shirt or black hoodie." Officers spoke with the other individual who did in fact have on a black shirt, but he denied being in the white Lexus. Although Defendant's description matched the other individual, neither the description nor the other individual's appearance were consistent with the officer's observation of a person wearing a white t-shirt fleeing the scene.

Defendant appeals his conviction for possession of a stolen motor vehicle, asserting that the jury instructions contained an incorrect statement of law concerning the element of possession. Defendant failed to object to the purported instructional error at trial.

Standard of Review

"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) (2017). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

> The plain error standard requires a defendant to 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. . . . For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict.

State v. Juarez, 369 N.C. 351, 358, 794 S.E.2d 293, 299-300 (2016) (internal citations and quotation marks omitted).

Analysis

Defendant first contends that the jury instructions contained an incorrect statement of law concerning the element of possession which shifted the burden of proof from the State to Defendant. We disagree.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974) (citations omitted). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted).

A defendant may be convicted of possession of a stolen motor vehicle if the State proves that individual is in possession of a vehicle that he knows or has reason to believe is stolen or unlawfully taken. N.C. Gen. Stat. § 20-106 (2017). Evidence that a defendant is operating a stolen vehicle is sufficient to establish possession. *State v. Suitt*, 94 N.C. App. 571, 574, 380 S.E.2d 570, 572 (1989). Here, the trial court instructed the jury, in relevant part, as follows:

> Possession of a vehicle may be either actual or constructive. A person has actual possession of a vehicle if the person is aware of its presence, *is in the car, such as driving*, and has both the power and intent to control its disposition or use.
>
> A person has constructive possession of a vehicle if the person is aware of its presence and has both the power and intent to control its disposition or use.

> A person's awareness of the presence of the vehicle and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.
>
> If you find beyond a reasonable doubt that a white Lexus SUV vehicle was found in close physical proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the vehicle and had the power and intent to control its disposition or use.
>
> However, the defendant's physical proximity, if any, to the vehicle does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use.
>
> Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

(Emphasis added).

The trial court's instruction "is in the car, such as driving" relates to the theory of actual possession. Moreover, the wording by the trial court is consistent with the evidence that the driver's door was left open and that officers witnessed an individual in a white t-shirt fleeing from the driver's side of the car. The trial court correctly instructed the jury that, based upon the evidence presented in this case, the possession element could be satisfied if the jury found Defendant was operating the vehicle. When read as a whole, the instruction provided an accurate statement of the law arising from the evidence presented. Defendant's contention that the instruction shifted the burden of proof from the State is without merit.

Defendant correctly asserts that merely being in that stolen vehicle is not sufficient, standing alone, to satisfy the element of possession. *See State v. Franklin and State v. Hughes*, 16 N.C. App. 537, 540-41, 192 S.E.2d 626, 628 (1972). In that case, Defendant Hughes' conviction was overturned because he was simply a passenger in the stolen vehicle. *Id.* This Court noted that there was no evidence that Hughes tried to flee or otherwise acted in concert with co-defendant Franklin. *Id.*

Here, the evidence was sufficient for the jury to infer that Defendant operated the stolen vehicle, and was not merely a passenger. The State

presented sufficient evidence that an individual wearing a white shirt was fleeing from the driver's side of the Lexus after the car was abandoned, and the driver's door was the only door left open. Officers maintained almost constant visual contact with Defendant as he was fleeing. Defendant was arrested wearing a white t-shirt, and never denied being inside the automobile. Thus, the evidence tended to show that Defendant was more than merely a passenger in the stolen vehicle.

Moreover, Defendant identified another individual as the culprit, but the description of the clothes provided by Defendant and confirmed by law enforcement did not match the white t-shirt they observed fleeing the scene and worn by Defendant. Thus, there was sufficient evidence presented by the State that Defendant had *actual* possession of the stolen vehicle. Even if, assuming *arguendo*, the instruction was erroneous, Defendant has not demonstrated that absent the purported error a different verdict was probable. *See Juarez*, 369 N.C. at 358, 794 S.E.2d at 299-300.

Conclusion

Defendant received a fair trial free from error. The trial court included a phrase in the jury instructions that was consistent with the theory of actual possession and the evidence presented at trial, and Defendant has failed to show plain error.

NO ERROR.

Judges DAVIS and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 MARCH 2018)

ATKINSON v. CHAMBERLIN-SPENCER No. 17-941	Cabarrus (07CVD4186)	Affirmed
BARTLETT v. N.C. DEP'T OF PUB. SAFETY No. 17-935	N.C. Industrial Commission (TA-23903)	Affirmed
CREED v. CREED No. 17-456	Mecklenburg (15CVS6455)	Reversed and Remanded
DEP'T OF TRANSP. v. CHAPMAN No. 17-597	Forsyth (16CVS7476)	Affirmed
DEP'T OF TRANSP. v. MDC INVS., LLC No. 17-598	Forsyth (17CVS246)	Affirmed
FINN v. FINN No. 17-811	Mecklenburg (15CVD12244)	Vacated and Remanded
GATEWAY TERRACE PARTNERS, LLC v. MJM GATEWAY TERRACE RE, LLC No. 17-647	Mecklenburg (16CVS21564)	Dismissed
HAGERMAN v. UNION CTY. BD. OF ADJUST. No. 17-319	Union (16CVS1405)	Affirmed
IN RE A.R. No. 17-1212	Guilford (17JA164-166)	Affirmed
IN RE A.S. No. 17-1129	Chatham (07JT19) (10JT3)	Affirmed
IN RE A.V.C. No. 17-1210	Onslow (16JT79-80)	Vacated and Remanded
IN RE C.L. No. 17-1010	Randolph (16JT3-6)	Affirmed
IN RE H.R.M. No. 17-815	Wake (16SPC8154)	Affirmed

IN RE I.I.C. No. 17-1127	Cabarrus (14JT137) (14JT138)	AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS
IN RE I.J.A. No. 17-845	Mecklenburg (14JT470-471)	Affirmed
IN RE J.N.S. No. 17-807	Haywood (16JA37) (16JA38)	Affirmed
IN RE J.T.S. No. 17-1283	Alamance (16JT180)	Affirmed
IN RE N.D. No. 17-799	Durham (16JB174)	Affirmed in Part, Reversed and Remanded in Part
SAUNDERS v. HULL PROP. GRP., LLC No. 17-1115	Henderson (16CVS1001)	Dismissed in part; Affirmed in part
STATE v. DENT No. 17-857	Wake (15CRS1518) (15CRS206387-88)	NO ERROR AT TRIAL; REMAND FOR RE-SENTENCING IN 15CRS 206387
STATE v. FOSTER No. 17-64	New Hanover (13CRS56528) (14CRS6707)	No Error
STATE v. HAMMONDS No. 17-931	Robeson (05CRS57743)	Reversed
STATE v. HAYES No. 17-679	Gaston (14CRS52862)	No prejudicial error
STATE v. HOLLOMAN No. 15-1042-2	Wake (14CRS200073)	No Error
STATE v. KNIGHT No. 17-848	Catawba (16CRS2243) (16CRS50643)	Affirmed
STATE v. KOHLER No. 17-660	Washington (16CRS50017-18)	No Error
STATE v. NORMAN No. 16-1005-2	Washington (13CRS50002-05)	REVERSED IN PART; NO ERROR IN PART.

STATE v. ROBINSON No. 17-971	Richmond (17CRS28)	Affirmed
STATE v. ROSS No. 17-930	Forsyth (16CRS3468) (16CRS53940)	No Error
STATE v. ROYSTER No. 17-823	Vance (13CRS51770)	Dismissed
STATE v. SHEPHERD No. 17-541	Yancey (15CRS50003)	No Error
STATE v. TERRY No. 17-998	Rockingham (13CRS1902) (13CRS2076)	Affirmed
STATE v. WILDS No. 17-1048	Forsyth (16CRS462) (16CRS57012) (16CRS57072)	Affirmed

BOYCE v. N.C. STATE BAR

[258 N.C. App. 567 (2018)]

GORDON E. BOYCE, N.C.S.B. #0435, PLAINTIFF
v.
NORTH CAROLINA STATE BAR, AN AGENCY OF THE STATE OF NORTH CAROLINA, AND OTHERS OF INTEREST, IF ANY, DEFENDANTS

No. COA16-858

Filed 3 April 2018

1. Jurisdiction—standing—discipline of attorneys

A plaintiff had standing to bring a declaratory judgment action seeking interpretation of the statues for concurrent jurisdiction where plaintiff sought discipline against another attorney in superior court after the State Bar did not take public action on plaintiff's complaints.

2. Attorneys—discipline—settlement of underlying lawsuit

The General Court of Justice, in addition to the State Bar, had jurisdiction under its inherent powers to address professional misconduct arising out of litigation before the courts. Although the State Bar pled the settlement of plaintiff's private claim as a bar to disciplinary action for ethical misconduct, professional misconduct in a litigation cannot be dependent upon the outcome of a litigation.

3. Jurisdiction—standing—superior court—attorney discipline

Plaintiff did not have standing to bring declaratory judgment claims for the State Bar's refusal to pursue disciplinary action against an attorney. Plaintiff did not allege a cognizable legal injury. After reporting the alleged misconduct to the State Bar, the complainant's interest in the case going forward was the same as all other members of the public.

Judge DIETZ concurring in a separate opinion.

Appeal by Plaintiff from order entered 9 May 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 February 2017.

Gordon E. Boyce, for Plaintiff-Appellant.

The North Carolina State Bar, by Deputy Counsel David R. Johnson and Counsel Katherine Jean, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

I. Introduction

On 5 January 2016, Gordon E. Boyce ("Plaintiff") filed a declaratory judgment action pursuant to N.C. Gen. Stat. § 1-254 *et seq.* seeking a "declaration of the right, status or other relations" between Plaintiff and the North Carolina State Bar ("Defendant"). The trial court dismissed Plaintiff's request for declaratory judgment on two grounds: (1) Plaintiff lacks standing to bring this complaint under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, and therefore the court lacks subject matter jurisdiction; and (2) the complaint "presents no viable case or controversy" under Rule 12(b)(1) of the Rules of Civil Procedure. We reverse in part and affirm in part, as discussed herein.

II. Factual and Procedural History

Plaintiff filed a lengthy complaint outlining the history of defamation litigation between the Plaintiff, Roy Cooper and others. A brief summary of the context of this predicate litigation follows.

The law firm of Boyce and Isley, PLLC, and its members G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura B. Isley ("Plaintiffs") are the original Plaintiffs in this action. *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 26-27, 568 S.E.2d 893, 896 (2002) (hereinafter *Boyce I*). On 2 November 2000, Plaintiffs filed a complaint with the State Board of Elections against Roy Cooper, III, the Democratic nominee for the Office of Attorney General of North Carolina, his campaign committee, and members of his campaign staff ("Defendants"). *Id.* at 27, 568 S.E.2d at 896. Plaintiffs' complaint alleged defendant's political advertisement violated N.C. Gen. Stat. § 163-274(8), which prohibits "any person to publish . . . derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity[.]" N.C. Gen. Stat. § 163-274(8) (2001). *Id.* at 27, 568 S.E.2d at 896.

During this action's pendency before the State Board of Elections, Plaintiffs filed a similar complaint against Defendants in Wake County Superior Court. *Id.* at 27, 568 S.E.2d at 896. Here, Plaintiffs alleged Defendants published a false and fraudulent political television advertisement. *Id.* at 27, 568 S.E.2d at 896. Plaintiffs alleged Defendants' advertisement defamed R. Daniel Boyce ("Dan Boyce"), the Republican nominee for the Office of Attorney General of North Carolina. *Id.* at 27, 568 S.E.2d at 896. Plaintiffs also alleged Defendants' advertisement

defamed the member attorneys of the Boyce & Isley law firm. *Id.* at 27, 568 S.E.2d at 896. The audio portion of Defendants' advertisement stated:

> I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.
>
> . . . .
>
> Dan Boyce–his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.
>
> The Judge said it shocks the conscience.
>
> Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.
>
> Dan Boyce, wrong for Attorney General.

Id. at 27, 568 S.E.2d at 897.[1]

Plaintiffs' complaint alleged the above-quoted advertisement was defamatory *per se* and constituted unfair and deceptive trade practices. *Id.* at 27, 568 S.E.2d 897. The complaint also alleged Defendants conspired to violate N.C. Gen. Stat. § 163-274(8). *Id.* at 27, 568 S.E.2d 897. Plaintiffs requested the trial court issue a declaratory judgment in regard to Defendants' alleged violation of N.C. Gen. Stat. § 163-274(8). *Id.* at 28, 568 S.E.2d 897.

The State Board of Elections dismissed Plaintiffs' complaint on 20 December 2000. *Id.* at 28, 568 S.E.2d at 897. Defendants subsequently filed a motion requesting the trial court to dismiss Plaintiffs' complaint on all claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* at 28, 568 S.E.2d at 897. In an order filed 6 April 2001, Superior Court Judge James C. Spencer granted Defendants' motion to dismiss all claims. *Id.* at 26, 568 S.E.2d at 896.

Plaintiffs timely appealed to this Court, and this Court heard the action on 23 April 2002. *Id.* at 26, 568 S.E.2d at 896. Plaintiffs contended the trial court erred in dismissing their claims for defamation, *id.* at 28, 568 S.E.2d at 897, and unfair and deceptive trade practices. *Id.* at 35; 568 S.E.2d at 901. On cross-appeal, Defendants contended the trial court erred in failing to take judicial notice of the Board of Elections's order

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1. These lawsuits constituted a group of class action suits on behalf of "thousands of Plaintiffs alleging that taxes levied by the State were unconstitutional." *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 574, 611 S.E.2d 175, 176 (2005). "Dan Boyce or members of [his] law firm allegedly served as [Plaintiffs'] counsel" in these actions. *Id.* at 574, 611 S.E.2d at 176.

dismissing Plaintiffs' complaint, and of various newspaper articles concerning the political campaign. *Id.* at 37, 568 S.E.2d at 903. In an opinion filed on 17 September 2002, this Court concluded Plaintiffs' allegations of defamation and unfair and deceptive trade practices sufficiently stated a claim upon which relief could be granted. *Id.* at 39, 568 S.E.2d at 904. This Court also concluded the political advertisement was defamatory *per se*. *Id.* at 32, 568 S.E.2d at 899. Finally, this Court held the trial court erred in granting Defendants' Rule 12(b)(6) motion to dismiss and reversed the trial court's order.[2] *Id.* at 39, 568 S.E.2d at 904.[3]

On 27 November 2002, the North Carolina Supreme Court granted Defendants' motion for temporary stay "pending determination of Defendants' petitions for discretionary review." *Boyce & Isley, PLLC v. Cooper*, 356 N.C. 610, 574 S.E.2d 466 (2002). On 1 May 2003, the North Carolina Supreme Court ordered the stay dissolved. *Boyce & Isley, PLLC v. Cooper*, 357 N.C. 163, 580 S.E.2d 361 (2003). Also on 1 May 2003, the North Carolina Supreme Court denied Defendants' petition for "Writ of Supercedeas of the judgment of the Court of Appeals," and dismissed Defendants' appeal from this Court pursuant to N.C. Gen. Stat. § 7A-30 (constitutional question) *ex mero motu*. *Id.* at 163, 580 S.E.2d at 361. Finally, on 1 May 2003, the North Carolina Supreme Court denied Defendants' alternative petition for discretionary review of "Constitutional Issues of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31."[4]

Defendants appealed to the Supreme Court of the United States, and on 20 October 2003, that Court denied Defendants' petition for writ of certiorari. *Cooper v. Boyce*, 540 U.S. 965, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003).

On remand, Defendants answered Plaintiffs' complaint, raised constitutional defenses and moved for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. *Boyce and Isley, PLLC v. Cooper*, 169 N.C. App. 572, 573, 611 S.E.2d 175, 176 (2005) (hereinafter "*Boyce II*"). Chief Justice Lake of the North Carolina Supreme Court designated this action as exceptional, pursuant to Rule 2.1 of the General Rules of Practice. *Id.* at 573, 611 S.E.2d at 176. Chief

2. This Court also concluded the trial court correctly declined to take judicial notice of the Board's determination Defendants did not violate N.C. Gen. Stat. § 163-274(8).

3. Judge Timmons-Goodson wrote the opinion, with Judges Greene and McGee concurring.

4. Chief Justice Lake and Justices Parker and Orr recused from the 1 May 2003 Supreme Court orders.

Justice Lake assigned Superior Court Judge John B. Lewis, Jr., ("Judge Lewis") to the action. *Id.* at 573, 611 S.E.2d at 176. The trial court denied Defendants' motion for judgment on the pleadings on 22 September 2003. *Id.* at 573, 611 S.E.2d at 176. Defendants appealed to this Court, and this Court heard the matter on 25 August 2004. *Id.* at 573, 611 S.E.2d at 175.

This Court concluded Defendants' appeal was interlocutory since the trial court's denial of Defendants' motion to dismiss the case did not constitute a final judgment. *Id.* at 574, 611 S.E.2d at 176. This Court also determined Defendants failed to show how a substantial right would be lost if they did not immediately appeal the trial court's ruling. *Id.* at 578, 611 S.E.2d at 179. This Court dismissed Defendants' interlocutory appeal. *Id.* at 578, 611 S.E.2d at 179.[5]

On 7 June 2011, Defendants filed a petition for discretionary review with the North Carolina Supreme Court. The North Carolina Supreme Court denied Defendants' petition on 9 November 2011. *Boyce & Isley, PLLC v. Cooper*, 365 N.C. 365, 718 S.E.2d 403 (2011).[6]

Following the establishment of the validity of the complaint, there were additional appeals regarding discovery matters and litigation issues which are reported in detail in the following cases which are not outlined herein but are cited so to note the nature of this litigation.[7]

Fortunately for all concerned, after fourteen years of litigation, the parties settled this controversy. The current complaint for declaratory judgment alleges Defendant Cooper, as part of the settlement, admitted he made false assertions in the 2000 political advertisements. Plaintiff Gordon E. Boyce ("Plaintiff"), acting pursuant to Rule 8.3 of the North Carolina Rules of Professional Conduct, reported Cooper's unethical statements to Defendant North Carolina State Bar ("State Bar"). Specifically Plaintiff alleged Cooper violated Rule 4.1 and Rule 8.4 of the Rules of Professional Conduct. These Rules provide:

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5. Judge Hudson wrote the opinion, with Chief Judge Martin and Judge Elmore concurring.

6. Chief Justice Parker and Justices Timmons-Goodson and Hudson recused.

7. The case's third appeal concerned discovery issues. *Boyce & Isley, PLLC v. Cooper*, 195 N.C. App. 625, 673 S.E.2d 694, *review denied*, 363 N.C. 651, 686 S.E.2d 512 (2009) ("*Boyce III*"). Following another remand, the case came to this Court a fourth time. *Boyce & Isley PLLC v. Cooper*, 211 N.C. App. 469, 710 S.E.2d 309 (2011), *cert. denied*, 566 U.S. 987, 182 L. Ed. 2d 1018 (2012) ("*Boyce IV*").

> **Rule 4.1 Truthfulness in Statement to Others.**
>
> In the course of representing a client a lawyer shall not knowingly make a false statement of material fact to a third person.
>
> **Rule 8.4 Misconduct.**
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

When the State Bar failed to take public action on his complaints, Plaintiff filed a declaratory judgment action in Wake County Superior Court asking for three declarations:[8]

> (a) That concurrent jurisdiction of several types exists as to resolution of attorney discipline and misconduct matters, and
>
> (b) That Defendant The State Bar, by reason of its apparent Conflict of Interest has no right, jurisdiction or authority by recognition and knowledge of the clear conflict of interest and regarding the party and parties in question to ignore and appropriate Order of Referral, and
>
> (c) That Defendant The State Bar is obligated by law, by the Rules of Professional Conduct as a matter of conscience and good faith to refer Plaintiff's complaints and communications regarding the wrongful conduct of its own acting

8. We note during oral argument in this matter the State Bar's counsel refused to answer the court's questions with regard to what, if any, action the Disciplinary Committee took with regard to Boyce's ethical complaint citing confidentiality of the proceedings. The State Bar's counsel did concede the Attorney General and its lawyers are subject to the Rules of Professional Responsibility. In disciplining lawyers for misconduct, some disciplinary measures are confidential and even if disciplined, a complaining party would not be able to discover what, if any, discipline the State Bar meted out.

> Counsel, Legal Representative to the Appropriate Forum and Jurisdiction for investigation, findings of fact and recommendations as to discipline, if any, as by law provided and so recognized, for cost[.]

In response, the State Bar moved to dismiss on three grounds: (1) lack of standing; (2) declaratory judgment is a remedy limited to interpretation of "written instruments" and therefore lacks a viable controversy; and (3) settlement of the prior lawsuit acts as a bar to any of Plaintiff's claims. Following written responses, replies, and additional authorities from both parties, a hearing was held. Both parties were present and participated in the hearing. As a result, the trial court dismissed Plaintiff's case on two grounds: (1) Plaintiff lacks standing to bring this complaint under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, and therefore the court lacks subject matter jurisdiction; and (2) the complaint "presents no viable case or controversy" under Rule 12(b)(1) of the Rules of Civil Procedure. Plaintiff timely appealed.

III. Standard of Review

As an initial matter we note neither party in their briefs suggested a standard of review for this Court to examine the issues raised below. "The standard of review of a judgment rendered under the declaratory judgment act is the same as in other cases." *Miesh v. Ocean Dunes Homeowners Ass'n*, 120 N.C. App. 559, 562, 464 S.E.2d 64, 67 (1995), *disc. review denied*, 342 N.C. 657, 467 S.E.2d 717 (1996); *see also* N.C. Gen. Stat. § 1-258 (2017) ("All orders, judgment and decrees under [Article 26, 'Declaratory Judgments,'] may be reviewed as other orders, judgments and decrees.").

> Thus, where a declaratory judgment action is heard without a jury and the trial court resolves issues of fact, the court's findings of fact are conclusive on appeal if supported by competent evidence in the record, even if there exists evidence to the contrary, and a judgment supported by such findings will be affirmed.

Miesh at 562, 464 S.E.2d at 67.

"However, the trial court's conclusions of law are reviewable *de novo*." *Cross v. Cap Transaction Grp.*, 191 N.C. App. 115, 117, 661 S.E.2d 778, 780 (2008) (internal quotation marks omitted), *disc. review denied*, 363 N.C. 124, 672 S.E.2d 687 (2009).

IV. Analysis

[1] Under Article III, section 2 of the United States Constitution, federal courts are courts of limited jurisdiction. State courts, in contrast, are courts of general jurisdiction. Article IV, section 1 of the North Carolina Constitution provides, "[t]he Judicial Power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice."

Additionally:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Courts of Justice.

N.C. Const., Article IV, section 3 (2015). Matters which are justiciable under North Carolina state law are much broader than under federal law. *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) ("North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution."), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003).

Generally, the North Carolina Constitution grants standing on anyone who suffers harm. "All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (quoting N.C. Const. art. I, § 18).

> The rationale of [the standing rule] is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Id. at 642, 669 S.E.2d at 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)) (internal quotation marks omitted). "[S]tanding relates not to the power of the court but to

the right of the party to have the court adjudicate a particular dispute." *Cherry v. Wiesner*, ___ N.C. App. ___, ___, 781 S.E.2d 871, 876 (2016). "It 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." *Id.* at 642-43, 669 S.E.2d at 282 (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)).

Plaintiff's first allegation for declaratory relief requests the interpretation of a North Carolina statute regarding the availability of forums, in addition to that of the State Bar, for discipline of an attorney who has admitted he has been untruthful in litigation. Our law clearly provides for declaratory relief in the interpretation of state statutes. *Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). The State Bar failed to address this issue in its motion to dismiss before the trial court and in its appellate briefing. The State Bar instead focused on the issues of standing and the justiciability of the court to review the actions of the State Bar in connection with a specifically filed grievance. We hold this Plaintiff has standing to bring an action seeking interpretation of the statutes on concurrent jurisdiction for a court to discipline attorneys' misconduct.

[2] The State Bar Association is an administrative agency created under Article IV, section 3 of the North Carolina Constitution. The agency was created for the express purpose of regulating the practice of law in this State. *Cunningham v. Selman*, 201 N.C. App. 270, 282, 689 S.E.2d 517, 525 (2009). Its regulations have the force of law as to its members. 27 N.C. Admin. Code Chapter 2, 0.2. Its powers, however, are subject to review by way of appeal to the General Court of Justice under our State Constitution. N.C. Const. Art. IV, section 3 (2017). These powers are not exclusive.

Our legislature, in creating the State Bar, required the Bar to be subject to the "inherent power" of the courts to regulate the legal profession. N.C. Gen. Stat. § 84-36 (2016) provides, "Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys."

Neither party contests Plaintiff is a member of the State Bar, by virtue of having earned a license to practice law and by virtue of paying annual dues to the State Bar. As a member of the State Bar, Plaintiff has the right to participate in its organization. Plaintiff also has a duty to comply with its Code of Professional Responsibility. Rule 8.2 of the Professional Code of Conduct mandates, "[a] lawyer shall not make

a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, or other adjudicatory officer or of a candidate for election or appointment to judicial office." Additionally, under Rule 8.3(a) of the Revised Rules of Professional Conduct of the North Carolina State Bar:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

As is clear from the statutes, the General Court of Justice in Wake County, in addition to the State Bar, had or has jurisdiction under its inherent powers to provide for any relief needed to address professional misconduct arising out of litigation before the courts. *See Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *cert. denied and appeal dismissed*, 296 N.C. 740, 254 S.E.2d 182, 296 N.C. 740, 254 S.E.2d 183 (1979). We need not address whether Cooper has violated the Rules of Professional Conduct nor what, if any, discipline is appropriate, because he is not a party to this action and has not had a chance to defend himself against these charges of misconduct in a trial court. *See In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *In re Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33, *cert. denied*, 282 N.C. 426, 192 S.E.2d 837 (1972). Furthermore, Plaintiff did not ask the court to make a declaratory ruling on the question of Cooper's misconduct in his request for declaratory relief. *See In re Paul*, 84 N.C. App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987). He asks only for an interpretation of the statutes under which he could seek relief. *See State v. Spivey*, 213 N.C. 45, 195 S.E.2d 1 (1938); *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E.2d 279 (1978), *cert. denied and appeal dismissed*, 296 N.C. 740, 254 S.E.2d 182, 296 N.C. 740, 254 S.E.2d 183 (1979).

In the trial court below, we note the State Bar pled the settlement of Plaintiff's private claim would act as a bar to disciplinary action for ethical misconduct. The court below wisely did not address this issue. Notwithstanding this result, the State Bar raises this same claim on appeal arguing to this Court the claim is moot because the matter has been fully settled. This argument lacks merit. We shall now address this issue so that the court below, on remand, will not have to revisit this issue.

Professional misconduct in a litigation cannot be dependent upon the outcome of a litigation. Inaction by the State Bar or the courts during

the course of the litigation, as the concurrence points out, cannot bar or moot subsequent discipline for professional misconduct. A lawyer's duty to the truth and his duty to advocate based upon the truth is central to our system of dispute resolution. N.C. R. Prof. Conduct 3.3. While any client, regardless of his or her status, is entitled to procedural defenses and due process in litigating a claim, no client is entitled to have his attorney present a claim or defense which is untruthful. N.C. R. Prof. Conduct 8.2. Both the public and our profession expect truthful claims and defenses to be presented in court, so that resolution of disputes can be meritoriously and promptly settled. *Id.*

[3] With regard to the Plaintiff's second and third requests for declaratory relief, we agree with the trial court Plaintiff lacks standing to bring these claims. The injury for which Boyce seeks declaratory relief is the State Bar's refusal to pursue disciplinary action against Cooper, allegedly due to the State Bar's conflict of interest. We thus address whether *that* purported injury is one legally cognizable in court.

Unsurprisingly, Plaintiff is not the first attorney who has taken issue with a state bar's failure to act on a disciplinary grievance and then sought relief from the courts. From our review of the precedent addressing this issue, every jurisdiction that has ever confronted it has concluded that the complainant has not alleged an injury sufficient to confer standing. *See, e.g.*, *Lewis v. Slack*, 955 A.2d 620, 625 (Conn. App. Ct. 2008); *Cole v. Owens*, 766 So. 2d 287, 288 (Fla. Dist. Ct. App. 2000); *Scanlon v. State Bar of Georgia*, 443 S.E.2d 830, 831 (Ga. 1994); *Akinaka v. Disciplinary Bd. of Hawai'i Supreme Court*, 979 P.2d 1077, 1084-86 (Haw. 1999); *Woodard v. Kentucky Bar Ass'n*, 156 S.W.3d 256, 257 (Ky. 2004); *In re Request for an Investigation of an Attorney*, 867 N.E.2d 323, 324-25 (Mass. 2007); *Cotton v. Steele*, 587 N.W.2d 693, 699 (Neb. 1999); *see also Matter of Appointment of Indep. Counsel*, 766 F.2d 70, 73 (2d Cir. 1985) (holding that victim of an alleged crime had no standing to seek court appointment of independent counsel where prosecutors had a conflict of interest).

For example, in *Cotton v. Steele*, the Supreme Court of Nebraska examined the standing of a complainant who alleged the Nebraska state bar and its disciplinary attorneys refused to properly investigate his bar grievance against a Nebraska attorney due to bias. 587 N.W.2d at 699. That court concluded the complainant lacked standing because "the failure to discipline an attorney who should have been disciplined poses a risk of injury to the general public, not to a particular individual." *Id.* at 699. "Thus, when a citizen files a disciplinary complaint, there are two possible outcomes: either some form of discipline is assessed against

the attorney or no discipline is assessed. Neither result confers any legally cognizable benefit or causes any legally cognizable injury to the complainant who initiated the proceeding." *Id.* at 699.

We agree with the precedent from our sister states and hold the Plaintiff has not alleged a cognizable legal injury in this case. The State Bar disciplinary process is intended "to protect the public, the courts, and the legal profession." *N.C. State Bar v. Rogers*, 164 N.C. App. 648, 656, 596 S.E.2d 337, 343 (2004). Under our State Bar's disciplinary procedures, the complainant has no control over when, how, or whether the State Bar pursues his grievance. After reporting the alleged attorney misconduct to the Bar, the complainant's interest in the case going forward is the same as all other members of the public—to see a state agency protect the public from attorney misconduct by pursuing discipline for unethical behavior. 27 N.C. Admin. Code 1B.0101 *et seq.*

This is not to propose the State Bar and its officers and investigators are immune from consequences when they ignore a conflict of interest. If those investigators act unethically in the performance of their obligations, they can—and should—face consequences either through executive branch agencies designed to police ethical misconduct, or through a process created by our General Assembly.[9] The mere fact state investigators have an ethical conflict in the performance of their duties does not confer on members of the public the necessary legal standing to bring the dispute directly to court through the Declaratory Judgment Act. To hold otherwise, there would be no reason why similarly situated people—including, importantly, victims of crimes—could not bring suit when they believed those handling their case had a conflict of interest. This runs counter to the long-standing principle that when our government investigates and prosecutes wrongdoers, it does so to vindicate public interests, not private ones. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149, 35 L. Ed. 2d 536, 541 (1973). This, in turn, means those aggrieved by the alleged wrongdoing have no standing to ask the courts to intervene in government investigations or prosecutions.

With these principles in mind, we join our fellow courts in holding a complainant in a state bar disciplinary proceeding lacks standing to ask the courts to intervene in an ethics investigation on the ground the investigators are biased or have a conflict of interest.

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9. And, of course, these proceedings might make their way to the courts, if the law governing them permits judicial review. But that is not the path through which this case reached this Court.

We therefore affirm the decision of the trial court with regard to Plaintiff's second and third claims for relief as set forth in his complaint and reverse the decision of the trial court with regard to Plaintiff's first claim for relief and remand the matter to the trial court for further action consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

Judge BRYANT concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

Who watches the watchmen? We have asked that question at least since the days of Greek and Roman philosophers. *See* Plato, *Republic* 376c-376d; Juvenal, *Satires* 6.347-48.

Lawyers employed by the North Carolina State Bar are the watchmen when it comes to allegations of attorney conflicts of interest. In this declaratory judgment action, Boyce seeks an answer to a simple question: when the lawyers at the State Bar have a conflict of interest, who watches them?

One answer, Boyce contends, lies in the concurrent jurisdiction of the court system to regulate lawyers. He argues that the statutes creating the State Bar reserved the inherent power of the courts to discipline lawyers. Thus, the courts retain the power to hear claims of attorney misconduct when the claimants have shown that the Bar has a potential conflict of interest. I agree with the majority that this particular declaratory judgment claim (but not the other claims asserted by Boyce) involves a justiciable legal controversy between these parties that the courts may answer through the Declaratory Judgment Act.

It is worth emphasizing that Boyce has alleged a credible conflict of interest in this case. At the time Boyce submitted his grievance[1] and was awaiting an investigation by the State Bar, Cooper, then serving as our State's Attorney General, was representing the Bar in perhaps the highest profile legal issue in State Bar history—a lawsuit by LegalZoom

1. At oral argument, the State Bar refused to disclose precisely when it opened a grievance investigation or what steps it took with respect to Boyce's grievance. In its briefing, the Bar asserted only that the grievance exists and that, when Boyce inquired about it, the Bar gave him "a response he did not like."

that threatened to upend the Bar's core mission of licensing and regulating the practice of law in our State. *See LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11 CVS 15111 (N.C. Super. Ct. 2015).

Cooper appeared in that case as recently as October 2015, a time period that, according to Boyce, overlapped with the submission of his grievance. Moreover, during that same time period, Cooper and his staff routinely represented the State Bar or the Bar's Disciplinary Hearing Commission. *See, e.g.*, *Peggs v. North Carolina State Bar*, TA-25890 (N.C. Indus. Comm'n 2017); *Harper v. North Carolina State Bar*, TA-25285 (N.C. Indus. Comm'n 2016); *Sutton v. North Carolina State Bar*, No. 5:14-CV-243 (E.D.N.C. 2014).

One does not need to be a lawyer (and certainly not a State Bar lawyer trained to investigate conflicts of interest) to recognize that the State Bar itself has a potential conflict of interest when it is asked to investigate a lawyer who is actively representing the Bar in high-profile litigation, and who may possess confidential information about the Bar and its handling of past attorney discipline investigations.

Moreover, as the majority observes, before the General Assembly created the State Bar, the judicial branch handled lawyer discipline directly through its inherent authority to regulate the lawyers who appear before the courts. When the General Assembly created the State Bar, it emphasized in the enabling statutes that the Bar disciplinary process shall not be "construed as disabling or abridging the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36.

Indeed, the State Bar has conceded that the courts' inherent authority to discipline lawyers—even for conduct not occurring in a pending court proceeding—survived the creation of the Bar's disciplinary procedures. Several years ago, the Bar received a disciplinary complaint against one of Cooper's employees at the Attorney General's office. *In re Hicks*, 14 M 4670 (N.C. Super. Ct. Sept. 12, 2014). That employee had represented the State Bar and the Bar's Disciplinary Hearing Commission in past legal proceedings. *Id.*

Because of the potential conflict of interest, the Bar referred that matter to the State Bar of Georgia for investigation. *Id.* After the Georgia ethics investigators found probable cause to pursue discipline, the State Bar then referred the matter to Wake County Superior Court, which appointed a Wake County assistant district attorney to represent the State as "prosecuting counsel." *Id.* The court's order imposing discipline in that case expressly states that "[t]his matter is before the Court upon a referral from the North Carolina State Bar requesting that this court

exercise its inherent authority and concurrent jurisdiction over a grievance." *Id.*

In sum, there is a justiciable legal controversy concerning the scope of the concurrent jurisdiction of the court system over attorney disciplinary proceedings and the ability of complainants to bypass the State Bar process when they believe the Bar has a conflict of interest. Boyce has standing to seek declaratory relief on this issue from the trial court. I therefore concur in the decision to reverse the trial court's dismissal of this claim for lack of standing and to remand for further proceedings.

CASSANDRA SWARINGEN CHRISTIAN, PETITIONER
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA17-605

Filed 3 April 2018

1. Constitutional Law—due process—notice—revocation of child care license

Petitioner received due process in the revocation of her child care license where she was notified of the violations alleged against her, was allowed to respond, did so by admitting the violations, and was given a hearing before an administrative law judge.

2. Administrative Law—revocation of child care license—state procedure

Petitioner was not denied the procedure required under North Carolina law in the revocation of her child care license where the Department of Health and Human Services followed N.C.G.S. § 150B-3(b) by affording her the opportunity to show she had not been out of compliance. She was given notice, and she admitted the violations in her response by letter.

3. Administrative Law—child care license—revocation—factual basis

There was a sufficient factual basis for revocation of petitioner's child care license where she was cited multiple times over a twelve-month period for safety violations ranging from outdated certifications to exposed chemical products. Although petitioner contended that N.C.G.S. § 150B-3(b) required only that she show she was in

current compliance, the statute simply gave the licensee the opportunity to be heard on the matters giving rise to a pending revocation. Neither the administrative law judge nor the superior court erred by affirming the revocation.

Appeal by Petitioner from order entered 20 February 2017 by Judge Mark E. Klass in Stanly County Superior Court. Heard in the Court of Appeals 12 December 2017.

Robinson, Bradshaw & Hinson, P.A., by Sharika M. Robinson and D. Blaine Sanders, for the Petitioner-Appellant.

Attorney General Joshua H. Stein, by Associate Attorney Amalia Mercedes Restucha-Klem, for the Respondent-Appellee.

DILLON, Judge.

Cassandra Swaringen Christian ("Petitioner") appeals from an order entered by the trial court affirming the revocation of her child care license. Petitioner brings challenges to the procedures used by the Department of Health and Human Services ("DHHS") and the Administrative Law Judge in revoking her license, essentially contending that she was not given ample opportunity to "show compliance" before the revocation. We disagree, and therefore affirm.

I. Background

DHHS is the state agency tasked with licensing and monitoring child care services in North Carolina. Beginning in 1999 and pursuant to licensure by DHHS, Petitioner owned and operated a child care facility out of her home in Albemarle. Petitioner's license restricted her to a maximum of eight (8) children, with no more than five (5) of the children being of preschool age. After undergoing medical treatment in 2015, Petitioner enlisted the help of LaToya Baldwin to supervise the children.

As part of its oversite, DHHS sends licensing consultants to inspect the operations of its licensees. In 2015, a licensing consultant for DHHS (the "Consultant") conducted five separate visits to Petitioner's home. Over the course of these five visits, the Consultant cited Petitioner for various violations. After each visit, Petitioner sent a letter of correction to DHHS describing how she would purportedly fix each violation.

Notably, in January 2015, the Consultant arrived to discover that Ms. Baldwin, Petitioner's assistant, was the only adult on the premises caring for the children. The Consultant determined that Ms. Baldwin lacked

necessary documentation and certifications. The Consultant informed Petitioner that Petitioner could not employ Ms. Baldwin without proper credentials. Petitioner's letter of correction to DHHS stated that she would no longer employ Ms. Baldwin.

During an August 2015 visit, the Consultant discovered that Petitioner was caring for nine (9) children, one more than allowed by her license, *and* that seven (7) of the children were of preschool age, two more than allowed by her license.

The next month, during a September 2015 visit, the Consultant discovered that Petitioner was caring for seven (7) preschool-aged children, two more than allowed by her license, *and* that Petitioner attempted to conceal her violation by hiding five (5) of the children in her basement unattended during the visit. During the visit, the Consultant initially found Petitioner caring for two (2) preschool-aged children on the main floor of Petitioner's home. The Consultant, however, then heard the sound of another child crying. Petitioner claimed that the noise was coming from the television in another room. The Consultant though ultimately discovered five (5) additional preschool-aged children hidden in Petitioner's basement. These preschool-aged children were unsupervised. Petitioner claimed that she thought Ms. Baldwin was in the basement with the children, but she later admitted that Ms. Baldwin was not present when the Consultant arrived. Of additional concern, the basement where the unsupervised children were hidden contained improperly stored cleaning supplies and a dog for which Petitioner could not produce vaccination records.

Three months later, during a December 2015 visit, the Consultant only found two minor documentation violations. The Consultant explained to Petitioner that, although the Consultant was inspecting the premises as part of the licensure reissuance process, administrative proceedings were underway based on Petitioner's earlier violations.

Nine days after this visit, on 10 December 2015, DHHS gave Petitioner written notice of its intent to revoke her license, and informed Petitioner of her "opportunity . . . to submit written information [within fifteen days] as to why . . . [revocation] should not be taken[][.]" Petitioner promptly responded by letter, conceding that she had made mistakes but asking that her license not be revoked and requesting an opportunity to show that revocation was unnecessary.

Three months later, in March 2016, after considering the Consultant's concerns and Petitioner's response, DHHS decided to revoke Petitioner's license.

Petitioner contested DHHS's decision, alleging that she was told by the Consultant that if she did not repeat her violations discovered during the September 2015 visit (when Petitioner hid five children in her basement unsupervised) that she "would be fine." In August 2016, after a hearing on the matter, an administrative law judge issued an order upholding DHHS's decision to revoke Petitioner's license.

Petitioner then appealed to the trial court, contending in part that her license was revoked based on an improper procedure. In February 2017, after hearing arguments, the trial court affirmed the revocation of Petitioner's license.

Petitioner now appeals to this Court.

II. Analysis

A. Standard of Review

Petitioner claims that DHHS violated her constitutional right to due process by revoking her license before allowing her the opportunity to show that she had brought her daycare into compliance. Additionally, Petitioner alleges that each of the courts below erred in finding that the factual circumstances of her case merited a revocation of her license.

Petitioner's appeal lies with this Court from the superior court's decision to affirm the decision of the administrative law judge. N.C. Gen. Stat. § 150B-52 (2015). Our standard of review depends on the nature of the challenge being addressed. *ACT–UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); N.C. Gen. Stat. § 150B-51(c).

For instance, as our Supreme Court has instructed, "in cases appealed from administrative tribunals, questions of law receive *de novo* review[.]" *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (internal citation omitted). "Under the *de novo* standard of review, [this Court] considers the matter anew and freely substitutes its own judgment for the agency's." *Id.* at 660, 599 S.E.2d at 895 (internal citations and marks omitted).

However, "[w]hen the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). Using the whole record standard of review, we examine the entire record to determine whether the agency decision was based on substantial evidence such that a reasonable

mind may reach the same decision. *Carroll*, 358 N.C. at 674, 358 S.E.2d at 903-04 (2004).

Lastly, because this case comes to us from the superior court, our review necessitates an examination of the superior court's standard of review:

> [W]hen an appellate court reviews a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.

Mann Media, Inc., 356 N.C. at 14, 565 S.E.2d at 18.

B. Scope of Review

Petitioner argues that the superior court declined to address many of Petitioner's issues based on its determination that Petitioner failed to raise them in her original hearing before the administrative law judge. We note that the trial court did consider many of Petitioner's legal arguments, notwithstanding the labeling of many of that court's legal conclusions as "findings of fact." Assuming, *arguendo*, that Petitioner's issues were properly preserved, we choose to address them here and conclude that there was no reversible error in the decision of the superior court. We now review each issue in turn, using the appropriate standard of review.

C. Procedural Arguments

[1] Petitioner argues that procedural rights under the federal and state constitutions, as well as provided by state statute, were violated. We disagree.

The federal and state constitutions both prohibit the deprivation of life, liberty, or property without due process of law. U.S. Const. amend. XIV; N.C. Const. sec. 19 ("No person shall be deprived of his life, liberty, or property, but by the law of the land."); *see State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) ("The term 'law of the land' is synonymous with 'due process of law.' ").

As we have stated, "[w]ithout question, procedural due process requires that an individual receive adequate notice and a meaningful opportunity to be heard before [s]he is deprived of life, liberty, or property. Moreover, a professional license [] is a property interest, and is thus

protected by due process." *Herron v. N.C. Bd. of Exam'rs for Engin'rs & Surveyors*, ___ N.C. App. ___, ___, 790 S.E.2d 321, 327 (2016) (internal citation and marks omitted); *see Tully v. City of Wilmington*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2018) ("[A] property interest . . . can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law." (internal citation omitted)).

Here, Petitioner was afforded due process. She was notified of the violations alleged against her. She was allowed to respond, and she did so by admitting to the violations. Petitioner was also afforded a hearing before an administrative law judge to present her case. *See Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.")).

[2] Further, Petitioner was not denied the procedure required under North Carolina law. North Carolina law permits revocation of a child care license as a penalty for child maltreatment following administrative action. N.C. Gen. Stat. § 110-105.6 (2015) ("[W]hen an investigation confirms that child maltreatment did occur in a child care facility, the Department may issue an administrative action up to and including summary suspension and revocation of the facility's child care license.") Our law also requires that a license holder receive notice of a pending action and be given a chance to respond:

> Before the commencement of proceedings for the . . . revocation . . . of any license . . . , the agency shall give notice to the licensee, pursuant to the provisions of [N.C. Gen. Stat. §] 150B-23. . . . In either case, the licensee shall be given an opportunity *to show compliance* with all lawful requirements for retention of the license . . . .

N.C. Gen. Stat. § 150B-3(b) (2015) (emphasis added); 10A NCAC 9.2206(b) (2015) (describing the process for revocation of a child care license by DHHS).

Petitioner concedes that she was given notice in early December 2015 of DHHS's proceedings for revoking her child care license based on her 2015 violations, largely due to her hiding children unattended in unsafe conditions in her basement and her dishonesty to the Consultant. The notice allowed Petitioner a chance to respond, to which she sent a letter. In her response, Petitioner *admitted* to the violations, rather than contending that she had been in compliance.

We conclude that DHHS followed N.C. Gen. Stat. § 150B-3(b) by affording Petitioner the opportunity to show that she had not been out of compliance. Further, the Office of Administrative Hearings granted Petitioner an administrative hearing to formally review Petitioner's case, and Petitioner participated in a full hearing on her claims. We hold that Petitioner received notice of the pending action against her and had ample opportunity to show compliance.

D. Factual Basis for Revocation

[3] Petitioner also argues that the factual circumstances of her case did not warrant a revocation of her license. Before revoking Petitioner's license, a DHHS internal review panel conducted its own internal review, and reviewed the Consultant's visit reports, a letter filed by the Consultant, and Petitioner's rebuttal response. The internal review panel concluded that Petitioner's response "did not include an explanation of the violations that would warrant reducing the type of action" and determined that "the seriousness of the incident and falsification warrant[ed] a revocation of license."

Indeed, lying to a DHHS licensing consultant and attempting to hide potential license restriction violations may result in a revocation:

> Any effort to falsify information provided to the Department shall be considered by the Secretary to be evidence of violation . . . on the part of the operator . . . of the child care facility and shall constitute a cause for revoking or denying a license to such child care facility.

N.C. Gen. Stat. § 110-91(14) (2015). Additionally, maltreatment of a child in one's care is statutory grounds for punishment up to and including revocation of a child care provider's license. N.C. Gen. Stat. § 110-105.6. Child maltreatment is defined by our General Statutes as:

> Any act or series of acts of commission or omission by a caregiver that results in harm, potential for harm, or threat of harm to a child. . . . Acts of omission include, but are not limited to, failure to provide for the physical, emotional, or medical well-being of a child, and failure to properly supervise children, which results in exposure to potentially harmful environments.

N.C. Gen. Stat. § 110-105.3.

In September 2015, in an effort to avoid yet another citation for violation of her license's capacity restrictions, Petitioner hid a majority of

the preschool-aged children in her care in her basement. The children were unsupervised amidst improperly stored, hazardous chemicals, and Petitioner lied as to their presence when confronted by the Consultant. The record on appeal indicates that, after attempting to hide the children in the basement, Petitioner was momentarily unable to provide the names of the children to the Consultant. Baldwin was also unable to provide the children's names, and denied that the children had been in the basement. When the Consultant explained to Petitioner how dangerous it was to leave children unsupervised in a hazardous space, Petitioner responded that it "wasn't anything she didn't know already."

Petitioner's rebuttal response cited to an illness as the reason that she had repeat difficulties staying in compliance with licensing requirements. Petitioner continued by saying that she repeatedly took on additional clients beyond what her license allowed in order to aid families in the area. At no point did Petitioner explain or in any way address the September 2015 incident during which children were left in an unsafe environment and Petitioner provided false information to the Consultant. Pursuant to the statutes above, we hold that this incident alone was enough for DHHS to revoke Petitioner's child care license. In addition to the September 2015 incident, Petitioner was cited for numerous documentary errors over the course of 2015.

Regardless, Petitioner contends that the "opportunity to show compliance" afforded by N.C. Gen. Stat. § 150B-3(b) means that she needed only to show that she was *presently* in compliance with licensing requirements at the time of review, rather than needing to prove past compliance. In so doing, Petitioner assigns ambiguity to the temporal aspect of the statute and requests that we construe it strictly and against DHHS. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction[.]") We disagree. We hold the language of N.C. Gen. Stat. § 150B-3(b) unambiguous, and read it clearly.

Petitioner's reading of the statute leads to flawed practical applications, as she reads it to solely provide an opportunity to show *current* compliance and explain how past infractions are being remedied to avoid the revocation of a license. In theory, showing that one is *presently* in compliance with licensing requirements would certainly make them qualified for licensure. The language of DHHS's process for revoking a child care license does state that a licensee must "show compliance with all requirements for retention of [his or her] license." 10A NCAC 9.2206(b).

However, Petitioner would essentially have DHHS ignore the past actions and violations of licensees when deciding whether to revoke and/or reissue licenses. For instance, if a licensing consultant were to witness actual physical or sexual abuse being done to a child by a child care licensee, DHHS would be forced to reissue a license to that individual so long as he or she maintained an appropriate compliance score and promised that he or she no longer abused the children in his or her care. Similarly, if a licensee had a practice of leaving preschool-aged children to play in a pit inhabited by venomous snakes, under Petitioner's interpretation of N.C. Gen. Stat. § 150B-3(b), DHHS would be required to cease revocation proceedings if the licensee did away with the snake pit.

We hold that the statute simply grants the licensee an opportunity to be heard on the matters giving rise to a pending revocation. Petitioner was cited multiple times over a twelve-month period for safety-related violations, ranging from outdated certifications to exposed cleaning products. The internal review board gave Petitioner an opportunity to be heard, and to show that she was in compliance with DHHS licensing requirements. The board then found that Petitioner's rebuttal promising that she no longer intends to expose children to harmful chemicals or to falsify information to DHHS officials did not outweigh the harm done.

We conclude that the administrative law judge did not err by affirming the revocation of Petitioner's license. Further, the superior court appropriately employed the whole record test and did not err in affirming the administrative law judge's decision. We hold that the facts as presented by the entire record before us are sufficient to support a revocation of Petitioner's child care license, and thereby affirm.

AFFIRMED.

Judges BRYANT and DIETZ concur.

ENVIRONMENTALEE, CHATHAM CITIZENS AGAINST COAL ASH DUMP, AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC., PETITIONERS

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WASTE MANAGEMENT, AND DIVISION OF ENERGY, MINERAL AND LAND RESOURCES, RESPONDENTS, AND GREEN MEADOW, LLC AND CHARAH, INC., RESPONDENT-INTERVENORS

No. COA17-907

Filed 3 April 2018

1. Administrative Law—administrative law judge—review by superior court

The trial court erred in its review of an administrative law judge's opinion in a case with a unique procedural posture that involved permits for the use of coal ash. The superior court sits in the capacity of an appellate court when exercising judicial review of a final agency decision, and its standard of review is dictated by the nature of the errors asserted. The issues raised here required distinctly different reviews of the evidence and of the issues of the law, but the standards applied by the superior court were not clear from the court's order.

2. Administrative Law—review by superior court—conversion of motion

In a case with a unique procedural posture, it was improper for an administrative law judge to conflate summary judgment and involuntary dismissal. There is no authority for conversion from summary judgment to involuntary dismissal, especially where the administrative law judge acted sua sponte without providing the parties the opportunity to present additional arguments. The proper remedy in this case was reversal of the administrative law judge's grant of an involuntary dismissal and remand to the Office of Administrative Hearings.

Appeal by respondents and respondent-intervenors from order entered 10 April 2017 by Judge Carl R. Fox in Chatham County Superior Court. Heard in the Court of Appeals 24 January 2018.

John D. Runkle for petitioners.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel S. Hirschman, for respondents.

Moore & Van Allen PLLC, by Thomas D. Myrick and Peter McGrath, for respondent-intervenors.

ARROWOOD, Judge.

Respondents North Carolina Department of Environmental Quality ("NCDEQ")[1], Division of Waste Management ("DWM"), and Division of Energy, Mineral and Land Resources ("DEMLR") (collectively "the Department"), and respondent-intervenors Green Meadow, LLC and Charah, Inc. (collectively "Permittees") appeal from "Order on Judicial Review" (the "Order") that affirmed in part and reversed in part the Administrative Law Judge's ("ALJ") decision to uphold permits allowing for the use of coal combustion residual ("coal ash") to be used as structural fill at open pit mines in Chatham and Lee counties. For the following reasons, we reverse and remand to the superior court for further remand to the North Carolina Office of Administrative Hearings ("OAH").

I. Background

Subsequent to the Dan River coal ash spill in February 2014, the North Carolina General Assembly passed the Coal Ash Management Act of 2014 ("CAMA"), N.C. Gen. Stat. § 130A-309.200 *et seq.*, in August 2014 to mandate the closure and remediation of coal ash surface impoundments. 2014 N.C. Sess. Laws 122. As part of the CAMA framework, CAMA provides for expedited review by the Department of applications for permits necessary to conduct closure and remediation activities required by the act. *See* N.C. Gen. Stat. § 130A-309.203 (2017). Those activities requiring permits include the use of coal ash as structural fill. N.C. Gen. Stat. § 130A-309.219 (2017).

The present case concerns four permits issued by the Department to Permittees on 5 June 2015. Specifically, the DEMLR issued two modified mining permits and the DWM issued two structural fill permits. Together, those permits allow for the continued excavation and the use of coal ash as structural fill at the Brickhaven No. 2 Mine in Chatham County and the Colon Mine in Lee County, both open pit mines.[2]

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1. NCDEQ was formerly the N.C. Department of Environment and Natural Resources, but was renamed effective 18 September 2015.

2. The modified mining permits were issued to Green Meadow, while the structural fill permits were issued to both Charah and Green Meadow. One of each type of permit relates to each open pit mine.

On 6 July 2015, Blue Ridge Environmental Defense League, Inc., and its chapters in Chatham and Lee counties, Chatham Citizens Against Coal Ash Dump and EnvironmentaLEE (collectively "Petitioners"), filed a petition in the OAH for a consolidated contested case hearing on all four permits. The petition alleged that "[t]he actions allowed by the permits would have a significant and adverse impact on the health and well-being of the members of the Petitioners, and on their families, the use and enjoyment of their property, the value of their property and other economic interests[,]" and that "[t]he [Department's] issuance of the [p]ermit[s] has substantially prejudiced the rights of the Petitioners and their members." The petition specified seven issues with the permits.

On 14 July 2015, Permittees filed motions to intervene in the contested case hearing, which were granted by an OAH order filed 18 August 2015. Following amendments to one of the permits, the petition, and an OAH scheduling order, notice of hearing was filed on 27 October 2015 scheduling the matter for hearing in Raleigh in early December 2015. Prior to that hearing, the Department filed a motion for summary judgment on 9 November 2015. Petitioners filed a response to the Department's motion for summary judgment on 19 November 2015 seeking summary judgment in their favor. Permittees joined the Department's motion for summary judgment on 20 November 2015.

The contested case was heard in the OAH before the Honorable Melissa Owens Lassiter, on 7 and 8 December 2015. Upon hearing arguments on the motion for summary judgment, the ALJ granted summary judgment on one of the issues raised by Petitioners, which Petitioners then voluntarily dismissed as opposed to having a partial summary judgment order entered. When the hearing proceeded on the other issues, it was brought to the ALJ's attention that Petitioners were not ready to proceed on two of the remaining issues because their expert witnesses were not available. As a result, the Department moved to dismiss those issues. The ALJ denied the motion to dismiss and the hearing proceeded without Petitioners' expert witnesses present. At the conclusion of the Petitioners' presentation of evidence, the Department renewed its motion for summary judgment, which Permittees joined. Petitioners opposed the motions and sought summary judgment in their favor. The ALJ took the motions under advisement so that she could review the evidence.

On 10 February 2016, the ALJ filed an order granting an involuntary dismissal. In the order the ALJ explained as follows:

> [U]pon consideration of the evidence presented by both parties during Petitioner's case in chief, Respondent's

> Motion for Summary Judgment at the close of Petitioner's evidence, and Petitioner's response thereto, the undersigned hereby **DENIES** Respondent's Motion for Summary Judgment. The undersigned hereby converts Respondent's Motion for Summary Judgment to a Motion for Involuntary Dismissal, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, and **GRANTS** such Motion. Petitioner failed to meet its burden of proof in its case-in-chief, by failing to show it had a right to relief. Petitioner failed to show by a preponderance of the evidence that Respondent substantially prejudiced Petitioners' rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule in issuing the subject permits to [Permittees].

The ALJ's order further directed the Department and Permittees to file a joint proposed decision with the OAH.

On 5 May 2016, the ALJ filed her "Final Decision" with detailed findings and conclusions. In addition to denying the Department's and Permittees' motion for summary judgment and granting the Department's and Permittees' converted motion for involuntary dismissal pursuant to Rule 41(b), the order explained the consequences of the dismissal as follows:

> The decision by DWM to issue two permits on June 5, 2015 for a Structural Fill Permit to Construct and Operate, Permit No. 5306-STRUC-2015 for the Colon Mine to Charah, Inc. and Green Meadow, LLC and a Structural Fill Permit to Construct and Operate, Permit No. 1910-STRUC-2015 for the Brickhaven No. 2 Tract "A" Mine to Charah, Inc. and Green Meadow, LLC is hereby **UPHELD**. Further, DEMLR's decision to issue two permits on June 5, 2015 for a mining permit modification, Permit No. 53-05 for the Colon Mine to Green Meadow, LLC and mining permit modification, Permit No. 19-25 for the Brickhaven No. 2 Tract "A" Mine to Green Meadow, LLC is hereby **UPHELD**.

On 6 May 2016, the ALJ filed an "Order Amending Final Decision" to correct an error and add a transcript reference.

On 1 June 2016, Petitioners filed a "Civil Summons" and a "Petition for Judicial Review" (the "petition") in Chatham County Superior Court, followed by a brief in support of the petition on 1 August 2016.

Permittees and the Department responded by filing briefs in opposition to the petition on 15 September 2016.

The petition was heard in Chatham County Superior Court before the Honorable Carl R. Fox on 14 November 2016. Upon hearing arguments, the court took the matter under advisement. On 10 April 2017, the court filed the Order affirming the ALJ's Final Decision in part and reversing the ALJ's Final Decision in part. Specifically, the court ordered as follows:

> 1. The Final Decision is **AFFIRMED** as it relates to the use of the areas already mined or otherwise excavated in the two coal ash disposal sites (Brickhaven and Colon Road), and;
>
> 2. The Final Decision is **REVERSED** as to areas not already mined or otherwise excavated, and the two mine reclamation permits were issued improperly by the [Department] and are hereby **REVOKED**.

In so holding, the court amended, omitted, or outright rejected many of the ALJ's findings of fact and conclusions of law. The effect of the Order is that mining may continue at the Brickhaven No. 2 and Colon mines, but coal ash may only be used as structural fill in the areas mined or excavated at the time the permits were issued.

Permittees filed notice of appeal on 27 April 2017. The Department filed notice of appeal on 4 May 2017.

Subsequent to the filing of the notices of appeal, Permittees filed a motion to stay the enforcement of the Order in Chatham County Superior Court and Petitioners filed a response and motion to enforce the Order. Following a hearing on Permittees' motion to stay, the court denied the motion by order filed 15 June 2017. Permittees then filed a petition for writ of supersedeas and a motion for a temporary stay with this Court. On 14 June 2017, this Court granted a temporary stay pending a ruling on the petition for writ of supersedeas. On 27 June 2017, this Court allowed a petition for writ of supersedeas, thereby staying the Order upon Permittees posting of a bond, pending the outcome of the appeal.

II. Discussion

[1] On appeal, the Department and Permittees raise various issues with the superior court's review of the ALJ's Final Decision and the court's interpretation of the relevant statutory provisions. Because of the

unique procedural posture of this case, we address only the trial court's review of the ALJ's Final Decision and do not reach the issues of statutory interpretation.

"The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 673, 443 S.E.2d 114, 117 (1994). The APA provides a party aggrieved by a final decision in a contested case a right to judicial review by the superior court. N.C. Gen. Stat. §§ 150B-43 and -50 (2017). A party to the review proceeding in superior court may then appeal from the superior court's final judgment to the appellate division. N.C. Gen. Stat. § 150B-52 (2017). The APA sets forth the scope and standard of review for each court.

"The scope of review to be applied by the appellate court under [the APA] is the same as it is for other civil cases." *Id.* Thus, our appellate courts have recognized that "[t]he proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law." *Shackleford-Moten v. Lenoir Cnty. Dep't of Soc. Servs.*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002) (citing *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997)). Our appellate courts have further explained that "this 'twofold task' involves: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Hardee v. N.C. Bd. Of Chiropractic Examiners*, 164 N.C. App. 628, 633, 596 S.E.2d 324, 328 (2004) (internal quotation marks and citations omitted). As a result, this Court has required that "[t]he trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review." *Sutton v. N.C. Dept. of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 342 (1999). "As in other civil cases, we review errors of law *de novo*." *Hilliard v. N.C. Dep't of Correction*, 173 N.C. App. 594, 596, 620 S.E.2d 14, 17 (2005).

"When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Bernold v. Bd. of Governors of Univ. of North Carolina*, 200 N.C. App. 295, 297, 683 S.E.2d 428, 430 (2009) (quotation marks and citations omitted). The APA limits the scope of the superior court's judicial review as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings.

> It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). "The superior court's standard of review is dictated by the nature of the errors asserted." *Shackleford-Moten*, 155 N.C. App. at 571, 573 S.E.2d at 769 (citing *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392). The APA sets forth the standard of review to be applied by the superior court as follows.

> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c).

> These standards of review are distinct. Under a *de novo* review, the superior court consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment. When utilizing the whole record test, however, the reviewing court must examine all competent evidence (the "whole record") in order to determine whether the

> agency decision is supported by substantial evidence. The "whole record" test does not allow the reviewing court to replace the [b]oard's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 13-14, 565 S.E.2d 9, 17-18 (2002) (internal quotation marks and citations omitted).

In the present case, Petitioners asserted four exceptions to the ALJ's Final Decision in their petition for judicial review. First, Petitioners broadly asserted that the ALJ improperly upheld the permits and erroneously granted the involuntary dismissal. Petitioners alleged the permits and dismissal prejudiced their substantial rights under N.C. Gen. Stat. § 150B-51(b)(2)-(6). Petitioners next challenged specific findings and conclusions in three more specific exceptions alleging the ALJ erred: (2) "by finding and concluding the proposed coal ash disposal facilities were mine reclamation projects rather than solid waste landfills[;]" (3) "in giving undue deference to the unsupported positions of the staff of the Respondent state agencies[;]" and (4) "in misrepresenting the testimony and qualification of [p]etitioners' witness, Mr. Kovasckitz, and made no conclusions of law regarding his expert opinion."

These issues raised by Petitioners required the superior court to perform distinctly different reviews of the evidence under the whole record standard and of issues of law under the de novo standard. However, it is unclear from the Order what standards the superior court applied to the issues raised, making it impossible for this Court to determine whether the proper standards were applied and whether the standards were applied correctly. The Order does not even reference the exceptions raised by Petitioners. Instead, it appears the superior court reweighed the evidence and rewrote the ALJ's decision. In doing so, the court amended, omitted as "not in issue," or completely rejected without explanation many of the ALJ's findings of fact and conclusions of law. Thus, we hold the superior court erred in its review of the ALJ's Final Decision.

[2] In the past, when the superior court failed to indicate the standard of review applied to resolve the issues raised on appeal, or if its order was unclear, this Court simply reversed and remanded the case to the superior court for it to do so. *Shackleford-Moten*, 155 N.C. App. at 572, 573 S.E.2d at 770. However, in *Shackleford-Moten*, this Court explained that "our Supreme Court reversed this line of cases in a recent per curiam

decision for reasons stated in a dissenting opinion from this Court." *Id.* This Court further explained that dissenting opinion as follows:

> In *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 552 S.E.2d 265 (2001), *rev'd per curiam*, 355 N.C. 269, 559 S.E.2d 547 (2002), Judge Greene, in a dissenting opinion, wrote that an appellate court's obligation to review a superior court order examining an agency decision "can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court." *Id.* at 392, 552 S.E.2d at 268 (Greene, J., dissenting). Thus, in reviewing a superior court order examining an agency decision, an appellate court must determine whether the agency decision (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion. N.C. Gen. Stat. § 150B–51 (2001). In performing this task, the appellate court need only consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court.

Id.; *see also Bernold*, 200 N.C. App. at 298, 683 S.E.2d at 430 ("This Court's task when reviewing a superior court's order reviewing an administrative decision is simply to consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court.") (internal quotation marks and citations omitted).

As detailed above, upon hearing the parties' summary judgment arguments and taking the summary judgment motion under advisement, the ALJ, *sua sponte*, converted the Department's and Permittees' motion for summary judgment into a Rule 41(b) motion for involuntary dismissal. The ALJ offered no explanation or support for converting the summary judgment motion into a Rule 41(b) motion in the order granting involuntary dismissal. In the Final Decision, the ALJ concluded the "renewed [m]otion for [s]ummary [j]udgment was, in essence, a request for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1 Rule 41(b), and shall be so converted and [g]ranted as such." Upon review,

we disagree with the ALJ's conclusion that the Department's and the Permittee's renewed summary judgment motion was, "in essence," a Rule 41(b) motion. Furthermore, because we are unable to find any authority for the conversion of a motion for summary judgment into a motion for involuntary dismissal, we hold the ALJ erred in this instance.

Although both summary judgment and an involuntary dismissal at the close of Petitioners' evidence are adjudications on the merits, *see* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017), there are stark differences between the motions, including the standards to be applied in determining the motions.

"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. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (quoting N.C. Gen. Stat. § 1A–1, Rule 56(c)). "The purpose of [summary judgment] is not to allow the trial court to decide an issue of material fact, but to allow it to determine whether a genuine issue of material fact exists." *Hiatt v. Burlington Industries, Inc.*, 55 N.C. App. 523, 525, 286 S.E.2d 566, 567 (1982). Because of the nature of the motion, "it is inappropriate for the trial court's order to contain detailed findings of fact and conclusions of law . . . ." *Good Neighbors of Oregon Hill Protecting Property Rights v. Cnty. of Rockingham*, 242 N.C. App. 280, 288, 774 S.E.2d 902, 908, *appeal dismissed and disc. review denied*, 368 N.C. 429, 778 S.E.2d 78 (2015). Furthermore, "[i]n ruling on a motion for summary judgment, the trial court must review the record in the light most favorable to the party opposing the motion." *Hiatt*, 55 N.C. App. at 525, 286 S.E.2d at 567.

On the other hand, Rule 41(b) provides that

> [a]fter 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. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2017).

> On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. Instead, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them.

Hill v. Lassiter, 135 N.C. App. 515, 517, 520 S.E.2d 797, 800 (1999) (internal citations and quotation marks omitted). "If the trial court grants a . . . motion for involuntary dismissal, he must make findings of fact and failure to do so constitutes reversible error." *Id.*

In this case, the Department and Permittees' renewed their motion for summary judgment made prior to the hearing. They did not move for an involuntary dismissal pursuant to Rule 41(b). Because of the stark differences in the motions, we hold it was improper for the ALJ to conflate the two motions and convert the renewed motion for summary judgment into a Rule 41(b) motion for an involuntary dismissal. There is no authority authorizing such conversion, especially where the ALJ acts *sua sponte* without providing the parties the opportunity to present additional arguments on Rule 41(b).

While we recognize that the Rules of Civil Procedure apply in contested case hearings, *see* 26 N.C. Admin. Code 3.0101(a) (2018), we have not found any cases where an ALJ has granted an involuntary dismissal pursuant to Rule 41(b) other than for failure to prosecute, failure to abide by a court order, failure to follow other rules, or for other procedural errors. Although we do not foreclose the possibility that dismissal may be appropriate in the clearest cases, we find no justification for the ALJ to make such a ruling on its own without providing the parties with a full and fair opportunity to address the motion under the appropriate standards of review.

N.C. Gen. Stat. § 150B-25(c) provides that in a contested case, "[t]he parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact." N.C. Gen. Stat. § 150B-25(c) (2017). Given the unusual procedural posture of this case, the proper remedy upon reversal of the ALJ's grant of the involuntary dismissal is to remand the matter to the OAH to give the Department and Permittees the opportunity to present their evidence and defenses and to permit Petitioners to present any rebuttal to this evidence, including any expert testimony that may rebut the same.

III. Conclusion

The superior court erred by failing to recognize and apply the statutorily mandated standards of review, frustrating this Court's review of the Order. However, upon review of the record, we hold the ALJ erred in *sua sponte* converting the Department and Permittees' motion for summary judgment into a Rule 41(b) motion and granting the same. We remand the matter to the superior court for further remand to the OAH to allow the Department and Permittees the opportunity to present their case. At that time, Petitioners shall be permitted to offer any rebuttal evidence, including any expert testimony that rebuts the Department's and Permittees' contentions.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

IN RE ESTATE OF THOMAS S. SHARPE, DECEASED

No. COA17-1151

Filed 3 April 2018

1. Marriage—premarital agreement—waiver of elective share

Following precedent and well-settled principles of contract construction, the express language of a premarital agreement showed that a wife voluntarily waived any right to claim a spousal elective share of her deceased husband's separate property. The unambiguous language of the uncontested and valid agreement plainly established the parties' intention, prior to their marriage, that the wife-to-be waive any rights in her husband-to-be's separate property and that he waived any rights in her separate properly. The only logical reading of the agreement would include a spouse's fight to claim an elective share under N.C.G.S. § 30-3.1.

2. Marriage—spousal share—premarital agreement—judicial notice of will

In an action that involved a premarital agreement, the death of the husband, the widow's claim for a spousal elective share of her husband's estate and separate property, and her death, there was no prejudice from the trial court taking judicial notice of the widow's

will. The trial court order made it clear that it did not rely on the will but only noted it.

Appeal by petitioner from judgment entered 23 June 2017 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 6 March 2018.

Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley and Peter T. Blaetz, for petitioner-appellant.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for respondent-appellee.

TYSON, Judge.

I. Background

Thomas S. Sharpe and Alma G. Seward were married on 21 November 2009, and remained married until Thomas S. Sharpe's death on 14 January 2016. Thomas S. Sharpe was 86 years old and Alma G. Seward was 75 years old when they were married. Both had been married previously and had adult children from their prior marriages.

On 18 February 2016, a will for Thomas S. Sharpe ("testator") was entered into probate by his son, Thomas F. Sharpe. Attached to the will was a pre-marital agreement and a document entitled the "Thomas S. Sharpe Irrevocable Trust Agreement."

The testator's will designates Thomas S. Sharpe's two adult children from a previous marriage, Susan Wall and Thomas F. Sharpe, as co-executors. The will bequeaths all of the testator's estate to the "Thomas S. Sharpe Irrevocable Trust Agreement." The two beneficiaries of the trust are Thomas F. Sharpe and Susan Wall. The will leaves nothing to the testator's wife at his death.

The pre-marital agreement was executed between Thomas S. Sharpe and Alma G. Seward on 4 November 2009. The pre-marital agreement has two schedules attached, Schedule A and Schedule B. Schedule A lists all the separate property belonging to Thomas S. Sharpe and Schedule B lists all the separate property belonging to Alma G. Seward. The pre-marital agreement states that "each party agrees that the separate property shall include, but not be limited to, the property described hereafter, and that the separate property of the party shall remain the separate property of the other party."

Following Thomas S. Sharpe's death, Alma G. Seward filed a petition to claim an elective share of her husband's estate on 23 June 2016. "Under N.C. Gen. Stat. § 30-3.1 *et seq.*, a wife who survives her husband may choose to take an 'elective share' of the decedent's assets rather than taking under the decedent's will." *In re Estate of Heiman*, 235 N.C. App. 53, 56, 761 S.E.2d 191, 193 (2014) (footnote omitted). The executor, Thomas F. Sharpe ("Respondent"), filed an answer and reply denying Alma G. Seward's right to claim an elective share.

The Alamance County Clerk of Superior Court conducted a hearing on 17 January 2017 and entered an order granting Alma G. Seward's petition for an elective share. Thomas F. Sharpe appealed to the Alamance County Superior Court on 31 January 2017. On 23 March 2017, Alma G. Seward died. Alma G. Seward's personal representative, Steven Lawrence Seward ("Petitioner"), filed a motion to substitute a party. That motion was granted by an order filed 25 May 2017.

The matter was heard on 15 May 2017 in the superior court. The superior court entered a judgment filed 23 June 2017 denying Petitioner's petition for an elective share. Petitioner gave timely notice of appeal.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Petitioner argues the superior court erred in concluding the pre-marital agreement between Alma G. Seward and Thomas S. Sharpe waives Alma G. Seward's right to claim an elective share in his estate. Petitioner also contends the superior court improperly took judicial notice of Alma G. Seward's will to interpret the pre-marital agreement. We address each argument in turn.

IV. Standard of Review

On appeal of estate matters determined by the clerk, the superior court reviews an order of the clerk for purposes of determining: (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d) (2017).

The superior court, and therefore this Court, only reviews those "findings of fact which the appellant has properly challenged by specific exceptions." *In re Estate of Lowther*, 271 N.C. 345, 354, 156 S.E.2d 693,

700-01 (1967); *see also In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995) ("The standard of review in this Court is the same as in the Superior Court.").

V. Analysis

A. Pre-marital Agreement

[1] Both parties agree the pre-marital agreement at issue was executed both voluntarily and after full disclosure. The order of the clerk reviewed by the superior court contained ten findings of fact. These include:

> 1. A prenuptial agreement was executed between Thomas S. Sharpe and Alma Seward on November 4, 2009.
>
> 2. Thomas S. Sharpe and Alma Seward were marred on November 21, 2009.
>
> 3. Thomas S. Sharpe died January 14, 2016 still married to Alma Seward Sharpe.
>
> 4. A will for Thomas Sharpe was filed with Alamance County Estate office on February 18, 2016.
>
> 5. The will named his son, Thomas F. Sharpe, and his daughter, Susan Sharpe Wall, as co-executors of his will.
>
> 6. The will gives the tangible personal property (clothing, jewelry, automobiles, and personal effects) to Susan Wall and Thomas F. Sharpe.
>
> 7. The will gives the residue of the estate to the Thomas S. Sharpe Trust which effectively divides the property between the two children, Susan Wall and Thomas F. Sharpe.
>
> 8. The widow of Thomas S. Sharpe, Alma Seward Sharp[e], receives nothing under this will.
>
> 9. Alma Sharpe, through her Attorney in Fact, Steven Seward, filed this petition [to] get an elective share of the Total Net Assets pursuant to N.C. G.S. 30-3.1 on June 23, 2016.
>
> 10. The Prenuptial agreement executed by Thomas Sharpe and Alma Seward contains no clause waiving her right to claim an elective share of his estate.

Based upon these findings of fact, the clerk concluded Alma G. Seward's petition for an elective share should be granted. Findings of

fact 1 through 9 in the clerk's order recited undisputed facts, which were consented to by both parties, and neither party challenges these findings of fact. On appellate review, the superior court determined all of the clerk's findings of fact were supported by the evidence, except for finding of fact 10.

The superior court determined, "Finding of fact 10 is partially correct in that there is not one specific clause waiving the spouse['s] right to claim an elective share of the estate, but the findings supported by the evidence, contradict this statement and conclusively establish the intent of the parties." The only finding of fact at issue is finding of fact 10.

Although it was labelled as a "finding of fact" by the clerk, it is actually a conclusion of law, because it involves a matter of contract interpretation. *Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 123, 633 S.E.2d 113, 115 (2006) ("Contract interpretation is a matter of law, and the standard of review for this Court is *de novo*.") (citation omitted). The labels "findings of fact" and "conclusions of law" employed by the lower tribunal in a written order do not determine the nature of our standard of review. *See Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (reviewing what was labeled as a "conclusion of law" as a finding of fact). If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that "finding" as a conclusion *de novo*. *See id.* We therefore apply *de novo* review to the clerk's "finding of fact" 10.

To determine whether "finding of fact" 10 is outcome determinative of the issue, we review the terms of the pre-marital agreement. The pre-marital agreement contains, in part, the following pertinent provisions:

> WHEREAS, both parties are individually possessed of certain separate property and both acknowledge that they played no role in the accumulation of the other's separate property; and,
>
> WHEREAS, the parties desire to contract with each other concerning matters of the disposition of their separate property;
>
> . . . .
>
> 1. Division of Property. Except as provide[d] below, each party agrees that the separate property of the other party shall include, but not be limited to, the property described hereafter, and that the separate property of the party shall remain the separate property of the other party.

. . . .

2. Exclusive Right to Manage Separate Property. Each party has the sole and exclusive right at all times to manage and control their respective separate property to *the same extent as if each were unmarried*. This right to manage and control includes the right to dispose of any or all of that party's separate property by deed, will, or otherwise on that party's sole signature without any involvement or control by the other party[.] (Emphasis supplied).

. . . .

3. Obligation to Join in Execution of Documents and Free Trader Agreement. . . . Each party specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state. Each party agrees to execute a separate "Free Trader Agreement" to be recorded in the Alamance County Register of Deeds setting forth the intent of the parties.

. . . .

8. Agreements with Respect to Home. The parties will be residing at a home owned by Husband.

> 1. In the event of the death of Husband, the property shall be the sole and separate property of Husband subject to a right to possession by Wife so long as she maintains the house as her principal residence.
>
> 2. If Wife should die and Husband survive, the property shall be the sole and separate property of Husband.

. . . .

12. Miscellaneous Provisions. To clarify certain aspects of this document's execution and effectiveness, the parties agree as follows: . . .

> b. This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, personal representatives, successors, and assigns.

. . . .

> 13. Entire Agreement. This represents the entire Agreement of the parties with regard to the subject matter hereof. . . . All prior and contemporaneous conversations, negotiations, possible and alleged agreements and representations, covenants, and warranties with respect to the subject matter hereof are waived, merged herein, and superseded hereby.

In interpreting these provisions, we employ several well-established principles of contract construction. Pre-marital agreements are contracts, and "principles of construction applicable to contracts also apply to premarital agreements." *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990); *see also* 1 Lloyd T. Kelso, *N.C. Family Law Practice* § 3:7 (2017) ("Premarital agreements, like marital property settlement agreements, are subject to the same rules of construction applicable to contracts generally, including the application of the plain meaning of unambiguous contractual terms.").

If "the language of a contract is clear and unambiguous, construction of the contract is a matter of law for the court." *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987). "It must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford Acc. & Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (internal citations omitted).

"[T]he object of all interpretation is to arrive at the intent and purpose expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose unless at variance with some rule of law or contrary to public policy." *Citizens Nat. Bank v. Corl*, 225 N.C. 96, 102, 33 S.E.2d 613, 616 (1945) (citation omitted).

"Courts are not at liberty to rewrite contracts for the parties. We are not their guardians, but the interpreters of their words. We must, therefore, determine what they meant by what they have said- what their contract is, and not what it should have been." *Penn v. Standard Life Insurance Co.*, 160 N.C. 399, 402, 76 S.E. 262, 263 (1912).

The Supreme Court of North Carolina's opinion in *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973), is instructive in interpreting the pre-marital agreement. In *Lane*, a surviving wife asserted a right to share in her deceased husband's estate. 284 N.C. at 408, 200 S.E.2d at 623. During their marriage, the parties executed a separation agreement, which had no specific express release of the

wife's right to intestate succession. *Id.* The superior court held that the wife had not released her right to intestate succession and was entitled to share in her deceased husband's estate. *Id.* This Court affirmed the superior court and the Supreme Court reversed. *Id.* at 409, 412, 200 S.E.2d at 624-25.

In analyzing the separation agreement, the Supreme Court recognized express terms therein, such as "[t]hey agreed . . . they would live wholly separate and apart from each other as though they had never been married" and that "each agreed that the other would thereafter hold, acquire, and dispose of all classes and kinds of property, both real and personal, as though free and unmarried." *Id.* at 411, 200 S.E.2d at 625. The Court also noted the separation agreement stated that each party "released the right to administer upon the estate of the other." *Id.*

The Court determined that "the specific terms of the contract are totally inconsistent with an intention that the parties would each retain the right to share in the estate of the other . . . if he or she were to become the surviving spouse." *Id.* The Court ultimately concluded: "The provisions that each would thereafter acquire, hold, and dispose of property as though unmarried and that each renounced the right to administer upon the estate of the other refute the contention that [the wife] intended to retain any rights in her husband's estate." *Id.*

Here, the unambiguous language of the uncontested and valid pre-marital agreement plainly establishes the parties intention, prior to their marriage, that Alma G. Seward waived any rights in Thomas S. Sharpe's separate property and that Thomas S. Sharpe waived any rights in Alma G. Seward's separate property. The pre-marital agreement also clearly and unambiguously states "[e]ach party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]" and "[e]ach party specifically waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state."

The only logical reading of "each party specifically waives . . . any claim . . . to the other's separate property under the laws of this state," would extend, in light of the entire agreement, to include a spouse's right to claim an elective share under N.C. Gen. Stat. § 30-3.1. The pre-marital agreement also expressly states: "This Agreement shall be binding upon and inures to the benefit of the parties and their respective heirs, executors, personal representatives, successors, and assigns." The implications of these express and unambiguous terms "refute the contention

that [the wife] intended to retain any rights in her husband's estate." *See id.* Petitioner's argument is overruled.

Petitioner contends that the language in the pre-marital agreement is not sufficiently express or specific to include a waiver or release of Alma G. Seward's right to claim an elective share in her deceased husband's estate. Petitioner cites the case of *Napier v. Napier*, 135 N.C. App. 364, 520 S.E.2d 312 (1999), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000), in support of his contention.

At issue in *Napier* was whether a release term under a separation agreement constituted a waiver of alimony. *Napier*, 135 N.C. App. at 366, 520 S.E.2d at 313. The separation agreement provided:

> L. Mutual release: Subject to the rights and privileges provided for in this Agreement, each party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, known or unknown, by reason of any matter, cause or thing up to the date of the execution of this Agreement, except the cause of action for divorce based upon the separation of the parties.

Id. at 365-66, 520 S.E.2d at 313 (emphasis omitted).

This Court concluded that broad language was not sufficiently "express" to constitute a valid waiver of alimony under N.C. Gen. Stat. § 50-16.6(b), as it did not "specifically, particularly, or explicitly refer to the waiver, release, or settlement of 'alimony' or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights." *Id.* at 367, 520 S.E.2d at 314.

Furthermore, this Court determined that, without regard to the issue of the separation agreement not containing an express waiver of alimony, that:

> The preamble to the Agreement specifically states that it is entered into 'pursuant to North Carolina General Statutes Section 50-20(d).' This statute deals with the right of married persons to make agreements with respect to the distribution of their marital property under the equitable distribution statutes. The reference to section 50-20(d) thus reveals the intent of the parties to restrict the Agreement to marital property issues within the scope

> of equitable distribution. Issues of spousal support are not within the province of the equitable distribution statute.

Id. at 367-68, 520 S.E.2d at 314.

Contrary to Petitioner's contention, the ruling in *Napier* is not inconsistent with the determination that the pre-marital agreement before us constitutes a waiver of Alma G. Seward's right to claim a spousal elective share in Thomas S. Sharpe's separate property and estate. The pre-marital agreement at issue expressly states: "[e]ach party has the sole and exclusive right at all times to manage and control their respective separate property to the same extent as if each were unmarried[,]" and "[e]ach party *specifically* waives, relinquishes, renounces, and gives up any claim that he or she may have or otherwise had or may have made to the other's separate property under the laws of this state." (Emphasis supplied). Also, as noted above, the pre-marital agreement states: "This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, personal representatives, successors, and assigns."

Although the pre-marital agreement does not expressly refer to the parties rights to claim upon each other's estate, the plain and unambiguous language does not permit us to read the agreement to mean the parties intended to waive rights to each other's separate property while they were alive, but not after one of them had pre-deceased the other.

Additionally, unlike in *Napier*, the pre-marital agreement here does not have a specific reference to a statute that would limit the scope of the agreement to the scope of that statute. *See id.* (determining that reference to N.C. Gen. Stat. 50-20(d) limited the scope of the separation agreement to issues within the province of equitable distribution statute). The facts and holding in *Napier* are distinguishable and do not control our analysis with regard to the pre-marital agreement here.

Following *Lane*, and well-settled principles of contract construction, the express language of the pre-marital agreement shows Alma G. Seward voluntarily waived any right to claim a spousal elective share of the decedent Thomas S. Sharpe's separate property. Petitioner's arguments are overruled.

B. Judicial Notice

[2] Petitioner additionally argues the superior court erred, or abused its discretion, by taking judicial notice of the will of Alma G. Seward, which had not been submitted into evidence when this matter was heard before the clerk.

Rule 201 of the N.C. Rules of Evidence permits the trial court to take judicial notice of adjudicative facts, which are defined as those facts which are:

> (b) . . . [N]ot subject to reasonable dispute in that [they] are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

N.C. Gen. Stat. § 8C-1, Rule 201(b) (2017).

The trial court is required to take judicial notice of certain facts only when a party requests it and supplies the necessary information pursuant to Rule 201(d). Otherwise, taking judicial notice rests within the discretion of the trial court pursuant to Rule 201(c). N.C. Gen. Stat. § 8C-1, Rules 201(c) and (d).

Presuming, *arguendo*, without deciding the superior court acted improperly by taking judicial notice of the will of Alma G. Seward, Petitioner fails to demonstrate how they were prejudiced.

After concluding Petitioner waived any right to an elective share of the decedent's separate property, the order of the superior court states, in pertinent part, as follows:

> *Although not necessary to resolve this matter*, *but as corroboration for the decision*, the Court notes it may take judicial notice of the estate files of this county. The Court again notes that Ms. Seward, in her will, *executed after* the Premarital Agreement, chooses not to bequeath anything to the deceased 'pursuant to a premarital agreement executed by us on November 4, 2009.' *Although the Court does not find there is any ambiguity or doubt as to the meaning of the agreement*, had there been any doubt the will would have resolved it. . . . Here, Ms. Seward's statements in her will conclusively establish that she believed, and correctly so, that she had to make NO provision for her husband. This evidence would not be barred by the merger clause in the Premarital Agreement because it was not made prior to or contemporaneously with the agreement. (Emphasis supplied).

The superior court's order is abundantly clear and shows the court did not rely upon Alma G. Seward's will in making its ruling, but only noticed it for corroboration of that decision. Apparent from the face

of the order, the superior court concluded Petitioner was not entitled to claim a spousal elective share with or without taking judicial notice of Alma G. Seward's will. Petitioner fails to demonstrate the superior court's taking judicial notice of Alma G. Seward's will was an abuse of discretion or prejudicial. Petitioner's argument is overruled.

VI. Conclusion

The plain and unambiguous language of the pre-marital agreement between Thomas S. Sharpe and Alma G. Seward indicates Alma G. Seward waived any right to claim a spousal elective share of Thomas S. Sharpe's separate property or estate. Petitioner has demonstrated no abuse of discretion or prejudice from the superior court taking judicial notice of Alma G. Seward's will. The order of the superior court is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and DILLON concur.

IN THE MATTER OF J.R.S. AND Z.L.S.

No. COA17-1101

Filed 3 April 2018

1. Child Abuse, Dependency, and Neglect—grandparents—status as parties terminated

The trial court erred by discharging a grandmother and grandfather as a parties in an ongoing juvenile proceeding without the requisite findings. Because the grandmother and grandfather were appropriately named parties in the juvenile proceeding, the trial court was required to comply with N.C.G.S. § 7B-401.1(g).

2. Child Abuse, Dependency, and Neglect—grandparents—visitation

In a child abuse case where an order involving grandparents as parties was remanded, if on remand the trial court decides that the grandparents should remain as parties, then it must provide visitation in the best interests of the children.

3. Child Abuse, Dependency, and Neglect—grandparents—best interest of children

Incorporating reports was not sufficient to support a trial court's conclusion that it would not be in the best interests of juveniles to be returned to the grandparents. The court may not delegate its fact-finding duty.

Appeal by Respondents from order entered 27 June 2017 by Judge John R. Nance in Stanly County District Court. Heard in the Court of Appeals 20 February 2018.

Jacqueline P. De Santis for Petitioner-Appellee Stanly County Department of Social Services.

Mark L. Hayes for the Respondent-Appellant Grandmother.

Jeffrey William Gillette for the Respondent-Appellant Grandfather.

K&L Gates LLP, by Leah D'Aurora Richardson, for guardian ad litem.

DILLON, Judge.

Respondent-Grandmother and Respondent-Grandfather appeal from an order in which the trial court effectively removed them as parties in a neglect and dependency proceeding involving two of their grandchildren, "Jonah" and "Zeke."[1] After careful review, we reverse.

I. Background

In September 2015, the Stanly County Department of Social Services ("DSS") filed a petition alleging that Jonah and Zeke were neglected and dependent juveniles. The petition named the children's parents and grandparents as the "parent[s], guardian[s], custodian[s], or caretaker[s][,]" but its allegations referred only to the conduct of the parents.

In December 2015, the trial court entered an order (the "Custody Order") establishing a civil custody action and awarding legal and physical custody of both children to Grandmother and Grandfather. The Custody Order relieved DSS of further efforts on behalf of the children, concluding that the children's placement with Grandmother and

1. Pseudonyms are used throughout this opinion to protect the identity of the juveniles and for ease of reading.

Grandfather eliminated their need for further services from DSS or continued state intervention through a juvenile proceeding.

Approximately four months later, in May 2016, DSS began receiving reports of physical and verbal altercations between Grandmother and Grandfather which occurred in the presence of the children. In response, DSS filed a second juvenile petition, alleging that Jonah and Zeke were neglected and dependent juveniles. After a hearing on the petition, the trial court determined that it was not in the children's best interest to remain with Grandmother and Grandfather, nor to be returned to their parents, and ordered that they be placed in DSS custody. The trial court further ordered DSS to work with the parents and grandparents to develop case plans to address the issues that led to the removal of the children. For the next six months, the trial court conducted regular review hearings, but the circumstances of the parties remained relatively unchanged.

In March 2017, the trial court conducted a review hearing, during which it determined the following:

> 8. The [parents] have never entered into a case plan, have taken no action to resolve issues that led to the children being removed and have indicated a desire that the minor children [] be placed in the custody of [Grandmother and Grandfather].
>
> 9. [The parents and grandparents] continue to test positive for drugs, the primary drug being marijuana. . . .

Based on these and other findings, the trial court relieved DSS of further efforts to reunify the children with their parents and changed the children's permanent plan from reunification to "guardianship or adoption with an alternative plan of custody to a court approved caretaker."

Three months later, in June 2017, the trial court conducted a permanency planning hearing. At the hearing, the trial court noted its receipt of signed forms from both of the children's parents relinquishing their parental rights to Jonah and Zeke. But despite taking judicial notice of the Custody Order granting custody of the children to Grandmother and Grandfather, the trial court concluded that the parents' signed "relinquishments . . . terminated all parental rights of the respondents and the parents *thereby relinquishing any actions on behalf of [Grandmother] and [Grandfather] in this matter*." This order effectively removed the grandparents from the ongoing proceeding and directed DSS to pursue a permanent plan of adoption by Jonah and Zeke's foster parents. Grandmother and Grandfather both separately appealed.

II. Analysis

A. Removal of Grandparents as Parties

[1] The primary issue on appeal is whether the trial court erred in removing Grandmother and Grandfather from the ongoing juvenile proceeding. Because the trial court failed to enter the appropriate findings required by N.C. Gen. Stat. § 7B-401.1(g) when discharging a party from a proceeding, we reverse and remand.

At the time of the trial court's order, it took judicial notice of an active custody order which awarded legal and physical custody of the children to Grandmother and Grandfather. The Custody Order was entered pursuant to N.C. Gen. Stat. § 7B-911, which provides that upon placing custody of a child with an appropriate person, "the [trial] court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person [under Chapter 50]." N.C. Gen. Stat. § 7B-911(a) (2015). The Custody Order here specifically provided that it would "initiate[] a civil custody action" and that it terminated "the jurisdiction of the [trial court] in the juvenile proceeding." Thus, when DSS filed its second juvenile petition alleging that Jonah and Zeke were neglected and dependent juveniles, the petition created a new juvenile proceeding. *See* N.C. Gen. Stat. § 7B-401.1(a) (2015).

Section 7B-401.1 of the Juvenile Code lists the individuals who *must* be parties to a juvenile proceeding. N.C. Gen. Stat. § 7B-401.1(a)-(f). This list includes parents, guardians, custodians, and caretakers, among others. N.C. Gen. Stat. § 7B-401.1(b)-(d).

Here, the second juvenile petition named the parents and both Grandmother and Grandfather as parties. Presumably, Grandmother and Grandfather were included because the Juvenile Code provides that "[a] person who is the juvenile's custodian, as defined in G.S. § 7B-101(8), when the petition is filed *shall be a party*." N.C. Gen. Stat. § 7B-401.1(d) (emphasis added); *see also* N.C. Gen. Stat. § 7B-101(8) (defining "custodian" as "[t]he person or agency that has been awarded legal custody of a juvenile by a court").

Because Grandmother and Grandfather were appropriately named parties to the juvenile proceeding, the trial court was required to comply with N.C. Gen. Stat. § 7B-401.1(g) in ordering their removal from the proceeding:

> (g) Removal of a Party. – If a guardian, *custodian*, or caretaker is a party, the court may discharge that person from

> the proceeding, making the person no longer a party, if the court finds [1] that the person does not have legal rights that may be affected by the action and [2] that the person's continuation as a party is not necessary to meet the juvenile's needs.

N.C. Gen. Stat. § 7B-401.1(g) (emphasis added).

Here, the trial court failed to make the requisite findings to remove the grandparents as parties, instead basing its decision on the parents' relinquishment of their parental rights. Accordingly, we reverse the ruling of the trial court removing Grandmother and Grandfather as parties and remand for action consistent with this opinion, which must include the required findings pursuant to N.C. Gen. Stat. § 7B-401.1(g) if the trial court seeks to remove Grandmother and Grandfather from the juvenile proceeding. We note that the outstanding Chapter 50 Custody Order awarding Grandmother and Grandfather legal and physical custody of the children may prevent the trial court, in its discretion, from making the first required finding under N.C. Gen. Stat. § 401.1(g).

B. Visitation and Best Interest Considerations

[2] Grandmother and Grandfather make two additional arguments on appeal. First, Grandfather contends that the trial court abused its discretion by failing to provide for continuing visitation by the children's grandparents. Second, Grandmother contends that the trial court failed to properly consider the best interest of the children when it concluded that it was not in the children's best interest to be returned to their grandparents. We address each argument in turn.

"An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2015). We review an order denying visitation for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

Here, the trial court made no reference whatsoever to visitation in its order, presumably because it had removed the grandparents from the proceeding. In the event that the trial court, after its consideration of N.C. Gen. Stat. § 401.1(g), determines that the grandparents should remain parties to the juvenile proceeding, it must then provide for appropriate visitation as may be in the best interests of the children. *See* N.C. Gen. Stat. § 7B-905.1.

[3] Finally, we address whether the trial court properly considered whether it was in the children's best interest to be returned to their grandparents. A determination regarding the best interest of a child is a "conclusion of law because [it] require[s] the exercise of judgment." *Matter of Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997). Thus, we review this conclusion of law only to determine whether it is supported by the findings of fact. *Matter of Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

Here, the trial court did not make any findings in support of its conclusion that it would not be in the children's best interest to be returned to Grandmother and Grandfather. The sole finding which addressed physical custody of the children was finding of fact number six, which provided that the trial court "received [] copies of the court summaries from [DSS] and the GAL, adopts and incorporates those reports along with attachments as findings of fact." Our Court has previously held that the trial court "should not broadly incorporate [] 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), *superseded by statute on other grounds as recognized in In re A.S.*, ___ N.C. App. ___, 793 S.E.2d 285 (2016) (unpublished). Although the trial court is certainly permitted to consider all written reports and materials relevant to the proceeding, it should not delegate its fact-finding duty. *Id.* at 511, 598 S.E.2d at 660. On remand, the trial court shall make findings sufficient to supports its conclusion that it would not be in the children's best interest to be returned to Grandmother and Grandfather. *See id.* at 512, 598 S.E.2d at 660-61 ("[T]he [trial] court . . . must still make those findings that are relevant to the permanency plans being developed for the children.").

Therefore, the order appealed from is reversed and remanded for further consideration as set out herein.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

IO MOONWALKERS, INC., AND AMERICAN COINS & GOLD, INC., PLAINTIFFS
v.
BANC OF AMERICA MERCHANT SERVICES, LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., AND FIRST DATA MERCHANT SERVICES, LLC, DEFENDANTS

No. COA17-703

Filed 3 April 2018

Contracts—digital signature—ratification

The trial court correctly granted partial summary judgment based on contract ratification in a case involving electronic signatures. There was no dispute concerning the accuracy of the electronic signature records, although plaintiff Moonwalkers disputed whether anyone was authorized to sign the documents. Even if the documents were signed without authorization, the undisputed evidence showed that Moonwalkers received and reviewed the contracts, received services under the contracts, and engaged in communications about the contracts without suggesting that the parties were not bound by the them.

Judge DILLON concurring.

Appeal by plaintiffs from order entered 27 March 2017 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2017.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Richard L. Pinto, for plaintiffs-appellants.

Lord Law Firm, PLLC, by Harrison A. Lord, for defendants-appellees.

DIETZ, Judge.

This case is one of a growing number of contract cases requiring the courts to fit decades-old (sometimes centuries-old) contract principles to the realities of the digital age.

Banc of America Merchant Services, LLC (BAMS) provided credit card processing services to IO Moonwalkers, Inc., a company that sells hoverboard scooters. BAMS uses a standard contract with its customers and sent that contract to Moonwalkers using an electronic document application called DocuSign. DocuSign transmits the contract in

an email and the software records when the contract accompanying that email is viewed and when it is electronically signed.

After a dispute concerning chargebacks for fraudulent purchases, Moonwalkers asserted that it never electronically signed the contract with BAMS and should not be bound by its terms. The company asserted that a salesperson for BAMS likely signed the contract on behalf of Moonwalkers without permission.

At summary judgment, BAMS produced records showing the exact date and time that someone using the Moonwalkers company email viewed the proposed contract, electronically signed it, and later viewed the final, fully executed version. Moonwalkers does not dispute the accuracy of these DocuSign records, and does not claim that it never viewed the proposed contract, but insists that the contract was not signed by anyone at the company authorized to do so.

BAMS also produced emails and letters sent in the following months in which BAMS referenced the contract and asked Moonwalkers to take action required by the contract, such as providing documentation. Moonwalkers complied with those requests without ever suggesting the parties had no written contract.

As explained below, in light of this evidence, the trial court properly held that, even if Moonwalkers did not sign the contract, the company ratified the contract through its actions. We therefore affirm the trial court's grant of partial summary judgment based on the doctrine of ratification.

Facts and Procedural History

Plaintiffs IO Moonwalkers, Inc. and American Coins & Gold, Inc. are distinct corporations with shared ownership but unrelated businesses. Moonwalkers sells hoverboards and American Coins & Gold sells metals, gemstones, and jewelry. Third-Party Defendant Rilwan Hassan owns both companies.

Defendant Banc of America Merchant Services, LLC processes credit card transactions for retail businesses.[1] The company uses an electronic signature service called DocuSign to enter into written contracts with its customers that BAMS calls "merchant services agreements." DocuSign gives each merchant services agreement an identifying number, which then appears on each page of the document. DocuSign sends an email

1. For ease of reading, we refer to Banc of America Merchant Services, LLC and its affiliated co-defendants collectively as "BAMS."

with an electronic link to a copy of the agreement. Through DocuSign, the party viewing the contract can sign it using a digital signature. DocuSign tracks the date and time when the contract is sent, viewed, and signed by each party.

Once a contract between BAMS and a customer is executed, DocuSign sends a "certificate of completion" to BAMS that includes the identifying number for that contract, the email address of the contract recipient, the IP address of the computer that viewed the email and contract, and details of relevant "events" that occurred such as the time and date when the contract was viewed and signed. BAMS maintains these certificates of completion as business records in the ordinary course of its business.

Rilwan Hassan, the owner of Moonwalkers, is familiar with the DocuSign process because he used the service in 2014 to contract with BAMS for credit card processing services for American Coins & Gold, another business he owns. Hassan concedes that he used DocuSign to review and sign the BAMS contract with American Coins & Gold.

In 2015, Hassan met with BAMS employee Robert Kanterman to contract for similar card-processing services for Moonwalkers. Moonwalkers concedes that BAMS sent proposed merchant services agreements to Moonwalkers at the company email address Hassan provided. Those contracts contain various terms concerning BAMS services as well as a provision permitting the execution of the contract by electronic signatures.

Hassan stated in an affidavit that he "may have glanced at some of those emails" but he could not recall if he looked at all of them. DocuSign's electronic records indicate that someone with access to the Moonwalkers email account viewed the emails and corresponding contracts sent by DocuSign, and then electronically signed the contracts several minutes later. DocuSign later sent copies of the fully executed contracts to the Moonwalkers email account and, again, someone with access to that email account viewed the completed contracts. In an affidavit, Hassan asserts that he believes Robert Kanterman, the BAMS employee with whom he negotiated the contract, electronically signed Hassan's name on the contracts on behalf of Moonwalkers without Hassan's permission. The affidavit provides no explanation of how Kanterman could have accessed the Moonwalkers email account or altered the DocuSign records to make it appear as if someone with access to that account viewed and signed the contracts.

Once BAMS received the certificate of completion for the merchant services agreements with Moonwalkers, it began providing credit card processing services to the company. Several months later, after a series of transactions involving stolen credit card numbers, BAMS issued "chargebacks" to Moonwalkers, which occur when a credit card holder reports that a particular credit card purchase resulted from fraud. Under the terms of BAMS's merchant services agreements, BAMS requires the retail merchant to repay BAMS the funds from the fraudulent purchase. The chargebacks in this case were extensive and posed a significant financial challenge to Moonwalkers.

Ultimately, Moonwalkers sued BAMS and its affiliated companies and BAMS countersued. After discovery, BAMS moved for partial summary judgment on the ground that Moonwalkers was bound by the merchant services agreements and that the terms of those contracts disposed of many of the claims and defenses in this case. The trial court entered partial summary judgment against Moonwalkers and certified its partial summary judgment for immediate appellate review under Rule 54(b).[2] Moonwalkers timely appealed.

Analysis

This Court reviews the grant of a partial motion for summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Partial summary judgment is appropriate on an issue when there is no genuine dispute as to any material fact and the court may therefore rule on the issue as a matter of law. *Id.*

In the trial court, BAMS relied on a number of legal theories to support its motion for partial summary judgment. As explained below, the

2. The concurring opinion notes that the trial court's Rule 54(b) certification failed to expressly state that there was "no just reason for delay." In *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976), our Supreme Court held that a certification that expressly references Rule 54(b) is sufficient to confer jurisdiction if the "no just reason for delay" language is omitted due to inadvertence. The Court explained that "it seems to us that justice requires that the appeal be allowed despite the fact that the trial judge failed to enter the words 'there is no just reason for delay' in his judgment. This omission could have very well been an inadvertence on the part of the trial judge. He certainly intended that plaintiff be permitted to appeal, or otherwise he would not have entered the appeal entries on account of the language of Rule 54(b) and would have required plaintiff to seek certiorari." *Id.* at 129, 225 S.E.2d at 804–05. Here, too, the trial court's order expressly referenced Rule 54(b). And the transcript of the proceedings, as well as the language of the court's order, indicate that the trial court intended to make the necessary finding concerning "no just reason for delay" but inadvertently failed to do so. Accordingly, we have appellate jurisdiction to review the challenged order.

trial court properly entered judgment based on the doctrine of ratification and we therefore address that legal theory first.

In contract law, ratification is a legal doctrine that binds a principal to certain unauthorized acts of an agent, such as executing a contract. *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965). "In order to establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove (1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." *Id.* at 400–01, 144 S.E.2d at 258 (citation omitted).

"Intent to ratify can be evidenced by a course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 229, 721 S.E.2d 256, 262 (2012). "[T]o constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." *Id.*

Moonwalkers argues that the trial court could not enter summary judgment on the issue of ratification because there were genuine issues of material facts. Specifically, Moonwalkers argues that it did not sign the contracts and that it believes an employee of BAMS signed the contracts without authorization. Moonwalkers also argues that it did not have knowledge of the terms of the contracts and did not take any action indicating intent to ratify the unauthorized assent.

Were this a more traditional contract negotiation, in which the parties had mailed proposed contracts back and forth, a sworn affidavit stating that Moonwalkers never reviewed or signed the contracts might be sufficient to create a genuine issue of material fact with respect to the knowledge element of ratification. But this case is different because BAMS presented evidence from the DocuSign records indicating that it sent the merchant services agreements to Moonwalkers at the company email address. BAMS also submitted evidence from the DocuSign records that someone with access to that email viewed both the emails and the accompanying contracts, electronically signed them, and later viewed the completed contracts, which were sent to Moonwalkers in a separate email.

Simply put, the electronic trail created by DocuSign provides information that would not have been available before the digital age—the

ability to remotely monitor when other parties to a contract actually view it.

Moonwalkers disputes many facts alleged by BAMS but, notably, the company does not dispute the accuracy of the DocuSign records. In his first affidavit, Hassan states that Moonwalkers received many emails from Bank of America and its affiliated companies and that "some of the communications Bank of America has sent me appear to be of a general or not urgent nature, and I have not always reviewed those communications closely." He also states that "Robert Kanterman sent me various emails containing proposed merchant service agreements related to IO Moonwalkers. I may have glanced at some of those emails, but I do not recall whether I even looked at all of them or not."

In his second affidavit, Hassan further states that "the so-called 'signed' contracts that were sent to me came from an email account for 'Contract Management Services' rather than any email for any of the Defendants in this case." He explains that "I received an excessive amount of emails from Bank of America, many of which were not related to this issue. At no point, was I under the impression that any of those emails would create a contract between me and any of the Defendants in this case for merchant services."

Missing from Hassan's two lengthy affidavits is any assertion that the DocuSign records are incorrect or that no one from the company actually viewed the emails and accompanying contracts, as the DocuSign records indicate. To be sure, Hassan's affidavit states that Moonwalkers never *signed* those contracts and that the company never *intended* to be bound by them. But Hassan does not assert that the company never *received* or *reviewed* the contracts. Thus, the trial court properly determined that there was no genuine dispute concerning whether Moonwalkers had knowledge of the terms of the contracts because the undisputed evidence at summary judgment showed that the company had received and reviewed them.

The trial court also properly determined that Moonwalkers signified its intent to ratify the merchant services agreements through its conduct. First, as discussed above, the undisputed evidence presented to the trial court indicates that Moonwalkers received and viewed a fully executed copy of the merchant services agreements but did not, at that time, inform BAMS that the company had not signed the contracts and did not intend to be bound by them. Instead, Moonwalkers received credit card processing services from BAMS for several months after receiving the signed contracts without informing BAMS that it had not agreed to be bound.

Moreover, in October 2015, several months after Moonwalkers received copies of the executed contracts, BAMS sent an email to Moonwalkers at its company email address (the same email address to which DocuSign sent the contracts) attaching a letter requesting documents. The request stated that "Your merchant card processing contract requires that you fulfill informational requests that may be made by us from time to time. Therefore, please provide the following . . . ." Moonwalkers responded to that email and letter by providing the requested documents. The company did not assert that it was not bound by this term of the written contract.

The following week, BAMS sent another email and letter to Moonwalkers, detailing the establishment of a reserve account. The letter states, "Pursuant to the terms and conditions of the Merchant Agreement, the merchant is responsible for all chargebacks." The letter then describes a reserve amount that BAMS was imposing on Moonwalkers to protect against potential losses from chargebacks. The letter concludes by stating, "Please note that nothing contained herein shall be deemed a waiver of any rights we may have under the Merchant Agreement or otherwise and we expressly reserve such rights."

Again, Moonwalkers does not dispute that it received this letter. Indeed, BAMS presented email correspondence from Moonwalkers in which the company sought to negotiate more lenient terms for the reserve account after receiving the letter. Throughout this correspondence, Moonwalkers never asserted that it was not bound by the terms of the contract described in the letter.

In light of this evidence, we hold that the trial court properly entered partial summary judgment on the issue of ratification as a matter of law. Even accepting as true Moonwalker's claim that an employee of BAMS signed the contracts on Moonwalker's behalf without authorization, the undisputed evidence submitted by BAMS shows that Moonwalkers both received and reviewed the proposed contracts and received and reviewed the purportedly final contracts signed by the parties.

Moonwalkers then received services from BAMS covered by those contracts for several months. During that time, BAMS repeatedly asked Moonwalkers to comply with specific terms and conditions of the "merchant card processing contract" and "Merchant Agreement" and Moonwalkers did so, without ever suggesting that the parties were not bound by any written contracts containing specific terms and conditions. We agree with the trial court that these undisputed facts demonstrate that Moonwalkers "had full knowledge of all material facts relative to

the unauthorized transaction and . . . had signified [its] assent or [its] intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." *Carolina Equip. & Parts Co.*, 265 N.C. at 400–01, 144 S.E.2d at 258.

We therefore affirm the trial court's entry of partial summary judgment based on the doctrine of ratification. Having affirmed the trial court's ruling on this ground, we need not address the remaining contract arguments asserted by the parties.

Conclusion

We affirm the trial court's partial summary judgment order.

AFFIRMED.

Judge BRYANT concurs.

Judge DILLON concurs with separate opinion.

DILLON, Judge, concurring.

I agree with the result reached by the majority. However, I write separately because I disagree with the majority's analysis as to *why* we have appellate jurisdiction.

This appeal is interlocutory because it is from an order granting *partial* summary judgment. The majority concludes that we have appellate jurisdiction based on the trial court's Rule 54(b) certification. *See* N.C. R. Civ. P. 54(b). I disagree with this conclusion, because the trial court did not meet the requirement under Rule 54(b) that it find in its order that there is "no just cause for delay." Notwithstanding the trial court's failure to properly certify its order as a final judgment under Rule 54(b), I conclude that we have appellate jurisdiction, nonetheless, because the trial court's order affects a substantial right which would otherwise be lost. My reasoning is as follows:

It is the General Assembly which is constitutionally empowered to determine our appellate jurisdiction. N.C. Const. Art. IV, sec. 12(2) ("The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe."). In Chapter 7A of our General Statutes, our General Assembly has provided for situations where a party has the right to appeal an interlocutory order; for instance, when the order affects a substantial right. N.C. Gen. Stat. § 7A-27(b).

The General Assembly has also empowered the trial court with the discretion to certify judgments entered as to fewer than all the claims or parties as "final judgments" subject to immediate review, but "only if" it determines "in the judgment" that "there is no just reason for delay." N.C. R. Civ. P. 54(b). That is, the plain language of Rule 54(b) states that a judgment as to some, but not all, of the claims is *not* generally a final judgment and "is subject to revision at any time before the entry of judgment adjudicating" all of the remaining claims. *Id.* But, the trial court has the discretion to render such judgment a final judgment by stating in the order that there is no just reason for delay: "[T]he court may enter a final judgment as to [fewer] than all the claims [] only if there is no just reason for delay and it is so determined in the judgment." *Id.*

The partial summary judgment order at issue here is the type which the trial court has the discretion to certify as a final judgment since the order constitutes a judgment as to some, but not all, of the claims. However, the trial court has not properly exercised its discretion to certify the order as a final judgment. The trial court could have done so only if it had "determined in the judgment" that "there is no just reason for delay." *Id.* The trial court, however, made no such determination. Rather, it merely declared its interlocutory order as a final judgment based on its determination that its order affects a substantial right – the possibility of inconsistent verdicts[1] – stating as follows:

> The Court further finds and concludes, upon consideration of Plaintiffs' request for Certification for Immediate Appeal, that immediate appeal is appropriate pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, because this Order disposes of the majority of Plaintiffs' claims, and if the remaining claims proceeded to trial, there is a possibility of verdicts inconsistent with the Court's ruling in this case.

Whether the order affects a substantial right is a question of law which is to be determined by our Court *de novo*. The trial court does not have the discretion to determine that its interlocutory order affects a substantial right, thereby conferring appellate jurisdiction on that basis. It only has the discretion to certify an interlocutory order constituting a judgment regarding some claims or parties – which would otherwise be subject to

1. Our Supreme Court has recognized that a substantial right may be affected where an order subjects a party to the possibility of separate trials on its claims may result in "inconsistent verdicts." *See, e.g.*, *Green v. Duke Power*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982).

revision as an interlocutory order – as a final judgment and, therefore, make it subject to immediate review under Rule 54(b).

Our Supreme Court has recently held that the plain language of Rule 54(b) requires that the trial court expressly state in the order that it has determined that there is "no just reason for delay" for it to be properly certified as a final judgment. Specifically, our Court held that a certification by a trial court "requires" that the determination by the trial court that "there [is] no just reason [for] delay" must "be stated *in the judgment itself*" to constitute proper certification under Rule 54(b). *Branch Banking and Trust Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 218, 772 S.E.2d 495, 499 (2015) (emphasis in original). Our Supreme Court affirmed this holding per curiam "[f]or the reasons stated in the majority opinion[.]" *Branch Banking and Trust Co. v. Peacock Farm, Inc.*, 368 N.C. 478, 478, 780 S.E.2d 553, 553 (2015).

In another case, our Supreme Court reviewed an order for partial summary judgment in which the trial court expressed an intention that the parties be permitted to appeal immediately but failed to make the determination that there was "no just reason for delay." *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 126-27, 225 S.E.2d 797, 803-04 (1976). Our Supreme Court suggested that the trial court probably intended to certify its order as a final judgment and that its omission of the required language was probably due to "inadvertence." *Id.* at 129, 225 S.E.2d at 804-05. However, our Supreme Court determined that it had jurisdiction over the appeal, not because the trial court had certified the judgment as a final judgment pursuant to Rule 54(b), but rather pursuant to N.C. Gen. Stat. 7A-27, based on *its own determination* that the partial summary judgment order affected a substantial right. *Id.* at 130, 225 S.E.2d at 805 ("We believe that a 'substantial right' is involved here. . . . The Court of Appeals was in error in dismissing this appeal.").[2]

I, nonetheless, conclude that the trial court's partial summary judgment order before us does affect a substantial right. For instance, the

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2. I recognize that our Court, on occasion, has held that trial court's determination that its order would affect a substantial right "was tantamount to certification that there was no just reason for delay," and therefore properly certified the order under Rule 54(b). *Smock v. Brantley*, 76 N.C. App. 73, 74, 331 S.E.2d 714, 716 (1985); *see also Johnson v. Johnson*, 208 N.C. App. 118, 121, 701 S.E.2d 722, 725 (2010) (following the reasoning in *Smock*); *Garris v. Garris*, 92 N.C. App. 467, 470, 374 S.E.2d 638, 640 (1988). However, I conclude that these holdings are at odds with the plain language of Rule 54(b) and of the jurisprudence from our Supreme Court. A trial court has not been empowered with the discretion to determine for the appellate courts what constitutes a substantial right; it has only been granted the discretion to determine whether there is "no just reason for delay."

order expressly denies Plaintiffs the right to a jury trial on their remaining claims. And an interlocutory order denying a party the right to a jury trial affects a substantial right. *See*, *e.g.*, *In re Ferguson*, 50 N.C. App. 681, 682, 274 S.E.2d 879, 879 (1981). Accordingly, I believe we have appellate jurisdiction over this appeal, and I agree with the majority's holding on the merits.

TANKITA T. PETERSON, PETITIONER
v.
CASWELL DEVELOPMENTAL CENTER, DEPT. OF HEALTH & HUMAN SERVICES, RESPONDENT

No. COA17-1139

Filed 3 April 2018

1. Public Officers and Employees—career state employee—late for work—discipline

An Administrative Law Judge (ALJ) did not commit legal error in finding no just cause for the suspension of a career State Employee (petitioner) who worked in a residential care home. The ALJ could properly find that the preponderance of the evidence weighed in petitioner's favor under the applicable policy where petitioner was late for work on more than one occasion. Concerns about the negative effects of unannounced late arrivals could be dealt with appropriately in consistently written policies.

2. Public Officers and Employees—career state employee—late for work—suspension by agency—ALJ ruling to the contrary—not arbitrary and capricious

An Administrative Law Judge's (ALJ's) finding that there was no negative impact on a state-run residential facility from petitioner's tardiness was not arbitrary and capricious. The controlling jurisprudence and precedents had changed; the applicable precedent was *Harris v. N.C. Dep't of Pub. Safety*, 237 N.C. App. 94 (2017). The ALJ acted within her authority in determining that the agency failed to meet its burden of showing just cause to warrant petitioner's suspension.

Appeal by respondent from final decision and award entered 23 June 2017 and 6 July 2017 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 20 March 2018.

Glenn, Mills, Fisher & Mahoney, P.A., by Daniel N. Mullins, for petitioner.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for respondent.

TYSON, Judge.

Caswell Developmental Center, North Carolina Department of Health and Human Services ("Respondent") appeals from the final decision of the administrative law judge ("ALJ"), which reversed Respondent's decision to suspend Tankita Peterson ("Petitioner") for five days without pay. We affirm the decision of the ALJ.

I. Background

Caswell Developmental Center ("Caswell") is a state-run facility operated by the North Carolina Department of Health and Human Services. Caswell provides care to residents who have disabilities, behavioral challenges, or medical conditions that require 24-hour care and supervision. Petitioner is a career state employee and has been employed at Caswell since October 2009. Petitioner was assigned to work the morning shift from 6:00 a.m. to 2:30 p.m. at the Magnolia Cottage, where five patients resided.

A. Petitioner's Late Arrivals and Disciplinary Action

On 2 June 2016, Petitioner overslept to timely report for work. She awoke at approximately 6:20 a.m., and arrived at work at 7:00 a.m., an hour after her scheduled start time. On 6 June 2016, Petitioner received a documented counseling memo for unacceptable personal conduct on 2 June 2016 for her failing to report to work as scheduled and failing to notify her supervisor of her need to be late prior to the scheduled start of her shift, in violation of Caswell's Policy 4.9 Supervisor Notification of Absence. The memo further noted that violation of Policy 4.9 is an unexcused absence. Petitioner refused to sign the memo, because she "d[id] not agree . . . at all."

On 27 August 2016, Petitioner again overslept. She was awakened by a phone call from a colleague at approximately 6:30 a.m., and arrived for work at 7:00 a.m. Petitioner was issued a notice of pre-disciplinary conference on 5 September 2016, requesting she attend the pre-disciplinary conference the next day. The notice informed Petitioner of the possibility of a suspension without pay due to Petitioner's

unacceptable personal conduct of reporting to work late and for failing to notify her supervisor on 27 August 2016, in violation of Policy 4.9 and Policy 5.1.46 Time and Attendance.

Petitioner was given the opportunity to respond to the proposed suspension without pay at the pre-disciplinary conference on 6 September 2016. In her written statement, Petitioner acknowledged she had overslept on 27 August 2016, and the alarm clock, which had failed to wake her up on that day, had previously failed before.

Petitioner was suspended for five days without pay on 8 September 2016 for "unacceptable personal conduct" including:

> 1) conduct for which no reasonable person should expect to receive prior warning, 2) conduct unbecoming a State employee that is detrimental for state service and 3) willful violation of known or written work rules [i.e., Caswell Developmental Center Administrative Policy Manual #5.1.46 (Time and Attendance) and Developmental Technician Manual #4.9 (Supervisor Notification of Absences)]. Specifically, [reporting] to work late and fail[ing] to notify a supervisor of [Petitioner's] need to be late from work, according to policy.

Petitioner's supervisor referenced the previous documented counseling for the same issue on 6 June 2016, and Petitioner's in-service training on the violated policies on 22 January 2016 and 6 June 2016.

B. Caswell's Policies

Caswell's Time and Attendance Policy 5.1.46 states it exists to "ensure that sufficient staff are available to provide the continuous operation of the facility." The policy defines "tardiness" as the "[f]ailure to report to his/her assigned work area within three (3) minutes of the scheduled time . . . . Any tardiness exceeding 2 hours will be considered an unscheduled absence." An "unscheduled absence" is defined as "[a]bsence from work two or more hours of a scheduled shift . . . which is not approved by the immediate supervisor . . . in advance." (Emphasis original).

Under the procedures of 5.1.46, disciplinary action begins after five unscheduled absences or five instances of tardiness in reporting to work in a twelve-month period. Five occurrences triggers documented counseling, a written warning is issued for the sixth occurrence, a three-day suspension without pay is imposed for the seventh occurrence, and the eighth occurrence requires dismissal. Prior to any disciplinary action on unscheduled absences, the supervisor will log absences,

meet with the employee, and initiate documented coaching and policy in-service training.

Supervisor Notification of Absences Policy 4.9 provides, "[p]ursuant to . . . Administrative Policy 5.1.46, 'Time and Attendance', employees are required to notify their immediate supervisor or designee of a need to be absent, at a reasonable time, before the beginning of the assigned work shift." Failure to conform to this policy "will be viewed as an unexcused absence, resulting in unacceptable personal conduct and subject to intervention and disciplinary action as follows; 1) A documented counseling on the first occurrence[;] 2) A 5-day Disciplinary Suspension Without Pay on the second occurrence; and 3) Dismissal on the third and final occurrence." Policy 4.9 does not address an employee's tardiness to begin scheduled work.

C. Procedural History

On 19 December 2016, Petitioner filed a petition for a contested case with the Office of Administrative Hearings, alleging Respondent had suspended her for five days without pay without just cause. Petitioner filed a motion for summary judgment on 31 March 2017 and argued Respondent had improperly applied Policy 4.9 to her, since Policy 4.9 dealt with absences, because Petitioner was not "absent" as defined under Policy 5.1.46, but only tardy. The ALJ denied Petitioner's motion on 19 April 2017.

The matter was heard before the ALJ on 20 April 2017. In the final decision, issued 23 June 2017, the ALJ ruled Respondent did not have just cause to suspend Petitioner for five days without pay. Respondent was ordered to remove Petitioner's suspension, to issue a written warning, and to reimburse Petitioner back pay and any other benefits she would have been entitled to receive. In an order dated 6 July 2017, Petitioner was also awarded attorney's fees. Respondent filed timely notice of appeal on 21 July 2017.

II. Jurisdiction

An appeal lies with this Court of a final decision of the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 7A-29 (2017).

III. Issues

Respondent argues it had just cause to suspend Petitioner for five days without pay, and the ALJ committed legal error in finding no just cause existed for its actions. Respondent also argues the ALJ's reasoning in the final decision was arbitrary and capricious.

IV. Analysis

A. Standard of Review

The standard of review of a final decision of an agency depends on the alleged errors. N.C. Gen. Stat. § 150B-51(c) (2017). The Court reviews purported errors of law *de novo*, while decisions alleged to be arbitrary and capricious are reviewed under the whole record standard. *Id.*

B. Just Cause

[1] Career state employees are entitled to statutory protections, including the protection from being discharged, suspended, or demoted without "just cause." N.C. Gen. Stat. § 126-35(a) (2017). This Court established a three-part analysis to determine whether just cause existed for an employee's adverse employment action for unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

Warren v. N.C. Dep't of Crime Control, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012) (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)).

Here, only the third prong of the analysis is at issue, as the ALJ concluded, and Petitioner did not appeal, the first two findings that Petitioner had engaged in the alleged unacceptable personal conduct and that conduct fell within one of the provided categories. Respondent argues the ALJ's finding that the five-day suspension "did not fit the crime" was legal error because the preponderance of the evidence supports just cause for the suspension. After review of the record and decision, we disagree.

The record evidence indicates Petitioner had eight years of positive employment history. The Supreme Court of North Carolina has

identified past history as a factor to consider in a just cause determination. *See Carroll*, 358 N.C. at 670, 599 S.E.2d at 901.

Evidence was presented that other employees were able to cover the hour Petitioner was late on 2 June and 27 August 2016, resulting in no negative impact to the operation of the facility or the care of its residents. Respondent offered testimony of the potential harm from tardiness, including the uncertainty surrounding the maintenance of needs of the residents, the overtime costs, and the slackening of the organizational structure. We agree these could be general concerns associated with any absent employee, but the evidence in this case does not support these arguments, with the exception of overtime pay for the staff coverage retained until Petitioner arrived at 7:00 a.m.

Finally, the ALJ found and concluded the application of Policy 4.9 inappropriate, and issuing Petitioner's suspension under Policy 4.9 "essentially rendered the 'tardiness' definition in Policy 5.1.46 meaningless." Policy 4.9 makes no mention of arriving or starting late for scheduled work or tardiness, nor provides a definition, but does reference and is "pursuant to," Policy 5.1.46, which defines tardiness as being between three minutes and two hours late for scheduled work. Any tardiness after two hours is defined as an "unscheduled absence."

In accordance with contract law, when a term is defined in one location of the document, it is to be given that same definition throughout, unless context demands otherwise. *State v. Philip Morris USA Inc.*, 363 N.C. 623, 632, 685 S.E.2d 85, 91 (2009) (citation omitted). Policy 4.9 consistently refers to absences, and the need to contact a supervisor before the start of the shift if the employee will be absent. Applying the definitions as provided in Policy 5.1.46, Petitioner was never "absent" from work, but merely tardy.

Viewing the record evidence for the two occasions at issue, the ALJ could properly find the preponderance of the evidence tends to weigh in Petitioner's favor. The ALJ did not commit legal error in finding no just cause for Petitioner's suspension. While Respondent is concerned about the negative effects of unannounced and late arrivals for scheduled shifts in the operation of its facility and required staff presence to address the needs of its residents, these concerns are appropriately dealt with in consistently written policies.

C. Arbitrary and Capricious

[2] Under whole record review, the reviewing court must "determine whether there is substantial evidence to justify the agency's decision."

Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (citation omitted). The Respondent argues the ALJ's finding that there was no negative impact on the facility or its residents on the days Petitioner was tardy in arrival and reporting was arbitrary in capricious, under the precedent of *North Carolina A & T University v. Kimber*, 49 N.C. App. 46, 270 S.E.2d 492 (1980). We disagree.

The employee in *Kimber* had been dismissed for three reasons: she had been absent without prior approval, she was habitually late to work, and she falsified her time sheets to make it appear she arrived promptly. *Id.* at 50, 270 S.E.2d at 494. The State Personnel Commission reinstated the employee, finding the punishment was too severe since the University "failed to prove that [the employee's] absences hindered the operation of the University's work." *Id.* at 51, 270 S.E.2d at 495 (internal quotation marks omitted). The superior court reviewed the Commission's decision and reversed it, concluding

> the Commission has said that it is unfair and unreasonable to dismiss an employee unless it can be proved that work was not completed or performed because of an absence, or unless it can be proved that no one knows of the whereabouts of the employee. Such considerations had no logical or rational relation to the issues before the Commission and to the extent the Commission weighed these considerations in its decision it acted arbitrarily and capriciously[.]

Id. (emphasis omitted). This Court affirmed the superior court's ruling, finding "[t]he Commission's action reinstating Ms. Kimber was in excess of its statutory authority. The Commission has no policy under which it can excuse improper conduct by an employee[.]" *Id.* at 50, 270 S.E.2d at 494 (citations omitted).

The controlling statutes and jurisprudence of this State have been amended and changed since this Court affirmed the decision in *Kimber*. Whereas a finding an employee failed to perform his or her duties, including intentionally falsifying records, was enough for just cause for sanctions as cited in *Kimber*, such a finding does not control the result here. *Compare Brooks, Comr. of Labor v. Best*, 45 N.C. App. 540, 542, 263 S.E.2d 362, 364 (1980) ("Defendant failed to perform her duties properly on numerous occasions. Plaintiff's action in removing defendant from her position . . . was justified."), *with Carroll*, 358 N.C. at 669, 599 S.E.2d at 901 ("not every violation of law gives rise to 'just cause' for employee discipline") (emphasis original) (citation omitted).

Instead, "[j]ust cause is determined upon examination of all the facts, circumstances, and equities of a case, [and] consideration of additional factors shedding light on the employee's conduct[.]" *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 137 (citing *Bulloch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 1, 12, 732 S.E.2d 373, 381 (2012)), *aff'd per curium*, __ N.C. __, 808 S.E.2d 142 (2017).

After review of the whole record, it is clear the ALJ examined all the "facts, circumstances, and equities" present in the case. *Id.* Even if the ALJ may have reached a different result within the range of authorized actions, this Court may not substitute our judgment for that of the ALJ, as long as the ALJ's conclusion is lawful and is supported by substantial evidence. *N.C. Dep't of Pub. Safety v. Ledford*, __ N.C. App. __, __, 786 S.E.2d 50, 64 (2016) (citation omitted). The record before us contains substantial evidence to support the ALJ's decision.

Under N.C. Gen. Stat. § 126-34.02(a)(3) (2017),

> the ALJ has express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief."

Harris, __ N.C. App. at __, 798 S.E.2d at 138 (citing N.C. Gen. Stat. § 126-34.02(a)(3)). This "other suitable action" can be a sanction within the range of authorized disciplinary alternatives under 25 N.C.A.C. 1J .0604(a). *Id.* at __, 798 S.E.2d at 138-39.

The ALJ acted within her authority "by determining the agency failed to meet its burden to show just cause existed to warrant Petitioner's [suspension] for unacceptable personal conduct." *Id.* at __, 798 S.E.2d at 138. The imposed written warning was within the authorized disciplinary alternatives. 25 N.C.A.C. 1J .0604(a) (2017).

V. Conclusion

"As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." *Harris*, __ N.C. App. at __, 798 S.E.2d at 137 (citation omitted). After weighing all the evidence before her, the ALJ concluded Respondent did not have just cause to suspend Petitioner without pay for five days for tardiness. The record

contains substantial evidence, including the conflicting definitions, interpretations, and applications of Respondent's policies, to support this conclusion. The final decision of the ALJ is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and DILLON concur.

REGENCY LAKE OWNERS' ASSOCIATION, INC.,
AND CHARLES HUFFMAN, PLAINTIFFS
v.
REGENCY LAKE, LLC, COURTLAND PROPERTIES, INC.,
AND JOSEPH MACMINN, DEFENDANTS

No. COA17-1117

Filed 3 April 2018

1. Appeal and Error—interlocutory appeal—substantial right—joinder of parties—individual property right

There was not a substantial right permitting an interlocutory appeal to go forward where the case involved a subsequent owner of a development who wanted to reduce a lake access area and the trial court ordered that additional property owners within the subdivision be joined as parties. Although plaintiffs (appellants) contended that they were deprived of a substantial right because the joinder order eliminated their individual property rights and replaced them with a group property right, the plain language of N.C.G.S § 1-260 indicated that plaintiffs individually had no such substantial right. The other lot owners were necessary parties and plaintiffs were not deprived of their asserted substantial right.

2. Appeal and Error—interlocutory appeal—substantial right—order for joinder and rehearing of evidence—neither a verdict nor a judgment rendered—not a new trial

There was no effect on a substantial right such that an interlocutory appeal could be heard where the trial court ordered that additional parties be joined and evidence heard, and where plaintiff-appellant contended that a new trial had been granted. Neither verdict nor judgment were rendered, and the order was not for a new trial.

Appeal by plaintiffs from order entered 31 March 2017 by Judge Jeffrey K. Carpenter in Iredell County Superior Court. Heard in the Court of Appeals 6 March 2018.

Jones, Childers, Donaldson & Webb, PLLC, by Kevin C. Donaldson and C. Marshall Horsman, for plaintiff-appellees.

Eisele Ashburn Greene & Chapman, PA, by Kathleen L. Vogel and Douglas G. Eisele, for defendant-appellants.

TYSON, Judge.

I. Background

In July 1969 and October 1970, Rolling Homes, Inc. ("Rolling Homes") acquired two adjacent tracts of land situated in Davidson Township, Iredell County. The deeds are recorded in book 485, page 64, and book 494, page 192, respectively, in the Iredell County Registry. Rolling Homes developed the Regency Lake Village subdivision by dividing the two combined tracts into streets, lots, a playground and a lake access area (the "Access Area"). The subdivision plat for Regency Lake Village (the "Plat") was recorded in the Iredell County Registry at plat book 10, pages 59 and 59A.

The Regency Lake Village Access Area includes a boat ramp for owners to access Lake Norman. The Access Area is bounded on the east by a lot, on the south by Lake Norman, on the west by a dam impounding a private lake, and on the north by a road.

The first deed conveying a lot in Regency Lake Village was granted to Cecil B. Tucker and wife, Francis W. Tucker, in October 1970, after the Plat was recorded. The deed conveyed to the Tuckers makes reference to the Plat. After October 1970 and until early 1973, Rolling Homes conveyed several other lots in Regency Lake Village to numerous individuals. All of these deeds reference the Plat.

Auto Storage Company acquired all of the remaining property in Regency Lake Village, which had not been previously conveyed by Rolling Homes, by a substitute trustee's deed in 1973. The deed to Auto Storage Company is recorded in book 536, page 499, of the Iredell County Registry. This deed also references the Plat.

Defendants Regency Lake, LLC, Courtland Properties, Inc., and Joseph P. MacMinn (collectively, "Appellees") obtained title to the Access Area from Auto Storage Company by a quitclaim deed recorded in April 2001 in book 1258, page 1701 of the Iredell County Registry.

In October 2015, Defendants recorded a plat, at plat book 64, page 19 of the Iredell County Registry, subdividing the Access Area into two separate lots with the intention that they would develop one lot, designated as Lot 1, for residential purposes, and reduce the size of the originally platted Access Area, designated as Lot 1A.

Plaintiff Charles Huffman ("Huffman") is an owner of property located within Regency Lake Village and a member of Plaintiff Regency Lake Owners' Association (collectively, "Appellants"). On 2 February 2016, Appellants filed a verified complaint against Defendants seeking: (1) a declaratory judgment declaring Appellants and other purchasers and owners of lots described in the October 1970 plat have a private easement to the Access Area; (2) a motion for preliminary injunction to enjoin Defendants from altering the Access Area or preventing Appellants from entering and using the Access Area; and, (3) in the alternative, a declaration that there exists an easement to the Access Area for purchasers and owners of lots in Regency Lake Village.

Defendants filed their answer to Appellants' complaint on 15 April 2016. The trial court entered a preliminary injunction on 31 May 2016, which ordered that Defendants "shall not perform any acts on the Access Area which would alter its current condition and shall not prevent the Plaintiffs from entering and using the Access Area pending further orders of this Court."

The matter was heard on 20 March 2017. The parties waived the right to a jury trial and chose to proceed with a bench trial. Following the presentation of evidence and testimony of witnesses, but before a verdict was rendered, the trial court *ex mero motu* entered an order on 31 March 2017, which concluded that all necessary parties were not joined in the action, that all necessary parties should be joined, and that the matter should be re-heard after all of the necessary parties are joined. The trial court ordered that all "the remaining owners of property in Regency Lake Village Subdivision shall be joined as parties to this action." The trial court did not certify its order for immediate appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure.

Plaintiffs filed notice of appeal of the trial court's order.

II. Analysis

A. Substantial Right

[1] Appellants concede this appeal is interlocutory. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735,

736 (1990). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citations omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

"If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 77, 711 S.E.2d 185, 189 (2011) (citation omitted). "[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citations and internal quotation marks omitted).

The trial court's order is interlocutory, because it does not dispose of all of the issues in the case. The trial court ordered that all lot owners in Regency Lake Village be joined as necessary parties to the action and the evidence be re-heard following joinder of the necessary parties.

To determine whether an interlocutory order is immediately appealable when an appellant claims to have been deprived of a substantial right: (1) "the right itself must be substantial [,]" and (2) "the deprivation of that . . . right must potentially work injury . . . if not corrected before appeal from final judgment." *Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 192, 540 S.E.2d 324, 327 (2000) (citation and internal quotation marks omitted).

In order to determine whether jurisdiction over this appeal exists, "we must discern the precise nature of the right the appellant claims as substantial." *Neusoft Med. Sys., USA Inc. v. Neuisys, LLC*, 242 N.C. App. 102, 107, 774 S.E.2d 851, 855 (2015). The burden rests upon the appellant to demonstrate that the order "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

Appellants argue the order's requirement to join other lot owners in Regency Lake Village deprives them of a substantial right "by completely eliminating [Huffman's] individual property rights and replacing these rights with a group property right which only exists when exercised in concert with other property owners." In ordering that the other lot owners in the subdivision be joined as necessary parties, the trial court relied on N.C. Gen. Stat. § 1-260 and § 1A-1, Rule 19 of the North Carolina Rules of Civil Procedure.

N.C. Gen. Stat. § 1-260 requires, in relevant part: "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." N.C. Gen. Stat. § 1-260 (2017). The Supreme Court of North Carolina has also provided guidance that the last clause of the quoted sentence of N.C. Gen. Stat. § 1-260 "should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent." *Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 669, 101 S.E.2d 679, 682 (1958).

A necessary party is any person with "material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy." *N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 639, 180 S.E.2d 818, 821 (1971). If there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a party to make a proper motion. *White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983).

Before assessing whether the trial court's order deprives Appellants of a substantial right, we must first determine if the other lot owners in Regency Lake Village are necessary parties. To determine whether the other Regency Lake Village lot owners are necessary parties, this Court's opinion in *Rice v. Randolph*, 96 N.C. App. 112, 384 S.E.2d 295 (1989), is dispositive.

In *Rice*,

> [p]laintiffs brought suit to enjoin defendants from interfering with plaintiffs' user rights in an easement . . . created by deeds referencing a recorded plat of a subdivision in which the parties' land is located. Defendants raised abandonment of the easement as a defense and also counterclaimed for a declaration of their rights to the land described in their deed, which purported to convey fee ownership to a tract of land consisting of a portion of lot 1 in the subdivision as well as a portion of the easement. Defendants claimed ownership of that portion of the easement by virtue of seven years' adverse possession under color of title and, alternatively, by twenty years' adverse possession.
>
> A jury answered the questions of abandonment and adverse possession in favor of defendants, and the trial

> court entered judgment decreeing defendants owners of the property described in their deed free and clear of any claims of plaintiffs to the right of way shown on the subdivision plat and further enjoining plaintiffs from interfering with or going upon defendants' property.

Id. at 112-13, 384 S.E.2d at 296.

The plaintiffs appealed, but this Court determined it need not consider plaintiffs' arguments because "the verdict and judgment must be vacated because necessary parties were absent from the action." *Id.* at 113, 384 S.E.2d at 296. This Court vacated and remanded the action for the joinder of necessary parties because

> a dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession cannot be resolved without the joinder of . . . the record owners of lots in the subdivision, who have user rights in the easement. Those owners of interests in the easement have a material interest in the subject matter of the controversy, and their interest will be directly affected by the court's decision.

Id. at 114, 384 S.E.2d at 297. Here, we have similar facts to those in *Rice*. As in *Rice*, Appellants are seeking a judicial determination that they have rights in the easement to the Access Area created by deeds referencing the recorded plat of a subdivision. *See id.* The other owners and purchasers of lots in Regency Lake Village have user rights in the Access Area and, have material interests in the subject matter of Appellants' action. *See id.* The other lot owners in Regency Lake Village are necessary parties, whose "interest[s] . . . would be affected by the declaration" sought by Appellants, and are required to be joined under N.C. Gen. Stat. § 1-260.

Despite the express language of N.C. Gen. Stat. § 1-260, and the trial court's reliance upon it in its order, Appellants fail to demonstrate why N.C. Gen. Stat. § 1-260 is inapplicable. Appellants seek a declaration that they and other purchasers and owners of lots in Regency Lake Village have a private easement to the Access Area. Appellants do not dispute that other lot owners in Regency Lake Village may have interests in the Access Area easement, and explicitly state in their complaint that they seek declaratory relief "that the Access is dedicated to the private use of owners and purchasers of lots in the Subdivision."

Appellants fail to argue how they have a substantial right to an individual's ability to seek declaratory relief, without joinder, when other

necessary parties have claims and interests in the Access Area which could be affected by the trial court's declaration. *See* N.C. Gen. Stat. § 1-260. The plain statutory language of N.C. Gen. Stat. § 1-260 indicates Appellants individually have no such substantial right. The trial court's order does not deprive Appellants of their asserted substantial right.

B. Trial Court Did Not Order a New Trial

[2] Appellants assert an alternative argument that appeal lies of right in this court pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(d) because the trial court's order grants a new trial. We disagree.

N.C. Gen. Stat. § 7A-27(b)(3) states, in relevant part:

> (b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases:
>
> . . . .
>
> (3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:
>
> . . . .
>
> d. Grants or refuses a new trial.

N.C. Gen. Stat. § 7A-27(b)(3) (2017).

The plain language of the trial court's order does not specify a "new trial," but instead indicates "[t]his matter should be reheard after all of the necessary parties have been joined[,]" and "[t]his matter will be scheduled to be reheard and peremptorily set for hearing at the May 29, 2017 term of Civil Superior Court." The trial court's order does not specify a new trial.

The trial court's decree to rehear evidence is not an order for a new trial, because a judgment has not been rendered in the case. Rule 59 of the North Carolina Rules of Civil Procedure governs the authority of our courts to order new trials. Rule 59 contemplates that a new trial is a rehearing or reexamination that occurs post-judgment. *See Tetra Tech Tesoro, Inc. v. JAAAT Technical*, ___ N.C. App. ___, ___,794 S.E.2d 535, 536 (2016) ("This Court has held that Rule 59 of the Rules of Civil Procedure, which governs motions to alter or amend a judgment, only applies to post-trial motions, and that holding is confirmed by the plain text of Rule 59."); *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 77 (2011) ("[B]oth Rule 59(a)(8) and (9)

are post-trial motions[.]"); *see also* Trial, New Trial, Black's Law Dictionary (8th ed. 2004) (defining "new trial" as "[a] postjudgment retrial or reexamination of some or all of the issues determined in an earlier judgment.").

Here, the trial court has not rendered a verdict nor entered a judgment. The trial court's order to rehear evidence is not tantamount to an order for a new trial. Because the trial court did not order a new trial, Appellants are not entitled to an interlocutory appeal of the trial court's order under N.C. Gen. Stat. § 7A-27(b)(3)(d).

III. Conclusion

The order is not certified as immediately appealable. No showing is made that the trial court's interlocutory order affects a substantial right of Appellants. The order does not decree a new trial entitling Appellants to appeal under N.C. Gen. Stat. § 7A-27(b)(3)(d). Plaintiffs' appeal is dismissed as interlocutory. *It is so ordered.*

DISMISSED.

Judges BRYANT and DILLON concur.

STATE OF NORTH CAROLINA
v.
RALPH JONES, JR.

No. COA17-796

Filed 3 April 2018

1. Evidence—vehicle stop—driving while impaired—contemporaneous notes

The trial court properly considered a highway patrol trooper's testimony in a driving while impaired prosecution where the trooper's observation that defendant crossed the center line was not in his contemporaneous notes. The trooper's testimony at the suppression hearing supplemented rather than contradicted the notes, and the trial judge had the authority to evaluate the credibility of the testimony.

2. Search and Seizure—traffic stop—reasonable suspicion—crossing the center line

A highway patrol trooper had reasonable suspicion for a traffic stop of defendant's vehicle where the trooper personally saw

defendant cross a double yellow line, even though the trooper did not corroborate an anonymous tip received by dispatch. The act of crossing a double yellow line clearly constituted a traffic violation and was sufficient to constitute reasonable suspicion for a traffic stop.

Appeal by defendant from judgment entered 7 February 2017 by Judge Jeffery B. Foster in Beaufort County Superior Court. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Michelle D. Denning, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellant.

DAVIS, Judge.

In this appeal, we consider whether (1) a police officer's observation of a single instance of a vehicle crossing the double yellow centerline in violation of North Carolina's motor vehicle laws constitutes reasonable suspicion to conduct a traffic stop; and (2) a trial court may properly consider at a suppression hearing testimony from an officer about a vehicle stop that includes material information not contained in the officer's contemporaneous reports. Ralph Jones, Jr. ("Defendant") appeals from his conviction for driving while impaired. After a thorough review of the record and applicable law, we affirm the order of the trial court denying his motion to suppress.

Factual and Procedural Background

On 8 December 2013, Trooper Matthew Myers of the North Carolina State Highway Patrol was traveling southbound on N.C. Highway 32 in Beaufort County. At approximately 7:00 p.m., he was notified by dispatch that a caller had reported that a black Chevrolet truck was traveling northbound on Highway 32 at "a careless/reckless high speed . . . ."

As Trooper Myers approached a curve in the road, he observed two vehicles less than a quarter of a mile ahead of his patrol car traveling in the northbound lane. A double yellow line divided the lanes of travel. One of the two vehicles was a black Chevrolet truck, and Trooper Myers observed that the truck was "slightly left of center in a curve." He was able to "tell the [head]lights were in [his] traveling lane instead of the northbound lane . . . ."

After the truck passed Trooper Myers' patrol vehicle, it "pulled to the right shoulder of the road . . . ." He activated his blue lights, made a U-turn, and pulled behind the truck. He observed Defendant sitting in the driver's seat as he approached the vehicle. Based on his conversation with Defendant, Trooper Myers believed he was impaired.

Defendant was arrested and charged with driving while impaired. That same evening, Trooper Myers made handwritten notes in an Affidavit and Revocation Report (the "Revocation Report") and in a Driving While Impaired Report Form (the "DWIR Form"). He later testified that for "most of [his] DWI cases" he was unable to "put a lot of information on the DWIR form" due to space constraints and his "sloppy" handwriting. For this reason, he would type his full observations into a Microsoft Word document so that it would be "easier to read . . . ."

On 9 December 2013, he followed this practice by typing notes concerning the prior evening's traffic stop into a Microsoft Word document. These notes contained greater detail about the incident than the Revocation Report or the DWIR form.

On 26 August 2014, Defendant filed a motion to suppress in which he sought to exclude the evidence obtained as a result of the traffic stop based on his assertion that the stop itself was unlawful. A suppression hearing was held before the Honorable Wayland J. Sermons, Jr., in Beaufort County Superior Court on 15 September 2016. Trooper Myers was the only witness who testified at the hearing.

The trial court entered an order on 11 October 2016 denying the motion to suppress. On 7 February 2017, Defendant pled guilty to driving while impaired but expressly reserved his right to appeal the denial of his motion to suppress. That same day, the trial court sentenced him to 30 days imprisonment but suspended the sentence and placed him on unsupervised probation for 24 months. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant's sole argument is that the trial court erred by denying his motion to suppress. Specifically, he contends that (1) the trial court's findings of fact in its 11 October 2016 order were unsupported by competent evidence; and (2) the trial court erred as a matter of law in concluding that Trooper Myers possessed reasonable suspicion to stop his vehicle.

"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 conclusions of law." *State v. Granger*, 235 N.C. App. 157, 161, 761 S.E.2d 923, 926 (2014) (citation and quotation marks omitted). It is well established that "the trial court resolves conflicts in the evidence and weighs the credibility of evidence and witnesses." *State v. Saldierna*, __ N.C. App. __, __, 803 S.E.2d 33, 42, *disc. review allowed*, __ N.C. __, 805 S.E.2d 482 (2017).

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) (internal citation and quotation marks omitted).

In its 11 October 2016 order, the trial court made the following pertinent findings of fact:

> 1. On December 13, 2013, Trooper Matthew Myers of the North Carolina State Highway Patrol arrested defendant and charged him with impaired driving.
>
> 2. On August 26, 2014, defendant filed a *Motion To Suppress Evidence* that challenged whether there was reasonable suspicion for Trooper Myers to make a seizure of Defendant.
>
> 3. On December 13, 2013 at approximately 7:02 o'clock pm, Trooper Myers was employed with the North Carolina State Highway Patrol, on duty, and traveling south on NC Highway 32 towards the city of Washington.
>
> 4. That prior to 7:02 o'clock pm Trooper Myers overheard a dispatch from communications concerning a black Chevy truck travelling north on NC Highway 32 driving in a careless and reckless manner at a high speed just past the "Meat Farm".
>
> 5. Trooper Myers was just north of the "Meat Farm" and continued south looking for the black Chevy Truck on NC Highway 32.

6. As Trooper Myers was travelling south on NC Highway 32 he observed two vehicles approaching him with some distance between the two vehicles.

7. That when Trooper Myers initially observed the second vehicle said vehicle was coming out of a slight curve as it approached him and he could see that it was slightly left of the centerline because he could see one of its headlights in his lane of travel.

8. The second vehicle moved back into its lane of travel and as Trooper Myers passed the vehicle he noticed that it was a black Chevy truck and was the vehicle about which he had received the dispatch to be on the lookout for.

9. After Trooper Myers passed the black Chevy truck he observed the truck immediately pull over to the right side of the road.

10. Trooper Myers immediately turned his vehicle around and pulled in behind the black Chevy truck which was pulled off on the right hand shoulder of the road to check on the driver and activated his blue lights and exited his patrol vehicle.

11. During the hearing on Defendant's motion the Defendant admitted into evidence Defendant's Motion exhibit #1 which was a copy of form 3907, Affidavit and Revocation Report from this file number and Defendant's Motion exhibit #2 which is a copy of Trooper Myers' Driving While Impaired Report (DWIR) form from this case.

12. That the Court only reviewed said Exhibits to the point that Trooper Myers stopped his vehicle to check on the driver and did not consider any other portions of said Exhibits.

13. Trooper Myers on cross-examination admitted that neither the Affidavit and Revocation Report nor the DWIR form contained any mention that he observed the black Chevy truck left of center.

14. Trooper Myers testified that he had notes on his computer, which notes he made the day after the stop after

> he had watched the video from his on board camera of the incident, and in such notes he recorded that he had observed the truck left of center to the point he could observer [sic] one of the truck's headlights in his lane of travel.

Based on these findings of fact, the trial court then made the following relevant conclusions of law:

> 2. That a seizure occurred when Trooper Myers pulled in behind Defendant and his vehicle and activated his blue lights.
>
> 3. Considering the totality of the circumstances, Trooper Myers did have sufficient reasonable suspicion to make a seizure of Defendant and his vehicle.

I. Conflicts in Evidence

[1] Defendant's first argument is that the trial court erred in relying upon Trooper Myers' testimony at the motion to suppress hearing that he actually saw Defendant's vehicle cross the centerline given the absence of that information in the Revocation Report or DWIR Form. Defendant argues that the trial court's findings are contradicted by the Revocation Report and DWIR Form, which did not contain these details.

During the motion to suppress hearing, Trooper Myers testified from his typed Microsoft Word notes, which he read into the record as follows:

> [TROOPER MYERS:] . . . Received the call from dispatch of a . . . black Chevy truck northbound on NC 32 just past the meat farm. I was southbound, headed that way on my way to the office when the call came out. Truck was northbound exiting the curve when I first made contact, *could tell the truck was in the southbound lane coming out of the curve.* As it got closer, I saw it was a black Chevy truck matching the description of BOLO that was given out. With that, left of center and the vehicle pulling off onto the shoulder right past me, I turned around on the vehicle. As soon as the truck passed me, I could see the brake lights, and it pulled over to the right shoulder of the road.

(Emphasis added.)

Defendant contends that the trial court erred in giving weight to Trooper Myers' testimony at the hearing because it contradicted the

information contained in the Revocation Report and DWIR Form. In support of this argument, he cites *State v. Canty*, 224 N.C. App. 514, 736 S.E.2d 532 (2012), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013).

In *Canty*, an officer conducted a traffic stop of the defendant's vehicle based on his belief that the vehicle had crossed the fog line separating his lane of travel from the shoulder of the road. The State presented video surveillance from the patrol vehicle camera, which demonstrated that "there was no traffic violation" and that "the vehicle did not cross the fog line in the forty-five second interval before [the officer] engaged the lights and siren." *Id.* at 519-20, 736 S.E.2d at 537. We concluded — based on the video — that the officer lacked reasonable suspicion to conduct the traffic stop. *Id.* at 520, 736 S.E.2d at 537.

Here, conversely, Trooper Myers' testimony at the suppression hearing supplemented rather than contradicted the information in the Revocation Report and DWIR Form. He explained that although his contemporaneous notes in those documents on the evening of the traffic stop were not detailed, the notes he made the following day contained additional information — including the fact that he had observed Defendant's truck cross the double yellow centerline.

The trial court possessed the authority to evaluate the credibility of Trooper Myers' testimony as to what he observed before he pulled over Defendant's vehicle and the circumstances under which he made the Microsoft Word notes the following day. Thus, the trial court properly considered Trooper Myers' testimony at the suppression hearing, and the findings of fact in its order were supported by competent evidence.

II. Existence of Reasonable Suspicion

[2] Having determined that the challenged findings were supported by competent evidence, we turn to the question of whether the findings supported the trial court's conclusion of law that Trooper Myers had reasonable suspicion to stop Defendant's vehicle. Defendant argues that reasonable suspicion was absent given the failure of Trooper Myers to corroborate the anonymous tip received by dispatch, which by itself was insufficient to provide reasonable suspicion for the stop of Defendant's vehicle. *See State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000) (anonymous tip can establish reasonable suspicion only if it contains sufficient indicia of reliability but "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration" (citations omitted)).

We reject Defendant's argument because it ignores the fact that Trooper Myers' direct observations provided reasonable suspicion for the vehicle stop. Under North Carolina law, Defendant's act of crossing the double yellow centerline clearly constituted a traffic violation. N.C. Gen. Stat. § 20-150(d) (2017) ("The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible.").

This Court has made clear that an officer's observation of such a traffic violation is sufficient to constitute reasonable suspicion for a traffic stop. *See*, *e.g.*, *State v. Osterhoudt*, 222 N.C. App. 620, 632, 731 S.E.2d 454, 462 (2012) ("Trooper Monroe's testimony that he initiated the stop of defendant after observing defendant drive over the double yellow line is sufficient to establish a violation of: (1) N.C. Gen. Stat. § 20-146(d)(3-4) . . . ; N.C. Gen. Stat. § 20-146(d)(1) . . . ; and N.C. Gen. Stat. § 20-153 . . . ."); *State v. Hudson*, 206 N.C. App. 482, 486, 696 S.E.2d 577, 581 (officer's "observation of Defendant twice crossing the center and fog lines provided [officer] with probable cause to stop Defendant's truck"), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010); *State v. Baublitz*, 172 N.C. App. 801, 807, 616 S.E.2d 615, 620 (2005) (officer's stop of defendant's vehicle was justified where he saw vehicle twice cross centerline).

Here, the State's evidence established that Trooper Myers personally saw Defendant cross the double yellow line dividing the lanes of travel on Highway 32. This was sufficient to give him reasonable suspicion to stop Defendant's vehicle. Thus, the trial court's conclusion of law was supported by its findings of fact.

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
ALBERT URIAH MATHIS

No. COA17-128

Filed 3 April 2018

1. Appeal and Error—preservation of issues—double jeopardy

Defendant's contention that double jeopardy precluded a new trial for assault after a mistrial was not preserved for appeal where he consented to the mistrial at the first trial and did not raise the issue during his second trial.

2. Constitutional Law—ineffective assistance of counsel—consent to mistrial—no prejudice

There was no ineffective assistance of counsel in an assault prosecution where defendant's counsel consented to a mistrial, time constraints would not permit the trial to be finished that day, the judge and a juror had medical procedures the next day, and the judge was not confident that the alternate juror had heard what had transpired to that point. The trial judge could reasonably have concluded that the completion of the first trial would not be fair and in conformity with the law, and counsel's failure to object was of no consequence.

Appeal by Defendant from judgment entered 14 April 2016 by Judge Lindsay R. Davis in Wilkes County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State.

Paul F. Herzog for defendant-appellant.

MURPHY, Judge.

When a non-capital defendant's trial counsel fails to object, or consents, to a *sua sponte* mistrial declared for "manifest necessity," the trial judge's decision to declare the mistrial is unpreserved and not subject to appellate review. However, where related ineffective assistance of counsel claims are raised alleging that but for counsel's failure to object to the mistrial, a defendant would not have been subjected to double

jeopardy, we review these claims under the framework announced by the U.S. Supreme Court in *Strickland v. Washington*. 466 U.S. 668, 80 L.Ed.2d 674 (1984). Here, Albert Mathis ("Defendant") fails to show that he was prejudiced by his attorney's failure to object to the mistrial. One juror was going to be absent the following day, and the trial court judge had "absolutely no faith" in the alternate juror. Under these circumstances, the trial court did not abuse its discretion as the judge could have reasonably concluded that the trial could not proceed in conformity with the law. As a result, Defendant's second trial did not violate his constitutional right to be free from double jeopardy, and he can show no prejudice by his counsel's acquiescence in the first mistrial.

BACKGROUND

On 16 April 2013, Defendant and Jerry Jennings ("Jerry") got into a physical altercation near a fishing hole in Wilkes County. Jerry was rendered unconscious due to the numerous blows Defendant inflicted upon him. After Jerry was subdued, Defendant "got the heck out of [D]odge," leaving Jerry lying unconscious in a field with no one else around. Defendant was indicted for felony assault with a deadly weapon (steel-toed boots) inflicting serious injury in violation of N.C.G.S. § 14-32(a).

Defendant's First Trial: 11-12 February 2015 ("2015 Trial")

The first trial began on 11 February 2015 in Wilkes County Superior Court. On 12 February 2015, after the State's case-in-chief, the State moved to amend the indictment to allege that Defendant had struck Jerry with his limbs, rather than his steel-toed boots. This motion was denied. After denying the State's motion, and while still outside the presence of the jury, Judge David L. Hall expressed to the parties his concerns about the ability to move forward with the trial. A juror's wife was having a heart procedure and would be unavailable, and Judge Hall had "no confidence" and "absolutely no faith" in the alternate juror. After voicing his concerns, Judge Hall asked the parties if they wished to be heard. Defense Counsel indicated that he supported the mistrial for strategic reasons related to Defendant's testimony and the ability to get an instruction on self-defense.

> The Court: What I have concluded is that the motion to amend should be denied . . . Which brings me to my greatest concern now, which is it is presently 2:30 on Thursday, as I indicated to counsel on Monday, I have a very important appointment with a specialist tomorrow morning involving a hole in my retina, in my left eye and a floater in

> my right eye. Further, we have one juror, Juror Number 9 no, Juror Number 8, his wife is having a heart catheterization and a pacemaker procedure tomorrow and I have an alternate juror Mr. Maston, whom I have no confidence in because I believe if I inquire I believe his answer is going to be he has not been able to hear much of what has transpired and I cannot hold over, so, I'm concerned about that. Let me hear from the parties.
>
> Defense Counsel: Your Honor, we appreciate the Court's ruling and we are prepared to go forward, but in light of the time constraints Mr. Mathis, it would be my intent once the State, I guess has rested, it would be my intent to put him on the stand, but quite frankly, I don't personally believe that with instructions, closing arguments, and whatnot and the charge conference, I just quite frankly don't believe that this jury will have any meaningful amount of time to deliberate, if, in fact, it gets to them by 5 o'clock. So, my client is in agreement and I have talked to him because I have explained and I will state for the record my main concern right now is, if I put him on the stand, time expires and we come back for another trial at a later date, I have just provided Mr. Bauer and the State with another 15 to 20 minutes of direct cross-examination that could, in fact, be utilized against him at a later trial. I do not wish to do that, but I do not want the send this case to the jury without Mr. Mathis testifying.
>
> The Court: He would not get an instruction on self-defense.
>
> Defense Counsel: Exactly.

The trial court then declared a mistrial based on "manifest necessity" and "to preserve the ends of justice," and neither the State nor Defendant's counsel objected.

> The Court: We are now in a posture where moving forward seems unpractical, not practical and not feasible. And the Court has obligations which it may not avoid. I may not hold over and I do not see a reasonable prospect of continuing the case beyond today. I find that the interest of justice requires the matter be mis-tried. I find that the prospect of completing this trial is grim. That Juror Number 8, has a significant -- his wife has a significant medical procedure tomorrow. The Court has absolutely no

faith in the alternate juror. Is the State joining in a motion for mistrial?

The State: We are, Your Honor. We would renew our motion unsworn.[1]

The Court: I think that I have been scrupulously fair to both parties this entire time, trying to protect both the State's right to a fair trial and Mr. Mathis' rights to a fair trial. And it seems to me that neither party may enjoy a fair trial at this point. With the consent of the Defense and the State, I'm declaring a mistrial based on manifest necessity and to preserve the ends of justice. I find that jeopardy is not attached for purposes of retrying the matter and that the matter may be put on at the mutual convenience of the parties.

. . . .

The Court: I will order a transcript of the proceedings, costs shall be borne by the State of North Carolina because of manifest necessity and the interest of justice and unavoidable time constraints. I will also say that the parties have raised legal issues which have required and they have been genuine and made in good faith, but legal issues that have required a great deal of research, which has simply made it not practical to conclude this trial. So the Court strikes the jury as impaneled. The Court declares a mistrial as of manifest necessity and that further proceedings in this trial would result in manifest in justice. And the matter

1. On 11 February 2015 (the first day of Defendant's trial), during the cross-examination of Jerry, Defendant's counsel asked Jerry about "a previous matter where [he] was placed under oath and testifying about this particular incident." On 12 February 2015, before the trial resumed, the State moved for a mistrial because of the potential that the jury might infer, based on defense counsel's question to Jerry, that Defendant had already been involved in "another trial" related to this incident, and the potential for this inference might prejudice Defendant, providing him with a potential error on appeal. The trial court ultimately denied the State's mistrial motion and suggested that a curative instruction, along with asking Defendant to waive any potential error on defense counsel's part due to his mentioning of another trial, would "protect the state's right to a fair trial." The trial judge provided the following curative instruction: "[a]nother housekeeping detail, yesterday some mention was made about an objection that occurred at another trial. Okay. Please put that out of your mind. Give it no consideration. This is the first time this case has been tried so that had something to do with an entirely unrelated matter and it has nothing to do with your determination in this case. Just put it out of your mind. It has no consequence to your determination."

> may be re-calendared at the mutual convenience of these parties or by further order of this Court. All right. If you will bring -- does either party wish to be heard?
>
> The State: No, sir.
>
> Defense Counsel: No, sir.
>
> The Court: If you'll bring the jury in, please. I will explain to them and let them go.

Defendant's Second Trial: 13-14 April 2016 ("2016 Trial")

On 6 April 2016, the grand jury issued a superseding indictment against Defendant for Felony Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The weapons named in this indictment were Defendant's "hands, feet, and arms." Defendant's second trial began on 13 April 2016 before Judge Lindsey Davis in Wilkes County Superior Court. On 14 April 2016, a jury convicted Defendant of assault inflicting serious injury, a misdemeanor. Judge Davis ordered a suspended sentence of 150 days, and an active sentence of 30 days in Wilkes County Jail to be followed by 18 months of supervised probation. Trial counsel for Defendant did not make any motion to dismiss before, during, or after trial on double jeopardy grounds. Defendant timely appealed.

I. DOUBLE JEOPARDY

[1] Defendant first argues that he was subjected to double jeopardy because the trial court erred by declaring a mistrial at the end of his 2015 trial in the absence of "manifest necessity." We disagree.

"Freedom from multiple prosecutions for the same offense is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 19 of the Constitution of North Carolina." *State v. White*, 85 N.C. App. 81, 86, 354 S.E.2d 324, 328 (1987) (internal citations omitted). Nevertheless, a second trial after a mistrial is not always barred by the Double Jeopardy Clause, and "[i]t is well established that the plea of former jeopardy cannot prevail on account of an order of mistrial when such order is entered upon motion or with the consent of the defendant." *State v. Crocker*, 239 N.C. 446, 449, 80 S.E.2d 243, 245-46 (1954); *see also State v. Dry*, 152 N.C. 813, 817, 67 S.E. 1000, 1002 (1910) ("Where the prisoners assent to a mistrial, they cannot afterwards be heard to object."), *overruled on other grounds by State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989). Furthermore, "[t]he constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant, and

such waiver is usually implied from his action or inaction when brought to trial in the subsequent proceeding." *State v. Hopkins*, 279 N.C. 473, 475-76, 183 S.E.2d 657, 659 (1971). To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. *State v. McLaughlin*, 321 N.C. 267, 272, 362 S.E.2d. 280, 283 (1987) ("[b]y failing to move in the trial court to arrest judgment on either conviction, or otherwise to object to the convictions or sentences on double jeopardy grounds, defendant has waived his right to raise this issue on appeal.").

Defendant argues that the Double Jeopardy Clause precluded his second trial in 2016 because there was not a "manifest necessity" to justify the mistrial declared in his 2015 trial. However, this issue has not been preserved for appeal because he consented to the mistrial, and Defendant failed to raise the issue during his second trial in 2016. *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d. 664, 667 (1999) ("[t]o avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court.") (citations omitted). Accordingly, we dismiss his appeal as to this issue and do not reach the merits of his stand-alone double jeopardy argument.

II. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

[2] Defendant advances two Sixth Amendment right to counsel claims. First, he alleges that counsel during the first trial was ineffective because he consented to the trial court's mistrial order in the absence of a "manifest necessity." Second, Defendant alleges that his counsel in the second trial was ineffective because he failed to move for a dismissal of the charges on double jeopardy grounds. We disagree as to the first claim which renders his second claim moot.

Strickland announced a two prong test for ineffective assistance of counsel claims. *State v. Givens*, ___ N.C. App. ___, ___, 783 S.E.2d 42, 49 (2016) (citing *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985)). Under Strickland, a defendant must show that his counsel's performance (1) fell below an objective standard of professional reasonableness and (2) that he was prejudiced by the error. *See Strickland*, at 687, 80 L. Ed. 2d at 693. Prejudice is established by showing that "the error committed was so serious as to deprive the defendant of a fair trial." *Id.* In evaluating ineffective assistance of counsel claims, a court may bypass the performance inquiry and proceed straight to the question of prejudice. *Id.* at 697, 80 L. Ed. 2d at 699. We conclude that Defendant's first claim fails under the prejudice prong of *Strickland* as the trial court did not abuse its discretion in declaring a mistrial due to a manifest necessity. Counsel's failure to object was not of any consequence.

A second trial after a mistrial of a defendant is not barred by the Double Jeopardy Clause "where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice." *State v. Shoff*, 128 N.C. App. 432, 434, 496 S.E.2d 590, 591 (1998) (citing *State v. Lachat*, 317 N.C. 73, 82, 343 S.E.2d 872, 877 (1986); *see also State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986) (stating that an order of mistrial after jeopardy has attached may only be entered over a defendant's objection where "manifest necessity" exists). We review a trial court's decision to declare a mistrial for abuse of discretion, and the decision will not be disturbed unless it is "so arbitrary that it could not have been the result of a reasoned decision." *See State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985). "The exercise of this discretion is governed by [N.C.G.S.] § 15A-1063 and 15A-1064." *See Shoff*, at 434, 496 S.E.2d at 591. N.C.G.S. § 15A-1063 provides:

> Upon motion of a party or upon his own motion, a judge may declare a mistrial if:
>
> (1) It is impossible for the trial to proceed in conformity with law[.]

N.C.G.S. § 15A-1063 (2017). N.C.G.S. § 15A-1064 requires a trial court to make findings of fact before granting a mistrial and enter them into the record.

> Before granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.

N.C.G.S. § 15A-1064 (2017).

"Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice." *State v. Schalow*, ____ N.C. App. ____, ____, 795 S.E.2d 567, 576 (2016) (citing *Crocker*, at, 450, 80 S.E.2d at 246). "For example, physical necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial." *Schalow*, at ____, 795 S.E.2d at 576. "Whereas the necessity of doing justice arises from the duty of the [trial] court to guard the administration of justice from fraudulent practices and includes the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *Id.* The manifest necessity present in the case *sub judice* involves a combination of "physical necessity" and the "necessity of doing justice."

After the State's case-in-chief, the trial court expressed concerns related to juror number 8 because he was going to be physically

unavailable due to his wife's upcoming heart procedure. Also, the trial judge had "no confidence" and "absolutely no faith" in the alternate juror because he believed that the alternate had not heard much of the trial testimony up to that point. It is well settled that "[t]he trial judge is empowered to decide all questions regarding the competency of jurors," and the question of juror competency includes issues related to physical or mental limitations that would "hamper his or her ability to perform a juror's duties." *See State v. King*, 311 N.C. 603, 615, 320 S.E.2d 1, 9 (1984). Ensuring juror competency and availability is especially important because twelve jurors must unanimously agree to find a defendant guilty. *See* N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]"); *State v. Bindyke*, 288 N.C. 608, 623, 220 S.E.2d 521, 531 (1975) ("there can be no doubt that the jury contemplated by our Constitution is a body of twelve persons[.]"). The twelve juror requirement is strict, and in *State v. Hudson*, our Supreme Court held that that notwithstanding defendant's consent, the verdict was a nullity because it was reached by a jury of eleven. *See* 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971).

In light of our strict twelve juror requirement, the impending absence of juror number 8 due to his wife's heart procedure, and the judge's belief that the alternate juror would be unable to perform his duties, the trial judge could have reasonably concluded that the completion of the 2015 trial would not be fair and in conformity with the law. *See State v. Cooley*, 47 N.C. App. 376, 383, 268 S.E.2d 87, 92 (1980) (upholding mistrial order where trial court "could reasonably conclude that a fair and impartial trial in accordance with law could not be had"); *see also State v. Sanders*, 347 N.C. 587, 496 S.E.2d 568 (1998) (holding that the record supported the trial court's decision to grant a mistrial based on the trial court's conclusion that at least one juror was not following the instructions of the trial court as to his conduct and duty as a juror); *State v. Pfeifer*, 266 N.C. 790, 147 S.E.2d 190 (1966) (holding that defendant was not subjected to double jeopardy when his first trial ended in a mistrial due to the sudden illness of a juror); *Crocker*, at 452, 80 S.E.2d at 248 (holding that where a juror "is so incapacitated by reason of intoxicants or otherwise as to be incapable, physically or mentally, of functioning as a competent, qualified juror, the trial judge may order a mistrial"); *Shoff*, at 434, 496 S.E.2d at 592 (concluding that the trial court did not abuse its discretion by declaring a mistrial "due to adverse weather conditions" that affected the jurors' ability to physically return for the second day of trial); *State v. Montalbano*, 73 N.C. App. 259, 326 S.E.2d 634 (1985) (holding that retrial was not barred on double jeopardy grounds following a mistrial granted after the judge observed an investigator, who

was assisting the district attorney, engage in conversation with one or two jurors before trial); *State v. Ledbetter*, 4 N.C. App. 303, 167 S.E.2d 68 (1969) (affirming a trial court's declaration of mistrial where the judge found that a juror had been taken to a hospital as the result of a sudden illness).

Here, by declaring a mistrial, instead of proceeding with an alternate juror that he had no confidence in, Judge Hall intelligently exercised his discretion to assure the "credibility of the jury verdict," *Montalbano*, at 263, 326 S.E.2d at 637 (citing *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982)), and we cannot say this decision was "manifestly unsupported by reason." *Shoff*, at 432, 496 S.E.2d at 592 (citations omitted). Defendant's first claim for ineffective assistance of counsel fails because his second trial was not precluded by the Double Jeopardy Clause, and he is therefore unable to demonstrate any prejudice resulting from counsel's acquiescence and failure to object to the 2015 mistrial. Based upon our holding as to the first claim for ineffective assistance of counsel, Defendant's second claim is rendered moot. Both of Defendant's ineffective assistance of counsel arguments are overruled.

CONCLUSION

By failing to raise the issue of double of jeopardy in his 2016 trial, Defendant failed to preserve the issue of double jeopardy for appellate review. Furthermore, Defendant was not deprived of effective assistance of counsel in his 2015 trial where the trial court did not abuse its discretion in ordering a mistrial for manifest necessity. Defendant's second ineffective assistance of counsel claim, based on his counsel's failure to file a motion to dismiss on double jeopardy grounds in the 2016 trial, is moot.

DISMISSED IN PART; NO ERROR IN PART.

Judges CALABRIA and ZACHARY concur.

STATE v. SHORE

[258 N.C. App. 660 (2018)]

STATE OF NORTH CAROLINA
v.
CHARLES AUGUSTUS SHORE, JR.

No. COA16-1243-2

Filed 3 April 2018

1. Witnesses—expert—basis of knowledge—delayed disclosure by child sexual assault victim

The trial court did not abuse its discretion in a prosecution for sexual offense and statutory rape by allowing an expert witness to testify that it is not uncommon for children to delay the disclosure of sexual abuse and then to provide possible reasons for the delay. Although defendant contended that the witness's testimony was not reliable because she had not conducted her own research but relied on the studies of others, the expert testified that her testimony was grounded in training, forensic interviewing experience, and review of multiple articles on delayed disclosure. Her testimony was the result of reliable principles and methods, and defendant did not demonstrate that his arguments attacking her testimony were pertinent in assessing the reliability of her testimony on delayed disclosure.

2. Constitutional Law—ineffective assistance of counsel—premature claim

A claim for ineffective assistance of counsel was premature where the record was not sufficiently complete to determine whether the claim had merit. It was dismissed without prejudice to defendant's right to assert it during a subsequent motion for appropriate relief.

3. Criminal Law—mistrial—conduct of victim's father

The trial court did not abuse its discretion by not declaring a mistrial sua sponte due to the disruptive behavior of a statutory rape victim's father during the trial. The trial court took immediate and reasonable steps to address the behavior.

4. Judges—impermissible expression of opinion—in presence of jury

The trial judge did not impermissibly express an opinion during a trial for statutory rape and other offenses by denying defendant's motion to dismiss in the presence of the jury. Defendant did not seek to have the ruling made outside the presence of the jury, did not object, and did not move for a mistrial on these grounds.

On remand by order of the Supreme Court on 1 March 2018 in *State v. Shore*, __ N.C. __, __ S.E.2d __ (2017), remanding the unanimous decision of this Court filed 5 September 2017 for the limited purpose of considering the merits of defendant's argument concerning the issue of mistrial. Case originally appealed by defendant from judgments entered 26 April 2016 by Judge Stanley L. Allen in Mecklenburg County Superior Court.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Hale Blau & Saad Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

ARROWOOD, Judge.

Charles Augustus Shore, Jr. ("defendant") appeals from judgments entered upon his convictions for statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and for statutory rape of a person thirteen, fourteen, or fifteen years old. Based on the reasons stated herein, we restate our previous opinion with respect to the issues upon which our Supreme Court denied discretionary review and find no error with respect to the trial courts failure to *sua sponte* declare a mistrial. No error.

I. Background

On 31 March 2014, defendant was indicted on the following charges: four counts of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1; one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27.7A(a); and three counts of statutory rape of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27A.

Defendant was tried at the 18 April 2016 criminal session of Mecklenburg County Superior Court, the Honorable Stanley Allen presiding.

The State's evidence tended to show that in 2012, H.M.[1] began living with her father. She was eleven years old at the time. H.M.'s father was living with Brandi Coleman ("Brandi") and defendant, who was Brandi's boyfriend. H.M. testified that after moving into the house, she spent time

1. Initials are used throughout this opinion to protect the identity of the juvenile and for ease of reading.

with defendant by jumping on the trampoline, watching sports, fishing, watching television, and playing video games. She described their relationship as "always friendly, really nice. Anything I ever needed when my dad wasn't around or Brandi wasn't around, he always helped me." In the summer of 2013, defendant's son moved into the house. H.M. shared a room with defendant's son and they became best friends.

In January 2014, after Brandi and defendant ended their relationship, defendant and defendant's son moved to a nearby apartment complex. H.M. testified that she saw defendant and defendant's son "all the time" after they moved, frequently visiting their apartment to "hang out." H.M. spent the night at their apartment more than once and slept in defendant's bed.

H.M. testified that one night, she was sleeping in defendant's bed when defendant got into his pajamas and crawled into bed with her. They "cuddled up together." H.M. testified that defendant's hands "slowly started to go down my side," defendant put his hands around the waistband of her pants, and then her shorts came off. Defendant's hands "entered" her underwear and defendant began touching H.M.'s vagina. Defendant got on top of H.M. and kissed her neck. H.M. told defendant that she was tired and defendant replied, "okay," gave her a hug, and the two fell asleep.

H.M. testified that she and defendant had vaginal intercourse on two occasions. One incident occurred when she spent a few nights at defendant's apartment during the weekend of 14 February 2014. On one of those nights, defendant and H.M. began kissing on the couch. They went into defendant's bedroom where defendant "crawled" on top of her, put his hand inside of her, and then put his penis inside of her. The next morning, defendant gave her a pill which he instructed her to take. The other occasion where defendant had sex with H.M. occurred in the same way except that defendant did not give her a pill to take.

H.M.'s father testified that he would check H.M.'s cell phone on a regular basis. On 22 February 2014, H.M.'s father was looking through H.M.'s cell phone when he noticed text messages from defendant. The messages included "Good morning, Baby[,]" "Good morning, Beautiful[,]" and "Hello, Princess." H.M.'s father became very angry and threw the cell phone on the ground and the screen broke. H.M.'s father confronted H.M., asking if "anything ever happened between you and [defendant]" and H.M. replied, "yes." H.M.'s father proceeded to drive to defendant's apartment.

While H.M.'s father was gone, Brandi spoke with H.M. During the conversation, H.M. revealed that defendant had touched her in "her private areas" and that she and defendant engaged in sex.

Defendant was not at his apartment when H.M.'s father arrived. H.M.'s father called Brandi and she was able to convince him to return back to his house. At his house, H.M.'s father directly asked H.M. if she and defendant had ever had sex and H.M. replied, "yes, Dad[.]" H.M.'s father left his house again and went to defendant's apartment. Defendant was not home, so H.M. went to a nearby karate studio in search of defendant. As H.M.'s father walked up to the karate studio, defendant was walking out. H.M.'s father yelled, "you son of a b****, I'm here to kill you[.]" Defendant ran back inside the studio and came back outside with twenty men to protect him. H.M.'s father continued to scream at defendant, claiming that defendant had raped his daughter.

H.M.'s father had called the police earlier and the police arrived on the scene. Officer Thomas Gordon and Sergeant Grant Nelson, of the Matthews Police Department, testified that on 22 February 2014, they responded to a call at Scott Shields Martial Arts Academy. H.M.'s father informed the officers why he was angry and accused defendant of inappropriately touching H.M. Sergeant Nelson testified defendant "knew what we were there [in] reference to." After Sergeant Nelson explained to defendant that he was not under arrest, defendant told him of two different incidents that occurred with H.M. Defendant stated that one time, H.M. had sat on defendant's lap, grinding her bottom pelvic area into his pelvic area and grabbing his crotch area. Defendant told her to stop, but she continued. On another occasion, defendant was standing when H.M. approached him from behind and grabbed his crotch. Defendant again told her to stop, but she continued to grab him. H.M. then took defendant's hand and placed it down her pants. Defendant left his hand there for a minute and then pulled it out of her pants.

Kelli Wood ("Wood") testified as an expert in clinical social work, specializing in child sexual abuse cases. Wood testified that on 5 March 2014, she interviewed H.M. at Pat's Place Child Advocacy Center, a center providing services to children and their families when there are concerns that a child may be a victim of maltreatment or may have witnessed violence. A videotape of her interview was played for the jury with a limiting instruction that it should be received for corroborative purposes.

At the close of the State's evidence, the State dismissed one count of indecent liberties and one count of statutory rape.

Defendant testified that his relationship with H.M. was "[p]retty good" and they were like family. Defendant denied ever sitting on his couch and kissing H.M. and denied ever sleeping in his bed with H.M. He also denied ever touching her sexually with his hands, using his mouth to touch her private parts, or having sexual intercourse with her. Defendant admitted that H.M. spent the night at his apartment on 14 and 15 February 2014, but testified that H.M. slept on the lower bunk bed one of the nights and slept on the couch the other night. He testified that on 15 February 2014, his girlfriend, Bridget Davenport, had spent the night with defendant in his bedroom. Defendant testified that on 16 February 2014, he was making lunch in the kitchen when H.M. walked up to him and grabbed his crotch. He backed away and told her "no, no. Inappropriate." H.M. giggled in response. Defendant further testified that on the same day, he was sitting in a recliner when H.M. sat on top of him. Defendant pushed H.M. off of him and told her that "it was very inappropriate, she couldn't do it, could not do that."

On 26 April 2016, a jury found defendant guilty of three counts of taking indecent liberties with a child, one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and one count of statutory rape of a person thirteen, fourteen, or fifteen years old. The jury acquitted defendant of one count of statutory rape.

Judgment was arrested as to the indecent liberties convictions. Defendant was sentenced to a term of 144 to 233 months for the statutory rape conviction and to a consecutive term of 144 to 233 months for the statutory sexual offense conviction.

Defendant was ordered to register as a sex offender upon release from imprisonment. The trial court further ordered that the Department of Adult Correction shall perform a risk assessment of defendant and will determine the need for satellite-based monitoring ("SBM").

Defendant gave oral notice of appeal in open court. Defendant also filed a petition for writ of certiorari to this Court, since the sex offender registration and SBM are civil in nature, and thus require written notice of appeal. N.C. R. App. P. 3(a) (2016); *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). Our Court granted defendant's petition for writ of certiorari on 21 July 2017 and we review the merits of his appeal.

II. Discussion

On appeal, defendant argues that: (A) the trial court erred by permitting the State to introduce unreliable expert testimony, in violation

of Rule 702 of the North Carolina Rules of Evidence; (B) he received ineffective assistance of counsel where his attorney elicited evidence of guilt that the State had not introduced; (C) the trial court erred by failing to declare a mistrial *sua sponte* after a State's witness engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial; and (D) the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. We address each argument in turn.

A. Expert Testimony Under Rule 702

[1] Defendant argues the trial court abused its discretion by allowing expert witness Wood to testify that it is not uncommon for children to delay the disclosure of sexual abuse and by allowing Wood to provide possible reasons for delayed disclosures. Specifically, defendant contends that Wood's testimony was unreliable because it was neither "based upon sufficient facts or data[,]" nor "the product of reliable principles and methods[,]" in violation of N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(2). While acknowledging that our Court has previously allowed analogous expert testimony, *see State v. Carpenter*, 147 N.C. App. 386, 556 S.E.2d 316 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002), he urges our Court to examine this issue in light of the General Assembly's 2011 amendment to Rule 702 of the North Carolina Rules of Evidence and the specific facts of his case.

Our Court reviews a trial court's admission of expert testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a) for an abuse of discretion. *State v. Hunt*, __ N.C. App. __, 790 S.E.2d 874, 881, *disc. review denied*, __ N.C. __, 795 S.E.2d 206 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), our Supreme Court confirmed that the most recent amendment of Rule 702 adopted the federal standard for the admission of expert witness testimony articulated in the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) line of cases. *See McGrady*, 368 N.C. at 884, 787 S.E.2d at 5. "By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well." *Id.* at 888, 787 S.E.2d at 7-8. Although Rule 702 was amended, our Supreme Court reasoned

that "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *Id.* at 888, 787 S.E.2d at 8. While the amendment "did not change the basic structure of the inquiry" under Rule 702(a), it "did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it." *Id.* at 892, 787 S.E.2d at 10. "To determine the proper application of North Carolina's Rule 702(a), then, we must look to the text of the rule, [the *Daubert* line of cases], and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, or *Kumho*." *Id.* at 888, 787 S.E.2d at 8.

The text of Rule 702, in pertinent part, provides:

> (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) (2016).

The *McGrady* Court held that:

> Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible. First, the area of proposed testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." This is the relevance inquiry[.]
>
> . . . .
>
> Second, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. . . . Whatever the source of the witness's knowledge,

> the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?
>
> . . . .
>
> Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case. 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, 368 N.C. at 889-90, 787 S.E.2d at 8-9 (internal citations, footnote, and quotation marks omitted).

In the present case, defendant does not dispute either Wood's qualifications or the relevance of her testimony. Defendant challenges the reliability of Wood's delayed disclosure testimony; whether her testimony met prongs (1) and (2) of the three-pronged reliability test.

"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.* at 890, 787 S.E.2d at 9. Regarding factors a trial court may consider in its determination of reliability, the *McGrady* Court explained as follows:

> 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, 113 S.Ct. 2786. 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, 119 S.Ct. 1167. 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, 113 S.Ct. 2786, so they do not form "a definitive checklist or test," *id.* at 593, 113 S.Ct. 2786. 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, 119 S.Ct. 1167.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

(1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

(3) Whether the expert has adequately accounted for obvious alternative explanations.

(4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).

Id. at 890-91, 787 S.E.2d at 9-10.

At trial, Wood testified that she had a bachelor's degree in sociology from Georgia State University and a master of social work from Clark Atlanta University. She had been a licensed clinical social worker for six years. Wood was working as forensic interviewer at Pat's Place Child Advocacy Center. Wood testified that a forensic interview is a structured conversation with a child, allowing the child to be able to communicate in their own words, about a personal experience or something they had witnessed. She explained that the purpose of a forensic interview is to "elicit those details, and those details are either to refute the allegations that something may have happened to a child or a child may have witnessed something, or to support those allegations." She had approximately eleven years of forensic interviewing experience and over 200 hours of training in the field of forensic interviews of children suspected of being maltreated. Wood testified that she had obtained research-based knowledge of sexually abused children by reading research studies concerning the suggestibility of children, best types of questions to ask, how children develop and understand questions, and the process by which children provide disclosures. She continued to update her research in order to ensure she was utilizing the best practices. Wood testified that over her eleven years of experience, she had interviewed over 1,200 children, with 90% of those interviews focusing on sexual abuse allegations. She had also been qualified as an expert in child sexual abuse in Georgia over twenty times and once in North Carolina.

The State tendered Wood as an expert in the field of clinical social work, specializing in child sexual abuse and defendant objected. On *voir dire*, Wood testified that she had not conducted research in the delayed reporting of sexual assault cases by children, but had reviewed research on "delayed disclosures, reasons for delayed disclosures, as well as concerns that delayed disclosures could be false disclosures, and so I have reviewed on both sides of the concerns of delayed disclosures." When asked by defense counsel whether the claims of the research participants were determined to be true or false, Wood explained that the research she had reviewed were "already supposing that the participants are victims" and "they are just going by what the participants are saying." Wood testified that she was forming opinions based on her observations through the thousand-plus interviews she had conducted, as well as research she had reviewed. She estimated that she had read over twenty articles on delayed disclosures.

Ultimately, the trial court allowed Wood to testify as an expert in clinical social work, specializing in child sexual abuse cases. However,

the trial court prohibited any testimony as to why, if at all, H.M. delayed in reporting the alleged abuse. The trial court stated as follows:

> THE COURT: Based on [] Miss Wood's education, she's a licensed clinical social worker, and having done forensic interviews of at least, approximately, over 1,200 children, 90 percent of those were focused on sexual abuse allegations, the Court will allow her to testify as a licensed clinical social worker with a specialization in child-sexual-abuse cases. And – however, despite that, the state has already said that they're not going to try to elicit testimony, and the Court will prohibit any testimony as to why, if at all, [H.M.] delayed in reporting, if she did, in reporting any potential inappropriate behavior, but just in general what Miss Wood has observed from child abuse, I'm sorry, sexual abuse from persons in the past.
>
> I think, [defense counsel], almost the exact question in [*State v. Dew*], and then the quote: R.O says, however, the appellate courts in this jurisdiction have consistently allowed the admission of expert testimony, such as the witness in that case, which relies upon personal observations of professional experience rather than upon quantitative analysis.
>
> I think something like this would not be able to be, as you indicated, from empirical data or empirical testing, but I think that's going to go to the weight rather than to the admissibility so I'll deny the motion to the extent that she cannot testify as an expert, but I'll allow it to the extent that she cannot testify as to why anybody involved in this case may have delayed reporting any inappropriate behavior.

Wood later testified, amid objections from defendant, to the following:

> [THE STATE:] In your experience and in your survey of the research, is it uncommon for a child to delay disclosure of sexual abuse?
>
> [WOOD:] No.
>
> . . . .

> [WOOD:] No, it's not.
>
> [THE STATE:] What are some of the reasons that a child, based on the research and experience, in general, may delay disclosure?
>
> . . . .
>
> [WOOD:] There are numerous reasons. Some of them are due to fear: Fear of not being believed, fear of what others are going to say about them, fear of what the disclosure will do to the family, will it break the family up, fear that something will happen to the alleged perpetrator, fear that something will happen to the victim, fear that something will happen to the other family members if there's retaliation. Then, also, blame and self-guilt that they didn't do something to stop it, that they didn't run, that they didn't say something. Also, concern that if they tell, what will happen to their family. If this is – if the alleged perpetrator is a primary caregiver, will they have to begin to look for a new residence, will their brothers or sisters not be able to see their parent any further, and how will others in the family – will the other family members blame them for the destruction or the demise of the family; and so some of those are the reasons that children do not tell immediately.

Wood further testified that she had personally heard children express the same potential reasons for delayed disclosures that she had found in her research throughout her experience in forensic interviewing.

Defendant cross-examined Wood about whether the studies on delayed disclosures included false allegations of child sexual abuse. Wood replied that she had examined "both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research."

First, to be reliable, an expert's testimony must be based upon sufficient facts or data pursuant to Rule 702(a)(1). Defendant contends that Wood's testimony was unreliable because she had not conducted her own research and instead, relied on studies conducted by others. Defendant is essentially arguing that the trial court abused its discretion when it admitted Wood's expert testimony, which was based upon her review of research on delayed disclosures, combined with professional

experience. Upon thorough review, we hold that this contention directly conflicts with the meaning of Rule 702, the *Daubert* line of cases, and our existing precedent.

The Advisory Committee Notes to the federal rule state that subsection (a)(1) of Rule 702 "calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying 'facts or data.' The term 'data' is intended to encompass the reliable opinions of other experts." Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments; *see Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (citations omitted) (stating that the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology[]' " and that "experts may rely on data and other information supplied by third parties"), *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015). Moreover, the Advisory Committee Notes provide as follows:

> Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. . . . In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. The *Daubert* line of cases also stands for the proposition that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 143 L. Ed. 2d 238, 255 (1999).

The principle that experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for reliable expert testimony is in line with our previous holding in *Carpenter*. In *Carpenter*, our Court admitted analogous expert testimony under the prior version of Rule 702(a). The defendant in *Carpenter* argued that the trial court erred by admitting expert witness testimony from a licensed clinical social worker that "delayed and incomplete disclosures are not unusual in cases of child abuse[.]" *Carpenter*, 147 N.C. App. at 393, 556 S.E.2d at 321. The defendant asserted, *inter alia*, that the State had failed to establish that there was any scientific foundation for this opinion testimony and our Court rejected his argument. *Id.* Our Court reasoned as follows:

> Though she did not specifically cite supporting texts, articles, or data, [the expert witness] testified on *voir dire* that she was basing her conclusions on literature, journal articles, training, and her experience. Thus, a proper foundation was established for her opinion testimony. In her testimony, [the expert witness] explained general characteristics of children who have been abused. [The expert witness] testified that an abused child often delays disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser. [The expert witness] did not testify as to her opinion with respect to [the victim's] credibility.
>
> Evidence similar to that offered by [the expert witness] has been held admissible to assist the jury. *See State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (finding expert testimony as to why a child would cooperate with adult who had been sexually abusing child admissible); *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994) (concluding trial court did not err in admitting testimony describing general symptoms and characteristics of sexually abused children to explain the victim's behavior); *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987) (holding trial court was proper in admitting a doctor's testimony that a delay between the occurrence of an incident of child sexual abuse and the child's revelation of the incident was the usual pattern of conduct for victims of child sexual abuse). Thus, for the foregoing reasons we hold that the trial court did not abuse its discretion in admitting [the expert witness'] testimony.

Id. at 394, 556 S.E.2d at 321-22.

We find the circumstances in *Carpenter* and the case *sub judice* to be substantially similar. In *Carpenter*, our Court held that a proper foundation for the expert witness' testimony was established when the expert testified that her testimony was based on literature, journal articles, training, and experience. Likewise, Wood testified that her testimony on delayed disclosures was grounded in her 200 hours of training, eleven years of forensic interviewing experience, conducting over 1,200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over twenty articles on delayed disclosures. Wood, like the expert in *Carpenter*, testified about delayed disclosures in general

terms and did not express an opinion as to the alleged victim's credibility. We hold that *Carpenter* is still good law as it does not conflict with the reliability requirements of the *Daubert* standard. *See McGrady*, 368 N.C. at 888, 787 S.E.2d at 8.

Based on the foregoing, Wood's testimony on delayed disclosures was clearly based upon facts or data sufficient to satisfy the first prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

Second, an expert's testimony must be the product of reliable principles and methods pursuant to Rule 702(a)(2). Defendant argues that Wood's testimony is not reliable because the research she relied upon was flawed in the following ways: they assumed participants were honest; they did not have any methods or protocols in place to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know the "error rate." Defendant also argues that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the obvious alternative explanation that the abuse did not occur.

A careful review of the transcript establishes that these concerns were addressed throughout the examination and cross-examination of Wood and that Wood was able to provide detailed explanations for each.

During cross-examination by defense counsel on whether the research she had reviewed eliminated delayed disclosures that were based on false allegations of child sexual abuse, Wood testified, "I've looked at both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research." As to defendant's argument that the research assumed participants were honest, Wood explained that the research on delayed disclosures was not focused on making a determination of whether the alleged sexual abuse had in fact occurred:

> [WOOD:] . . . In the research they are – the researchers, from my understanding, at least the research that I have read, are not asking if it's true or false; they're taking from the – their methodology, they're asking, whether children or adults, to become participants if they have been victims, and so they're already supposing that the participants are victims.

Regarding defendant's argument that there were no methods or protocols in place to screen out participants making false allegations and thus, no way to obtain an error rate, Wood explained that there was not an identifiable method to ascertaining whether the participants were in fact sexually abused:

> [DEFENSE COUNSEL:] Okay. So they're supposing that they're victims but it's not ascertained.
>
> [WOOD:] It's not. Based on the participants, the participants are saying –
>
> . . . .
>
> [DEFENSE COUNSEL:] Right. And so there's no digging down beneath the surface to see if those participants are being truthful about being abused.
>
> [WOOD:] You mean, like, are they making them take a lie detector test?
>
> [DEFENSE COUNSEL:] Or doing anything to find out if they're being truthful.
>
> [WOOD:] I don't know how else someone would find out the truth about child sexual abuse.
>
> [DEFENSE COUNSEL:] Exactly. So in these studies there's no way to know whether the participants who delayed reporting delayed reporting [sic] of a false occurrence or a true occurrence.
>
> [WOOD:] Well, I guess they are just going by what the participants are saying.

Wood's clarification demonstrated that obtaining the "known or potential rate of error" was not pertinent in assessing reliability based on the nature of delayed disclosures. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (stating that the "precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony.").

When asked by defense counsel if the research Wood reviewed involved a scientific data or theory, Wood suggested that if one method would be the creation of a control group, an ethical question would be raised in the context of delayed disclosures: "it would be unethical to have a control group to abuse children and uncontrol group to not abuse children." She further explained that: "I think that the theories that I have found is, is that they took populations that the researchers have

gathered in their research; and according to multiple research articles, some of those same theories cross all the research, is similar."

Lastly, in regards to defendant's argument that Wood did not account for alternative explanations of delayed disclosures, Wood's testimony reflected that she was identifying a non-exhaustive list of possible reasons:

> [THE STATE:] [] What are some of the reasons that a child, based on research and experience, in general, may delay disclosure?
>
> . . . .
>
> [WOOD:] There are *numerous* reasons. *Some* of them are due to fear . . . . Then, also, blame and self-guilt . . . . Also, concern that if they tell, what will happen to their family. . . . and so *some* of those are the reasons that children do not tell immediately.

(emphasis added).

In sum, defendant has failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing the reliability of Wood's testimony on delayed disclosures. *See Kumho*, 526 U.S. at 150, 143 L. Ed. 2d at 251-52 (stating that the *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his [or her] testimony."). Accordingly, we hold that Wood's testimony was the product of reliable principles and methods sufficient to satisfy the second prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

B. Ineffective Assistance of Counsel

[2] In his second argument on appeal, defendant contends that he received ineffective assistance of counsel ("IAC") when his attorney elicited evidence of guilt that the State had not introduced. Specifically, defendant argues that while the State only elicited testimony from H.M. about one instance of sexual intercourse with defendant, defense counsel asked H.M. a leading question implying that she had sex with defendant on two occasions.

Defendant directs us to the following exchange that occurred during defense counsel's cross-examination of H.M.:

> [DEFENSE COUNSEL:] So the first weekend that my client, according to you, inappropriately touched you and put

> his hands in your vagina and actually, you said, had sexual intercourse with you, you didn't tell your dad, did you?
>
> [H.M.:] No.
>
> . . . .
>
> [DEFENSE COUNSEL:] So how many times are you saying that my client had actually put his penis inside of you, how many different nights?
>
> [H.M.:] Two times.

In the present case, the record is not sufficiently complete to determine whether defendant's IAC claim has merit. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ."). "Trial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test." *State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). Accordingly, the claim is premature and we are obligated to dismiss it "without prejudice to the defendant's right to assert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

C. Mistrial

[3] In his third argument, defendant contends that the trial court erred by failing to declare a mistrial *sua sponte* after H.M.'s father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial. In our previous decision, we relied on *State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004), and held that defendant did not preserve this argument for appellate review. In accordance with the Supreme Court's 1 March 2018 remand order, we now address the merits of defendant's argument that the trial court erred by failing to declare a mistrial *sua sponte*. After a careful review of the record, we hold that the trial court did not abuse its discretion by failing to declare a mistrial *sua sponte*.

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (2015). "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (citation omitted), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In the present case, defendant points to several instances of conduct by H.M.'s father which he contends disrupted the "atmosphere of judicial calm" to which he was entitled. The first instance occurred in October 2015 at defendant's original court date which was later rescheduled. The trial court judge had just informed the audience to "maintain proper courtroom decorum at all times." Thereafter, defense counsel informed the trial court as follows:

> [DEFENSE COUNSEL:] Your Honor, related to that, I would ask the Court not just in the courtroom, but outside the courtroom. This morning the alleged victim's father in a very loud voice made some derogatory comments to me about my client.
>
> And since we're going to have jurors, prospective jurors in that hallway during the course of jury selection and the trial itself, I would ask the Court to instruct him not to do that in the hallway because jurors are everywhere in this courthouse.

The trial court judge responded by stating:

> THE COURT: There is to be no contact; all right? And I expect that from everyone. Look, this is a – court's a place where trials are tried in the courtroom and not in the hallway. And I'm not going to have any type of intimidation by anybody take place, a witness, a party, the defendant, the victim. It's just not going to happen.
>
> And if it's reported to me that it does occur, you have been warned and I will deal with it appropriately; all right?

The second instance occurred in April 2016, prior to the commencement of jury selection:

> [DEFENSE COUNSEL:] Your Honor, one more thing. This is a security matter for the courtroom staff. I've been informed by [defendant] and his girlfriend, they are both present in court today, both are inside the courtroom, that

> [H.M.'s father] approached my client and said something to the effect of – pardon my French – but f*** with my daughter, I'm going to f*** with you then he was on the phone standing close enough that his comments could be heard on the phone saying if [H.M.'s] mother was still alive, [defendant] would be dead, and, finally, that I'm going to kill the motherf***er. So we had some of these issues six months ago when we started this trial, and they're popping up again, and I'm very concerned about him sort of threatening when they got here. And the police may be made aware of this later when we finish with court, but I just wanted the Court and staff to know about the security concerns that I have with my client and others.
>
> THE COURT: I appreciate you making the courtroom and the court officers aware of that. All right.

Defendant also points to several occasions during H.M.'s father's testimony where he was "admonished" by the trial court:

> THE COURT: If you know what [defense counsel is] asking, answer. If you don't, say you don't know.
>
> . . . .
>
> THE COURT: Listen to [defense counsel's] question.
>
> . . . .
>
> THE COURT: Sir, wait for the next question, please.
>
> . . . .
>
> [DEFENSE COUNSEL:] So going back to the morning that you discovered this on February 22nd, you speak to police at the scene of the karate studio, and then it's another couple weeks before Detective Bridges follows up and does anything?
>
> [H.M.'S FATHER:] Yeah. That's the good old Mecklenburg County court system, sir.
>
> THE COURT: Sir, if I have to keep admonishing you one more time –
>
> [H.M.'S FATHER:] I apologize.
>
> THE COURT: I'm going to – don't interrupt me. – about answering these questions directly, I'm going [to] exclude

> you from this trial and strike your testimony from the record, and you're going to be out in the hallway. Do you understand me?
>
> [H.M.'S FATHER:] Yes, sir.
>
> THE COURT: All right. Let's – I'm tired of this. Answer the lawyers' questions directly. Don't throw in editorial comments, don't threaten the lawyers or anybody else in this courtroom, and answer these questions, and let's move on with this. I'm sorry, [defense counsel.] Go ahead.

The record demonstrates that the trial judge took immediate measures to address H.M.'s father's behavior, and ordered him to answer questions directly and refrain from making editorial comments or threats. In each of these instances, defendant did not request additional action by the trial court, move for a mistrial, or object to the trial court's method of handling the alleged misconduct in the courtroom. We note that, with regard to each act that the defendant characterizes as abusive and prejudicial, the trial judge was in the best position to investigate any allegations of misconduct. *See State v. Washington*, 141 N.C. App. 354, 376, 540 S.E.2d 388, 403 (2000) (citation omitted). In light of the immediate and reasonable steps taken by the trial court to address H.M.'s father's behavior, and the totality of the facts and circumstances of the case, we find that the trial court did not abuse its discretion when it did not *sua sponte* declare a mistrial. Therefore, we find this argument to be without merit.

D. Trial Court's Ruling in Presence of Jury

[4] In his final argument on appeal, defendant asserts that the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. Specifically, defendant argues that because the trial court's ruling was audible to the jury, the exchange was a "focal point" of the jury's short trip to the courtroom, and the jury was not made aware of the difference in the standards of proof necessary to survive a motion to dismiss as compared to obtaining a conviction, the trial court's ruling carried a substantial risk of prejudice. We are not convinced by defendant's arguments.

N.C. Gen. Stat. § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2015).

We find the holding in *State v. Welch*, 65 N.C. App. 390, 308 S.E.2d 910 (1983), to be controlling on this issue. The defendant in *Welch* argued that the trial court expressed an opinion, in violation of N.C. Gen. Stat. § 15A-1222, by summarily denying his motion to dismiss while in the presence of the jury. *Id.* at 393-94, 308 S.E.2d at 912. Our Court stated as follows:

> The record, however, does not affirmatively disclose that the ruling was in fact audible to the jurors. Defendant did not seek to have the ruling made out of the presence of the jury, nor did he object or move for mistrial on this account at trial. Generally, ordinary rulings by the court in the course of trial do not amount to an impermissible expression of opinion. *State v. Gooche*, 58 N.C. App. 582, 586-87, 294 S.E.2d 13, 15-16, *modified on other grounds*, 307 N.C. 253, 297 S.E.2d 599 (1982). At most the ruling here merely informed the jury that the evidence was sufficient to allow it to decide the case. On this record no prejudice to defendant appears.

Id. at 393-94, 308 S.E.2d at 912-13.

The circumstances found in *Welch* are analogous to those found in the present case. At the close of the State's evidence and outside the presence of the jury, defendant made a motion to dismiss the remaining charges. The trial court denied this motion. The next day, following the presentation of defendant's evidence, defendant renewed his motion to dismiss while the jury was present. Again, the trial court denied his motion. Defendant did not seek to have the ruling made outside the presence of the jury, he did not object, and he did not move for a mistrial on this account. Accordingly, we hold that defendant's argument is meritless.

NO ERROR.

Judges ELMORE and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JEFFREY SCOTT SMITH, DEFENDANT

No. COA17-384

Filed 3 April 2018

1. Appeal and Error—interlocutory orders and appeals—order disqualifying counsel—immediately appealable

An order disqualifying counsel is generally interlocutory but immediately appealable because it affects a substantial right.

2. Criminal Law—disqualification of prosecutor—conflict of interest

The trial court exceeded its lawful authority by ordering the recusal of a district attorney and his entire staff for a conflict of interest in defendant's criminal action where business entities affiliated with defendant filed a civil complaint against the district attorney. A conflict of interest sufficient to disqualify a prosecutor cannot arise from from the unilateral actions of a criminal defendant, and the trial court's order here did not include findings as to how the substance of the civil case created a conflict. Moreover, the order was not narrowly tailored to address any conflict.

Appeal by the State from orders entered 13 January 2016 and 19 August 2016 by Judge Ola M. Lewis in Bladen County Superior Court. Heard in the Court of Appeals 18 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Kip David Nelson, for Defendant-Appellee.

INMAN, Judge.

The State appeals from an order entered by Judge Ola M. Lewis in Bladen County Superior Court recusing the District Attorney of the 13th Judicial District and his staff from further prosecuting Jeffrey Scott Smith ("Defendant") and five unnamed co-defendants in criminal actions arising from the commercial use of promotional internet software. The State also appeals from the denial of its motion to reconsider the recusal

order. The State argues that the trial court's order must be vacated on three grounds: (1) the trial court exceeded its lawful authority by recusing the entire District Attorney's Office, (2) the *sua sponte* nature of the recusal order—decided without notice or a hearing—undermines the adversarial process of our legal system, and (3) the trial court's findings of fact are not support by any evidence.

After careful review, we vacate the trial court's recusal order and remand for further proceedings. Because we vacate the recusal order, the State's appeal from the trial court's denial of its motion for reconsideration is moot.

Factual and Procedural History

On 10 June 2013, Defendant was indicted on two counts of electronic sweepstakes violations pursuant to N.C. Gen. Stat. § 14-306.4(b) in case numbers 13 CRS 50477 and 13 CRS 50479. Defendant entered a plea of not guilty, the case proceeded to trial, and on 10 April 2014, a mistrial was declared following a deadlocked jury. Defendant, who had been released on pre-trial bond, remained free pending the resolution of the charges.

Defendant was next indicted on 6 July 2015 on seven counts of felonious possession of five or more video gaming machines (15 CRS 944, 947, 948, 949, 950, 951; 15 CRS 50858), seven counts of felonious operation of five or more video gaming machines in violation of N.C. Gen. Stat. § 14-306.1A (15 CRS 945, 946, 956, 957, 958 959; 15 CRS 50855), two counts of misdemeanor gambling (15 CRS 952, 953), and two counts of misdemeanor electronic sweepstakes violations pursuant to N.C. Gen. Stat. § 14-306.4(b) (15 CRS 954, 955). The State filed a motion to revoke Defendant's initial bond of $68,750 and to set a new secured bond in the amount of $500,000.

Defendant filed a response to the State's motion to increase bond, along with a motion to dismiss all charges for prosecutorial vindictiveness. On the same day, Cybernet LLC and Aladdin Real Estate, LLC, business entities affiliated with Defendant, filed a civil complaint in Bladen County Superior Court against Jonathan David, in his individual capacity and in his official capacity as the District Attorney for the 13th Judicial District, James McVicker, in his individual capacity and in his official capacity as the Sheriff of Bladen County, and Travis Deaver, in his individual capacity and in his official capacity as a Deputy Sheriff of Bladen County.

A hearing on the State's motion to increase bond was set for 11 January 2016, but the parties agreed to continue the hearing, after

Defendant's motion to dismiss the charges for prosecutorial vindictiveness was served on the State only three days before the proposed hearing.

Despite the parties' agreement to seek a continuance of the State's motion, at the 11 January 2016 Criminal Session of Bladen County Superior Court, the trial court, *sua sponte* and without a hearing, rendered an oral order removing the District Attorney for the 13th Judicial District, and his staff, from serving as the prosecutors in the pending matters regarding Defendant.[1] Two days later, the trial court issued its written order of recusal, signed *nunc pro tunc* to 11 January 2016, in which it made the following Findings of Fact:

> 1. That the Defendant stands charged with twenty (20) indictments, all involving Defendant's wife's businesses which use internet promotional software.
>
> 2. That the State and the Defendant had agreed to continue the hearing since the District Attorney was served on January 8th, 2016 with the vindictiveness dismissal motion.
>
> 3. That, also on Friday, January 8th, 2016, a civil action was filed against the District Attorney, and others, which involves damages suffered by Defendant's company and Defendant's wife's company during the Bladen County Sheriff's raid which resulted in most of the Defendant's criminal charges. That file is 16 CVS 9, Bladen County Clerk of Superior Court, and is incorporated herein.
>
> 4. That the Court finds that the civil filing creates a conflict of interest, and that the District Attorney for the 13th Judicial District, and his staff, should be recused from further prosecution of the criminal action.
>
> 5. That there are five (5) Co-Defendants charged with the same offenses as the Defendant, arising out of the same facts and circumstances.

From these facts, the trial court made the following Conclusions of Law:

> 1. That the Court has jurisdiction over the subject matter of this action.

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1. The parties stipulated to the events of the 11 January 2016 Criminal Session of Bladen County Superior Court as no recordings or transcripts were taken of the oral order.

> 2. That the civil action filed in File No. 16 CVS 9, against the District Attorney for the 13th Judicial District, creates a conflict of interest which prevents the District Attorney from being involved in further prosecution of the Defendant.
>
> 3. That the District Attorney should be recused from any further criminal prosecution of the Defendant or any co-Defendants.

The trial court's order decreed:

> Based on the Foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged, and Decreed that the District Attorney for the 13th Judicial District, and his staff, are hereby recused from any further prosecution of these cases or any of the cases of the Co-Defendants.

Two days later, on 15 January 2016, the State filed a motion for reconsideration of the recusal order. A hearing was set for 25 April 2016, however before this date, the State waived its request for a hearing and requested that the motion be decided on the briefs. The trial court denied the State's motion by order signed on 1 August 2016 and filed 19 August 2016. On 16 August 2016, the State filed a notice of appeal from both the recusal order and the denial of its motion to reconsider. The State withdrew this appeal on 5 December 2016.

A month later, on 6 January 2017, the State filed a petition for writ of certiorari with this Court seeking review of both the recusal order and the denial of its motion to reconsider. We granted this petition by order entered 24 January 2017.

Analysis

The State argues that the trial court's recusal order must be vacated because the trial court exceeded its lawful authority by recusing the entire District Attorney's Office from further prosecution of Defendant and the unnamed co-defendants. We agree.

1. Appellate Jurisdiction and Standard of Review

[1] North Carolina's appellate courts have not previously reviewed a trial court's order recusing a district attorney's office. We have, however, reviewed a trial court's order disqualifying a district attorney's office. *See State v. Scanlon*, 176 N.C. App. 410, 434, 626 S.E.2d 770, 786 (2006). For the purposes of our review today we note the primary distinction between *recusal* and *disqualification* is the self-imposing nature

associated with *recusals* compared with the directive nature associated with *disqualifications*.[2] Because the trial court's order compels the District Attorney's Office's recusal, we review the order as one disqualifying the District Attorney and his staff.

While generally interlocutory, an order disqualifying counsel is immediately appealable because it affects a substantial right. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726-27, 392 S.E.2d 735, 736-37 (1990); *see also Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 293, 420 S.E.2d 426, 429 (1992) ("[T]he granting of a motion to disqualify counsel, unlike a denial of the motion, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client.").

In *Scanlon*, this Court held that a trial court's "decision regarding whether to disqualify counsel 'is discretionary with the trial judge and is not generally reviewable on appeal.' " *Scanlon*, 176 N.C. App. at 434, 626 S.E.2d at 786 (citation omitted). This abuse of discretion standard is consistent with other decisions by both this Court and the North Carolina Supreme Court. *See*, *e.g.*, *Travco Hotels*, 332 N.C. at 295, 420 S.E.2d at 430 ("Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." (citation omitted)).

When applying an abuse of discretion standard, our review "is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted). "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." *Id.* at 777, 324 S.E.2d at 833. On a motion for disqualification, "the findings of the trial court are binding on appeal if supported by any

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2. Black's Law Dictionary defines *recusal* as "*removal of oneself* as judge or policymaker in a particular matter, esp. because of a conflict of interest." Black's Law Dictionary (10th ed. 2014) (emphasis added). *Disqualification* is defined as "[s]omething that incapacitates, disables, or makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party." Black's Law Dictionary (10th ed. 2014).

competent evidence, and the court's ruling may be disturbed only where there is a manifest abuse of discretion, or if the ruling is based on an error of law." *State v. Rogers*, 219 N.C. App. 296, 299, 725 S.E.2d 342, 345 (2012) (citing *State v. Taylor*, 155 N.C. App. 251, 255, 574 S.E.2d 58, 62 (2002)).

2. Discussion

[2] The principal case in our jurisdiction addressing a trial court's authority to disqualify a prosecutor is *State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991). In *Camacho*, the trial court ordered:

> *[I]n order to avoid even the possibility or impression of any conflict of interest*, the Court directs that the District Attorney's Office immediately withdraw from the case; that the District Attorney's Office, including Ms. Shappert, have no further participation, either directly or indirectly, with the case; that the Attorney General's Office be contacted immediately by the District Attorney's Office for representation of the State in the matter; and that the Attorney General's Office shall immediately assume the prosecution of the case.

Id. at 593, 406 S.E.2d at 870 (emphasis in original). Our Supreme Court addressed whether each directive in the trial court's order exceeded the trial court's authority. *Id.* at 593-95, 406 S.E.2d at 870-72. The trial court had disqualified the district attorney and his staff from further participation in the defendant's case for the purpose of avoiding "even the possibility or impression of any conflict of interest." *Id.* at 595, 406 S.E.2d at 871-72. The Supreme Court held "that the trial court exceeded its authority in several respects . . . ." *Id.* at 595, 406 S.E.2d at 872.

Camacho articulated the rule that "a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that *an actual conflict of interests exists*[,]" as defined by that opinion. *Id.* at 601-02, 406 S.E.2d at 875-76 (emphasis added) ("[W]e conclude that where a trial court has found 'an actual conflict of interests' *as that term has been defined in this opinion*, the trial court may disqualify the prosecutor . . . ." (emphasis added)). The Court defined "an actual conflict of interests" as arising when "a District Attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted and, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial." *Id.* at 601, 406 S.E.2d at 875. The Court went on to note that "[e]ven then . . . any order of disqualification ordinarily should be

directed only to individual prosecutors who have been exposed to such information." *Id.* at 601, 406 S.E.2d at 876.

Our Supreme Court in *Camacho* considered the constitutional nature of the office of a district attorney, noting: "The several District Attorneys of the State are independent constitutional officers, elected in their districts by the qualified voters thereof, and their special duties are prescribed by the Constitution of North Carolina and by statutes." *Id.* at 593, 406 S.E.2d at 870 (citations omitted). It was with this constitutional and statutory mandate in mind that the Court rejected *per se* rules of disqualification and concluded: "The courts of this State . . . must, at the very least, make every possible effort to avoid unnecessarily interfering with the District Attorneys in their performance of such duties. . . . [And] any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible." *Id.* at 595, 406 S.E.2d at 872 (citations omitted).

Camacho ultimately held that a trial court considering disqualifying a prosecutor should balance the respective interests of the defendant, the government, and the public. *Id.* at 600, 406 S.E.2d at 874-75. The Court adopted the balancing test established by the United States Court of Appeals for the Seventh Circuit in *United States v. Goot*, 894 F.2d 231, 236 (7th Cir. 1990), *cert. denied*, 498 U.S. 811, 112 L. Ed. 2d 22 (1990). *Goot* reasoned that

> [The defendant] has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. The government has an interest in fulfilling its public protection function. To that end, the convenience of utilizing the office situated in the *locus criminis* is not lightly to be discarded. Furthermore, the government has a legitimate interest in attracting qualified lawyers to its service.

894 F.2d at 236. The Seventh Circuit panel affirmed the denial of the defendant's motion to disqualify the entire United States District Attorney's Office because the government had sufficiently screened the United States Attorney from the prosecution of the defendant "so that each and every particular interest of [the defendant], the government, and the public was met." *Id.* at 237.

The trial court's order in the present case fails for several reasons. First, *Camacho* plainly directs that a prosecutor may be disqualified only when the trial court has found the existence of a conflict of interests as defined by that decision—a prior representation of Defendant by the

prosecutor in the matter sought to be prosecuted, in which that prosecutor has obtained confidential information detrimental to Defendant. The trial court here made no such finding. Nor was there any evidence before the trial court, at the time of its order, that would support a finding that a member of the District Attorney's Office had previously represented Defendant in a related matter and received confidential information detrimental to Defendant. Rather, the trial court explicitly justified its recusal order based on a different consideration, stating that "the civil action filed in File No. 16 CVS 9, against the District Attorney for the 13th Judicial District, creates a conflict of interest which prevents the District Attorney from being involved in further prosecution of the Defendant." The mere filing of a civil suit is insufficient to meet *Camacho*'s criteria to disqualify the District Attorney or any of his staff.

Even assuming *arguendo* that a conflict of interests beyond the definition provided in *Camacho* could support an order compelling the recusal of—*i.e.*, disqualifying—a prosecutor, the unilateral filing of a civil suit by a criminal defendant would not, on its own, suffice. The North Carolina Supreme Court in *State v. Britt*, 291 N.C 528, 231 S.E.2d 644 (1977), entertained possible scenarios in which it might be proper to remove a prosecutor. In *Britt*, the defendant sought to remove a prosecutor based "upon the fact that this [was] the fourth trial for this offense by the same district attorney, and the fact that [the North Carolina Supreme] Court reversed the conviction of [the] defendant for overzealous conduct on the part of the district attorney . . . ." *Id.* at 541, 231 S.E.2d at 653. The Supreme Court, rejecting the defendant's argument, explained that "[i]n the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand." *Id.* at 541-42, 231 S.E.2d at 653. The Court noted that "the prosecutor was acting as the advocate of the State's interest. . . . There [had] been no showing of misconduct in [the] trial . . . [nor] evidence that the prosecutor [had] any conflict of interest, E.g., [sic] prior representation of [the] defendant; nor that the prosecutor [had] any self-interest in obtaining the conviction of [the] defendant, E.g., [sic] revenge; nor that the prosecutor [had] any interest adverse to that of protecting the State." *Id.* at 542, 231 S.E.2d at 653-54 (citations omitted).

A conflict of interests sufficient to disqualify a prosecutor cannot arise merely from the unilateral actions of a criminal defendant. The trial court's order here included no findings of fact as to how the substance of the civil case created a conflict of interest for the District Attorney, or any of his staff, in the criminal action.

Moreover, the trial court's order is not drawn as narrowly as possible, as required by our Supreme Court. *Camacho* directs that "any order tending to infringe upon the constitutional powers and duties of an elected District Attorney must be drawn as narrowly as possible." 329 N.C. at 595, 406 S.E.2d at 872. The trial court's order here disqualifies the named District Attorney in the civil suit, as well as the entire District Attorney's Office for the 13th Judicial District. Additionally, the order applies not only to Defendant, but to five other unnamed co-defendants.

Because the trial court's order lacks the proper findings sufficient to support the disqualification of the prosecutor or any of his staff, and because the trial court's order is not narrowly tailored to address any possible conflict of interests, we hold that the trial court exceeded its lawful authority in ordering the recusal of the District Attorney for the 13th Judicial District and his entire staff.[3]

Conclusion

For the foregoing reasons, we vacate the trial court's recusal order and remand for further proceedings.

VACATED AND REMANDED.

Judges ELMORE and DIETZ concur.

3. We note that the trial court did not proceed with a hearing on Defendant's motion to dismiss for prosecutorial misconduct. Our opinion today does not address that motion or Defendant's contentions therein.

SULLIVAN v. PUGH

[258 N.C. App. 691 (2018)]

DONALD SULLIVAN, PLAINTIFF
v.
ROBERT WAYNE PUGH AND KAREN LLOYD PUGH, HIS LEGAL WIFE, DEFENDANTS. PENDER COUNTY, NO. 15-CVS-348 TOG PROPERTIES, LLC, PLAINTIFF
v.
KAREN PUGH, DEFENDANT

No. COA17-450

Filed 3 April 2018

1. Civil Procedure—right to trial by jury—summary judgment—no conflict

The constitutional right to trial by jury is premised upon a preliminary determination by the trial judge that there are genuine issues of fact and credibility which require submission to a jury.

2. Civil Procedure—summary judgment—agency—transfer of ownership interest

The determination of whether an agent had authority for the transfer of ownership in a company was a matter of law.

3. Civil Procedure—summary judgment—-transfer of ownership interests in real property

Plaintiff had no right to a trial by jury where there was no genuine issue of fact requiring a jury concerning the the apparent authority to transfer ownership interests in real property.

Appeal by plaintiff TOG Properties, LLC from order entered 14 February 2017 by Judge Phyllis M. Gorham in Pender County Superior Court. Heard in the Court of Appeals 5 October 2017.

Donald Sullivan, pro se, plaintiff-appellant.

The Law Offices of Oliver & Cheek, PLLC, by Ciara L. Rogers, for plaintiff-appellee TOG Properties, LLC.

BERGER, Judge.

Donald Sullivan ("Sullivan") appeals a February 14, 2017 order granting summary judgment to TOG Properties, LLC ("TOG Properties") on its cross-claim for declaratory judgment. This dispute arose over which party, Sullivan or TOG Properties, owned certain timbered property at the time it was damaged by a fire allegedly set by Karen Pugh ("Pugh")

on April 14, 2012. Whichever party owned the property at the time of the fire would hold any legal claims against Pugh resulting from the damages to the property as a result of the fire. Sullivan appeals, arguing that the trial court erred in granting TOG Properties' summary judgment motion because this ruling denied him his right to a jury trial and because there was a genuine issue of material fact which should have precluded the trial court from granting the motion. We disagree.

Factual and Procedural Background

On June 1, 2006, TOG Properties purchased approximately 1500 acres of timbered real property in Pender County, North Carolina from B&N Properties of Pender, LLC ("B&N"). B&N financed the sale to TOG Properties, secured by a deed of trust. At the time of the sale, Kenner Day ("Day") was a manager of TOG Properties as well as the designated registered agent of TOG Properties in North Carolina. On May 9, 2010, Day was terminated as TOG Properties' president and was removed from the company. On July 16, 2010, TOG Properties filed for bankruptcy, and B&N subsequently filed a proof of claim as senior creditor with a claim to the real property and assigned its interest to Sullivan, its sole shareholder and manager.

On April 14, 2012, Pugh set a fire near her home on property adjacent to the property at issue in this appeal damaging approximately 500 acres of timber. At the time of the fire, TOG Properties still maintained ownership of the property. Sullivan subsequently foreclosed on the property, and on October 20, 2012, Sullivan purchased the property in a foreclosure sale at the Pender County Courthouse. In the following months, Day, the former president and manager of TOG Properties, sent letters and executed documents purporting to transfer TOG Properties' legal and equitable interests in any proceeds or claims related to the fire to Sullivan.

Sullivan filed an amended complaint against Robert Wayne and Karen Pugh on February 3, 2015 alleging negligence and negligence *per se* seeking damages for the burning of the timber on the property now owned by Sullivan. On April 10, 2015, TOG Properties also filed a complaint against Pugh seeking to recover damages resulting from the fire. TOG Properties additionally filed a cross-claim against Sullivan seeking a declaratory judgment that it was the owner of the property at the time of the fire and was, therefore, the sole owner of any claims against Pugh.

On November 16, 2016, TOG Properties filed a motion for summary judgment on its cross-claim for declaratory judgment. The trial court

granted summary judgment in TOG Properties' favor on February 14, 2017, and it is from this order that Sullivan timely appeals.

Analysis

[1] Sullivan argues first that his constitutional right to a trial by jury was denied when the trial court granted TOG Properties' motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. He asserts that, although Rule 56 is "a commendable attempt by the judiciary to extend its power in order to reduce its docket and render the courts more efficient," it is nevertheless "blatantly unconstitutional," treasonous, and should not be tolerated. In support of his argument, Sullivan cites our North Carolina Constitution, Article I, Section 25, which states that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25.

It is true that "[t]he right to a jury trial is a substantial right of great significance." *Mathias v. Brumsey*, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975), *disc. review denied*, 289 N.C. 140, 220 S.E.2d 798 (1976). However, "[t]he constitutional right to trial by jury, N.C. Const. Art. I, § 25, is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." *Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). As both the United States Supreme Court stated in *Ex parte Wall* and this Court adopted in *In re Bonding Co.*, " 'it is a mistaken idea that due process of law requires a plenary suit and a trial by jury[] in all cases where property or personal rights are involved.' " *In re Bonding Co.*, 16 N.C. App. 272, 277, 192 S.E.2d 33, 36 (brackets omitted) (quoting *Ex parte Wall*, 107 U.S. 265, 289, 27 L. Ed. 552 (1883)), *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972).

Therefore, because "[t]he right to a jury trial accrues only when there is a genuine issue of fact to be decided at trial," *State ex rel. Albright v. Arellano*, 165 N.C. App. 609, 618, 599 S.E.2d 415, 421 (2004), we must resolve Sullivan's other argument raised in his appeal, whether the trial court erred in granting TOG Properties' motion for summary judgment. Specifically, Sullivan argues that there remains the genuine issue of material fact that requires determination by a jury: whether Day had the apparent authority as an agent of TOG Properties to transfer TOG Properties' legal and equitable interests in any proceeds or claims related to the fire.

[2] "The doctrine of summary judgment requires cautious application, ensuring that no litigant is unjustly deprived of his right to try disputed factual issues." *Leiber v. Arboretum Joint Venture, LLC*, 208 N.C. App. 336, 344, 702 S.E.2d 805, 811 (2010) (citation omitted), *disc. review denied*, 365 N.C. 195, 711 S.E.2d 433 (2011). Citing Rule 56 of the North Carolina Rules of Civil Procedure, our Supreme Court explained summary judgment in *Dalton v. Camp*, stating that it

> is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. The rule is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed.

Dalton v. Camp, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001) (citations omitted). Therefore, if "the trial court determines that only questions of law, not fact, are at issue," a trial is not necessary and is to be eliminated, along with the attendant opportunity for the nonmoving party to present its facts to a jury. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 437, 278 S.E.2d 897, 903-04 (1981).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. Moreover, the party moving for summary judgment bears the burden of establishing the lack of any triable issue." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (citations omitted). Therefore, we must determine whether the trial court could correctly assert as a matter of law that "Day did not have authority, actual or apparent, to act on behalf of TOG Properties when the Day letters were executed," namely, Day had no actual or apparent agency relationship with TOG Properties at the time he transferred TOG Properties' substantive rights to Sullivan. If no agency relationship existed at that time, then the purported transfer of rights was void. "Unless there is but one inference that can be drawn from the facts, whether an agency relationship exists is a question of fact for the jury. If only one inference can be drawn from the facts then it is a question of law for the trial court." *Hylton v. Koontz*, 138 N.C. App. 629, 635-36, 532 S.E.2d 252, 257 (2000) (citing *Hoffman v. Moore Regional Hospital*, 114 N.C. App. 248, 250, 441 S.E.2d 567, 569, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994)), *disc. review denied and dismissed*, 353 N.C. 373, 546 S.E.2d 603-04 (2001).

"[A]n agent is one who acts for or in the place of another by authority from him. Two factors are essential in establishing an agency relationship: (1) the agent must be authorized to act for the principal; and (2) the principal must exercise control over the agent." *Leiber*, 208 N.C. App. at 344, 702 S.E.2d at 811 (citations, quotation marks, and brackets omitted). A principal will only be held liable to a third person for the actions of his agent "when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority." *First Union Nat'l Bank v. Brown*, 166 N.C. App. 519, 527, 603 S.E.2d 808, 815 (2004) (citation omitted). Furthermore, the doctrine of apparent authority

> may not be invoked by one who knows, or has good reason for knowing, the limits and extent of the agent's authority. In such case the rule is: Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, or what he is not, empowered to do for his principal.

Commercial Solvents v. Johnson, 235 N.C. 237, 242, 69 S.E.2d 716, 720 (1952) (citation and quotation marks omitted).

Here, the uncontroverted evidence presented to the trial court in support of TOG Properties' summary judgment motion "indicated that Day's role as President of TOG Properties had been terminated on May 9, 2010"; thus, Day had no actual authority after that date. Additionally, no allegations were made that the establishment of a contract, or ratification of a contract, between TOG Properties and Sullivan is an issue. Therefore, our final determination is whether, as a matter of law, Day had the apparent authority to bind TOG Properties to the transfer to Sullivan of its right to seek compensation for its damages caused by the April 2012 fire.

[3] Sullivan presented no evidence beyond the assertions in his pleadings to oppose TOG Properties' motion for summary judgment. The exhibits and affidavits presented to the trial court in support of TOG Properties' motion showed that Sullivan knew, or had good reason for knowing, that Day had no authority to bind TOG Properties. First, the evidence tended to show that Sullivan had been served TOG Properties' bankruptcy petition in 2010 as a creditor of the company. The Statement of Financial Affairs served on Sullivan with the bankruptcy petition listed Day under the section "Former partners, officers, directors and

shareholders" as an officer or director of TOG Properties "whose relationship with the corporation terminated within one year immediately preceding the commencement of [the bankruptcy] case." The date of Day's termination was listed as May 9, 2010. Second, the agreement purporting to cede any rights to any insurance claims resulting from the 2012 fire was introduced to the trial court in support of TOG Properties' motion. This agreement between Day and Sullivan, which they had sworn to, signed, and notarized in November and December of 2014, twice identified Day as a *former* member and registered agent of TOG Properties. Sullivan makes no attempt to explain what authority a *former* member or agent may reasonably possess that could bind his principal.

Because only one inference can be drawn from the facts presented to the trial court for summary judgment, whether an agency relationship existed between Day and TOG Properties is a question of law for the court, and was correctly settled through summary judgment. No genuine issue of fact or credibility exists which would require submission of this question to the jury; therefore, Sullivan has no constitutional right to trial by jury.

Conclusion

The trial court did not err in ordering that, because no genuine issue of material fact existed, it could determine the rights, status, and legal relations of TOG Properties and Sullivan as a matter of law. Therefore, the order granting summary judgment to TOG Properties is affirmed.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 APRIL 2018)

ANTICO v. N.C. DEP'T OF PUB. SAFETY No. 17-1085	Office of Admin. Hearings (16OSP12191)	Affirmed
CONNOR v. CONNOR No. 17-987	Mecklenburg (11CVD12894)	Affirmed
DORAN v. FRESH MKT. No. 17-836	N.C. Industrial Commission (15-031965)	Affirmed
IN RE A.S. No. 17-1100	Beaufort (15JA83-84)	Affirmed in part; Reversed and Remanded in part
IN RE D.M.P. No. 17-1073	Stokes (16JT149)	Affirmed
IN RE E.M.S. No. 17-1078	Wayne (15JT37)	Affirmed
IN RE G.N.R. No. 17-914	Craven (16JT80)	Vacated
IN RE J.A.K. No. 17-1056	Mecklenburg (15JT256-258)	AFFIRMED
IN RE P.R. No. 17-901	Wake (16JA265-267)	Affirmed
IN RE R.L.H. No. 17-1136	Guilford (16JT201) (16JT408)	Affirmed
IN RE T.D.H. No. 17-956	Catawba (16JT91)	Reversed
LEWIS v. LEWIS No. 17-790	Craven (14CVD1573)	Dismissed
N.C. DEP'T OF INS. v. MATHIS No. 17-752	Union (16CVS3049)	Reversed and Remanded
QUANTUM MORTG. CORP. v. GHELANI No. 17-940	Mecklenburg (16CVS6368)	Affirmed

STATE v. LEONARD No. 17-898	Transylvania (15CRS51760) (15CRS51768)	No Error
STATE v. RAMOS No. 17-808	Wake (14CRS224665)	No Plain Error
STATE v. RICHMOND No. 17-87	Person (15CRS50275)	No Error
STATE v. SMITH No. 17-680	Wake (14CRS227618)	NO ERROR IN PART, REMANDED FOR RESENTENCING
STATE v. SPAULDING No. 17-1016	Robeson (14CRS55571) (17CRS305-306)	Reversed and Remanded
STATE v. TAYLOR No. 17-376	Mecklenburg (13CRS229505) (13CRS229508)	No Error
STATE v. ZINNA No. 17-1028	Gaston (16CRS50039) (16CRS50042)	No Error
WHITLEY v. BAUGUESS No. 17-1047	Wilkes (16CVD992)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

argument in the brief concerning why the ruling was erroneous or how plaintiff was prejudiced by it. **Shearin v. Reid, 42.**

Interlocutory appeal—substantial right—joinder of parties—individual property right—There was not a substantial right permitting an interlocutory appeal to go forward where the case involved a subsequent owner of a development who wanted to reduce a lake access area and the trial court ordered that additional property owners within the subdivision be joined as parties. Although plaintiffs (appellants) contended that they were deprived of a substantial right because the joinder order eliminated their individual property rights and replaced them with a group property right, the plain language of N.C.G.S § 1-260 indicated that plaintiffs individually had no such substantial right. The other lot owners were necessary parties and plaintiffs were not deprived of their asserted substantial right. **Regency Lake Owners' Ass'n, Inc. v. Regency Lake, LLC, 636.**

Interlocutory appeal—substantial right—order for joinder and rehearing of evidence—neither a verdict nor a judgment rendered—not a new trial—There was no effect on a substantial right such that an interlocutory appeal could be heard where the trial court ordered that additional parties be joined and evidence heard, and where plaintiff-appellant contended that a new trial had been granted. Neither verdict nor judgment were rendered, and the order was not for a new trial. **Regency Lake Owners' Ass'n, Inc. v. Regency Lake, LLC, 636.**

Interlocutory orders and appeals—order disqualifying counsel—immediately appealable—An order disqualifying counsel is generally interlocutory but immediately appealable because it affects a substantial right. **State v. Smith, 682.**

Interlocutory orders—costs and attorney fees—amount undetermined—An appeal of an order allowing plaintiff's motion to quash, granting a protective order, granting related costs and attorney fees was dismissed as interlocutory where the trial court did not certify its order as immediately appealable and the amount of the costs and fees was not determined. **Engility Corp. v. Nell, 402.**

Interlocutory orders—denial of motion to dismiss—governmental immunity—substantial right—The Court of Appeals had jurisdiction in a Tort Claims Act case to hear defendant Board of Education's appeal of an interlocutory order denying its motion to dismiss that were grounded on governmental immunity since they affected a substantial right and were immediately appealable. **Martinez v. Wake Cty. Bd. of Educ., 466.**

Interlocutory orders—grant or refusal of new trial—Although the appeal of a grant of a new trial is from an interlocutory order, an appeal may be taken from every judicial order that grants or refuses a new trial under N.C.G.S. § 1-277(a). **Piedmont Nat. Gas Co. v. Kinlaw, 481.**

Interlocutory—motion for change of venue—convenience of witnesses—The trial court's venue order was an interlocutory order where the parties' claims for child custody, child support, and equitable distribution remained unresolved. The grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable, while an order granting or denying a motion for a change based on the convenience of witnesses and the ends of justice is interlocutory. The trial court's findings here did not make clear under which subsection of N.C.G.S. § 1-83 it granted the motion to change the venue, but as the trial court appeared to find venue proper in either venue, it would appear that the decision was based on the convenience of witnesses. **Stokes v. Stokes, 165.**

APPEAL AND ERROR—Continued

Notice of appeal—motion to quash and objective order—untimely—writ of certiorari—A petition for certiorari was granted in an appeal from an order granting plaintiff's motion to quash and for a protective order. **Engility Corp. v. Nell, 402.**

Preservation of issues—constitutional objection—satellite-based monitoring—Rule of Appellate Procedure 2—Defendant in properly preserved a constitutional objection to the imposition of satellite-based monitoring (SBM) under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), even though he did not clearly reference the Fourth Amendment in his objection. His objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicated defendant's rights under *Grady* to a Fourth Amendment reasonableness determination. Further, even if his objection was inadequate, the Court of Appeals in its discretion would invoke North Carolina Rule of Appellate Procedure 2 under the particular circumstances of this case in order to review its merits. **State v. Bursell, 527.**

Preservation of issues—double jeopardy—Defendant's contention that double jeopardy precluded a new trial for assault after a mistrial was not preserved for appeal where he consented to the mistrial at the first trial and did not raise the issue during his second trial. **State v. Mathis, 651.**

Preservation of issues—double jeopardy—failure to object—The Court of Appeals declined to invoke Appellate Rule 2 to hear a kidnapping and sexual offense defendant's contentions on double jeopardy where defendant did not raise the issue at trial. **State v. Harding, 306.**

Preservation of issues—failure to object at trial—plain error—An alleged instructional error was not excluded from plain error review under the invited error doctrine in a prosecution for kidnapping and other offenses where the State alleged that defendant actively participated in crafting the instruction given and affirmed that it was "fine." **State v. Harding, 306.**

Preservation of issues—failure to object—sentencing—satellite-based monitoring order—statutory mandate—Defendant's right to appeal a satellite-based monitoring order was preserved despite his failure to object at trial where the issue he raised implicated a statutory mandate. **State v. Harding, 306.**

Preservation of issues—guardianship—notice—failure to raise issue at trial—Respondent-mother waived appellate review of her argument that the trial court erred by awarding guardianship of her child to a non-parent without finding that respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected parental status. Respondent-mother had ample notice that guardianship was being recommended, but she failed to raise the issue below. **In re C.P., 241.**

Preservation of issues—sentencing for two assaults—failure to object below—Notwithstanding defendant's failure to object below to being sentenced for both assault on a female and assault by strangulation, defendant's argument was preserved for appellate review where the court acted contrary to a statutory mandate. N.C.G.S. § 14-33(c) contains a mandatory prefatory clause that prohibits the trial court from punishing defendant for assault on a female since he was also punished for the higher offense of assault by strangulation based on the same conduct. **State v. Harding, 306.**

TERMINATION OF PARENTAL RIGHTS—Continued