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262 N.C. APP.

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

BRENNAN STATION 1671, LP, PLAINTIFF
v.
MICHAEL BOROVSKY, GOLDSMITH LLC D/B/A MB GOLDSMITHS AND
MICHAEL BOROVSKY, DEFENDANTS / THIRD-PARTY PLAINTIFFS
v.
KIMCO REALTY CORPORATION, CHINA COURT CHINESE RESTAURANT, INC.,
AND CHINA COURT, INC., THIRD-PARTY DEFENDANTS

No. COA18-184

Filed 16 October 2018

1. Landlord and Tenant—breach of contract—foul odor and mold—judgment notwithstanding the verdict

The trial court properly denied plaintiff-landlord’s motion for judgment notwithstanding the verdict on its breach of contract claim in a commercial landlord-tenant dispute. Although there was evidence that defendant-tenants breached their lease, they presented at least a scintilla of evidence—that plaintiff had failed to remedy the sources of a foul odor and mold problem—in support of their counterclaim for constructive eviction.

2. Landlord and Tenant—constructive eviction—jury instructions—language of lease and relevant law

The trial court’s omission of plaintiff-landlord’s preferred phrasing from its jury instructions did not amount to a misstatement of law where the instructions tracked the language and provisions of the lease agreement and reflected the relevant law of constructive eviction.

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[262 N.C. App. 1 (2018)]

3. Landlord and Tenant—constructive eviction—foul odor and mold—judgment notwithstanding the verdict

In a commercial landlord-tenant dispute, the trial court erred by granting plaintiff-landlord's motion for judgment notwithstanding the verdict to overturn the jury's verdict and award on defendant-tenants' counterclaim for constructive eviction. Defendant-tenants presented at least a scintilla of evidence that plaintiff-landlord had breached the lease by not remedying the sources of a foul odor and mold problem upon defendant-tenants' adequate and repeated notices of the problem.

4. Landlord and Tenant—constructive eviction—lost profits—after vacating premises—question for jury

In a commercial landlord-tenant dispute, the trial court erred by instructing the jury that it could award damages only for defendant-tenants' lost profits through the date defendant-tenants vacated the leased premises. Because defendant-tenants could prove their lost profits after vacating the premises with reasonable certainty, the issue should have been before the jury.

Appeal by plaintiffs from judgment and orders entered 13 October 2017 and 17 October 2017, respectively, by Judge Anderson D. Cromer in Wake County Superior Court. Heard in the Court of Appeals 20 September 2018.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and Aleksandra E. Anderson, for plaintiff-appellant/cross-appellee.

Mark Hayes and Nicholls & Crampton, P.A., by Adam M. Gottsegen, for defendant-appellee/cross-appellant.

TYSON, Judge.

Brennan Station 1671, LP ("Plaintiff") appeals from an order entered upon a jury's verdict denying Plaintiff's claims against Michael Borovsky, Goldsmith, LLC d/b/a MB Goldsmiths, and Michael Borovsky (collectively "Defendants"), finding in favor of Defendants' claims, and awarding Defendants \$60,000.00 on their counterclaim. Plaintiff also appeals the trial court's order denying its motion for judgment notwithstanding the verdict finding Defendants not liable. Defendants cross-appeal the trial court's granting of Plaintiff's motion for judgment notwithstanding

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the verdict setting aside the jury's verdict on their counterclaim and the trial court's limits on the scope of lost profits recoverable by Defendants.

I. Background

Defendants agreed to lease 1,238 square feet of premises located in Brennan Station Shopping Center in Raleigh, North Carolina, to operate a jewelry store ("premises"). In March 2011, Defendants entered into a lease agreement with GRE Brennan Station LLC for an initial term of three years and four months. Defendants were required to pay monthly installments of minimum annual rent and additional rent due and payable on the first day of each month. Defendant Michael Borovsky signed a personal guaranty agreement for the lease. In November 2011, GRE Brennan Station LLC sold the shopping center to Plaintiff, who became the successor-landlord under the lease agreement.

On 25 February 2014, Defendants sent an email to Plaintiff's property management company, Kimco Realty Corporation ("Kimco"), complaining they were "still getting a bad odor" inside the store. Kimco sent an employee to the store, but the smell had dissipated prior to his arrival.

On 23 April 2014, Defendants exercised their option to renew the term under the lease agreement and executed a first amendment to the lease. This amendment extended the lease term for three years, from 1 September 2014 through 31 August 2017, and then extended the term for an additional seven years, from 1 September 2017 through 31 August 2024. On that same date, Defendants wrote a letter to Plaintiff's property manager, complaining about the "toxic sewage smell" that had been plaguing the store "for the past several months to about a year[.]" In their brief, Plaintiff asserts it has no record of this letter.

Beginning in September 2014, Defendants began keeping a record of the presence of the foul smells inside the jewelry store and of the actions being taken. Defendants also kept a log of customers who acknowledged a "strong odor of sewage like smell."

In November 2014, Kimco contracted with a plumber to inspect the premises and investigate the smell. The plumber identified multiple possible causes of the sewage smell including degraded wax seals in the toilets in Defendants' premises and the adjacent Chinese food restaurant ("China Court"), and a possible clogged or deficient grease trap located outside behind the two properties. The plumber recommended a smoke test be performed to locate potential sewer gas leaks and the source or cause of the odor.

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Defendants sent a letter dated 16 December 2014 to Plaintiff, detailing the issues with the sewage odor, the property management's attempts to remedy the issue, and the loss of business because of the foul smell inside the store. Defendants referenced Article 22 of their lease, Quiet Enjoyment, and requested "someone from [Plaintiff's] legal department" to contact them "to discuss a resolution of this ongoing problem, including a rent reduction" to remedy for the loss of sales and profits. Plaintiff asserts there was no record of receipt of this letter either, and questions how the envelope was purported to include a copy of the lease agreement when the weight on the receipt indicated it was one ounce.

Defendants retained counsel, who sent another letter dated 14 January 2015. This letter complained of mold in the jewelry store and included a mold report. The letter also mentioned the issue of the sewage smell and its negative impact upon the jewelry business. Defendants' counsel asserted these issues violated Plaintiff's obligations under Article 22 of the lease agreement to provide Defendants with the right of quiet enjoyment. Defendants' counsel proposed rent abatement or an early termination of the lease as remedies for the violations.

By 26 January 2015, the toilets inside Defendants' premises and China Court were fixed and the grease trap was cleaned. A smoke test was conducted at the jewelry store and China Court and revealed no evidence of sewer gas leaks. Kimco indicated they had "no other ideas to remedy" the sewage smell.

On 12 February 2015, general counsel for Kimco sent a letter in response to Defendants' counsel's 14 January 2015 letter. The letter denied Plaintiff was in breach of the lease because Defendants had been continuously operating the business inside the premises. Further, Kimco asserted the operative article of the lease on the landlord's obligations would be Article 13, which details Plaintiff's duties to repair and maintain the property. The letter advised Defendants of their obligations and need to specify what repair obligation Plaintiff had failed to remedy, and their requirement to provide written notice of such obligation before Plaintiff would be considered in breach of the lease.

Further, the letter stated Plaintiff had inspected the areas it was responsible to maintain under the lease, the exterior walls and structural columns, and found no issues to address. Defendants were directed to look into the areas they were responsible for as tenant to maintain under the lease for potential sources of the odor and mold.

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Defendants' counsel responded in writing on 23 February 2015, and asserted Defendants' inability to peacefully enjoy the premises due to the daily issue of mold and the "horrible odor." The letter listed the numerous occasions Defendants had complained in writing, both via email and first-class mail, but also indicated: "please accept this [letter] as our client's written notice of the maintenance obligation of the landlord to remediate the mold in the premises." The letter reasoned the mold was due to "high moisture levels, which would have been caused by water intrusion in the exterior walls, as is the typical cause for the presence of mold."

On 11 March 2015, a roofing company was sent to inspect and repair the roof over the jewelry store. The roofer identified three holes in the membrane of the roof and found water had been entering the building. The holes in the roof were repaired and the area was cleaned. On 3 April 2015, Defendants' counsel sent a letter to China Court, to provide written notice of the issues with the mold and the odor and to assert the responsibility of China Court and Plaintiff for the damage.

On 1 June 2015, Defendants' counsel sent a certified letter to Plaintiff indicating the enclosed rent check for June would be Defendants' final rent payment. Defendants indicated they would vacate by the end of the month. Kimco's general counsel replied in an email noting the failure of Defendants to "provide anything to [Kimco or Plaintiffs] indicating it [was their] responsibility" to repair any damage, and that by leaving the premises Defendants would be in breach of the lease.

Defendants made no additional rent payments after 1 June 2015. Plaintiff sent a notice of default on 11 August 2015. This notice indicated Defendants' defaulted by nonpayment of rent and failure of the tenant to continuously operate in the premises throughout the lease period.

Plaintiff filed its complaint on 2 September 2015, and asserted claims for breach of lease and breach of guaranty agreement. Defendants filed an answer and counterclaims against Plaintiff for breach of contract, constructive eviction, unfair or deceptive trade practices, negligence, and breach of covenant of good faith and fair dealing. Defendants also asserted third-party claims against both Kimco and China Court.

Plaintiff filed a motion to dismiss. Defendants' counterclaims for unfair or deceptive trade practices and negligence were dismissed. Kimco's motion to dismiss Defendants' claims against it was granted. Defendants voluntarily dismissed their claims against China Court.

The case went to trial on 18 September 2017. Each party timely moved for directed verdict at the close of the opposing side's evidence,

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and both motions were denied. The jury returned a verdict in favor of Defendants on both Plaintiff's claims and Defendants' counterclaims and awarded Defendants \$60,000.00 in damages.

Plaintiff filed a motion for judgment notwithstanding the verdict ("JNOV"). The trial court granted Plaintiff's JNOV motion setting aside Defendants' counterclaims against Plaintiff and the jury award of damages, and denied the motion regarding Plaintiff's claims against Defendants. Both Plaintiff and Defendants timely appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Plaintiff's Appeal

Plaintiff argues the trial court erred (1) in denying the portion of Plaintiff's JNOV concerning its claims for breach of lease and breach of guaranty against Defendant, and (2) in instructing the jury on the elements of constructive eviction.

A. Judgment Notwithstanding the Verdict

1. Standard of Review

[1] The standard of appellate review for a JNOV is *de novo*. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008). The proper inquiry upon review of a JNOV is "whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000) (citation omitted). "The hurdle is high for the moving party as the motion should be denied if there is more than a scintilla of evidence to support the [nonmovant's] *prima facie* case." *Id.* (citation omitted). A "[j]udgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict." *Beal v. K. H. Stephenson Supply Co.*, 36 N.C. App. 505, 507, 244 S.E.2d 463, 465 (1978).

2. Breach of Contract

Plaintiff argues all elements of its breach of contract claims against Defendants were established by stipulations and evidence presented at trial, and once Defendants' claims were disposed of, the trial court should have granted Plaintiff's motion for JNOV.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*

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v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). Breach of a contract with unambiguous terms is a question of law for the trial courts, which may be decided on a directed verdict. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 661, 464 S.E.2d 47, 56 (1995).

Before trial, the parties stipulated to the existence of a valid contract:

(a) [Defendants] entered into a Shopping Center Lease with GRE Brennan Station LLC on March 19, 2011 for the lease of a commercial space located in Suite 123 of Brennan Station Shopping Center;

(b) [Defendant] Michael Borovsky signed an Absolute Unconditional Guaranty Agreement to GRE Brennan Station LLC guarantying payment for all amounts owed under the Shopping Center Lease by [Defendant] MB Goldsmiths;

(c) [Defendants] executed a First Amendment to Lease . . . on April 23, 2014 extending the . . . Lease through August 31, 2024. . . .

As listed in Article 18 of the lease agreement, Defendants would be in breach of the lease if:

(a) any part of the Rent required to be paid by Tenant under this Lease shall at any time be unpaid beyond any applicable grace period;

. . .

(c) Tenant fails, after the date on which it is required by this Lease to open the Premises for business with the public, to be open for business as required by this Lease, or Tenant vacates or abandons the Premises[.]

As part of their pretrial stipulations, the parties also stipulated to conduct that would be a breach under the lease:

(h) Defendants vacated . . . in June 2015;

(i) The last payment of rent made by Defendant to Plaintiff was on June 1, 2015[.]

While elements of Plaintiff's breach of contract claim were present in the pretrial stipulations, the trial court did not err in denying Plaintiff's motions for directed verdict or JNOV. Motions for JNOV are held to high standards, and there was at least a scintilla of evidence to

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support Defendants' claim for constructive eviction. See *Tomika Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595.

B. Jury Instructions

[2] Plaintiff argues the jury instructions concerning constructive eviction confused the jury and misstated the law on the elements of the constructive eviction claim.

1. Standard of Review

Challenges to the form and phrasing of jury instructions are reviewed for an abuse of discretion, but challenges that raise questions of law are reviewed *de novo*. *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 686, 759 S.E.2d 696, 700 (2014).

"[T]his Court considers a jury charge contextually and in its entirety." *Hammel v. USF Dugan, Inc.*, 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citation omitted). "[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987) (citation omitted).

2. Constructive Eviction Instruction

No pattern jury instructions exist for constructive eviction. Plaintiff submitted the proposed instruction on that issue:

Did the Plaintiff Landlord breach the Lease Agreement by failing to remediate the water leak amounting to a breach of the express covenant of quiet enjoyment resulting in a constructive eviction of the tenant Defendant MB Goldsmith[s] from the premises in accordance with applicable law and the Lease Agreement, as Amended?

On this issue, the burden of proof is on the [Defendants].

Constructive eviction occurs when a breach of a contractual duty by a landlord deprives its tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing his tenant to abandon the leased premises. In other words, constructive eviction takes place when a landlord's breach of duty under the lease renders the premises untenable. (Citations and internal quotation marks omitted).

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[262 N.C. App. 1 (2018)]

This means that the Defendants must prove, by the greater weight of the evidence, four things:

First, that the Plaintiff had a duty under the terms of the Lease Agreement to repair or remedy any mold or foul odor caused by a water leak from the neighboring tenant space formerly occupied by China Court restaurant.

Second, that the Plaintiff breached a duty under the Lease Agreement by failing to repair or remedy any mold or foul odor caused by a water leak from the neighboring tenant space formerly occupied by China Court restaurant.

Third[,] that the Plaintiff's failure to repair or remedy any mold or foul odor, deprived the Defendants of the beneficial use and enjoyment of the Premises Leased by [Defendants] which were unsuitable for the purposes for which they were leased.

Fourth, that the Defendant Tenant vacated possession of the Leased Premises within a reasonable time after the occurrence of the water or moisture intrusion into the Leased Premises.

Instead of using Plaintiff's proposed elements, the trial court instructed the jury on the following elements:

First, that Plaintiff, Brennan Station, had a duty under the terms of the Lease Agreement not to hinder or interrupt the [Defendants'] peaceable and quiet enjoyment of the Premises;

Second, that Plaintiff breached that duty under the Lease Agreement;

Third[,] that Plaintiff's breach of that duty deprived Defendants of the beneficial use and enjoyment of the Premises Leased by [Defendants] and that they were rendered untenable for the purposes for which they were leased; and

Fourth, that Defendant Tenant vacated possession of the leased premises within a reasonable time after the occurrence of the hindrance or interruption of the Landlord.

Plaintiff timely objected to the trial court's version of the elements of quiet enjoyment, which was overruled. Plaintiff asserts the trial

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court's changes to the first two elements misconstrue North Carolina law on constructive eviction by removing the "two-step" requirement that the jury first find a breach of a specific lease agreement provision before finding the landlord's breach forced a tenant to vacate.

The language provided in the trial court's instructions follows the express covenant of quiet enjoyment contained in the lease agreement: "Tenant shall peaceably and quietly hold and enjoy the Premises for the Term without hindrance or interruption by Landlord[.]" Further, the instructions given indicate the jury needed to find Plaintiff had a duty under the lease and breached that duty, the same finding as asserted in Plaintiff's requested instructions.

The trial court's omission of Plaintiff's preferred phrasing is not a misstatement of law, but is a matter to be reviewed for abuse of discretion. *See Geoscience Grp.*, 234 N.C. App. at 686, 759 S.E.2d at 700. Plaintiff has failed to show the trial court abused its discretion in giving the jury instructions, which track the language and provisions of the lease agreement, and reflect the relevant law of constructive eviction. *See Marina Food Assocs., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990) ("when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction"). Plaintiff's argument is overruled.

IV. Defendants' Cross-Appeal

Defendants argue the trial court erred in: (1) granting Plaintiff's JNOV motion concerning Defendants' claims of constructive eviction setting aside the jury's verdict; and, (2) ruling at the charge conference that the trial court would instruct the jury it could only award damages for lost profits through 2015.

A. Judgment Notwithstanding the Verdict

1. Standard of Review

[3] Plaintiff moved for JNOV. As previously stated the standard of review requires: "if there is more than a scintilla of evidence to support [Defendants] *prima facie* case," the motion should be denied. *Tomika Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595. "[T]he trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the

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non-movant's favor." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985) (citation omitted).

2. Constructive Eviction

Many of the issues before us hinge upon the applicability of the law of constructive eviction, and whether Plaintiff, Defendants, or a third party had a duty to remedy the foul odor and mold inside the premises Defendants leased.

An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction. Put another way, when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction. Furthermore, a lease includes the implied covenant of quiet enjoyment. Where a lessee has been constructively evicted, the covenant of quiet enjoyment has also been breached.

Marina Food Assocs., 100 N.C. App. at 92, 394 S.E.2d at 830 (citations omitted).

Plaintiff asserts it had no obligation under the lease to remedy the foul odor inside Defendants' premises. Article 13.1 of the lease agreement states:

LANDLORD'S DUTY TO MAINTAIN. Landlord will keep the exterior walls, structural columns and structural floor or floors (excluding outer floor and floor coverings, walls installed at the request of Tenant, doors, windows, and glass) in good repair. Notwithstanding the foregoing provisions of this Section, Landlord shall not in any way be liable to Tenant on account of its failure to make repairs unless Tenant shall have given Landlord written notice and afforded Landlord a reasonable opportunity to effect the same after such notice.

Article 13.2 lists Defendants' maintenance duties as tenant, and indicates Defendant was responsible to repair "interior walls . . . the interior portions of exterior walls . . . pipes and conduits within the Premises . . . pipes and conduits outside the Premises between the Premises and the service meter[.]"

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Plaintiff asserts the cause of the mold and the foul smell was a water leak from China Court between two interior walls of the building, and was beyond its obligation under the lease. However, under the strict requirements of a JNOV, if a scintilla of evidence supports Defendants' prima facie case, the JNOV is properly denied. At trial, Defendants presented other evidence and theories of potential sources and causes of the foul odors and mold damage, including an exterior wall, demising wall between two tenants, a faulty grease trap, and a leaking roof.

Defendants presented and admitted testimony by James Spangler, an environmental assessment expert, to detail how China Court's exterior grease trap could have caused the odor inside Defendants' store. The grease trap was located outside of the premises near the back parking lot. The grease trap uses pipes to transfer the wastewater out of the restaurant and filter out the grease. Sewage had been found in the grease trap on previous occasions. Spangler testified China Court's grease trap had settled, possibly leading to odors being able to travel back up the pipes and into the premises. Spangler also identified significant holes in the demising wall between the jewelry store and China Court, possibly allowing the smell to enter into Defendants' business.

Whether or not this shared wall between the premises and China Court was a structural or demising wall, or an interior wall, and fell under Defendants' or Plaintiff's responsibility under the lease, was a question for the jury. Further, under the terms of the lease, Defendants were not responsible for maintaining the exterior grease trap or for the integrity of the roof.

Plaintiff, through its management company, pumped the grease trap after Defendants began complaining of the odor in the jewelry store. After the grease trap was pumped, Defendants still complained of odor. Plaintiff sent a roofing company to look for possible damage in the roof, and the company repaired three holes in the roof. Viewed in the light most favorable to Defendants, this evidence was sufficient to support a jury's verdict in favor of Defendants. *See McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 406, 466 S.E.2d 324, 328 (1996).

The plaintiff in *McNamara* leased a space in a mall to operate a jewelry store. *Id.* at 403, 466 S.E.2d at 326-27. The plaintiff was informed an aerobics studio would be moving in next door, and it would be required to install soundproofing to prevent excessive noise in the plaintiff's space. *Id.* After multiple complaints of noise by the plaintiff, the defendant-landlord installed more insulation, claimed it had remediated the problem and considered the matter "closed." The landlord also

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demanded the rent payments, which had been deposited in an escrow account pending resolution of the issue, be released. *Id.* The plaintiff did not pay the rent and abandoned the premises. *Id.*

The plaintiff then initiated an action “for breach of contract based upon the theories of constructive eviction and breach of the covenant of quiet enjoyment.” *Id.* Though the plaintiff had asserted two theories of recovery, the question submitted to the jury was, “Did the [d]efendant . . . breach the lease agreement with the [p]laintiff?” *Id.* at 405, 466 S.E.2d at 328. A jury found in favor of the plaintiff, and the trial court denied the defendant-landlord’s motion for JNOV. *Id.* at 404, 466 S.E.2d at 327.

This Court held the trial court did not err in denying the defendant’s JNOV for either of the plaintiff’s claims. This Court stated that the facts and evidence, “viewed in the light most favorable to plaintiff [the non-moving party], constituted sufficient evidence to support a jury finding that plaintiff abandoned the premises within a reasonable time and that the abandonment was the result of defendant’s failure to remedy the noise from the studio.” *Id.* at 406, 466 S.E.2d at 328.

The defendant argued the terms of the express covenant of quiet enjoyment overrode any implied rights. This Court disagreed and found that if the defendant “took no action regarding plaintiffs complaints” received after the defendant had installed the additional insulation, “then for purposes of plaintiff’s claims, defendant’s failure to abate the noise constituted a constructive eviction as of that time.” *Id.* at 407, 466 S.E.2d 329.

Plaintiff argues the constructive eviction counterclaim fails unless Defendants can point to an express obligation under the lease it breached. Plaintiff cites to *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.* to support its assertion. The defendants in that case entered into a lease with the plaintiff to open a shoe repair business in the mall. 166 N.C. App. 659, 660, 608 S.E.2d 70, 71 (2004). Two years prior to the end of the lease term, the defendants abandoned the premises and ceased rent payments. *Id.* The plaintiff filed suit and the defendants asserted an affirmative defense. *Id.* at 661, 608 S.E.2d at 71. The trial court granted the plaintiff’s motion for summary judgment. *Id.*

On appeal, the defendants argued the trial court erred because “there was a material issue of fact regarding whether [p]laintiff’s failure to provide adequate security negated [d]efendants’ obligation to pay rent[.]” *Id.* at 661, 608 S.E.2d at 72. The defendants asserted the plaintiff’s “failure to provide security was a breach of its duty to provide a ‘safe environment’, an explicit breach of plaintiff’s duties under the

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lease, and a breach of the implied covenant of ‘quiet enjoyment.’” *Id.* at 662, 608 S.E.2d at 72.

This Court rejected the defendants’ arguments, as the lease specifically stated the plaintiff could elect to provide security for the mall, *at its discretion*. *Id.* at 663, 608 S.E.2d at 73. This Court also rejected the defendants’ argument that the lack of provided security led to their constructive eviction, stating “defendants have failed to show that plaintiff breached any duty under the lease.” *Id.* at 664, 608 S.E.2d at 73.

This case is distinguishable from *Charlotte Eastland Mall*. As previously stated, sufficient evidence was presented to support a jury’s finding Plaintiff had breached the lease in not remedying the sources of the foul odor and mold problem. Plaintiff’s lease does not include a conditional obligation or option to repair structural damage or to maintain the roof and exterior, as was the case for the landlord’s *discretion* to provide security as in *Charlotte Eastland Mall*.

Finally, Plaintiff asserts Defendants did not provide adequate notice of default under the lease. Article 19.1 of the lease agreement states, in relevant part:

LANDLORD’S DEFAULT. Except as otherwise provided in this Lease, Landlord shall be in default under this Lease if Landlord fails to perform any of its obligations hereunder and said failure continues for a period of thirty (30) days after written notice thereof from Tenant to Landlord (unless such failure cannot reasonably be cured within thirty (30) days and Landlord shall have commenced to cure said failure within said thirty (30) days and continues diligently to pursue the curing of the same).

Plaintiff argues Defendants’ notice only informs Plaintiff of the existence of mold, but failed to point to any specific breach by Plaintiff. Further, Plaintiff argues mold and odor are not Plaintiff’s responsibilities under Article 13, and Plaintiff argues Defendants were aware any of the purported causes of the mold and odor were their responsibility.

Upon review of the extensive record in this case, Defendants provided adequate and repeated notices to Plaintiff of the ongoing foul odor and mold problems. Several letters were sent, and though Plaintiff purports to not have received the early letters, Plaintiff was certainly aware of the issue and their property manager responded, sent personnel, and began investigating the source of the foul smell as early as February 2014.

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In February 2015, Plaintiff asserted in a letter it had inspected all areas it was responsible to maintain under the lease, but the roof was not repaired until March 2015, and the holes in the shared demising wall for the premises and China Court were first mentioned by James Spangler, when he inspected the premises in late June and late August 2016. Plaintiff had ample and specific notice of the ongoing problems in Defendants' premises. Plaintiff's arguments are overruled.

Defendants presented sufficient, and certainly a scintilla of, evidence to defeat the high standard to grant Plaintiff's JNOV motion. The trial court erred in granting the JNOV to overturn the jury's verdict and award on Defendants claims for constructive eviction. We reverse and reinstate the jury's verdict and damages and the judgment entered thereon. The trial court's order left open the issue of attorney's fees and costs for Defendants. We remand for a determination of the costs and fees, if any, Defendants are entitled to recover.

B. Jury Instruction on Damages

[4] Defendants assert the trial court erred in instructing the jury it could only award damages for lost profits through 30 June 2015. Defendants argue the lost profits between 30 June 2015 and the date of trial were not "purely speculative" but were based upon Borovsky's testimony as the owner of the business and substantial financial documents, which had been admitted into evidence.

"Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987) (citation omitted). "To recover lost profits, the claimant must prove such losses with reasonable certainty." *McNamara*, 121 N.C. App. at 407, 466 S.E.2d at 329 (citation and internal quotation marks omitted). Whether an amount has been proven with reasonable certainty is a question of law, to be reviewed *de novo*. *Plasma Ctr. of Am., LLC v. Talecris Plasma Resources, Inc.*, 222 N.C. App. 83, 91, 731 S.E.2d 837, 843 (2012).

Plaintiff argues Defendants' lost profits after vacating the location in Raleigh were speculative. Plaintiff asserts Defendants' profits were affected by the relocation of the jewelry business to a smaller market in Graham, North Carolina, and Defendants made little effort to find a new location within Raleigh. However, Defendants presented sufficient evidence of lost profits stemming from Plaintiff's breach of the lease. Defendants had an established history of profits, and used historical tax

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records to establish profits before and after Plaintiff's breach. *Compare McNamara*, 121 N.C. App. at 409, 466 S.E.2d at 330.

The trial court did not give a limiting instruction preventing the jury from considering lost profits after Defendants vacated the premises, but after the ruling on the scope of the lost profits both parties' limited their closing arguments to damages through 30 June 2015. Because Defendants could prove their lost profits with reasonable certainty, the issue should have been before the jury. We remand for a new trial on the issue of potential lost profits damages. *See id.* at 412, 466 S.E.2d at 332.

V. Conclusion

A motion for JNOV should be "cautiously and sparingly granted." *Bryant*, 313 N.C. at 369, 329 S.E.2d at 338. As more than a scintilla of evidence supports Defendants' claim of constructive eviction, Plaintiff's JNOV should have been denied. The trial court properly denied the motion concerning Plaintiff's claims against Defendants. That portion of the order appealed from is affirmed.

We reverse the partial grant of Plaintiff's JNOV motion and reinstate the jury's verdict and the judgment entered thereon. We remand this issue to the trial court for a new trial on potential lost profits damages after 30 June 2015. We also remand to the trial court for a determination on the costs and fees, if any, Defendants are entitled to as the prevailing party. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and BERGER concur.

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COUNTY OF DURHAM, BY AND THROUGH DURHAM DSS, EX REL: SHARON L. WILSON
AND TIFFANY A. KING, PLAINTIFF

v.

ROBERT BURNETTE, DEFENDANT

No. COA17-557

Filed 16 October 2018

**Child Custody and Support—civil contempt—findings of fact—
ability to pay**

The trial court's findings of fact were too minimal to support its conclusion that defendant father's failure to pay child support was willful. The bare findings that he owned a boat, car, and cell phone; that he spent money on gas and food; and that he had medical issues but was not prevented from working did not sufficiently indicate the necessary evaluation of defendant's actual income, asset values, and reasonable subsistence needs to support a conclusion that defendant had the present ability to pay both his child support obligations and purge payments for civil contempt.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from orders entered 23 November 2016 by Judge Fred Battaglia in District Court, Durham County. Heard in the Court of Appeals 18 October 2017.

Office of the County Attorney, by Senior Assistant County Attorney Geri Ruzage, for plaintiff-appellee.

Mary McCullers Reece, for defendant-appellant.

STROUD, Judge.

Trial courts have a responsibility to enforce the law and to order relief or punishment for willful disobedience of its orders. But courts are not just collection agencies. Trial courts also have a responsibility to consider the basic subsistence needs of an alleged contemnor before determining he has the ability to pay child support as ordered and the ability to pay purge payments. Although the exact details of basic subsistence needs will vary in different cases and the trial court has wide discretion in determining these needs, basic subsistence needs normally will include food, water, shelter, and clothing at the very least. The trial

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court must make sufficient findings of fact to show that an alleged contemnor has the ability to pay his child support obligation and purge payment for civil contempt *after* considering his income, assets, and basic subsistence needs.

Defendant appeals two orders¹ entitled as “Order on Civil Contempt” based upon his failure to pay child support and past public assistance arrears from voluntary support agreements entered in 1993. Plaintiff presented no evidence other than the amount of child support arrears or past public assistance owed. Defendant presented substantial evidence of his inability to pay. Because the findings of fact in the orders do not support the trial court’s determination that defendant willfully refused to pay or that he had the ability to pay the purge payments for civil contempt, and neither the evidence nor the findings of fact support the trial court’s finding that defendant had the ability to satisfy the purge conditions, the trial court erred in holding him in civil contempt. We therefore vacate both orders and remand for entry of new orders.

I. Background

Defendant entered into a Voluntary Support Agreement and Order in File No. 93 CVD 4477 on 9 November 1993 for a child or children born to Tiffany King which required him to pay child support of \$97.00 per month and to repay past public assistance of \$5,600.00 at the rate of \$13.00 per month.² We will refer to this case as the King matter. Defendant also entered into a Voluntary Support Agreement and Order in File No. 93 CVD 2822 on 19 November 1993 for his two children born to Sharon Wilson, which required him to pay child support of \$203.00 per month starting 1 December 1993 and to repay past public assistance of \$2,436.00, to be paid at the rate of \$20.00 per month, for a total of \$223.00 per month. We will refer to this case as the Wilson matter. Over the years, it appears that defendant’s child support obligations in both the Wilson and King matters may have been modified and the amounts of past public assistance to be repaid increased, although he did pay some of his obligations.³

1. On 31 May 2017, defendant filed a motion to amend and supplement the record on appeal, which was granted on 14 June 2017. The original record contains the Order on Civil Contempt entered on behalf of Sharon Wilson, while the supplement contains the Order on Civil Contempt entered on behalf of Tiffany King.

2. Our record does not include the entire Voluntary Support Agreement but does include these numbers which are not in dispute.

3. Defendant’s entire payment history over the prior twenty-three years and modifications were not in our record, but those details are not necessary for the issues presented on appeal.

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On 11 July 2016, plaintiff initiated contempt proceedings against defendant in both cases under N.C. Gen. Stat. § 50-13.9(d). In the Wilson matter, an order to show cause was issued based upon the most recent order of 26 May 2015, with total past due child support of \$23,186.69 and \$2,136.07 due based on the terms of the last order. In the King matter, an order to show cause was issued based upon the most recent order of 26 May 2015, with total past due child support of \$9,138.73 due based on the terms of the last order. Both orders to show cause required defendant to appear on 2 September 2016 to show cause why he should not be held in contempt and to bring to the hearing “all records and information relating to your employment and the amount and source of your disposable income.”

On 2 September 2016, defendant appeared in court and applied for a court-appointed attorney; the trial court entered an order continuing the hearing in the Wilson case to 29 September 2016 for “PRETRIAL” and to 18 October 2016 for “Hearing” and appointed counsel for defendant.⁴ The case was then continued and the hearing began on 18 October 2016. After hearing a portion of defendant’s testimony, the trial court *sua sponte* subpoenaed defendant’s sister to testify and set the completion of the hearing for 15 November 2016. On 15 November 2016, the trial court initially questioned defendant’s sister, and then defendant continued presenting his evidence.

The trial court held defendant in willful civil contempt for his failure to pay his child support. On or about 23 November 2016, the trial court entered a two-page “Order on Civil Contempt” in each case. The two orders are identical except for the case captions, file numbers and amounts of arrears stated in Finding No. 4 of each order; we quote Finding No. 4 below from both orders instead of repeating the rest of the order. The orders first find that defendant was in court and represented by counsel and the custodial parent was not in court. *All* of the remaining findings of fact are:

3. The Defendant has willfully failed and refused to comply with the Order of this Court entered on 2/1/2009.
4. The Defendant as of the date of his hearing is in arrears in the amount of \$22,965.89. (Wilson case)

4. Our record does not include a similar order for the King case but based upon the later orders and hearing transcript it appears the two cases were heard simultaneously.

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4. The Defendant as of the date of his hearing is in arrears in the amount of \$8959.53. (King case)
5. The Defendant is presently able to comply with the Order or to take reasonable measures that would enable the Defendant to comply with the order and pay a purge of \$2500.00 for the following reasons:
 - a. The Defendant owns a boat.
 - b. The Defendant owns a car.
 - c. The Defendant spends money on gas.
 - d. The Defendant spends money on food.
 - e. The Defendant has medical issues, but they do not prevent him from working.
 - f. The Defendant prepares and delivers food.
 - g. The Defendant repairs cars for money.
 - h. The Defendant pays car insurance in the amount of \$147.00 per month.
 - i. The Defendant receives in kind income from his sister and friends.
 - j. The Defendant has a cell phone.

The trial court concluded defendant “should be found in direct Civil Contempt per NCGS § 5A, Article 2.”⁵ The trial court ordered that defendant be immediately taken into custody by the Durham County Sheriff and that he “shall remain in custody for 90 days or until a purge of \$2,500.00 is paid into the office of the Clerk of Superior Court of this County.” *In addition*, the trial court ordered: “The Defendant shall serve a 90 [day] sentence consecutive with any other child support contempt orders in this Court.”⁶ Defendant timely filed notice of appeal from both

5. North Carolina General Statutes Chapter 5A, Article 2 deals with Civil Contempt. Civil contempt is neither “direct” nor “indirect.” *See generally* N.C. Gen. Stat. § 5A-21 (2017). North Carolina General Statutes Chapter 5A, Article 1 deals with Criminal Contempt, which may be either direct or indirect. *See* N.C. Gen. Stat. § 5A-13 (2017). The trial court specifically concluded defendant was in civil contempt based on Article 2.

6. Since two orders were entered on the same day with this same provision, defendant was effectively sentenced to a fixed term of imprisonment of 180 days.

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orders. We will address both orders together since they are identical except for the case captions, file numbers, custodial parent, and findings of amount of arrearages.

II. Analysis

A. Standard of Review

We review orders for contempt to determine if the findings of fact support the conclusions of law: The standard of review we follow in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Spears v. Spears*, __ N.C. App. __, __, 784 S.E.2d 485, 494 (2016) (citation and quotation marks omitted); *see also Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (“The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. North Carolina’s appellate courts are deferential to the trial courts in reviewing their findings of fact.” (Citations and quotation marks omitted)).

County of Durham v. Hodges, __ N.C. App. __, __, 809 S.E.2d 317, 323 (2018).

B. The absence of evidence is not evidence.

Defendant argues that the trial court failed to make sufficient findings of fact to support a conclusion of law that defendant was in willful contempt and challenges some findings as not supported by the evidence. Defendant contends neither the facts as found by the trial court nor the evidence show he could pay a \$5,000.00 purge payment as ordered or that he could pay his monthly obligations.

Plaintiff begins its argument by stating that defendant “was working at the time of trial and therefore his medical issues may have . . . been restrictive but did not prevent him from working.” Plaintiff does not direct us to any evidence which would indicate that defendant was “working” at the time of trial, and the trial court’s order did not make a finding he was “working.” Plaintiff does not directly respond to

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defendant's arguments but simply emphasizes that the trial court is the sole judge of the credibility of the evidence and the trial court apparently did not find defendant's evidence of his medical disability to be credible.

This case is remarkably similar, both factually and legally, to *Hodges*, which discussed the burden of proof for civil contempt and the required findings of fact:

Proceedings for civil contempt can be initiated in three different ways: (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.

In the present case, the trial court entered an order to show cause, which shifted the burden of proof to defendant to show cause as to why he should not be held in contempt of court. The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful.

And despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt.

Hodges, __ N.C. App. at __, 809 S.E.2d at 324 (citations and quotation marks omitted).

Because of the order to show cause, defendant had the burden of production of evidence to show he was unable to pay his child support

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as ordered. *Id.* at ___, 809 S.E.2d at 324. Defendant presented substantial evidence regarding his medical condition, his minimal living expenses, and his lack of income. Plaintiff presented no evidence other than the amount of arrears owed, including any evidence regarding defendant's ability to work, income, potential income, or assets. "[D]espite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt." *Id.* at ___, 809 S.E.2d at 324.

Plaintiff is correct that the trial court is the sole judge of credibility and weight of the evidence, and although the trial court could find defendant's evidence not to be credible, this does not *create* evidence for plaintiff. The absence of evidence is not evidence. Defendant presented evidence, and even if the trial court determined not one word of it to be true, we are then left with no evidence from plaintiff other than the amount owed. Just as in *Hodges*, "defendant met his burden to show cause as to why he should not be held in contempt, presenting evidence from [a] treating physician[] that he is physically incapable of gainful employment. DSS presented no evidence and did not refute defendant's evidence at all." *Id.* at ___, 809 S.E.2d at 324. But even based upon Defendant's evidence, it may be possible for the trial court to have determined that Defendant had the ability to pay more than he actually paid.

Defendant need not have the ability to pay his entire support obligation to be held in civil contempt for failure to pay. If he had the ability to pay some of his obligation, but he paid none, or less than he could have paid, he may still be held in contempt. We addressed this type of situation in *Spears*:

We agree with plaintiff that an interpretation of the cases which would always require a finding of full ability to pay would "encourage parties to completely shirk their court-ordered obligations if they lack the ability to fully comply with them." Yet the cases do not go quite so far as plaintiff suggests. An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him.

The seminal case on this issue from our Supreme Court is *Green v. Green*, a civil contempt proceeding for

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nonpayment of alimony, in which the Court held that the trial court's findings of fact were insufficient to support its order that the defendant be imprisoned until he paid the amounts owed in full:

The judge who heard the proceedings in contempt recited the findings of fact made by the judge who granted the order allowing alimony, and added two others, in words as follows: "I further find that said defendant could have paid at least a portion of said money, as provided in said order, and that he has willfully and contemptuously failed to do so. I further find that he is a healthy and able-bodied man for his age, being now about fifty-nine years old." So, notwithstanding the finding of the fact that the defendant was able to pay only a part of the amount ordered to be paid, he was to be committed to the common jail until he should comply with the order making the allowance in the nature of alimony, that is, until he should pay the whole amount. Clearly, the judgment can not be supported on that finding of fact.

Green v. Green, 130 N.C. 578, 578–79, 41 S.E. 784, 785 (1902).

Although the Court in *Green* did not state this explicitly, it seems that the defendant paid nothing toward his alimony obligation and that the trial court found that he could have paid "at least a portion" of the amounts owed. *Id.*, 41 S.E. at 785. Indeed, this sort of vague finding that an obligor could have paid "more" could be made in almost any case where the obligor has paid nothing at all, since most obligors probably have the ability to pay \$1.00 per month, for example. Presumably, the defendant in *Green* had the ability to pay some significant amount but less than the full amount. The problem with the trial court's order in *Green* was that it went too far with the remedy—despite a finding that the defendant had the ability to pay only a portion of the sums owed, he was imprisoned "until he should pay the whole amount." *Id.* at 579, 41 S.E. at 785. In addition, we can also infer from this opinion that the only source of the defendant's funds was his labor and that he was "healthy and able-bodied[,] " thus able to work to earn funds to pay the plaintiff, although he could not work while in jail. *Id.* at 578-79, 41 S.E. at 785. He apparently did not have investments or other sources of funds

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upon which to draw. *See id.*, 41 S.E. at 785. Based upon the trial court's findings, the order showed that the defendant had the ability to earn enough income to pay only part of his alimony before he went to jail; while in jail, he would have no ability to pay anything although he was ordered to pay in full. *Id.*, 41 S.E. at 785. For these reasons, the Court found error. *Id.*, 41 S.E. at 785.

Green has been followed for over 100 years in both alimony cases and child support cases. These cases are all very fact-specific.

Spears, 245 N.C. App. at 278-80, 784 S.E.2d at 497-98 (citations omitted). We will therefore review the order to determine if the evidence supports the challenged findings of fact and if the findings support the trial court's conclusions of law.

C. Taking the inventory of financial condition

In determining the ability to pay and willfulness of failure to pay child support, the trial court must consider both sides of the equation: income or assets available to pay *and* reasonable subsistence needs of the defendant. *See, e.g., Bennett v. Bennett*, 21 N.C. App. 390, 394, 204 S.E.2d 554, 556 (1974) (“Our Supreme Court has indicated . . . that the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work – an inventory of his financial condition – so that there will be convincing evidence that the failure to pay is deliberate and willful.” (Citations and quotation marks omitted)).

Defendant argues that the trial court did not make a “meaningful analysis of [his] income and expenses” in its findings of fact. Defendant contends some findings are not supported by the evidence and others “provided little or no information from which the court could deduce that [defendant] was able to pay more” toward his child support arrears.

The trial court need not find detailed evidentiary facts but an order must have sufficient findings to support its conclusions of law and decretal. There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. While a trial court need not make findings as to all of the evidence, it must make the required ultimate findings, and there must be evidence to support such findings.

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Hodges, __ N.C. App. at __, 809 S.E.2d at 323 (citations and quotation marks omitted). We will therefore address defendant's arguments about each of the trial court's findings of fact enumerated as its specific reasons for determining defendant had the ability to pay or to take reasonable measures to enable him to pay.

i. "The Defendant owns a boat."

Defendant does not challenge this finding as unsupported by the evidence. He did own a boat. The trial court made no findings of the type, size, age, value, or condition of the boat. Based on the evidence before the court, defendant received the boat as a gift from a friend and it could be worth as much as \$1,500.00. Defendant agreed he would sell the boat. "Reasonable measures" to pay an outstanding judgment could include "borrowing the money, selling defendant's . . . property . . . , or liquidating other assets, in order to pay the arrearage." *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 787-88 (1980). Selling the boat is a reasonable measure which would enable defendant to pay a portion of the purge payments, or defendant could have sold the boat and used the proceeds to pay some of his outstanding obligation. At most, the finding and the evidence could show defendant's ability to pay the proceeds from the sale of the boat.

ii. "The Defendant owns a car."

Defendant does not challenge this finding as unsupported by the evidence. He did own a car. The trial court made no findings of the make, model, age, condition, or value of the car. Based on the evidence before the court, it was a gift to defendant from a friend and could be worth as much as \$1,800.00. Defendant could sell the car, although as defendant contends, then he would not have transportation to go to his medical appointments or therapy, nor would he have transportation to get to a workplace, if his medical restrictions are lifted. At most, this finding and the evidence could show defendant's ability to pay the proceeds from the sale of the car.

iii. "The Defendant spends money on gas."

Defendant does not challenge this finding as unsupported by the evidence. He did buy a little gas. The trial court made no findings about how much gas defendant actually bought or where he got the money for it. Although the trial court need not make findings on each evidentiary fact, this finding -- like the others -- is too minimal to be meaningful. The evidence before the court was that defendant did not drive very much due to the effects of his medication. When asked how he paid for gas, he

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testified that he had “a little bitty thing with change in it.” He collected “pennies, nickels, dimes, quarters” to pay for gas. He would go to friends occasionally to get “a little \$20 here, \$30 there.” This finding does not show defendant has any financial ability to pay his monthly obligation or purge payments but only that he has a minimal living expense to put gas in his car.

iv. “The Defendant spends money on food.”

Defendant does not challenge this finding as unsupported by the evidence. The trial court made no findings about how much defendant spends on food. The evidence before the court showed that defendant often relied on his sister or friends to help with basic subsistence needs such as food.⁷ This finding does not show that defendant has any financial ability to pay his support obligation but only that he has a minimal living expense to buy food.

v. “The Defendant has medical issues, but they do not prevent him from working.”

First, even if this finding were supported by the evidence, it would not support a determination of ability to pay and willful contempt. The finding does not say what sort of work the defendant could do or how much that work may pay and there was no evidence to support findings of these facts. In this sense, this finding about “work” generally is similar to the findings in prior cases in which far more detailed findings were held to be insufficient:

The only findings of fact relating to plaintiff’s ability to pay include:

14. The Plaintiff is an able-bodied, 32 year old, who attended high school up to the tenth grade. He has no military background. His work experience includes running a Tenon machine in the furniture industry. The plaintiff has skills in the furniture industry, but prefers to work in landscaping or construction. The Plaintiff has worked odd-jobs for himself and for others. The Plaintiff has been paid in cash. The Plaintiff worked for 8 months last year as a brick mason for Jones Rock Mason, and earned \$8.00 per hour and worked forty-hour weeks, with no overtime.

.....

7. We take judicial notice that people must have some food to eat or they will starve to death, and they usually have to buy this food.

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16. The Court finds that the Plaintiff is like an ostrich, burying his head in the sand, in [that] he believes that if he does not see the minor child's medical bills, that he will not have to pay them. The Plaintiff believes ignorance is bliss.

. . . .

18. While [the] Court does not disbelieve that the Plaintiff would prefer to work at an outside job, when a child is in the equation, the Plaintiff has to do what is necessary for the child.

Clark v. Gragg, 171 N.C. App. 120, 124, 614 S.E.2d 356, 359 (2005). These findings addressed the defendant's work experience, physical ability to work, and some actual work he had done and his hourly pay, but this Court reversed the order, remanded "for further findings of fact" and instructed the trial court to "make specific findings addressing the willfulness of plaintiff's non-compliance with the prior consent orders, including findings regarding plaintiff's ability to pay the amounts provided under those prior orders during the period that he was in default." *Id.* at 126, 614 S.E.2d at 360.

We also noted in *Clark* that prior cases held similar findings to be insufficient to show ability to pay and willfulness:

Our appellate courts have previously held that almost identical findings are insufficient, standing alone, to support the finding of willfulness necessary to hold a party in civil contempt.

In *Mauney*, 268 N.C. at 257-58, 150 S.E.2d at 394, our Supreme Court held that the following finding of fact was not a sufficient basis for the conclusion that the non-paying party's conduct was willful in the absence of a finding that defendant had in fact been able to make the required payments during the period in which he was in arrearage:

Judge Martin found that the defendant "is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of [the] order [requiring payment of alimony] entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he

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is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments.” *Id.* at 255, 150 S.E.2d at 392. Likewise, in *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983), this Court reversed an order for civil contempt because [o]ur Supreme Court has held that a trial court’s findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill-health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not support confinement in jail for contempt. *Id.* See also *Yow v. Yow*, 243 N.C. 79, 84, 89 S.E.2d 867, 871-72 (1955) (setting aside civil contempt decree when the trial court found only that the defendant was employed as a manager of a grocery and did not specifically find that the defendant possessed the means to comply with the prior orders during the period that he was in default).

Clark, 171 N.C. App. at 124-26, 614 S.E.2d at 359-60.

But defendant also challenges this finding of his ability to work as unsupported by the evidence. The only evidence before the court regarding defendant’s medical condition was his testimony, his sister’s testimony, and the letter from defendant’s physician. The evidence showed that defendant was injured when he fell from a roof while doing roofing work in 2013. Defendant testified that he had fallen “14 feet onto a brick foundation” and “that messed me up pretty bad.” He kept trying to work after the accident but in the “last three, four years” the doctor “said no more working.” He testified that since the accident, he had been in pain and had to take “strong medication” which “knocks me out” so he could not work while taking it. Without objection from plaintiff, defendant entered into evidence a letter from Dr. Amir Barzin, Director of Family Medicine Inpatient Service at UNC Healthcare. Dr. Barzin wrote that he had been defendant’s primary care physician since October 2013. Dr. Barzin stated that he had been working with defendant to try to “control issues that have been related to pain and injury” and that he was on work restrictions. Defendant was being seen in UNC Healthcare’s “Physical Medicine and Rehabilitation Department” as well. Dr. Barzin reevaluated his work restrictions at each visit and noted that “when he is able to work with limited pain the restriction will be lifted.” Defendant

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also testified about a burn injury to his right arm and his back “from half way down to my lower back.” Defendant is right-handed. He received second and third degree burns in a grease fire in 2003 and his “forearm swells up.”

Considering all of the findings of fact and the transcript of the trial, including the trial court’s comments, it appears that this finding meant that defendant had the ability to “work” only in the sense he was physically able to do some household tasks such as laundry or cooking. For purposes of ability to pay child support, the ability to “work” means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job. *See generally Self v. Self*, 55 N.C. App. 651, 653-54, 286 S.E.2d 579, 581 (1982) (“While the evidence establishes that defendant was physically able to work, it does not establish that work was available to him. . . . Absent evidence refuting testimony that failure to pay as ordered was due to lack of financial means, the record does not support a finding that the failure was willful.”). A defendant need not be completely incapacitated to be considered as unable to “work.” *See, e.g., Brandt v. Brandt*, 92 N.C. App. 438, 444, 374 S.E.2d 663, 666 (1988) (“The trial court considered this evidence and concluded that the plaintiff’s medical condition prevented her from undertaking any meaningful employment and that she is unable to work and earn income to defray her own expenses. This conclusion is supported by the testimony of the plaintiff.”), *aff’d per curiam*, 325 N.C. 429, 383 S.E.2d 656 (1989).

In addition, the trial court’s comments indicate some potential misapprehension of the law regarding the relevant time for defendant’s ability to work. The defendant must be *currently* able to comply with the order to be held in civil contempt, *see, e.g., Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787 (“For civil contempt to be applicable, the defendant must be able to comply with the order or take reasonable measures that would enable him to comply with the order. We hold this means he must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order.”); a defendant may be held in criminal contempt as punishment for an act committed *in the past*, when he had the ability to comply, even if he no longer has the ability, but *not* civil contempt. *See, e.g., O’Briant v. O’Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (“A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. When the punishment is to preserve the court’s authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured

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suitor and to coerce compliance with an order, the contempt is civil.”). A person cannot be held in both civil and criminal contempt for the same conduct. *See* N.C. Gen. Stat. § 5A-21(c). This is a crucial distinction.⁸

Civil contempt and criminal contempt are distinguishable. It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings.

. . . Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Resort to this proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters.

Mauney v. Mauney, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (citations, quotation marks, and ellipses omitted).

When defendant was testifying about his medical condition, the trial court noted that defendant had previously been held in contempt in 2015 – after his 2013 fall from a roof – so he must have had the ability to work in 2015⁹:

8. These comments are not the only reason we note the distinction between civil and criminal contempt. The orders both found defendant in “direct civil contempt” and imposed fixed term of imprisonment of 90 days for each case, to be served consecutively, for a total of 180 days imprisonment. A fixed term of imprisonment is a proper sanction for *criminal contempt*, but not for civil contempt. *See* N.C. Gen. Stat. § 5A-22(a) (2017) (“A person imprisoned for civil contempt must be released when his civil contempt no longer continues.”). This fixed term of imprisonment was *in addition* to civil contempt imprisonment which defendant could purge by paying \$2,500.00 for each order. In other words, defendant would remain in jail for at least 180 days (a criminal contempt sanction) even if he immediately paid the \$5,000.00 in purge payments (a civil contempt sanction). “A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter.” N.C. Gen. Stat. § 5A-21(c).

9. The “Commitment Order for Civil Contempt- Child Support,” on Form AOC-CV-603, Rev. 3/03, from 26 May 2015 is in our record on appeal. None of the boxes on the form are checked and it has no findings of fact or conclusions of law. It simply orders defendant’s

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THE COURT: Well, ma'am, in 2015, he was held in contempt and had the ability to make the payments, so I guess why are we going back and revisiting that issue, since I don't have any medical – there's no medical issue that he – that's preventing him from working, and that seems to me he was found in willful contempt in March – on May the 26th, 2015, by this Court. So if you could help me to understand why we're re-addressing that issue.

MS. WATKINS: Well, yes, Your Honor. I'm not sure it was entered into evidence at that time, however the injury continues and continues to prevent him from working.

Even if defendant was physically able to work at a wage-paying job in 2015, his former ability to work would not mean he was still able to work at the time of the hearing. Dr. Barzin's letter was dated 10 October 2016. Dr. Barzin did not say when defendant's work restrictions began but did say that he currently could not work.

Because the trial court determines the credibility and weight of the evidence, it is possible the trial court may be able to make more specific findings regarding defendant's actual ability to work as of the date of the hearing and earnings from his work, so we must remand for additional findings as discussed by *Clark*, 171 N.C. App. at 126, 614 S.E.2d at 360.

vi. "The Defendant prepares and delivers food."

Defendant challenges this finding as unsupported by the evidence. It is not clear what this finding means; certainly defendant did not operate a catering business. The entirety of evidence about defendant's preparation and delivery of food was defendant's sister's testimony in response to the trial court's question, "What can you tell me about him?"

Well, he's a good person, he's a kind-hearted person. He'll do anything for anybody. In fact, I visit nursing homes, facilities, homes. I'm at work and I'll call him ask him if he'd fix food for me, at times, to take it to nursing homes to different people, people that we know, people we do not know. He's always been there when there are funerals or anything, I can call on him and he'll cook for me.

There was not a scintilla of evidence that defendant was ever paid for any food nor any evidence he ever worked in any sort of food service

imprisonment for civil contempt and sets a purge payment. It is nearly identical to the order entered in *Hodges*, __ N.C. App. at __, 809 S.E.2d at 320.

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employment. Generally, people do not charge a fee for food they have prepared for a family member or to take to someone in a nursing home or to a funeral. Again, this finding does not demonstrate defendant's ability to work at a wage-paying job or his ability to pay child support or the purge payments.

vii. "The Defendant repairs cars for money."

Defendant challenges this finding as unsupported by the evidence. Defendant is correct there was no evidence he earned income from car repairs. The entire evidence which could relate to car repair was his sister's following testimony:

Q. Do you know whether or not he sells vehicles like junk cars?

A. He put -- He fix [sic] cars, and there are times I helped him. There are times, yes.

As defendant notes, the meaning of "fix" in this quote is uncertain, since there was no evidence he *repaired* cars. The only evidence was that he sold junk cars. Junk cars are, by definition, beyond repair. Defendant had earlier testified that some friends had given him some junk cars which he then sold to generate funds to pay toward his child support obligations. He testified:

A. I'm just messing around with, you know, friends of mine that had cars and I will get those and sell them to the junk man. But about three or four months ago I did -- every little money I had I was sending it in. It was like maybe \$30, but I sent it to Raleigh, and that's what they told me last time for the last three or four months to sent one [sic] to Raleigh.

Q. And how much are you getting when you're selling these junk cars?

A: I don't get like maybe \$100, \$120 or whatever I get.

Q. And how many have you sold in October?

A. I think it was like two, three something like that.

Q. So you received about two to three hundred dollars this month.

A. Yeah. And the money that I had I had to have the receipts for it, and I did send that in, the money order to Raleigh.

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To the extent that the trial court may have meant this finding to address the type of “work” defendant may have the ability to perform, it is not sufficient to show that he had the ability to pay. Whether defendant repaired a car or just sold a junk car, the trial court’s finding does not indicate that defendant was paid, or could be paid, for anything he did to a car. This finding does not show that defendant had the ability to pay his monthly obligations or purge payments.

viii. “The Defendant pays car insurance in the amount of \$147.00 per month.”

Defendant challenges this finding as unsupported by the evidence because by the time of the second hearing date, defendant had cancelled his car insurance. But even if the trial court did not find defendant’s testimony he cancelled his insurance to be credible, this finding indicates only that defendant had a basic living expense required by law for him to continue to operate his car.

ix. “The Defendant receives in kind income from his sister and friends.”

Defendant challenges this finding as unsupported by the evidence but acknowledges there was evidence that defendant’s sister and friends had assisted defendant with paying essential bills such as utilities. But as defendant notes, there is no finding of the “circumstances, regularity, and the amount of ‘in kind’ income” and “no context for determining whether those contributions enabled [defendant] to eke [sic] out anything beyond his essential living expenses.” Defendant’s characterization of the finding is accurate. The evidence showed only that some friends had assisted defendant by giving him something, such as the junk cars to sell or the boat or his car, and that his sister assisted him at times with paying bills in varying amounts.

This Court has discussed the type of financial support from others which may be “in kind” income for purposes of establishing child support, *see generally Spicer v. Spicer*, 168 N.C. App. 283, 288-89, 607 S.E.2d 678, 682-83 (2005), so this analysis is helpful for determining ability to pay child support for purposes of contempt as well. Generally, evidence must show the amount of the support and that it is given on a regular basis:

The Guidelines include as “income” any “maintenance received from persons other than the parties to the instant action.” Guidelines, 2005 Ann. R. N.C. 48. “Maintenance” is defined as “[f]inancial support given by one person to

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another. . . .” Black’s Law Dictionary 973 (8th ed.2004). As our appellate courts have previously recognized, cost-free housing is a form of financial support that may be considered in determining the proper amount of child support to be paid. *See Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996) (voluntary support by maternal grandparents, including cost-free housing, properly considered in determining child support); *Gibson v. Gibson*, 24 N.C. App. 520, 522-23, 211 S.E.2d 522, 524 (1975) (evidence that employer supplied father with automobile and rent-free apartment that reduced his living expenses was evidence of “additional income” from his job beyond his salary). *See also* 2 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 10.8 at 533 (5th ed. 1999) (included in income are “in-kind payments, such as a company car, free housing or reimbursed meals, if they are significant and reduce personal living expenses”). We therefore hold that the trial court did not err in including the \$300.00 per month value of Mr. Spicer’s housing as income.

Spicer, 168 N.C. App. at 288-89, 607 S.E.2d at 682-83.

None of the evidence here shows a regular or consistent amount or type of assistance defendant has received from others and thus it cannot support a finding of his ability to pay his ongoing obligation or purge payments.

x. “The Defendant has a cell phone.”

The defendant does not challenge this finding as unsupported by the evidence. Once again, there is no finding of the cost of the cell phone, although the evidence showed that defendant’s monthly bill was \$42.00. Having a cell phone does not show defendant’s ability to pay but instead is a basic living expense. Defendant notes this finding illustrates the “trial court’s dogma that any living expense [defendant] paid reflected a dereliction of his duty to pay off his child support.” Just as with the findings that defendant pays for gas, food, and car insurance, this finding shows only that defendant has a living expense but does not indicate an ability to pay.

D. Failure to consider living expenses

The central deficiency of the trial court’s order is the complete failure to consider defendant’s living expenses. This is apparent even

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if we treated all of the findings as correct. The trial court made no finding regarding the value of the defendant's car or boat but required him to sell these items. Defendant acknowledged he should sell the boat, but without a car (with liability insurance required by law) and some gas, defendant would have no transportation to get to doctor appointments or to work, should he ever be released from his medical work restrictions.

To determine the ability to pay, the trial court must "take an inventory of the property of the [defendant]; find what are his assets and liabilities and his ability to pay and work -- an inventory of his financial condition -- so that there will be convincing evidence that the failure to pay is deliberate and willful." *Bennett*, 21 N.C. App. at 394, 204 S.E.2d at 556 (citations and quotation marks omitted). Only then can the trial court determine if the defendant's failure to pay is willful. *Id.* Based upon the evidence, the trial court must do an inventory considering defendant's income, or ability to earn, if the trial court makes the required finding of fact to impute income to defendant. *See, e.g., Lasecki v. Lasecki*, 246 N.C. App. 518, 523, 786 S.E.2d 286, 291 (2016) ("The trial court may impute income to a party only upon finding that the party has deliberately depressed his income or deliberately acted in disregard of his obligation to provide support[.]" (Citation and quotation marks omitted)).

Our dissenting colleague takes the position that the expense side of the financial inventory of a parent under obligation to pay child support can include *only* food, water, clothing, and shelter as legitimate needs for subsistence, and all expenses beyond this are unnecessary and unreasonable. This position is not supported by prior precedent or the practical needs of a parent to allow the parent to have the ability to work and support the child. The financial inventory must consider both sides of the equation: the defendant's income, assets, or ability to take reasonable means to obtain funds to pay support *minus* the defendant's legitimate reasonable needs and expenses.¹⁰ The defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses.

10. The trial court did not find that defendant was malingering, spending excessively, acting in bad faith, suppressing his income, or hiding assets, and the trial court did not impute income to defendant. *See Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) ("It is clear, however, that before the earnings capacity rule is imposed, it must be shown that the party's actions which reduced his income were not taken in good faith." (quotations, brackets, and citation omitted)).

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The trial court has broad discretion to determine which expenses are reasonable and necessary, but depending upon the facts of the particular case, those expenses may include more than the basic subsistence needs of food, clothing, water, and shelter. The extent of the legitimate needs of the obligor is in the discretion of the trial court because in some cases, it would be to the child's detriment to ignore the obligor's needs beyond food, water, clothing, and shelter. For example, an obligor who lives and works in an urban area with reliable public transportation may not need a car to get to work, to get to medical appointments, or to visit with or transport a child – although he would still need funds to pay for the public transportation. But an obligor who lives in an area without public transportation and has a job which requires transportation normally must have a car or he will be unable to work. If he loses his job, he will not be able to pay child support. Owning and operating a car requires certain expenses, including liability insurance, gas, and maintenance such as oil changes and new tires. This is why the trial judge has the discretion to determine if an obligor *needs* a car and the reasonable expenses for the car.

This opinion does *not* hold that liability insurance, gas, or a cell phone are necessities for anyone, including defendant. But it is apparent from the trial court's order that it considered all of these items, along with food, as disposable assets instead of living expenses. The trial court did not consider defendant's legitimate need for anything – even food, water, clothing, or shelter. On remand, the trial court may determine that defendant has no legitimate need for a means of transportation or communication, but the trial court must at least consider the possibility that these expenses might be reasonable needs.

Here, the evidence presented does not support a finding that defendant had the ability to pay the purge payments ordered by the trial court. Defendant's assets were a car, worth at most \$1,800.00, and a boat, worth roughly \$1,500.00. The total value is \$3,300.00. If defendant sold both of his assets for his estimated value, he would still not have sufficient funds to pay the \$5,000.00 purge. The trial court must consider defendant's financial condition, including reasonable expenses for subsistence, as part of the determination of his ability to pay his regular obligation as well as purge conditions. The trial court's findings do not address how much income defendant has, if any, or how much his subsistence expenses are. There was some evidence that defendant had received some money from selling a few junk cars which were given to him. He testified he made about \$200.00 to \$300.00 one month, but the trial court must be able to make findings which demonstrate his ability

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both to subsist and to pay his obligations, or some portion of the obligations if not the entire amount. The trial court must also make findings of how much defendant has actually paid, as there was evidence that he had made some payments, and compare this to the amount he had the ability to pay. The order does not address defendant's payments at all.

We also recognize there were two orders entered, and that the purge payment in each order was \$2,500.00. If defendant sold the car *and* the boat, he would have enough to pay *one* purge payment. But the two orders were entered on the same date as a result of the same hearing, both require the same purge payment, and the term of imprisonment in each was consecutive to any other order. Practically speaking, this means defendant would have to pay \$5,000.00 to purge his contempt for both orders. The trial court could not logically find that defendant was able to pay the purge payment in *both* orders, even if it could have found him able to pay in one of the orders. After selling both the car and the boat and paying one purge payment, defendant would have only a portion of the purge payment for the other order. Yet a finding of ability to pay *some* portion of the purge payment is not sufficient. Even if the defendant owns some property or has some income, the actual value of that property or the amount of income must be sufficient to satisfy the purge conditions. *See Jones v. Jones*, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983) (“While the evidence tends to show that defendant was gainfully employed as a construction worker at an hourly wage of \$5.75 and that he lives with his second wife who also is gainfully employed with an average take-home pay of approximately \$406.00 per month and that the defendant and his wife reside in a trailer situated on some ‘land’ given to defendant by his present father-in-law and that the trailer is heavily mortgaged and that monthly mortgage payments are \$250.00 and that the mortgage will be paid in six years and that defendant owns an automobile which is ‘broken,’ there is no evidence in this record that defendant actually possesses \$6,540.00 or that he has the present ability to take reasonable measures that would enable him to comply, with the order.” (Citation and quotation marks omitted)).

III. Conclusion

Because the existing evidence does not support the findings of fact, and the findings of fact do not support the trial court's conclusions that defendant had the ability to pay either his ongoing obligations or his purge payments in the Wilson and King cases, we vacate both orders. We remand for entry of new orders including the required findings of fact, including but not limited to the defendant's reasonable living expenses, and conclusions of law for contempt *and* his present ability to pay the

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full amount of any purge payments ordered. The trial court may, in its discretion, receive evidence on remand.¹¹

VACATED and REMANDED.

Judge HUNTER concurs.

Judge TYSON concurs in part and dissents in part.

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

The majority's opinion vacates and remands the trial court's orders. It asserts no competent evidence in the record supports the trial court's unchallenged findings and conclusion that Defendant failed to meet his burden to show cause and he could have paid at least some portion of his child support obligations, or that he can meet his purge conditions. If so, we should remand for further findings of fact solely on Defendant's present ability to purge.

I concur in part to remand for further findings on Defendant's present ability to purge his contempt, but respectfully dissent in part. Defendant has not met his burden or shown any cause why he should not be held in willful contempt to vacate the trial court's order. Competent evidence in the record presented by the Defendant himself supports the trial court's unchallenged findings of fact that Defendant repeatedly failed to pay his child support. Defendant does not deny he failed to pay child support for his children and his own evidence shows he possessed funds and hoarded assets above his basic necessities. Defendant's actions prove he was willing to and did deprive his children of their most basic needs, rather than discharge his lawful, voluntarily agreed-upon, and minimal child support obligations when he clearly had some means to do so.

I. Duty to Support

There is an ancient expectation and duty required of parents to support their children. *State v. Bell*, 184 N.C. 701, 713, 115 S.E. 190, 196 (1922). "This duty is recognized and discharged even by the higher orders of the animal world, and it would seem to be prescribed as to the human father by the most elementary principles of civilization as well as

11. On remand, if the trial court holds defendant in civil contempt, new evidence will be necessary to determine if defendant has the *present* ability to pay any purge payments ordered.

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of law.” *Id.* (Emphasis omitted.) The Supreme Court of North Carolina has also held: “A duty to support and maintain minor children is universally recognized as resting upon the parents of such children This parental duty is said to be a principle of natural law[.]” *Wells v. Wells*, 227 N.C. 614, 618, 44 S.E.2d 31, 34 (1947).

The parents’ failure to provide support for their child creates both civil and criminal liability for the parents. *See* N.C. Gen. Stat. § 49-2 (2017) (“Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her child born out of wedlock shall be guilty of a Class 2 misdemeanor.”); *see also* N.C. Gen. Stat. § 49-15 (2017) (“Upon and after the establishment of paternity pursuant to G.S. 49-14 of a child born out of wedlock, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same, and may be determined and enforced in the same manner, as if the child were the legitimate child of the father and mother.”).

The case before us involves civil contempt. Under N.C. Gen. Stat. § 50-13.4(c1) (2017), North Carolina’s stated public policy and “purpose of the [support] guidelines and criteria shall be to ensure that payments ordered for the support of a minor child are in such amount as to meet the reasonable needs of the child for health, education, and maintenance[.]” Parents must meet the support needs of their children after their own “basic necessities,” food, clothing and shelter, are met. Once these minimal or “basic necessities” for the parents’ self-subsistence are satisfied, all other funds and assets of the parents are priority to and must be used to support their children, under pain of contempt. *See Bell*, 184 N.C. at 713, 115 S.E. at 196.

II. Contempt

“An order for the periodic payments of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt.” N.C. Gen. Stat. § 50-13.4(f)(9) (2017). Once Defendant failed to make his child support payments, proceedings for civil contempt are properly initiated “by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt[.]” *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012). Once the order directs the “alleged contemnor to appear,” Defendant has the burden to “show cause why he should not be held in civil contempt.” *See id.*

“Failure to comply with an order of the court is civil contempt only when the noncompliance is willful *and* ‘[t]he person to whom the order

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is directed is able to comply with the order *or* is able to take reasonable measures that would enable the person to comply with the order.’” *Carter v. Hill*, 186 N.C. App. 464, 466, 650 S.E.2d 843, 844 (2007) (quoting N.C. Gen. Stat. § 5A-21(a)(3)) (2005) (emphasis supplied)). Under the unambiguous words in the statute and our precedents, Defendant’s willfulness in his breach and nonpayment of child support and his ability to purge his contempt are separate and distinct issues. *Id.*

The majority’s “balancing” analysis is more suited to the initial determination of what Defendant could and should pay for child support, which is not the issue at show cause. At the contempt hearing, Defendant acknowledged his past accumulation and nonpayment of his child support obligations. The correct inquiry on show cause is what Defendant could have paid, but did not pay, after he exempted and satisfied his basic needs of subsistence.

Any inquiry into the continued reasonableness of the agreed upon and established support obligations is proper at a modification hearing, not a contempt hearing. *See Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999) (a trial court’s order allowing a partial payment of support obligation at a contempt proceeding did not constitute a modification, because such modification is only allowed “upon motion in the cause and a showing of changed circumstances by either party.”) (citation omitted).

Defendant’s past willfulness of nonpayment can be ascertained through “an inventory of his financial condition” and findings by the trial court of his “assets and liabilities *and* his ability to pay and work.” *Bennett v. Bennett*, 21 N.C. App. 390, 394, 204 S.E.2d 554, 556 (1974) (emphasis supplied) (citation omitted). Defendant’s ability to purge his contempt must additionally satisfy the “present ability test,” which requires the defendant to “possess some amount of cash, or asset readily converted to cash.” *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985).

In this case, Defendant expressly acknowledged his duty to support his children. Defendant entered into two voluntary support agreements ordering him to pay a little over \$300.00 per month in total to support his children. Defendant accumulated a repeating history of nonpayment and breaches of his support agreement and obligations. At the time the most recent show cause hearing was held, Defendant had accumulated and owed nearly \$32,000.00 in past due and unpaid child support.

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III. Burden at Hearing

Defendant does not contest that he was properly served with the motion and order to show cause. At the show cause hearing, Plaintiff presented evidence of the amount of accumulated arrears Defendant owed. The burden then shifted and rested upon Defendant to overcome the allegations of willful breach of his admitted obligations and nonpayment, and to show any cause why he should not be held in contempt. *See Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05. Defendant appeared with counsel and offered evidence of his income, expenses, and assets at the hearing.

Defendant provided competent evidence of his income and expenditures, including estimates on the values of his car and boat, his monthly income from gifts and selling junk cars, and his living expenses, which included payments he had made for gas, automobile liability insurance, and a cell phone in addition to expenses for food, clothing, and shelter.

The majority's opinion correctly states: "An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him." *Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016).

The majority's opinion also correctly states the trial court's unchallenged findings of fact are based upon competent evidence:

i. "The Defendant owns a boat." Defendant does not challenge this finding as unsupported by the evidence. He did own a boat. . . .

ii. "The Defendant owns a car." Defendant does not challenge this finding as unsupported by the evidence. He did own a car. . . .

iii. "The Defendant spends money on gas." Defendant does not challenge this finding as unsupported by the evidence. He did buy a little gas. . . .

. . . .

viii. "The Defendant pays car insurance in the amount of \$147.00 per month." Defendant challenges this finding as unsupported by the evidence because by the time of the second hearing date, defendant had cancelled his car insurance. . . .

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....

- x. “The Defendant has a cell phone.” The defendant does not challenge this finding as unsupported by the evidence.

None of these items are “basic necessities” for self-sustenance to excuse Defendant from breach of his priority obligations to support his children. It is not the role of this appellate court to re-weigh the competent evidence on these unchallenged and binding findings of fact, which support the trial court’s conclusion.

IV. Standard of Review

The majority’s opinion correctly states: “Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. North Carolina’s appellate courts are deferential to the trial courts in reviewing their findings of fact.” *County of Durham v. Hodges*, __ N.C. App. __, __, 809 S.E.2d 317, 323 (2018). That standard of review is misapplied by re-weighing the evidence on appeal.

The record and transcript contain competent evidence to support the trial court’s finding Defendant possessed money and assets above his “basic necessities,” had been and was able to help meet a portion of his support obligations, and had failed to support his children. This evidence supports the trial court’s conclusion that Defendant’s failure was, and his continued failure to pay his child support obligations is, willful. *See Hill*, 186 N.C. App. at 466, 650 S.E.2d at 888.

Precedents require us on appellate review to defer to the trial court’s findings and conclusion in contempt hearings. Our review of “contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted). “Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by *any competent evidence* and are *reviewable only for the purpose of passing upon their sufficiency* to warrant the judgment.” *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (emphasis supplied) (citation omitted). “[T]he court is not limited to ordering one method of payment to the exclusion of the others provided in the statute. The Legislature’s use of the disjunctive and the phrase ‘as the court may order’ clearly shows that the [trial] court is to have broad discretion in

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providing [and ordering] for payment of child support orders.” *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978).

If, as the majority’s opinion asserts, despite the established and unchallenged nonpayment and the competent evidence provided by Defendant, the findings of fact by the trial court are insufficient to support a conclusion Defendant has the present ability to purge, it is not necessary to vacate the entire order. Defendant still has failed to meet his burden at the show cause hearing why he should not be held in willful contempt for his past and admitted failures to pay child support and the \$32,000.00 of accumulated debt under his voluntary agreement and the trial court’s order. *Spears*, 245 N.C. App. at 278, 784 S.E.2d at 497.

If the trial court’s findings do not support the conclusion that Defendant has the present ability to purge his willful contempt, upon remand for further findings of fact Defendant must show the amounts he can pay to purge his contempt or seek reduction of the purge conditions.

Defendant is not entitled to the findings and conclusions of his past breaches of his agreed-upon and very modest support obligations to his children being vacated. The competent evidence and unchallenged findings clearly show Defendant had money and hoarded assets well above his basic living necessities, and willfully spent money admittedly owed to the children on a cell phone, boat, car, gas, and insurance, instead of meeting his agreed-upon and lawful support obligations to his children.

While the trial court, *sua sponte*, did set purge conditions that are higher than DSS had initially sought, Defendant’s own evidence shows he had additional means and capacity to pay beyond what he did pay and what DSS initially sought for him to purge. *See Shippen v. Shippen*, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) (“a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order.” (citation omitted)).

A finding indicating Defendant’s failure to pay is willful and that he has the ability to comply “while not as specific or detailed as might be preferred, is minimally sufficient.” *Id.* at 191, 693 S.E.2d at 244. The evidence, findings, and order before us clearly meets and exceeds that standard.

At most on remand, Defendant can attempt to meet his purge and/or can argue for a reduction of the purge amount or conditions. *Tyll v. Berry*, 234 N.C. App. 96, 112, 758 S.E.2d 411, 422 (2014) (“The trial court, therefore, erred in requiring the monetary payments without first

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finding defendant was presently able to comply with the \$2,500.00 fine imposed as a result of defendant's past contempt").

V. Conclusion

The issue in this case is whether Defendant's past failures to pay his support obligations were willful, not the reasonableness of the support obligation. Defendant voluntarily agreed to meet his most basic and legal obligations to support for his children and does not challenge that he willfully failed to do so. Defendant's own evidence shows he possessed funds and property above his basic necessities, failed to pay his child support, spent his money and time on other things, hoarded assets available to discharge his obligations, and breached and ignored his "universally recognized" duty to support his children. *See Wells*, 227 N.C. at 618, 44 S.E.2d at 34. Defendant has failed to meet his burden to "show cause why he should not be held in civil contempt[.]" *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05.

Under our standard of review, and Defendant's admitted breaches, it is unnecessary and a waste of judicial resources to vacate the trial court's unchallenged findings and conclusions on Defendant's willfulness. Such evidence and unchallenged findings show the Defendant's actions were volitional and his failure to support was willful. The trial court's unchallenged findings and conclusions that Defendant failed to pay his child support and has failed to meet his burden to show cause why he should not be held in willful contempt is properly affirmed. Presuming the purge amount may exceed the Defendant's admitted present abilities, remand is appropriate for supplemental findings on Defendant's present ability to purge or for him to seek reduction thereof. I respectfully concur in part and dissent in part.

IN THE COURT OF APPEALS

EVERETT'S LAKE CORP. v. DYE

[262 N.C. App. 46 (2018)]

EVERETT'S LAKE CORPORATION, PLAINTIFF

v.

LEWIS EDWARD DYE, JR., DEFENDANT

No. COA18-360

Filed 16 October 2018

Waters and Adjoining Lands—riparian rights—non-commercial fishing—granted to predecessor in title

Defendant landowner had the right to fish in plaintiff's lake based on the riparian right originally granted to a predecessor in title in an earlier deed.

Appeal by Plaintiff from Amended Order entered 30 November 2017 by Judge Richard T. Brown in Richmond County Superior Court. Heard in the Court of Appeals 19 September 2018.

Anderson, Johnson, Lawrence & Butler, L.L.P., by Steven C. Lawrence, for the Plaintiff-Appellant.

Lewis Edward Dye, Jr., pro se.

DILLON, Judge.

Plaintiff Everett's Lake Corporation owns Everett's Lake (the "Lake"), a non-navigable lake in Richmond County. Defendant Lewis Edward Dye, Jr., owns a small tract of land, comprising approximately two-tenths of an acre, which abuts the Lake. This dispute concerns whether Defendant, through his chain of title in his small tract, also owns the right to access the Lake.

I. Background

As of 1948, the Lake and the land around the Lake were all owned by the Lamb family.

Defendant's Chain of Title

In 1948, the Lambs conveyed a thirty-acre tract which abutted the Lake to the Entwistles. In the Lamb's 1948 deed to the Entwistles (the "1948 Deed"), the Lambs not only conveyed the tract of land, but also conveyed certain rights to use the adjacent Lake for non-commercial purposes. Specifically, the 1948 Deed stated as follows:

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The parties of the first part hereby convey unto the parties of the second part riparian water rights in Everett's Lake on that portion of the above described property bounded by the said Everett's Lake. (This deed is made subject to this restriction. The parties of the second part shall not use the said Everett's Lake for any commercial purpose.) It is further understood and agreed that the parties of the first part are hereby conveying riparian rights in Everett's Lake in connection with a tract of Land owned by the parties of the second part consisting of about 30 acres and located on the South side of the said Everett's Lake.

[. . .]

TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said parties of the second part, their heirs and assigns, to their only use and behoof forever.

This deed was duly recorded in 1948.

In 1988, the Entwistles conveyed a 3.55-acre portion of their property abutting the Lake to the Bakers. In 1989, the Bakers conveyed two-tenths of an acre abutting the Lake from their 3.55-acre tract to the Threadgills. And in 2015, the Threadgills conveyed this two-tenths of an acre tract, abutting the Lake, to Defendant and his wife. In each of the above-described conveyances, the grantor conveyed not only a tract of land, but also riparian rights, as described in the 1948 Deed.

Plaintiff's Chain of Title in the Lake

In 1958, ten years after the Lambs conveyed the thirty-acre tract to the Entwistles, the Lambs conveyed the Lake itself to Plaintiffs by warranty deed. This deed contained the following exceptions:

[E]xcept as to such riparian and other rights which any firm or corporation or any person or persons may have in and to Everett's Lake and use thereof, irrespective of the method by which such rights may have been acquired.

The Dispute

At some point, Plaintiff formed a fishing club (the "Club"), charging members for the right to fish the Lake. In 2007, Plaintiff performed extensive work on the Lake. Plaintiff had an expectation that adjacent landowners would join the Club and pay annual dues of \$500.00 if they desired to fish on the Lake. Upon the purchase of his lot in 2015, Defendant began to fish the Lake without joining the Club. As a result,

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Plaintiff brought a suit for civil trespass against Defendant. Defendant answered and counterclaimed, seeking a declaration that he had the right to use the Lake.

A bench trial was held in Richmond County Superior Court. The trial court declared that Defendant did have valid riparian water rights “for the reasonable use and enjoyment of Everett’s Lake body of water by virtue of such rights acquired from [D]efendant’s predecessors entitled to his real property.” Plaintiff timely appealed.

II. Standard of Review

We review the Amended Order and its findings of fact for competent, supporting evidence. The trial court’s conclusions of law are reviewed *de novo*. *Weaverville Partners v. Town of Weaverville Bd. of Adj.*, 188 N.C. App. 55, 57, 654 S.E.2d 784, 787 (2008).

III. Analysis

The central issue in this matter is whether the trial court correctly determined that Defendant, as the owner of his small tract, has “riparian rights” in the Lake, which include the right to make personal use of the Lake. For the following reasons, we affirm.

The trial court agreed with Defendant that Defendant has the right to fish the Lake based on the “riparian right” originally granted to his predecessor in title in the 1948 Deed. Based on the language in the 1948 Deed, we also agree. We conclude that “riparian rights” in the Lake were part of the “bundle of sticks” that the Lambs conveyed to Defendant’s predecessor in title.¹ As the owners of the Lake itself, the Lambs had the right to exclude others from the Lake. *See Hildebrand v. S. Bell Tel.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941) (recognizing that the right to own property includes “the right to exclude others from its use”). When the Lambs executed the 1948 Deed to Defendant’s predecessor in title, the Lambs conveyed “sticks” representing fee simple absolute ownership in the thirty acres adjacent to the Lake. The Lambs also essentially gave up a “stick,” namely their right to exclude Defendant’s

1. Property has been described as a “bundle of sticks,” whereby various people/entities could own different rights in the same real estate. *See United States v. Craft*, 535 U.S. 274, 278 (2002) (describing property as a “bundle of sticks”). For example, one may own a life estate interest in certain property, another may own a remainder interest in that property, another may have an easement to use the property, the State has the right to condemn the property, and a bank may have a lien against that property. *See also In re Greens of Pine Glen*, 356 N.C. 642, 651, 576 S.E.2d 316, 322 (2003) (describing that property includes a “bundle of rights” which can be held by various parties).

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predecessor in title from using the Lake as a “riparian right” owner, so long as these rights were used for non-commercial purposes. Therefore, when the Lambs conveyed their fee simple interest in the Lake itself to the Plaintiff in 1958, the Lambs could only convey the sticks they still owned in the Lake, which did not include the “riparian rights” nor the “right to exclude” sticks already conveyed to Defendant’s predecessor in title. In fact, the 1958 deed to the Plaintiff recognizes that the fee simple interest in the Lake being conveyed by the Lambs was subject to the riparian rights in the Lake already owned by others.

Plaintiff argues that the Lambs’ conveyance in the 1948 Deed of “riparian water rights . . . on that portion of the [thirty-acre tract] bounded by [the Lake]” was ambiguous and, therefore, did not convey any rights to use the Lake. We disagree. Indeed, our Supreme Court has held as follows with regard to interpreting language in a deed:

It is . . . a general rule that the deed must be upheld, if possible, and the terms and phraseology of description will be interpreted with that view and to that end, if this can reasonably be done. The Court will effectuate the lawful purposes of deeds and other instruments if this can be done consistently with the principles of rules of law applicable.

N.C. Self Help v. Brinkley, 215 N.C. 615, 619, 2 S.E.2d 889, 892 (1939). We conclude that the phraseology and terms used in the 1948 Deed clearly evince an intent to convey the right to enjoy the Lake for non-commercial purposes: “[The Lambs] are hereby conveying riparian rights in Everett’s Lake” and “[Defendant’s predecessor in title] shall not use the said Everett’s Lake for any commercial purpose.” Our Supreme Court has held that “riparian rights” include the right of a landowner “to make reasonable use of the waters” adjacent to his land. *Dunlap v. Carolina Power & Light*, 212 N.C. 814, 818, 195 S.E. 43, 46 (1938). This right includes the right to fish. *See, e.g., Hampton v. N.C. Pulp*, 223 N.C. 535, 548, 27 S.E.2d 538, 546-47 (1943) (recognizing the right to fish is a riparian right).

Plaintiff further argues that the 1948 Deed from the Lambs to the Entwistles only created an “easement in gross.” That is, Plaintiff argues, the 1948 Deed only conveyed a *personal* right to the Entwistles to use the Lake which was not transferable to successors in title. We disagree. We conclude, rather, that the language of the 1948 Deed did not convey an easement in gross, but rather a right which ran with the portion of the thirty-acre tract which abutted the Lake.

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The 1948 Deed grants riparian rights “on that portion of the above described property bounded by the said Everett’s Lake.” The 1948 Deed states that the rights were being conveyed “in connection with a tract of land owned by the parties of the second part consisting of about 30 acres and located on the South side of the said Everett’s Lake.” Finally, the 1948 Deed states that the grant was to Defendant’s predecessor, “their heirs and assigns to their only use and behoof forever.” The language in the 1948 Deed indicates an intention on behalf of the Lambs for the riparian rights to run with the land, at least that portion of the thirty-acre tract which directly abutted the Lake. Therefore, we affirm that Defendant does have valid riparian rights in the Lake, including the right to fish.

We note that the trial court did *not* base its ruling on the “public trust doctrine.” Indeed, Defendant made no argument that his right to fish the Lake stems from the application of the public trust doctrine. The public trust doctrine applies only to those bodies of water which are determined to be navigable. *See, e.g., State ex rel. Rohrer v. Credle*, 322 N.C. 522, 526, 369 S.E.2d 825, 827-28 (1988). And the trial court concluded that the Lake is not a “navigable” lake but rather a lake that is privately owned by Plaintiff. This determination is not in dispute on appeal.

Further, though not argued by either party, we recognize that the trial court’s holding is *not* based on a theory that Defendant’s riparian rights arise from the common law. Our Supreme Court has held that where the boundary of a tract of land is the edge of a non-navigable swamp, there is no “common law” right of that land-owner to use the swamp. *See Kelly v. King*, 225 N.C. 709, 714, 36 S.E.2d 220, 223 (1945). And, here, Defendant’s deed cites the edge of the Lake, which the trial court found to be non-navigable, as one of the boundaries. *Kelly*, though, is not applicable to the present case as Defendant’s right springs from an express grant contained in his chain of title, not from the operation of some common law principle.

IV. Conclusion

The trial court correctly concluded that Defendant has certain riparian rights to make reasonable use and enjoyment of the Lake for non-commercial purposes based on the grant of “riparian rights” in Defendant’s chain of title.

AFFIRMED.

Judges ELMORE and DAVIS concur.

HAMLET H.M.A., LLC v. HERNANDEZ

[262 N.C. App. 51 (2018)]

HAMLET H.M.A., LLC D/B/A SANDHILLS REGIONAL MEDICAL CENTER, PLAINTIFF

v.

PEDRO HERNANDEZ, M.D., DEFENDANT

No. COA17-744

Filed 16 October 2018

1. Contracts—repayment of physician recruitment loans—compromise verdict—multiple components

The jury's verdict awarding repayment of loans that were made by a hospital to a physician under a Physician Recruitment Agreement was not a compromise verdict requiring a new trial even though it only awarded \$334,341.14 of the \$902,259.66 total loan amount. The amount of the verdict, standing alone, was not sufficient to show an abuse of discretion by the trial court in denying defendant physician's motion for a new trial, because extensive evidence was presented that the total sum comprised 21 payments stemming from different types of obligations.

2. Unfair Trade Practices—learned profession exception—physician claim against hospital—employment contract

In an issue of first impression, the Court of Appeals held that a defendant physician's claim that a hospital made false representations to induce him to enter an employment contract involved a business arrangement, not professional services rendered, and was therefore not exempt from the Unfair and Deceptive Trade Practices Act (UDTP) under the learned profession exception. The trial court erred by granting directed verdict dismissing defendant's UDTP claim.

3. Appeal and Error—preservation of issues—contemporaneous objection—identification of improper evidence

In a dispute between a hospital and a physician regarding an employment agreement, defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence. In a nine-day trial with extensive testimony and documentary evidence, even if defendant's "continuing objection" to parol evidence was valid, defendant's brief did not clearly identify the specific evidence he claimed should not have been admitted, precluding an opportunity to respond by plaintiff as well as appellate review.

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[262 N.C. App. 51 (2018)]

4. Evidence—breach of contract—parol evidence—Rule 59 motion

In a dispute between a hospital and a physician regarding an employment agreement, where defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence, the Court of Appeals determined all of the evidence was properly before the jury and defendant’s argument that his Rule 59 motion for a new trial should have been granted was without merit.

Judge DAVIS dissenting in part with separate opinion.

Appeal by defendant from judgment and order entered 9 January 2017 by Judge Richard T. Brown in Superior Court, Richmond County. Heard in the Court of Appeals 21 March 2018.

Thomerson Freeman & Rogers P.C., by William S. F. Freeman, for plaintiff-appellee.

Mark L. Hayes, for defendant-appellant.

STROUD, Judge.

Defendant Pedro Hernandez, M.D. (“defendant”) appeals a judgment upon a jury verdict finding him liable for breach of contract and an order denying his motions for judgment notwithstanding the verdict and for a new trial. Defendant has raised three issues on appeal regarding the judgment and order. First, defendant has failed to demonstrate that the trial court abused its discretion in denying his motion for new trial based upon his claim of a compromise verdict. Second, the trial court improperly dismissed defendant’s Unfair and Deceptive Trade Practices (“UDTP”) counterclaim based upon the “learned profession” exception to N.C. Gen. Stat. § 75.1-1. Last, defendant failed to preserve his argument regarding erroneous admission of parol evidence. We therefore reverse and remand in part and affirm in part the trial court’s judgment.

I. Background

Defendant is a physician who moved from Maine to North Carolina to be closer to his family. He had been practicing in Maine since 2008. In March of 2011, before he and his wife moved, defendant used an online portal called MedHunters to look for open medical positions in North Carolina. He sent seven hospitals an interest email, including plaintiff Sandhills Regional Medical Center, a hospital owned and operated by

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plaintiff Hamlet H.M.A. LLC.¹ Plaintiff responded immediately, and on 16 March and 17 March 2011, plaintiff paid for defendant to visit the Hospital and plaintiff. Plaintiff made an offer to defendant five days after his visit.

The original offer was for defendant to set up his own independent practice and to be an independent contractor for plaintiff. The offer guaranteed a minimum collection amount for the first 18 months of the 36-month contract. The income guarantee was described in the email with the offer attached. Mr. Michael McNair, the CEO of the Hospital at the time, testified: “the theory is, as his practice develops over a period of time and his practice starts bringing in more money from him seeing patients and doing surgery and those kind of things, then the amount that you get paid [by plaintiff] gets less.”

Plaintiff also offered defendant an employment option as an addendum to the original offer, which plaintiff could exercise at the end of the first 18 months of the contract. The employment option section specified that the option would “at a minimum, include the following material terms and conditions: Proposed Duration: 18 months. Proposed Compensation Methodology for Employment Agreement: Base Salary \$325,000 with a bonus based on worked RVUs.”²

Defendant clarified in two emails dated 23 March 2011 and 24 March 2011 that he was not comfortable with this arrangement. Instead, he asked to be an employee with a regular salary like the other doctors employed by Plaintiff. Plaintiff sent defendant an employment offer on 25 March 2011 with a base salary of \$275,000 and several other incentives. Defendant responded four hours later that he did not think it made sense to accept less money for an employee position or status.

Defendant then sent plaintiff an email asking to extend the time period of guaranteed income to 24 months, rather than 18 months. Plaintiff replied that it could not extend the period but raised the monthly salary from \$47,616.82 to \$49,500.00 and also added a signing bonus of \$30,000.00. After further negotiations, the parties entered into a Physician Recruitment Agreement on 29 March 2011.

1. We will refer to Hamlet H.M.A., LLC as “plaintiff” and the Sandhills Regional Medical Center operated by plaintiff as “the Hospital.”

2. Mr. McNair testified that “RVUs” refers to “relative value units” and explained that this portion of the agreement was “the bonus piece that’s based upon your productivity RVUs, relative value units. That’s a fairly common term in physician contracting language.”

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Defendant started his practice at the Hospital on 1 September 2011 and was to work until 1 September 2014 based upon the 36-month contract requirement. The practice was not successful, and at the end of the first 18-month period, defendant timely notified plaintiff of his desire to exercise the employment option in his contract. But plaintiff did not give defendant an employment contract at the end of the 18-months. The Physician Recruitment Agreement defendant signed required plaintiff to offer defendant an employment contract on one of plaintiff's standard template forms at the end of the first 18 months, should defendant exercise the option. Plaintiff believed the Physician Recruitment Agreement itself to be the employment contract, since it was on a standard template form and stated the amount his salary would be as an employee, so plaintiff did not send defendant an employee contract.

Defendant closed his practice in April 2013, so defendant did not practice for the full 36-month period. Plaintiff informed defendant that whether defendant became an employee of Plaintiff or not, he was still required to practice for the 36 month period. When defendant did not receive an 18-month employment contract from plaintiff, he began looking for other work. Plaintiff made several requests to defendant demanding repayment of its loans made during defendant's first 18 months of practice, but defendant did not repay them.

On 29 August 2014, plaintiff filed a complaint against defendant alleging breach of contract and demanding repayment of the entire amount paid to defendant, a total of 21 payments amounting to \$902,259.66. Defendant filed an answer with counterclaims for breach of contract, fraud, unfair or deceptive trade practices, and unjust enrichment. A jury trial was held in Superior Court in Richmond County at the end of August and beginning of September 2016. The jury returned a verdict for plaintiff for \$334,341.14. Defendant filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial on 8 September 2016. On 9 January 2017, the trial court entered judgment on the jury verdict and issued an order denying both of defendant's post-trial motions. Defendant timely appealed to this Court from both the order denying the motions and the judgment.

II. Compromise Verdict

[1] Defendant contends that the jury reached an impermissible compromise verdict when it found that defendant owed \$334,341.14, instead of \$902,259.66.

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a. Standard of Review

We review an appeal from denial of a motion for new trial based upon an alleged compromise verdict for abuse of discretion. *See Smith v. White*, 213 N.C. App. 189, 195, 712 S.E.2d 717, 721 (2011) (“An appeal from a trial court’s denial of a motion for new trial because of an alleged compromise verdict is reviewed for an abuse of discretion.”). The party seeking to show an abuse of discretion has the burden of demonstrating that the verdict was a compromise. *Id.* Our Supreme Court has stressed that we should not review this discretionary ruling except in “rare cases”:

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. The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review of a trial judge’s exercise of that power. The principle that appellate review is restricted in these circumstances is so well established that it should not require elaboration or explanation here. Nevertheless, we feel compelled by the Court of Appeals’ disposition of the case before us to restate and reaffirm today the basic tenets of our law which would permit only circumscribed appellate review of a trial judge’s discretionary order upon a Rule 59 motion for a new trial. Those tenets have been competently set forth in innumerable prior opinions of this Court, and, for instructive purposes, we provide the following sampling therefrom.

In *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915), the Court evinced a positive hesitancy to review such discretionary rulings by the trial court except in rare cases: While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will

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yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E.2d 599, 602-03 (1982) (citations and quotation marks omitted).

b. Analysis

Defendant contends the jury's verdict is a compromise verdict so it must be set aside. "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. The dollar amount of the verdict alone is insufficient to set aside the verdict as being an unlawful compromise." *Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721 (citations and quotation marks omitted).

Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. If the award of damages to the plaintiff is grossly inadequate, so as to indicate that the jury was actuated by bias or prejudice, or that the verdict was a compromise, the court must set aside the verdict in its entirety and award a new trial on all issues.

Robertson v. Stanley, 285 N.C. 561, 569, 206 S.E.2d 190, 195-96 (1974) (citation and quotation marks omitted).

Defendant argues that the verdict here is a compromise verdict much like an example noted in *Bartholomew v. Parrish*, 186 N.C. 81, 118 S.E.2d 889 (1923). The Court in that case set forth this example:

[I]f a suit were brought upon a promissory note, which purported to be given for \$100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for \$50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence, nor to that of the defendant. It would be a verdict without evidence to support it; and it is not to be tolerated that the jury should thus assume in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim.

Id. at 84, 118 S.E.2d at 900; *see also Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721 ("A compromise verdict is one in which the jury answers

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the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court.”). Defendant argues that but for the numbers, this case is almost identical to the example in *Bartholomew*, 186 N.C. at 84, 118 S.E.2d at 900. At trial, the parties entered into a stipulation that plaintiff loaned defendant \$902,259.66. Defendant disputed only that he had a legal obligation to repay plaintiff any of the payments. He argued he had no obligation to pay plaintiff at all because plaintiff breached the contract first by not fulfilling its obligation to give him an employment contract at the end of the first 18 months. The employment contract was an optional provision, but defendant had notified plaintiff of his intention to exercise the option in a timely fashion. Defendant argues that based upon the issues and the stipulation of the amount of potential damages plaintiff may recover, the jury could return a verdict for \$902,259.66 or for nothing at all. *See also Wiles v. Mullinax*, 275 N.C. 473, 485-86, 168 S.E.2d 366, 375-76 (1969) (determining that because the damages were stipulated at trial, they were not of issue and would not be reconsidered in a new trial). Because the verdict was \$334,341.14, defendant contends the jury apparently came to a compromise by including the amounts on some of the checks in evidence at the trial but excluding others.

Plaintiff contends that defendant has not demonstrated a compromise verdict simply by the amount of damages so the trial court did not abuse its discretion by denying his motion for new trial.³ Although the parties had stipulated that the total sum paid to defendant was \$902,259.66, the 21 payments plaintiff paid to defendant were also in evidence, and the parties presented much testimony and other evidence regarding the various obligations and amounts related to each. The Physician Recruitment Agreement included payments and financial obligations of several different types, and the checks included amounts based upon different portions of the Agreement. For example, plaintiff notes that it “agreed to provide several categories of financial assistance to [defendant] under the terms of the Recruitment Agreement, including: (i) reimbursement of relocation expenses, up to \$15,000; (ii) reimbursement of expenses incurred to market the new practice, up to \$10,000; (iii) reimbursement of start-up expenses incurred with setting up a new practice, up to \$10,000; (iv) a sign-on bonus of \$30,000; and (v) for the first eighteen (18) months of the thirty-six (36) month period, a

3. Plaintiff’s brief notes that plaintiff did not cross-appeal from the judgment, despite the fact that the jury did not award the total \$902,259.66, and it is difficult to see how defendant is an “aggrieved party” since the verdict was far less than it should have been based upon defendant’s argument regarding the compromise verdict.

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monthly income guarantee of \$49,500 against cash collections.” In addition, defendant had agreed to be on emergency call at the Hospital and to accept calls for unassigned patients. The parties presented extensive evidence over nine days regarding the various obligations and payments. The verdict sheet had 12 separate issues, and the jury’s answers to all of the issues were internally consistent. The jury never indicated any confusion about the issues under consideration.

Plaintiff also notes that this case is not at all like *Bartholomew*, the case with the example quoted above and noted by defendant. In *Bartholomew*, the jury’s compromise was obvious both from the number and the notation on the verdict sheet: “In answer to the issue, the jury rendered a verdict in word and figures as follows: ‘Compromise, \$283.25.’” *Bartholomew*, 186 N.C. at 83, 118 S.E. at 900 (emphasis added). In addition to labeling the verdict as a “[c]ompromise,” the way the jury had calculated the compromise was obvious: “[T]he sum of \$283.25 is arrived at by taking one-half of the \$366.51 and adding to it \$100, the sum admitted by the defendant to be due to the plaintiffs.” *Id.* at 84, 118 S.E. at 900.

Here, the only evidence defendant can offer of a compromise is the amount of the damages, and given the complex evidence and issues presented, the amount alone does not convince us that the jury reached a compromise verdict. See *Piedmont Triad Reg’l Water Auth. v. Lamb*, 150 N.C. App. 594, 598, 564 S.E.2d 71, 74 (2002) (“The dollar amount of the verdict alone is insufficient to set aside the verdict as being either an unlawful compromise or a quotient verdict.”). The cases cited by plaintiff in which the amount of damages could show a compromise verdict involved simple single-issue verdicts. In addition, had the trial court granted defendant’s motion, it would logically have granted a new trial on damages only and not on defendant’s liability. See, e.g., *Handex of Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 20, 607 S.E.2d 25, 36-37 (2005) (“A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case. It must be clear that the error in assessing damages did not affect the entire verdict.” (Citations omitted)). Defendant argues that new trial should have been granted on all issues because of how “interconnected” the issues were, but it is this very “interconnectedness” that also makes it impossible to determine a compromise verdict simply from the amount of the verdict. The jury’s answers as to liability were clear, and defendant does not challenge those issues on appeal, other than as noted in the parol evidence argument, so there would have been

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no need for a new trial on all issues. *See generally id.* The trial court may have considered a new trial on damages only to be unfair to defendant, considering the complexity of the evidence. This is not one of those rare cases in which we can say that the trial court abused its discretion by denying defendant's motion. *See Smith*, 213 N.C. App. at 195, 712 S.E.2d at 721.

III. Unfair and Deceptive Trade Practices (“UDTP”) Claim

[2] Defendant argues the trial court erred by granting entry of directed verdict dismissing his UDTP counterclaim “based on a misapplication of the ‘learned profession’ exclusion.” (Original in all caps).

a. Standard of Review

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. On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury. A motion for directed verdict or JNOV should be denied unless the evidence, taken as true and viewed in the light most favorable to the plaintiff, establishes an affirmative defense as a matter of law. Our review is *de novo*.

King v. Brooks, 224 N.C. App. 315, 317-18, 736 S.E.2d 788, 791 (2012) (citations and quotation marks omitted).

b. The Learned Profession Exception

The trial court granted the motion for a directed verdict based upon the learned professional exception to a claim for Unfair and Deceptive Trade Practices. Chapter 75 of the North Carolina General Statutes states:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, “commerce” includes all business activities, however denominated, but does not include professional services rendered by a member of a *learned profession*.

N.C. Gen. Stat. § 75-1.1(a), (b) (2017) (emphasis added).

In *Reid v. Ayers*, this Court noted a two-part test to determine when the learned profession exception applies: “In order for the learned

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profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services.” 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citations omitted).

There is no dispute that doctors and hospitals are members of a learned profession. *See Wheelless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 589 768 S.E.2d 119, 123 (2014); *see also Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12 (2001); *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000); *Abram v. Charter Medical Corp. of Raleigh*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990). The first prong of the learned profession exception is satisfied, since both parties are members of a learned profession. *See generally Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

The second prong of the test is less clear. None of the cases cited by the parties which address the learned profession exception deal with a dispute arising from a contractual arrangement like this one among members of a learned profession. Since the claims must arise out of “professional services rendered” by a physician, *see* N.C. Gen. Stat. § 75-1.1 (b), where a claim does not arise directly from rendition of professional services, defendant argues that one member of a learned profession may bring a UDTP claim against another member of a learned profession regarding a business dispute unrelated to rendition of medical services.

The pertinent parts of N.C. Gen. Stat. § 75-1.1 provide:

(a) Unfair methods of competition in or affecting commerce, and *unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.*

(b) For purposes of this section, “commerce” includes all business activities, however denominated, *but does not include professional services rendered by a member of a learned profession.*

N.C. Gen. Stat. § 75-1.1(a)-(b) (emphasis added).

The issue of first impression presented by this appeal is whether the “learned profession” exception set forth in N.C. Gen. Stat. § 75-1.1(b) applies to a dispute between a physician and a hospital relating to alleged false claims made by the hospital to induce the physician to enter into an employment contract such as the one at issue in this litigation. The gravamen of defendant’s UDTP counterclaim is that plaintiff made certain

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false representations to him prior to his entering into the contract at issue and that those false representations constituted a violation of N.C. Gen. Stat. § 75.

Although no case has addressed a situation exactly like this one, other cases have interpreted the learned profession exception in some medical contexts. In *Wheless*, the plaintiff physician brought a claim against the hospital based upon the hospital's complaint to the Medical Board about care provided by the plaintiff physician, but this Court held making a complaint to the Medical Board is integral to the hospital's role in providing medical care and thus falls within the exception:

It is well-settled by our Courts that a matter affecting the professional services rendered by members of a learned profession therefore falls within the exception in N.C.G.S. § 75-1.1(b). Indeed, our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). This exception for medical professionals has been broadly interpreted by this Court, and includes hospitals under the definition of "medical professionals." In this case, defendants' alleged conduct in making a complaint to the Medical Board is integral to their role in ensuring the provision of adequate medical care. Accordingly, plaintiff's argument is without merit.

Wheless, 237 N.C. App. at 590-91, 768 S.E.2d at 123-24 (citations, quotation marks, ellipses, and brackets omitted).

Another case which provides guidance into our determination of whether the defendant's claim relates to the rendition of professional services is *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 293 S.E.2d 901 (1982). This case was decided under a prior version of N.C. Gen. Stat. § 75-1.1, and this Court held that plaintiffs could not maintain a UDTP claim against the defendant. *See generally Cameron*, 58 N.C. App. at 445-46, 293 S.E.2d at 920-21. The holding was based upon the wording of N.C. Gen. Stat. § 75-1.1 at that time, which referred to a "seller." *See* N.C. Gen. Stat. § 75-1.1 (1975 Replacement). But since Chapter 75 had been amended just before *Cameron*, this Court noted, *in dicta*, that the result would have been the same under the amended version of the statute, which is the version in effect now. *Cameron*, 58 N.C. App. at 446, 293 S.E.2d at 920.

In *Cameron*, the plaintiffs were podiatrists who brought twelve different claims against the defendant hospital arising out of the hospital's

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denial of hospital staff privileges. *Id.* at 416, 293 S.E.2d at 904. The claims included allegations based upon the hospital's bylaws and application process, civil conspiracy, interference with contractual rights, "unfair methods of competition and unfair practices" in violation of G.S. 75-1.1, slander, and libel. *Id.* The Court noted that under the newly amended UDTP Act, the podiatrists' UDTP claims against the hospital would be barred by the learned profession exemption:

We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. Plaintiffs contend that the so-called "learned profession" exception in the current G.S. 75-1.1(b) does not exclude defendants' alleged "anticompetitive" conduct because that conduct involves "commercial" activity, not the rendering of "professional services." We do not agree for the following reasons.

At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."

This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to staff privileges. We conclude that the nature of this consideration of whom to grant

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hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of “professional services” which is now excluded from the aegis of G.S. 75-1.1.13. In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants’ motions for a directed verdict upon this issue also were properly granted.

Id. at 446-47, 293 S.E.2d at 920–21 (citations, quotation marks, brackets and footnote omitted).

Cameron dealt with staff privileges at the hospital, and, similar to *Wheless*, this Court held the case fell within the learned profession exception because the hospital’s process of evaluating the professional qualifications of physicians to determine whether a physician should have staff privileges at the hospital was necessary to assure “good health care” at the hospital. *Id.*

These cases addressing UDTP claims in a medical context do not suggest that negotiations regarding a business arrangement, even between a physician and a hospital, are “*professional services rendered* by a member of a learned profession.” N.C. Gen. Stat. § 75-1.1(a) (emphasis added). In *Wheless*, the Court found that certain medical professionals making a complaint to the North Carolina Medical Board alleging that Dr. Wheless had engaged in inappropriate and disruptive behavior fell within the learned profession exception because complaining to the medical board was “integral to their role in ensuring the provision of adequate medical care.” 237 N.C. App. at 591, 768 S.E.2d at 124. In *Cameron*, the issue related to whether the plaintiff podiatrists should be granted staff privileges. The Court found that because the “consideration of whom to grant staff privileges is a necessary assurance of good health care[,] certainly, this is the rendering of ‘professional services’ which is . . . excluded from the aegis of [N.C. Gen. Stat. §] 75-1.1.” 58 N.C. App. at 447, 293 S.E.2d at 921.

This case involves a business deal, not rendition of professional medical services. Defendant alleged that the hospital made false representations to induce him to enter into a contract; the fact that he is a physician does not change the nature of the negotiation of a business contract. Plaintiff declined to enter into an employment contract with defendant; if defendant had been an employee of plaintiff, this situation may be somewhat more similar to *Wheless* and *Cameron*, but plaintiff wanted defendant to be an independent contractor with an independent practice. If we were to interpret the learned profession exception

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as broadly as plaintiffs suggest we should, any business arrangement between medical professionals would be exempted from UDTP claims. The learned profession exception does not cover claims simply because the participants in the contract are medical professionals. For example, if a physician entered into a lease agreement for space in a medical office building owned by a group of physicians or hospital and then seeks to bring a UDTP claim based upon a dispute over the lease, it should be treated no differently than a similar lease arrangement for parties in any other business. The fact that medical services will be provided in the building does not mean that the lease arrangement arises from rendition of professional services and has no effect on the quality of the medical care provided.

Taking the evidence in the light most favorable to defendant, as we must in reviewing a directed verdict, the trial court should have submitted defendant's UDTP claim to the jury. The trial court therefore erred by granting directed verdict as to defendant's UDTP counterclaim.

IV. Parol Evidence

[3] [4] Defendant argues that “the jury’s verdict as to [defendant’s] alleged breach of contract was unsupported by the plain terms of the agreement and the uncontroverted evidence. The jury was only able to reach its verdict by the impermissible use of parole [sic] evidence.” (Original in all caps).

Defendant argues that the trial court should have granted his Rule 59 motion because of the improper parol evidence.

The standard of review for denial of a Rule 59 motion is well-settled: According to Rule 59, a new trial *may* be granted for the reasons enumerated in the Rule. By using the word *may*, Rule 59 expressly grants the trial court the discretion to determine whether a new trial should be granted. Generally, therefore, the trial court’s decision on a motion for a new trial under Rule 59 will not be disturbed on appeal, absent abuse of discretion. This Court recognizes a narrow exception to the general rule, applying a *de novo* standard of review to a motion for a new trial pursuant to Rule 59(a)(8), which is an error in law occurring at the trial and objected to by the party making the motion.

Kor Xiong v. Marks, 193 N.C. App. 644, 654, 668 S.E.2d 594, 601 (2008) (citation, quotation marks, and brackets omitted).

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In this case, defendant contends that the typical abuse of discretion standard applies, and defendant's argument presents two discrete issues. Defendant argues that without the admission of improper parole evidence regarding the parties' contract negotiations, the evidence would have been insufficient to support the verdict. The first issue is whether the trial court abused its discretion in admitting the alleged improper parole evidence. *See generally id.* If so, the second issue is whether the remaining evidence could support the verdict. If the trial court did not abuse its discretion in admission of the alleged parole evidence, then we need not consider the remainder of this argument, since there would be sufficient evidence to support the jury verdict. *See generally Nguyen v. Burgerbusters, Inc.*, 182 N.C. App. 447, 454, 642 S.E.2d 502, 508 (2007) ("[A] review of the record evidence before this Court shows that while defendant presented evidence in support of its position, plaintiff's evidence was sufficient to support the jury verdict. The jury verdict is not contrary to the greater weight of the evidence nor contrary to law, and defendant has not shown that the trial court abused its discretion in denying defendant's motion for new trial." (Citation omitted)).

Since the first portion of this argument deals with the admission of evidence, we must first consider whether the defendant preserved his objection to the particular evidence. As to preservation, defendant argues that

After the jury returned its verdict, [defendant] filed a motion for a new trial based on the following argument: "The jury was improperly allowed to consider matters and things which were barred by the parole [sic] evidence rule, and as a result the verdict was based on improper evidence, and must be set aside." [Defendant] had already established his concern about the improper use of parole [sic] evidence as the jury considered the breach of contract claims, lodging a standing objection to [plaintiff's] parole [sic] evidence exhibits and questions. Counsel for [defendant] referenced these objections in its argument on the Rule 59 motion.

Our first difficulty with defendant's argument is that we are unable to identify exactly what evidence he contends was improperly admitted. At the beginning of the trial, before presentation of any evidence, defendant did "establish[] his concern" about potential parole evidence issues and counsel for both parties discussed this concern with the trial

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court.⁴ Defendant noted that he would object to some of the evidence of emails and other negotiations plaintiff may seek to present as improper parol evidence. But since defendant brought counterclaims other than breach of contract, such as the fraud and UDTP claims, defendant also planned to introduce some of the emails and communications prior to the Physician Recruitment Agreement. Defendant contended plaintiff committed fraud in the inducement to get defendant to enter into the Physician Recruitment Agreement, not fraud after the signing of the agreement. Defendant would seek to show that plaintiff fraudulently induced him to enter into the contract and planned to use some of the communications in support of this theory. Plaintiff contended that if defendant wanted to introduce some of the communications leading up to the entry of the Physician Recruitment Agreement, all must be admitted so that the jury could understand the context of the discussion: “[I]f he sends an e-mail but not the reply - I think it all comes in, or none of it comes in.” The issue was not resolved at the time, and the trial court noted that it would need to address the evidence as it was presented.

Defendant’s brief directs us to only two places in the transcript of nine days of trial where he noted his objections to evidence he contends was improper parol evidence. The first objection came in response to plaintiff’s introduction of an email identified as “Plaintiff’s Exhibit 12,” which was a response from the plaintiff to an email from defendant. The objection was: “Your Honor, just with our objection about the parol evidence.” Defendant’s second, and final, objection was just after the testimony about Exhibit 12:

MR. BUCKNER: If Your Honor please. I guess if that was a question, we would object. And ask if we might have a renewed continuing objection to all of the communications before the merged agreement under the parol evidence rule, and also relevance.

THE COURT: Your objection is noted. The objection is overruled. Thank you.

MR. BUCKNER: Then a continuing objection?

THE COURT: Your exception is noted. Yes, sir.

MR. BUCKNER: I don’t want to keep interrupting, but --

THE COURT: The Court will note a continuing objection by the defense to questions related to this series of e-mails.

4. Defendant did not file a motion *in limine* seeking to exclude any evidence.

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As a general rule, a party must make a contemporaneous objection to evidence to preserve the issue for appellate review. *See State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000) (“Based on the established law of this State, because defendant failed to object to the admission of the evidence at the time it was offered, he has failed to preserve this issue for our review.”). But even if we were to assume that defendant’s “continuing objection” here was a valid objection, defendant’s brief has not noted which particular exhibits or testimony he contends would have been covered by this “continuing objection.” This trial lasted nine days, and there was extensive testimony and evidence of the emails and other communications between the parties leading up to the entry of the Physician Recruitment Agreement, and certainly some of this evidence defendant used to further his counterclaims of fraud in the inducement and UDTP. We are simply unable to sort out which bits of testimony and which exhibits might fall under defendant’s continuing objection to improper parol evidence and which bits are evidence defendant sought to use for his own purposes of showing fraud in the inducement. And since defendant’s brief did not clearly identify which evidence it claims was erroneously admitted, plaintiff also did not have the opportunity to respond as to any specific exhibit or testimony but could only argue in broad terms the various reasons the communications prior to the Physician Recruitment Agreement would be admissible. Defendant did not make contemporaneous objections to the alleged parol evidence and did not sufficiently identify the evidence he claims was admitted in error, so he has not preserved this argument for appeal. *See, e.g., id.* Since defendant’s argument regarding his Rule 59 motion and sufficiency of the evidence is based upon the jury’s consideration of parol evidence, which should not have been admitted, and we have determined that all of the evidence was properly before the jury, we need not address the remainder of defendant’s argument. This issue is without merit.

V. Conclusion

For the reasons stated above, we affirm in part and reverse and remand the granting of directed verdict as to defendant’s UDTP counterclaim.

AFFIRM IN PART; REVERSE AND REMAND IN PART.

Judge ARROWOOD concurs.

Judge DAVIS dissents in part with separate opinion.

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DAVIS, Judge, dissenting in part.

While I concur in the majority's well-reasoned opinion on the remaining issues in this case, I respectfully dissent from Section III of its opinion as I believe the trial court properly granted a directed verdict as to Defendant's counterclaim for unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes ("UDTP Claim").

The trial court granted the motion for a directed verdict based upon the "learned profession" exception to UDTP claims. N.C. Gen. Stat. § 75-1.1 states, in pertinent part, as follows:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a *learned profession*.

N.C. Gen. Stat. § 75-1.1(a), (b) (2017) (emphasis added).

In *Reid v. Ayers*, 138 N.C. App. 261, 531 S.E.2d 231 (2000), this Court articulated the following test to determine when the learned profession exception applies: "In order for the learned profession exemption to apply, a two-part test must be satisfied. First, the person or entity performing the alleged act must be a member of a learned profession. Second, the conduct in question must be a rendering of professional services." *Id.* at 266, 531 S.E.2d at 235 (citations omitted).

There is no dispute that doctors and hospitals are members of a learned profession. See *Wheless v. Maria Parham Med. Ctr., Inc.*, 237 N.C. App. 584, 590, 768 S.E.2d 119, 123-24 (2014), *disc. review denied*, 368 N.C. 247, 771 S.E.2d 284 (2015); see also *Burgess v. Busby*, 142 N.C. App. 393, 407, 544 S.E.2d 4, 11-12, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001); *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001); *Abram v. Charter Med. Corp. of Raleigh*, 100 N.C. App. 718, 722, 398 S.E.2d 331, 334 (1990), *disc. review denied*, 328 N.C. 328, 402 S.E.2d 828 (1991). Here, the first prong of the test is clearly satisfied as both Plaintiff and Defendant are members of a learned profession.

With regard to the second prong, none of the cases cited by the parties concern a dispute arising from a contractual arrangement between

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members of a learned profession similar to the one at issue in the present case. This Court has made clear, however, that the learned profession exception is to be construed broadly.

It is well-settled by our Courts that a matter affecting the professional services rendered by members of a learned profession therefore falls within the exception in N.C.G.S. § 75-1.1(b). Indeed, our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). This exception for medical professionals has been broadly interpreted by this Court, and includes hospitals under the definition of “medical professionals.” In this case, defendants’ alleged conduct in making a complaint to the Medical Board is integral to their role in ensuring the provision of adequate medical care. Accordingly, plaintiff’s argument is without merit.

Wheless, 237 N.C. App. at 590-91, 768 S.E.2d at 123-24 (citations, quotation marks, ellipses, and brackets omitted).

Another case that provides guidance on this issue is *Cameron v. New Hanover Mem’l Hosp.*, 58 N.C. App. 414, 293 S.E.2d 901 (1982), *disc. review denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). *Cameron* was decided under a prior version of N.C. Gen. Stat. § 75-1.1, and this Court held that the plaintiffs could not maintain a UDTP claim against the defendant. *Id.* at 446, 293 S.E.2d at 920. We noted, albeit in *dicta*, that the result would have been the same under the amended version of the statute (which is the version currently in effect). *Id.*

In *Cameron*, the plaintiffs were podiatrists who brought a number of claims against the defendant hospital arising out of the hospital’s denial of the plaintiffs’ request for staff privileges, including a UDTP claim. *Id.* at 446, 293 S.E.2d at 920. This Court noted that even under the newly amended UDTP Act, the podiatrists’ UDTP claim against the hospital would be barred by the learned profession exception.

We are constrained to add that our conclusion would not be different had we retroactively applied the current version of G.S. 75-1.1(a) & (b) in this case. Plaintiffs contend that the so-called “learned profession” exception in the current G.S. 75-1.1(b) does not exclude defendants’ alleged “anticompetitive” conduct because that conduct involves “commercial” activity, not the rendering of “professional services.” We do not agree for the following reasons.

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At most, plaintiffs' evidence tends to show that Dineen and Thomas have individual, like personal opinions regarding the provision of hospital staff privileges to plaintiffs. Dineen's testimony indicates that his objection to plaintiffs is grounded in their qualifications to practice podiatry in a hospital. Further, upon plaintiffs' final request for an amendment to the New Hanover medical staff bylaws to include hospital staff privileges for podiatrists, the 13 November 1978 minutes of the Executive Committee state that the Credentials Committee recommended that staff privileges for podiatrists "be granted depending upon individual qualifications." Williams' testimony also shows that the New Hanover Board of Trustees considered qualifications as a paramount issue: "As to who has to make the choice, the Board has to determine with what information comes to it, all the information it can determine, whether they feel that those asking privileges have the qualifications that the hospital has set as standard."

This evidence indicates that defendants were acting in large measure pursuant to an "important quality control component" in the administration of the hospital. As one court described it, the hospital's obligation is to exact professional competence and the ethical spirit of Hippocrates as conditions precedent to staff privileges. We conclude that the nature of this consideration of whom to grant hospital staff privileges is a necessary assurance of good health care; certainly, this is the rendering of "professional services" which is now excluded from the aegis of G.S. 75-1.1. In this respect, the current version of G.S. 75-1.1 is not a substantive change from our prior law. Defendants' motions for a directed verdict upon this issue also were properly granted.

Cameron, 58 N.C. App. at 446-47, 293 S.E.2d at 920-21 (citations, quotation marks, brackets and footnote omitted).

Cameron is analogous to the present case as it involved a dispute between medical professionals and a hospital — both members of a learned profession — and the plaintiffs' claims were based upon their attempt to provide medical care as podiatrists at the defendant hospital. Although the claims did not involve breach of contract or a proposed employment arrangement, the effect is essentially the same: the hospital was making arrangements for medical professionals to provide care to patients served at its facilities.

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Here, Plaintiff and Defendant were seeking to do the same thing. Plaintiff was making arrangements, or attempting to make arrangements, for Defendant to provide medical care to patients served at its facilities. In this sense, the negotiations and contractual arrangement between Plaintiff and Defendant were “integral to their role in ensuring the provision of adequate medical care.” *Wheelless*, 237 N.C. App. at 591, 768 S.E.2d at 124. The agreement even included specific requirements for Defendant to be on emergency call at the Hospital and to accept unassigned patients. Thus, these provisions of the agreement address the rendition of professional services by both the Plaintiff and Defendant and fall within the learned profession exception.

For these reasons, I believe the trial court did not err by granting a directed verdict dismissing Defendant’s UDTP claim against Plaintiff. Accordingly, I respectfully dissent.

IN THE MATTER OF D.A., A.A., L.A., L.A.

No. COA18-290

Filed 16 October 2018

1. Termination of Parental Rights—no-merit brief—no issues on appeal—*independent review*

Where the mother’s counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record, because the mother failed to argue or preserve any issues for review. *See In re L.V.*, 260 N.C. App. 201 (2018).

2. Termination of Parental Rights—no-merit brief—mandatory service requirement—*frustration of counsel—no issues on appeal*

Where the father’s counsel in a termination of parental rights case filed a no-merit brief but was unable to send a copy of the required documents to the father pursuant to Rule of Appellate Procedure 3.1(d) because the father refused to divulge his address, the Court of Appeals invoked Rule of Appellate Procedure 2 to suspend the mandatory service requirement of Rule 3.1(d) in light of appellate counsel’s exhaustive efforts to locate the father and in the interest of expediting a decision in the public interest. The Court

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dismissed the father's appeal pursuant to *In re L.V.*, 260 N.C. App. 201 (2018), because the father failed to argue or preserve any issues for review.

Judge DIETZ concurring in the result only.

Appeal by respondents from order entered 1 December 2017 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 12 July 2018.

Gillette Law Firm, PLLC, by Jeffrey William Gillette, for respondent-appellant mother.

Richard Croutharmel, for respondent-appellant father.

Assistant County Attorney Theresa A. Boucher, for petitioner-appellee Forsyth County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

MURPHY, Judge.

Respondent-Mother and Respondent-Father appeal from the trial court's order terminating their parental rights to D.A., A.A., L.A., and L.A.¹ Counsel for both Respondents filed no-merit briefs in accordance with Rule 3.1(d). N.C. R. App. P. 3.1(d). While we dismiss the appeals of both Respondents, the procedural posture requires us to address each appeal separately.

RESPONDENT-MOTHER'S APPEAL

[1] On 18 April 2018, counsel for Respondent-Mother filed a no-merit brief pursuant to Rule 3.1(d) certifying that he had "made a conscientious and thorough review of the record on appeal" and "identified no issue of merit on which to base an argument for relief." In full compliance with Rule 3.1(d) counsel for Respondent-Mother sent a letter dated 18 April 2018 to Respondent-Mother informing her of her right to file a *pro se* brief, along with complete copies of the record on appeal and the trial transcript. "Respondent[-Mother]'s counsel complied with

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

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all requirements of Rule 3.1(d), and Respondent[-Mother] did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.” *In re L.V., A.V.*, ___ N.C. App. ___, 814 S.E.2d 928, 929 (2018). Respondent-Mother’s appeal is dismissed.

RESPONDENT-FATHER’S APPEAL

[2] On 13 April 2018, counsel for Respondent-Father filed a no-merit brief pursuant to Rule 3.1(d) stating that “[a]fter a conscientious and thorough review of the record and the relevant law . . . I am unable to identify any issues with sufficient merit on which to base an argument for relief on appeal.” However, Respondent-Father’s counsel was unable to send a copy of the required documents to Respondent-Father in full compliance with Rule 3.1(d), stating in the no-merit brief:

I have attempted to send [Respondent-Father] copies of this brief, the record on appeal, and the transcript along with a letter indicating he can file his own *pro se* brief with instructions on how to do that. My attempts included trying to call his trial attorney at a number listed in the record, emailing his trial attorney, and calling [Respondent-Father] at a phone number listed in the record. However, my attempts to locate [Respondent-Father] have been unsuccessful. The trial attorney’s phone number is incorrect and she has not emailed me back. I left a voicemail for the number listed for [Respondent-Father] in the record but I have not received a return call. I will continue to make efforts to locate him and provide him with the above-listed items. In the meantime, I will maintain the packet of items in my file. I have appended a copy of the instruction letter to this brief.

Rule 3.1(d) contains mandatory language requiring service on the represented individual concurrently with the filing of counsel’s no-merit brief:

Counsel *shall* provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel *shall* also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and *shall* attach to the brief evidence of compliance with this subsection.

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N.C. R. App. P. 3.1(d). After an initial review by this Court and in order to allow for full compliance with Rule 3.1(d), we requested that counsel for Respondent-Father attempt to serve him at two physical addresses found in the Record. On 16 July 2018, counsel certified that he mailed the no-merit letters to the addresses identified. However, on 3 August 2018, counsel further certified that both packages had been returned to him, one marked, “insufficient address,” and the other marked, “VTF RTS” (sic).² Further, at trial, Respondent-Father testified and refused to divulge his address:

Petitioner’s Counsel: Where are you living?

Respondent-Father: Now?

Petitioner’s Counsel: Yes.

Respondent-Father: I live in my man cave.

Petitioner’s Counsel: And what is the address of your man cave?

Respondent-Father: I give you my daddy’s address.

Petitioner’s Counsel: No. Where is the address of your man cave?

Respondent-Father: I’m not telling.

Petitioner’s Counsel: You’re not telling?

Respondent-Father: I told you that the last time. No disrespect to this Court.

This case presents us with an issue of first impression in interpreting Rule 3.1(d)’s mandatory provisions when the client’s failure to communicate his current address to appellant counsel frustrates counsel’s compliance with the Rule. We have considered guidance from Rule 5(b)(2)(b) of the Rules of Civil Procedure,³ our decision in *State*

2. We take judicial notice that UTF RTS is an often-used postal code for “Unable to Forward – Return to Sender.”

3. Respondent-Father’s counsel’s mailings constituted service under Rule 5:

(b) Service – How made. – . . .

Service under this subsection may also be made by one of the following methods:

. . . .

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v. Mayfield, 115 N.C. App. 725, 446 S.E.2d 150 (1994),⁴ and RPC 223, an ethics opinion issued by the North Carolina State Bar.⁵ Even assuming *arguendo* that service was perfected in accordance with Rule 5(b)(2)(b) of the Rules of Civil Procedure, the appeal is otherwise “ripe for appellate

(2) Upon a party: . . .

b. By mailing a copy to the party at the party’s last known address or, if no address is known, by filing it with the clerk of court.

N.C.G.S. §1A-1, Rule 5(b).

Further, Respondent-Father’s counsel’s filing of the documents with the Clerk of this Court, including a copy of the proposed letter, constituted service and the same was available to Respondent-Father for inspection at any time. N.C.G.S. § 7B-2901 (2017)(“The [juvenile’s parent] may examine the juvenile’s record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court[.]”)

4. In an *Anders* setting, not subject to the requirements of Rule 3.1(d), we addressed the appeal without requiring service on the client:

In this case, defendant’s attorney has used all due diligence in attempting to notify defendant of his right to pursue his appeal pro se, and the fault of counsel’s failure to so notify defendant must lie with defendant. Accordingly, defendant’s counsel has fully complied with the holding in *Anders*, and the appeal is ripe for appellate review upon the record and briefs before us.

State v. Mayfield, 115 N.C. App. at 727, 446 S.E.2d at 152. Here, counsel for Respondent-Father used all due diligence and this case would otherwise be ripe for appellate review.

5. RPC 223 states:

When a client stops communicating with his or her lawyer, the lawyer must take reasonable steps to locate and communicate with the client. In the present inquiry, Attorney A’s efforts to locate Client A were more than reasonable. However, if the lawyer is still unable to locate the client and the client has made no effort to contact the lawyer, the client’s failure to contact the lawyer within a reasonable period of time after the lawyer’s last contact with the client must be considered a constructive discharge of the lawyer. Rule 2.8(b)(4) of the Rules of Professional Conduct requires a lawyer to withdraw from the representation of a client if the lawyer is discharged by the client. Therefore, Attorney A must withdraw from the representation.

Attorney A may not file a complaint on behalf of Client A although filing suit might stop the running of the statute of limitations. The determination of the objective of legal representation is the client’s prerogative. As the comment to Rule 7.1 observes, “[t]he client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer’s professional obligation.” If a client disappears, the lawyer cannot know whether the client wanted to proceed with the lawsuit, who the client was prepared to sue, and whether the allegations in the complaint are accurate. Therefore, if a client disappears and the lawyer is unable to locate the client after

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review” and Respondent-Father’s appellate counsel has been constructively discharged. However, given the constitutional right at issue in a termination of parental rights case, we hold that situations such as this must be considered on their own merits on a case-by-case basis. Due to the exhaustive efforts of counsel for Respondent-Father, and in the exercise of our independent discretion, we invoke Rule 2 to “expedite a decision in the public interest” and suspend the mandatory service requirement of Rule 3.1(d).

“Respondent[-Father] did not exercise [his] right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.” *In re L.V., A.V.*, N.C. App. at ___, 814 S.E.2d at 929. Respondent-Father’s appeal is dismissed.

CONCLUSION

Respondent-Mother did not file a *pro se* brief after counsel’s full compliance with Rule 3.1(d) and her appeal is dismissed. After an individual consideration of the frustration of counsel for Respondent-Father’s ability to fully comply with Rule 3.1(d)’s mandatory service requirement, we invoke Rule 2 to suspend that portion of Rule 3.1(d). Respondent-Father did not file a *pro se* brief and his appeal is dismissed.

DISMISSED.

Judge TYSON concurs.

Judge DIETZ concurs in result only.

reasonable efforts to do so, the lawyer should withdraw from the representation without taking further action on behalf of the client.

Responsibility to Client Who Has Disappeared, N.C. STATE BAR (adopted 12 Jan. 1996), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-223/>.

MASTANDUNO v. NAT'L FREIGHT INDUS.

[262 N.C. App. 77 (2018)]

VINCENT MASTANDUNO, EMPLOYEE, PLAINTIFF

v.

NATIONAL FREIGHT INDUSTRIES, EMPLOYER, AND AMERICAN ZURICH
INSURANCE CO., CARRIER, DEFENDANTS

No. COA17-1058

Filed 16 October 2018

1. Appeal and Error—denial of motion to seal worker's compensation award—privacy concerns—interlocutory appeal—substantial right

In an interlocutory appeal from a worker's compensation case, plaintiff's invocation of statutory and constitutional privacy protections sufficiently demonstrated the Full Industrial Commission's order denying his motion to seal his entire file to prevent disclosure of his medical information affected a substantial right.

2. Workers' Compensation—opinion and award—medical information—privacy concerns—statutory analysis

The Court of Appeals found no federal or state statutory privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Pursuant to N.C.G.S. § 97-92(b), medical records and documents other than Awards are already protected from public disclosure; other statutes cited by plaintiff that protect an individual's health information either did not apply or had express exemptions for worker's compensation or other judicial proceedings.

3. Workers' Compensation—opinion and award—medical information—privacy concerns—constitutional analysis

The Court of Appeals found no constitutional privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Given the importance of maintaining open proceedings in this state's worker's compensation system and the legislature's determination that these documents are public records, plaintiff's privacy interests did not outweigh the public interests at stake, and the Industrial Commission was not required to seal his file.

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[262 N.C. App. 77 (2018)]

Appeal by Plaintiff from order entered 22 May 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 2018.

Law Offices of John M. Kirby, by John M. Kirby for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by S. Scott Farwell and Bruce A. Hamilton, for defendants-appellees.

MURPHY, Judge.

This case requires that we examine the relationship between a public document entitled an “Opinion and Award” (“Award”) and a workers’ compensation claimant’s privacy interest in the personal medical information relevant to the resolution of his claim. Every year, the North Carolina Industrial Commission enters hundreds of Awards, which are the written records of decision for adjudicated workers’ compensation claims. After these Awards are entered, they are uploaded to a publicly accessible and searchable online database.¹ Due to the fact that workers’ compensation claims arise from physical injuries suffered at work, the evidentiary findings contained within an Award often directly address a claimant’s medical conditions and employment history.

In prior proceedings before the Industrial Commission, Plaintiff unsuccessfully moved to have his entire case file sealed. He complained that due to the Commission’s policy to make Awards available to the public online, Plaintiff’s personal and medical information (which becomes part of that Award) will be disseminated and his privacy interest in avoiding the disclosure of this information will be compromised. On appeal, Plaintiff argues that he has a privacy interest rooted in statute and the U.S. Constitution, and contends this interest can only be protected by a judicial order that preemptively seals his entire workers’ compensation case file, including any future Award entered for his claim. After careful review, we conclude that there is no statutory or constitutional basis that obligates the Industrial Commission to seal Plaintiff’s workers’ compensation file.

BACKGROUND

On 29 May 2012, Vincent Mastanduno (“Plaintiff”), while employed as a truck driver, slipped and fell on a wet floor while moving a pallet

1. See *Searchable Databases*, N.C. INDUSTRIAL COMMISSION, <http://www.ic.nc.gov/database.html> (last accessed 27 August 2018).

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during work, injuring his lower back. On 11 September 2012, Plaintiff filed a *Notice of Accident* with the Industrial Commission to obtain workers' compensation benefits. His employer at the time, Defendant National Freight Industries, filed a Form 60 *Employer's Admission of Employee's Right to Compensation* on 19 November 2012 for temporary total compensation in the amount of \$740.56 per week. National Freight Industries was covered by a workers' compensation insurance policy through American Zurich Insurance Company (collectively "Defendants").

Several years later on 14 March 2016, Defendants filed a Form 33 with the Industrial Commission requesting that Plaintiff's workers' compensation claim be assigned for a hearing. Defendants alleged that Plaintiff was no longer disabled and refused to cooperate with medical treatment authorized and paid for by Defendants. Plaintiff filed his response, denying that he had not been compliant with Defendant's direction for medical care and further claiming that he remained disabled. On 29 March 2016, the Industrial Commission entered an order permitting Plaintiff's counsel at the time to withdraw. Plaintiff then proceeded pro se. Plaintiff's initial hearing was set for 12 July 2016, and the matter was assigned to Deputy Commissioner Tyler Younts.

On 6 June 2016, prior to Plaintiff's July 2016 evidentiary hearing, Plaintiff moved to have all information regarding his hearing sealed "so that it is not a matter of public record." Deputy Commissioner Younts subsequently entered an order denying Plaintiff's request to seal his file, concluding that "Plaintiff's Workers' Compensation claim file is not a public record[,] and "to the extent that certain Orders and Awards of the Commission are public records, Plaintiff has provided no factual or legal basis for the relief sought." Plaintiff then requested Deputy Commissioner Younts to reconsider his previous motion and a conference call was held on 24 June 2016. Plaintiff expressed various privacy concerns associated with the potential use of his personal medical information. Deputy Commissioner Younts again denied Plaintiff's request to seal his file, concluding:

Nevertheless, it remains the case that all injured workers involved in litigation before the Industrial Commission operate under the same privacy rules. Thus, the undersigned finds insufficient basis for the extraordinary relief Plaintiff seeks.

Plaintiff then appealed Deputy Commissioner Younts' denial to the Full Commission. Because the Deputy Commissioner's order was

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interlocutory, Plaintiff was required to submit reasons warranting immediate review by the Full Commission. Plaintiff's primary privacy concern is that Awards of the Industrial Commission are made available to the public and immediately placed online, and, therefore, third parties could use personal and medical information included therein to his detriment.² Plaintiff also alleged that the denial of his motion to seal infringed on his Ninth and Fourteenth Amendment rights under the U.S. Constitution.

On 10 April 2017, Plaintiff's Motion to Seal was heard by the Full Commission, and on 22 May 2017 the Commission denied Plaintiff's motion. The Full Commission concluded that pursuant to N.C.G.S. § 97-92(b), the Opinions and Awards of the Commission are public records, but the medical records and other evidence upon which an Award would be premised are not. The Commission also concluded that "Plaintiff has offered no evidence or legal argument which would justify his claim being treated differently than that of any other injured worker who is seeking benefits under the Act." Finally, the Full Commission's order correctly recognized that it did not have jurisdiction to rule on Plaintiff's Ninth and Fourteenth Amendment arguments because the Commission does not have jurisdiction to rule on constitutional issues.³ Plaintiff timely appealed the Full Commission's 22 May 2017 denial of his Motion to Seal.

Represented by counsel on appeal, Plaintiff argues that the Industrial Commission was obligated to seal his entire file upon request because "[p]ursuant to North Carolina statutory law and federal Constitutional law, a person has a right to privacy with respect to his or her medical information."

GROUND S FOR APPELLATE REVIEW

[1] Plaintiff's appeal is interlocutory as the Full Commission's order does not finally dispose of all issues in the matter. However, "immediate appeal may be taken from an interlocutory order when the challenged order affects a substantial right of the appellant that would be lost

2. For example, Plaintiff claimed that his record should be sealed because otherwise: (1) his insurance premium rates could increase because he would be considered a greater risk; (2) he could be denied visas for travel to other countries; (3) there is risk that he could be blackmailed; (4) he could be prohibited from adopting a child; (5) he could be prevented from renting an apartment; and (6) the posting of these records could result in cyberbullying, identify theft, and impairment of his ability to obtain lines of credit.

3. *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) ("[I]t is a 'well-settled rule that a statute's constitutionality shall be determined by the judiciary, not an administrative board.'").

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without immediate review.” *France v. France*, 209 N.C. App. 406, 411, 705 S.E.2d 399, 404-05 (2011) (citation and alteration omitted). “No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case.” *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citation omitted).

Plaintiff argues that a substantial right is affected because any Award in this matter will necessarily contain some of Plaintiff’s medical information and this information will be made available online at the time the Award is entered. Thus, because the Full Commission has denied his motion to seal on the grounds that there is no legal basis for Plaintiff’s requested relief, Plaintiff’s privacy rights will be lost absent review by this court. Plaintiff cites several cases in support of his right to appellate review. *See France*, 209 N.C. App. at 411, 705 S.E.2d at 405 (“Absent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public. Because the only manner in which Plaintiff may prevent this from happening is through immediate appellate review, we hold that a substantial right of Plaintiff is affected”); *Velez v. Dick Keffer Pontiac GMC Truck, Inc.*, 144 N.C. App. 589, 592, 551 S.E.2d 873, 875 (2001) (“While certainly if the Financial Privacy Act was implicated here, it would raise a substantial right”).

For the purpose of determining whether the challenged order affects a substantial right, we need not definitively decide at the outset whether Plaintiff’s personal or medical information would fall within the scope of any specific statutory or constitutional privacy protections. Rather, it is sufficient that absent immediate review, some of Plaintiff’s personal and medical information will be made available to the public upon entry of a final Award and that some of this information might be subject to statutory and constitutional privacy protections. *See Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 791 (2009) (finding the production of documents which might be protected by statute to affect a substantial right). Plaintiff has therefore demonstrated that the order denying his motion to seal by the Full Commission affects a substantial right.

Finally, since the Industrial Commission did not have jurisdiction to pass upon Plaintiff’s constitutional privacy claims, it is appropriate for this Court, as the first destination for the dispute in the General Court of Justice, to address these constitutional arguments even though they were not passed upon below. *See Redmond*, 369 N.C. at 497, 797 S.E.2d at 280 (“When an appeal lies directly to the Appellate Division from an

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administrative tribunal, in the absence of any statutory provision to the contrary a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.”).

ANALYSIS

Plaintiff argues that he has “a Constitutional and statutory right to confidentiality over his private medical information.” We initially note that Plaintiff relies heavily on the United States Supreme Court’s decision in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869 (1977), to support his contention that an Award of the Industrial Commission implicates a constitutional “privacy right.” However, the U.S. Supreme Court has not explicitly recognized a constitutional *right* to keep one’s personal information private. Rather, *Whalen* and its progeny stand for the proposition that there *may* be a “constitutional privacy ‘interest in avoiding disclosure of personal matters.’” See *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147, 131 S. Ct. 746, 756 (2011) (citing *Whalen*, 429 U.S. at 599-600, 97 S. Ct. at 876; *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S. Ct. 2777, 2797 (1977)). With this constitutional backdrop in mind, we first address Plaintiff’s claim that he has a statutory right to have his workers’ compensation file sealed.

A. Statutory Right to Privacy

[2] An individual’s privacy interest in their personal information may be protected by statute. Our Supreme Court has recognized that although the Public Records Act “provides for liberal access to public records,” the General Assembly may dictate “that certain documents will not be available to the public.” *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999); see also N.C.G.S. § 131E-95(b) (2017) (“The proceedings of a medical review committee, the records and materials it produces and the materials it considers shall be confidential and not considered public records within the meaning of G.S. 132-1”); N.C.G.S. § 7B-2901(d) (2017) (“The court’s entire record of a proceeding involving consent for an abortion of an unemancipated minor . . . is not a matter of public record”); N.C.G.S. § 132-1.4(a) (2017) (“Records of criminal investigations conducted by public law enforcement agencies . . . are not public records”). With respect to Workers’ Compensation proceedings, the General Assembly has already provided that certain records of the Industrial Commission that are not Awards are not public records:

The records of the Commission *that are not awards* under G.S. 97-84 and that are not reviews of awards under

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G.S. 97-85, insofar as they refer to accidents, injuries, and settlements are not public records under G.S. 132-1 and shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

N.C.G.S. § 97-92(b) (2017) (emphasis added).

Turning to the instant case, because of N.C.G.S. § 97-92(b), Plaintiff's medical records and any other documents that are not Awards which refer to accidents and injuries are already shielded from public disclosure. Any order to seal these records would be superfluous as they are already, in effect, sealed by statute. With respect to the Awards of the Industrial Commission, the General Assembly has not provided any exemption from the Public Records Act. If we were to adopt Plaintiff's position and instruct the Industrial Commission to seal a yet to be entered Award, then we would contravene the legislative intent expressed in N.C.G.S. § 97-92(b). Specifically, applying the doctrine of *expressio unius est exclusio alterius* to § 97-92(b), we conclude that by expressly listing the subset of records of the Industrial Commission that are exempted from the Public Records Act (i.e. records that are not Awards), the legislature intended that Awards of the Industrial Commission are to be public records. See *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (“[T]he doctrine of *expressio unius est exclusio alterius* provides that the mention of such specific exceptions implies the exclusion of others.”).

Plaintiff also points us to N.C.G.S. §§ 8-53 and 122C-52 to support his position that his private medical information is not a matter of public record. N.C.G.S. § 8-53, which codifies the physician-patient privilege, is a qualified evidentiary privilege that is waivable by the patient, *Adams v. Lovette*, 105 N.C. App. 23, 411 S.E.2d 620 (1992), and must yield in some instances when certain medical information “is necessary to a proper administration of justice.” N.C.G.S. § 8-53 (2017). More importantly, the mere existence of the physician-patient privilege has no bearing on whether an Award of the Industrial Commission is a public record or whether the Commission is statutorily obligated to seal any Award that makes reference to a claimant's medical information. Turning to N.C.G.S. § 122C-52, this statute does provide that confidential information acquired in attending or treating a client is not a public record. However, Plaintiff's reliance is inapposite because § 122C-52 only applies to services for the “mentally ill, the developmentally disabled, or substance abusers.” N.C.G.S. § 122C-3(14) (2017). Plaintiff

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makes no argument addressing how any of these mental health services are relevant to his workers' compensation claim arising from a lower back injury.

Plaintiff next cites a federal statute relevant to health information privacy, the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* Health Insurance Portability and Accountability Act of 1996 Pub.L. 104-191, 110 Stat. 1936, (1996). Although a primary goal of HIPAA is to assure that an individual's health information is properly protected from unauthorized disclosure, Plaintiff has failed to recognize that the HIPAA Privacy Rule does not apply to the Industrial Commission because they are not a "covered entity." 45 C.F.R. § 160.103 (2014). Furthermore, HIPAA regulations expressly permit covered entities, such as a patient's doctor, to disclose protected health information to workers' compensation agencies without first obtaining patient authorization. *See* 45 C.F.R. § 164.512 (a) (2016).

In sum, none of the above cited statutory provisions support Plaintiff's position that he possesses a statutory privacy right in his personal medical information that obligates the Industrial Commission to seal his workers' compensation case file on request, including any Award. Pursuant to N.C.G.S. § 97-92(b), Plaintiff's medical records are already exempted from the Public Records Act. Regarding Plaintiff's request to seal any Award entered by the Commission, we again emphasize the General Assembly is the body vested with the authority to determine which kinds of otherwise public records "shall be shielded from public scrutiny." *France*, 209 N.C. App. at 413, 705 S.E.2d at 406. While the General Assembly could have exempted the Awards of the Industrial Commission from the Public Records Act, they did not. "Absent clear statutory exemption or exception, documents falling within the definition of public records in the Public Records Law must be made available for public inspection." *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685 (citation and quotation marks omitted).

B. Constitutional Right to Privacy

[3] Plaintiff also contends "even if the Public Records Act applied to this matter, this act does not trump an individual's Constitutional right to privacy over his or her private health information." As the U.S. Supreme Court did in *Whalen* and *National Aeronautics & Space Administration*, we will assume for present purposes that the Industrial Commission's refusal to seal Plaintiff's case file implicates a privacy interest of constitutional significance. *See Nat'l Aeronautics & Space Admin.*, 562 U.S. at 147, 131 S. Ct. at 756 ("As was our approach in *Whalen*, we will assume for

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present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance.”).

Initially, our review of the Industrial Commission's decision to not preemptively seal Plaintiff's Award must consider the “context” of a workers' compensation proceeding. *See id.* at 148, 131 S. Ct. at 757 (“[J]udicial review of the Government's challenged inquiries must take into account the context in which they arise.”). The Workers' Compensation Act was enacted in 1929, and its purpose was not only to offer a swift and certain remedy for an injured worker, but also to ensure a limited and determinate liability for employers. *See* S.L. 1929-120. In 2017, the Industrial Commission had exclusive original jurisdiction over 64,000 filed workers' compensation claims, and approximately 1,800 claims were scheduled for hearings before a Deputy Commissioner. Over 400 of these claims were appealed to the Full Commission.⁴ Our assessment of the constitutionality of the challenged publicizing of medical information in an Award must take into account the crucial role the Industrial Commission plays for workers and the State's economy, as well as the sheer magnitude of claims that must be adjudicated in a timely manner.

Next, we must weigh Plaintiff's privacy interests implicated by the public dissemination of an Award against the public interest. *Nixon*, 433 U.S. at 458, 97 S. Ct. at 2798 (“[A]ny intrusion must be weighed against the public interest in subjecting the Presidential materials of appellant's administration to archival screening.”); *see also France*, 209 N.C. App. at 417, 705 S.E.2d at 408 (holding plaintiff's claim to be without merit since he “fail[ed] to show that any such right to privacy outweighs the qualified right of the public to open proceedings”).

As discussed *supra*, by not exempting the Awards of the Industrial Commission from the Public Records Act, our legislature has determined that these records are of special public interest and are to be made available in their original form. The Industrial Commission's policy of providing web access to final Awards is a reasonable, cost-effective manner of making these records available for public inspection. Furthermore, N.C.G.S. § 97-84 expresses other important public interests at stake:

The case shall be decided and findings of fact issued based upon the preponderance of the evidence in view of the entire record. The award, together with a statement of

4. North Carolina Industrial Commission, *Fiscal Year 2017 Annual Report*, <http://www.ic.nc.gov/2017AnnualReport.pdf> (last accessed 27 August 2018).

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the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings

N.C.G.S. § 97-84 (2017). We recognize that the findings of fact of an award will often include potentially sensitive information that might otherwise be considered private, such as a claimant's identity, a claimant's employment history, a description of the injury suffered at work, and the effects of the injury on the claimant's physical and mental capabilities. However, the inclusion of pertinent and relevant information such as this is necessary because it ensures that workers' compensation claims are resolved impartially with well-reasoned decisions. Not only does this serve the public's interest in government transparency, but, without this information, our ability to conduct effective appellate review would be significantly impaired. *See Wilkes v. City of Greenville*, 369 N.C. 730, 746, 799 S.E.2d 838, 849 (2017) (“[T]he Commission must make specific findings that address the ‘crucial questions of fact upon which plaintiff’s right to compensation depends.’ ”).

Regarding Plaintiff's asserted privacy interests, we are not unsympathetic to his concerns regarding the disclosure and potential use of personal information contained in an Award. To illustrate his concerns, Plaintiff submitted a publicly available final Opinion and Award from another workers' compensation claim.⁵ Plaintiff directs our attention to certain findings of this Award which went beyond the details of the worker's accident, indicating that the worker experienced episodes of crying, panic attacks, and was diagnosed with Post-Traumatic Stress Disorder (PTSD). Sensitive as these topics may be, Plaintiff wholly overlooks the crucial role this personal medical information had in the Commission's resolution of the claim. Specifically, crying and panic attacks were some of the symptoms the claimant presented to her treating physicians after the workplace accident. Furthermore, based on these symptoms, the claimant's psychiatrist ultimately diagnosed her with PTSD, and this evidence supported the Commission's conclusion that the claimant's PTSD was a compensable injury.

Plaintiff nevertheless argues, “It is inconceivable that a ‘proper administration of justice’ would require the Commission (which is not a court, and thus not subject to open courts provisions) to disseminate the Plaintiff's protected, private health information to the entire world via the Internet.” This argument fails to grasp the role of an Award in

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our Workers' Compensation system. The Industrial Commission does not make its Awards available online merely because it is necessary for the proper administration of justice, but a claimant's Award is made publicly available because this document is, as a matter of law, an official public record.

Plaintiff's constitutional privacy argument also overlooks critical distinctions between the facts of his case and those present in *Whalen*. In *Whalen*, a New York statute that required physicians to identify patients obtaining certain prescription drugs having potential for abuse was challenged as violating the plaintiff's privacy rights. *Whalen*, 429 U.S. at 592, 97 S. Ct. at 873. Doctors were required to disclose the name, age, and address of the patients for which they prescribed Schedule II drugs and this information was stored in a government office building. *Id.* The *Whalen* plaintiffs argued that patient-identification requirements created a risk of public disclosure and impaired their interests in avoiding disclosure of personal matters and "making important decisions independently." *Id.* at 599, 97 S. Ct. at 877 "After evaluating the security issues regarding the patient-identification requirements of the statute, the Supreme Court upheld the statute, stating that the statute 'does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.'" *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 710, 483 S.E.2d 388, 394 (1997) (citing *Whalen*, 429 U.S. at 600, 97 S. Ct. at 877).

The most obvious distinction between *Whalen* and the instant case is that the personal medical information at issue in *Whalen* was not directly at issue in an active legal dispute. Unlike the plaintiff-patients in *Whalen*, the Plaintiff here is a workers' compensation claimant who alleges that he is entitled to disability compensation as a result of a workplace accident. Because Plaintiff seeks compensation based on his injury, his privacy interest in avoiding the disclosure of medical information relevant to this claim is lessened, if not waived, due to his status as a party in the present action.

Plaintiff also avers that the statutory scheme in *Whalen* was upheld because of the security measures taken by the government to protect the patient's information. *See Whalen*, 429 U.S. at 607, 97 S. Ct. at 880 (Brennan concurring) ("In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."); *see also ACT-UP Triangle*, 345 N.C. at 712, 483 S.E.2d at 396 ("We conclude that the statutory security provisions are adequate to protect against potential unlawful disclosure which might otherwise render the confidential HIV

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testing program constitutionally infirm.”). We agree with Plaintiff that the presence of “safeguards” were considered by cases such as *Whalen* and *ACT-UP Triangle*. However, subsequent U.S. Supreme Court decisions have clarified that *Whalen* does not stand for the proposition “that an ironclad disclosure bar is needed to satisfy privacy interests that may be ‘rooted in the Constitution.’” *Nat'l Aeronautics & Space Admin.*, 562 U.S. at 157, 131 S. Ct. at 762 (alterations omitted) (citing *Whalen*, 429 U.S. at 605, 97 S. Ct. 869).

To the extent that *Whalen* is applicable here, we note that there are “safeguards” in place which mitigate against the risk of unwarranted and indiscriminate disclosure of Plaintiff’s personal information. N.C.G.S. § 97-92 already exempts Plaintiff’s medical records from the Public Records Act, and the risk of any unwarranted disclosure of these records is very low. While an Award will invariably contain some personal medical information, N.C.G.S § 97-84 provides that the Awards of the Industrial Commission are only allowed to include information “pertinent to the questions at issue.” Thus, this statute guides the pen of the Commissioners and mitigates against the risk that non-pertinent personal information will be indiscriminately included in an Award.

In light of the critical role that the Opinion and Award plays in our State’s workers’ compensation system and our General Assembly’s determination that these documents are public records, we conclude that Plaintiff’s asserted privacy interests do not outweigh the public interests at stake here. Accordingly, we conclude that the Industrial Commission is not obligated to seal Plaintiff’s workers’ compensation file, including any Award, due to any constitutional privacy interest.

CONCLUSION

Plaintiff has no statutory or constitutional right to have his entire workers’ compensation case file, including any Award, sealed. Accordingly, the order of the Industrial Commission denying Plaintiff’s Motion to Seal is affirmed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED.

Chief Judge McGEE and Judge CALABRIA concur.

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STATE OF NORTH CAROLINA
v.
CORY DION BENNETT, DEFENDANT

No. COA17-1027

Filed 16 October 2018

1. Jury—selection—race-based peremptory challenge—race of juror—subjective impression

In a prosecution for methamphetamine-related charges, defendant was not entitled to *Batson* relief upon his allegation that the prosecutor improperly dismissed two African-American prospective jurors solely on the basis of race. The trial court's finding that three out of five African-American prospective jurors were passed by the State and remained on the jury panel was accepted by the State, and was an indication that the prospective jurors' race was clear to the court, precluding the need to make further inquiry into the prospective jurors' race for the record.

2. Drugs—jury instruction—acting in concert—reasonable inference

In a prosecution for methamphetamine-related charges, the trial court properly instructed the jury on an acting in concert theory based on sufficient evidence that the woman arrested with defendant at his home where ingredients and paraphernalia associated with methamphetamine production were found was involved in a common plan or scheme to make methamphetamine with him.

Judge BERGER concurring with separate opinion.

Appeal by defendant from judgments entered on or about 16 March 2017 by Judge John E. Nobles, Jr. in Superior Court, Sampson County. Heard in the Court of Appeals 2 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Franklin E. Wells, Jr., for defendant-appellant.

STROUD, Judge.

Defendant appeals from convictions for several drug-related offenses. Defendant's *Batson* argument regarding jurors stricken by the

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State fails because he failed to make a *prima facie* case that the State's challenges were racially motivated. The trial court's jury instruction on acting in concert was supported by the evidence. We conclude there was no error in defendant's trial.

I. Background

On 4 December 2015, law enforcement officers responded to a complaint about drug activity at a mobile home where defendant and his girlfriend, Ms. Smith,¹ had been living for about two months. Their landlord met the officers at the residence and knocked on the door. Ms. Smith opened the door to the home and officers immediately smelled a chemical odor associated with making methamphetamine. During their initial pat-down of defendant, they found a methamphetamine pipe and a receipt from IGA, dated 4 December 2015, for crystal lye. During their initial sweep of the home when they arrested defendant and Ms. Smith, the officers found items used in making methamphetamine including pliers, rubber gloves, measuring devices, lithium batteries, lye, and aluminum foil; they also found drug paraphernalia including a methamphetamine pipe, chemicals used to make methamphetamine, and Sudafed pills. When he was standing outside the residence, Sudafed pills began falling out of defendant's pants.² The officers got a search warrant, and, during the search of the mobile home under the warrant, they found much more drug paraphernalia and many other items associated with methamphetamine production throughout the home. Defendant was tried by a jury and convicted of five counts of possession of methamphetamine precursor, one count of manufacturing methamphetamine, and two counts of trafficking in methamphetamine. Defendant timely appeals his convictions to this Court.

II. Jury Selection

[1] Defendant first contends that “[t]he trial judge erred in his handling of [d]efendant’s *Batson* motion because there was *prima facie* evidence that the prosecutor’s use of peremptory strikes was racially motivated.” (Original in all caps).

“The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit race-based peremptory challenges during

1. We will use a pseudonym to protect the privacy of this witness.

2. Defendant later told the officers the bags of pills had fallen into his pants when he was sitting on the couch because he wears his pants low.

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jury selection.” *State v. Taylor*, 362 N.C. 514, 527, 669 S.E.2d 239, 253–54 (2008). Moreover,

[t]he clear error standard is a federal standard of review adopted by our courts for appellate review of the *Batson* inquiry.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), modified, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991), the United States Supreme Court established a three-step test to determine whether the State’s peremptory challenges of prospective jurors are purposefully discriminatory. Under *Batson*, the defendant must first successfully establish a *prima facie* case of purposeful discrimination. If the *prima facie* case is not established, it follows that the peremptory challenges are allowed. If the *prima facie* case is established, however, the burden shifts to the prosecutor to offer a race-neutral explanation for each peremptory challenge at issue. If the prosecutor fails to rebut the *prima facie* case of racial discrimination with race-neutral explanations, it follows that the peremptory challenges are not allowed. Finally, the trial court must determine whether the defendant has proven purposeful discrimination.

If the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Wright, 189 N.C. App. 346, 351, 658 S.E.2d 60, 63-64 (2008) (citations and quotation marks omitted).

In reviewing this determination, we are mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor’s questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor’s use of

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peremptory challenges creates a *prima facie* case of discrimination. The trial court's findings will be upheld on appeal unless they are clearly erroneous—that is, unless on the entire evidence we are left with the definite and firm conviction that a mistake has been committed.

Taylor, 362 N.C. at 527-28, 669 S.E.2d at 254 (citations, quotation marks, and brackets omitted).

To establish a *prima facie* case of “purposeful discrimination,” a defendant must show that the State used peremptory challenges to remove jurors on the basis of race. Review of the denial of a *Batson* challenge is highly fact specific, and cannot be reduced to simple formula:

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a “pattern” of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. *Similarly, the prosecutor’s questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.* These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a *prima facie* case of discrimination against . . . jurors [of a certain race].

Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69, 88 (1986); *see also State v. Smith*, 328 N.C. 99, 120-21, 400 S.E.2d 712, 724 (1991) (“We have also considered questions and statements made by the prosecutor during *voir dire* examination and in exercising his peremptories which may either lend support to or refute an inference of discrimination. . . . We have concluded that the discrimination in a case need not be pervasive, as even a single act of invidious discrimination may form the basis for an equal protection violation.” (Citations, quotation marks, and brackets omitted)). Because of the fact specific nature of any *Batson* challenge, the Supreme Court “decline[d] . . . to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” *Batson*, 476 U.S. at 99, 106 S. Ct. at 1724-25, 90 L. Ed. 2d at 89-90.

The record must contain evidence sufficient to conduct a review of the defendant’s specific argument on appeal. *See State v. Brogden*, 329

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N.C. 534, 546, 407 S.E.2d 158, 166 (1991). Depending on the specific argument of the defendant, the evidence required for appellate review may include record evidence of the race of certain or all members of the jury pool. For proper review of denial of a *Batson* challenge, it is necessary that the record establishes the race of any prospective juror that the defendant contends was unconstitutionally excused for discriminatory purpose by peremptory challenge. Our Supreme Court has addressed this issue:

If a defendant in cases such as this believes a prospective juror to be of a particular race, *he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence[.]*

State v. Mitchell, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988) (emphasis added).³ If there is *not* any question about a prospective juror's race, neither the defendant nor the trial court is required to make inquiry regarding that prospective juror's race:

The race of one of the peremptorily challenged jurors was not clearly discernible to the attorneys in this case or to the judge. The court found as fact that this prospective juror was either black or Indian. Our Supreme Court has as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence. *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988). In this case no inquiry was made and the question was left unanswered. Defendant has therefore failed to present a sufficient record on appeal to include this prospective juror in the category of black prospective jurors peremptorily challenged.

State v. Robinson, 97 N.C. App. 597, 601, 389 S.E.2d 417, 420 (1990) (emphasis added).

We do not believe that the Supreme Court cases cited by the concurring opinion stand for the principle that the *only* method a trial court may use to support a finding concerning the race of a prospective juror

3. We note that our Supreme Court did not dismiss the defendant's *Batson* argument in *Mitchell*, it considered then "overruled" the defendant's *Batson* argument. *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557-58.

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is to ask that juror (and, apparently, just accept the juror's racial self-identification). As the concurring opinion apparently recognizes by citing *Brogden*, all our Supreme Court requires is "proper evidence [of] the race of each juror[.]" *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166. Certainly, not all African-Americans can be readily identified as such based upon outward appearances. That is why our Supreme Court rejected a scheme whereby the races of prospective jurors could be established for the record based upon notations of an attorney or a court reporter's "subjective impressions." *Id.* When the race of a prospective juror is not obvious, a person's subjective impressions may well be erroneous.

The concurring opinion conflates the role attorneys and other court personnel play in the process with the role of the trial court:

Subjective impressions of a juror's race made by a court reporter, clerk, or trial counsel are all insufficient to establish an adequate record on appeal. *It follows then that the subjective impressions of a juror's race made by the parties or trial court judge would also be insufficient to establish a proper record of the juror's races on appeal.*

(Citations omitted) (emphasis added).

We agree that the subjective impressions of the race of a prospective juror made by "the parties" is not relevant. However, "[t]he trial court has broad discretion in overseeing *voir dire*[.]" *State v. Campbell*, 359 N.C. 644, 666, 617 S.E.2d 1, 15 (2005). In jury *voir dire* the trial court is charged with making legal determinations based upon its factual findings.

"To allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches." This Court "*must uphold the trial court's findings unless they are 'clearly erroneous.'*" Under this standard, the fact finder's choice between two permissible views of the evidence "cannot" be considered clearly erroneous. We reverse "only" when, after reviewing the entire record, we are "left with the definite and firm conviction that a mistake has been committed."

State v. Headen, 206 N.C. App. 109, 114–15, 697 S.E.2d 407, 412 (2010) (emphasis added) (citations and brackets omitted). "Where the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties." *State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982). This presumption

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of correctness applies to findings made by the trial court. *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988).

Further, the *judge's* subjective impressions are not only relevant, but an integral part of the judge's duties: "Upon review, the trial court's determination [whether to excuse a prospective juror] is given great deference because it is based primarily on evaluations of credibility. Such determinations will be upheld as long as the decision is not clearly erroneous." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509–10 (2001) (citations omitted). Further:

[I]t is the trial court that "is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred."

State v. Salinas, 366 N.C. 119, 124, 729 S.E.2d 63, 67 (2012) (citation omitted).

We disagree with the concurring opinion's conclusion that findings of fact made by the trial court should be given no more weight than "[s]ubjective impressions of a juror's race made by a court reporter, clerk, or trial counsel . . ." We also disavow any suggestion that our holding would permit the trial court to make a finding of fact about a prospective juror's race "by accepting an interested party's or counsel's untested perceptions as fact." We simply hold that if the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during *voir dire*, and it thereafter makes a finding of fact based upon its observations, a defendant's burden of preserving that prospective juror's race for the record has been met. Absent evidence to the contrary, it will be presumed that the trial court acted properly – i.e. that the evidence of the prospective juror's race was sufficient to support the trial court's finding in that regard. *Fennell*, 307 N.C. at 262, 297 S.E.2d at 396. If the State disagrees with the finding of the trial court, it should challenge the finding at trial and seek to introduce evidence supporting its position. Questioning the juror at that point could be warranted. Here, however, the State clearly agreed with the trial court's findings related to the race of the five identified prospective jurors. Absent any evidence that the trial court's findings were erroneous, "we must assume that the trial court's findings of fact were supported by substantial competent evidence." *State v. James*, 321 N.C. 676, 686, 365 S.E.2d 579, 585 (1988).

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Nothing in the appellate opinions of this State require the trial court to engage in needless inquiry if a prospective juror's race is "clearly discernable" without further inquiry. Here, the record demonstrates that it was "clearly discernable" to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American, and that two prospective jurors were excused pursuant to peremptory challenges by the State. The following discussion and ruling occurred on defendant's *Batson* motion:

MS. BELL: Judge, I do have a *Batson* motion. And, Judge, the basis of my motion goes to the fact that in Seat Numbers 10, we had two jurors, [Mr. Jones] and [Ms. Taylor], both of whom were black jurors, and both of whom were excused. And, Judge, in the State's *voir dire* of both jurors, there was no overwhelming evidence, there was nothing about any prior criminal convictions, any feelings about -- towards or against law enforcement, there's no basis, other than the fact that those two jurors happen to be of African-American decent [sic] they were excused.⁴

We heard from Mr. [Jones] who stated that he was a supervisor here in Clinton and had a breaking and entering two and a half years ago. Nobody was charged, but he had no feelings towards law enforcement, no negative experience with the DA's office. And, with Ms. [Taylor], we heard that she owned a beauty salon that was next to ABC Insurance. She didn't know anyone in the audience or anyone in the case. There was nothing that was deduced during the jury *voir dire* that would suggest otherwise.

THE COURT: Mr. Thigpen?

MR. THIGPEN: Judge, I don't think Ms. Bell's made a *prima facie* showing discriminatory intent, which is required under *Batson*. The simple fact that both jurors happen to have been African-American and I chose to excuse them peremptorily, is not sufficient to raise a *Batson* challenge.

THE COURT: Seems to me that you excused two, but kept three African-Americans. Am I right?

4. We have used pseudonyms to protect the privacy of jurors.

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MR. THIGPEN: Yes, sir, that's right; including Mr. [Anderson], who is Juror Number 5, who is an African-American male; Ms. [Robins], Juror Number 9, who is an African-American female; and Juror Number 7, Ms. [Moore], an African-American female.

THE COURT: All right. I don't see where you've overcome or made a prima facie showing of lack of neutrality.

. . . .

THE COURT: Okay. Who was it you excused?

MR. THIGPEN: I excused [Mr. Jones] and [Ms. Taylor] who had been both seated in Seat Number 10.

. . . .

MS. BELL: I'm making my case that I have made a prima facie showing, that there was no other reason [for excusing the two African-American prospective jurors], other than that of race[.]

THE COURT: All right. I'm going to deny your motion. Madam Clerk, the Court, from the evidence, the arguments of counsel on the record, the Court finds there is no evidence of a showing of prejudice based on race or any of the contentions in *Batson*, GS 912A, GS 15A-958. *The Court further finds that out of the five jurors who were African-American, three still remain on the panel and have been passed by the State.* The Court concludes there is no prima facie showing justifying the *Batson* challenge; therefore, the defendant's motion is denied.

(Emphasis added).

Reading the trial court's ruling in context, it seems apparent that the fact that the prospective jurors in question were African-American was clear to the trial court. It is only "if there is any question as to the prospective juror's race [that] this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence." *Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557. The trial court made a finding that five African-Americans had been questioned on *voir dire*, that three made it onto the jury, and that the other two were excused pursuant to the State's use of peremptory challenges.

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However, the State contends that defendant has failed to properly preserve this argument for appeal. Assuming, *arguendo*, that defendant's argument is properly before us, we find no error in the ruling of the trial court and affirm. *See State v. Willis*, 332 N.C. 151, 162, 420 S.E.2d 158, 162 (1992) ("Assuming it was error to sustain the objections to this testimony by defendant Willis and that it was error for the court to hold that it could not find Willis was a member of a cognizable minority, we cannot hold this was prejudicial error.").

III. Jury Instruction

[2] Last, defendant contends that the trial court erred in instructing the jury over his objection on acting in concert "when the evidence failed to support an inference that . . . [defendant] and [Ms. Smith] were acting together in the commission of any crime." (Original in all caps).

The standard of review for appeals regarding jury instructions to which a defendant has properly requested at trial is the following: This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190-91, 729 S.E.2d 703, 708 (2012) (citation, quotation marks, ellipses, and brackets omitted). "In order to support a jury instruction on acting in concert, the State must prove that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citation and quotation marks omitted).

Ms. Smith was also charged with various crimes and entered into a plea agreement with the State to testify against defendant. The State elected not to call her to testify at defendant's trial, but defendant called her to testify.

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Defendant argues that

The jury should have been told that the state's burden was to prove that [defendant] accomplished each crime on his own. Instead, the judge told jurors they could convict [defendant] if they found that he alone or he acting in concert with [Ms. Smith] had committed the crimes. Because there was no evidence to support the suggestion that Ms. [Smith] was involved, [defendant] is entitled to a new trial.

Defendant claims that Ms. Smith's testimony "corroborated [defendant's] statement: she said the two of them had returned to the house shortly before law enforcement arrived with the landlord. When she and [defendant] returned to the home, they found the glass was broken in the back door."

Defendant argues that the evidence merely shows that Ms. Smith was "present" at the mobile home and

[a] person's mere presence is not enough to establish acting in concert. "A defendant's mere presence at the scene of the crime does not make him guilty [...] even if he sympathizes with the criminal act and does nothing to prevent it." *State v. Capps*, 77 N.C. App. 400, 402-03, 335 S.E.2d 189, 190 (1985). The state is required to prove a common purpose, plan, or scheme *State v. Forney*, 310 N.C. 126, 134, 310 S.E.2d 20, 25 (1984), and in this case Ms. [Smith] denied any such plan or purpose.

Ms. Smith did deny she was involved in a plan to make methamphetamine with defendant, but the jury did not have to believe her. *See, e.g., State v. Green*, 296 N.C. 183, 188, 250 S.E.2d 197, 200-01 (1978) ("The credibility of a witness's identification testimony is a matter for the jury's determination, and only in rare instances will credibility be a matter for the court's determination." (Citation omitted)). There was abundant evidence showing she was far more than "merely present" at the home during methamphetamine production. We do not understand defendant's argument that "there was no evidence to support the suggestion that [Ms. Smith] was involved" in the crimes charged. She testified she pled guilty to possession of methamphetamine precursor chemical and attempted trafficking for methamphetamine by possession. She also testified that on 4 December 2015, before their arrest and the search of the mobile home, she and defendant went to Walmart to purchase Sudafed and to IGA. The receipt from IGA -- which showed that crystal lye was purchased -- was found in defendant's pocket when he was arrested

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and was admitted as evidence. Sudafed and crystal lye are two primary ingredients used to make methamphetamine. They then went back to defendant's home, where Ms. Smith testified they had previously made methamphetamine. Ms. Smith had been living in the home with defendant for about two months, and officers found methamphetamine ingredients, paraphernalia, and items used to produce methamphetamine in plain view throughout the home in nearly every room -- bedroom, living room, bathroom, laundry room, and kitchen. Contrary to defendant's argument, all of the evidence, including Ms. Smith's testimony, tends to show that she was very much involved in making methamphetamine with defendant, despite her denial of any "plan." This evidence is more than sufficient to support an acting in concert instruction. We hold that the trial court did not err in giving the instruction.

IV. Conclusion

We conclude there was no error in defendant's trial.

NO ERROR.

Chief Judge McGEE concurs.

Judge BERGER concurs with separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur in the result reached by the majority. However, I would find that Defendant has waived review of his *Batson* challenge because he failed to preserve an adequate record setting forth the race of the jurors. Our Supreme Court has stated that findings as to the race of jurors may not be established by the subjective impressions or perceptions of "the defendant, the court, [] counsel" or other court personnel. *State v. Mitchell*, 321 N.C. 650, 656, 365 S.E.2d 554, 557 (1988). (emphasis added.) Because fact finding by guesswork or intuition is inappropriate, I disagree with the majority's conclusion that a trial court's subjective impressions concerning race are sufficient evidence to establish an adequate record on appeal.

Other than speculative statements by counsel and the trial court, there is nothing in the record that demonstrates, as the majority suggests, that it was " 'clearly discernable' to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American." Further inquiry should

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be required by a defendant alleging purposeful racial discrimination in jury selection to establish an adequate record for appellate review.

“An individual’s race is not always easily discernable.” *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557. When a defendant “believes a prospective juror to be of a particular race, he can bring this fact to the trial court’s attention and ensure that it is made a part of the record.” *Id.* at 656, 365 S.E.2d at 557. That was not done here.

In *State v. Mitchell*, our Supreme Court held that the defendant had “failed to present an adequate record on appeal from which to determine whether jurors were improperly excused by peremptory challenges on the basis of race.” *Id.* at 655, 365 S.E.2d at 557. In so holding, the Court in *Mitchell* reasoned that

the burden is on a criminal defendant who alleges racial discrimination in the selection of the jury to establish an inference of purposeful discrimination. The defendant must provide the appellate court with an adequate record from which to determine whether jurors were improperly excused by peremptory challenges at trial. Statements of counsel alone are insufficient to support a finding of discriminatory use of peremptory challenges. . . .

[Here,] the defendant filed a motion to require the court reporter to note the race of every potential juror examined, which was also denied. Although this approach *might* have preserved a proper record from which an appellate court could determine if any potential jurors were challenged solely on the basis of race, we find it inappropriate. To have a court reporter note the race of every potential juror examined would require a reporter alone to make that determination without the benefit of questioning by counsel or any other evidence that might tend to establish the prospective juror’s race. *The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, the court, or counsel.* . . . As the trial court noted, “The clerk might note the race as being one race and in fact that person is another race. My observation has been you can look at some people and you cannot really tell what race they are.” The approach suggested by the defendant would denigrate the task of preventing peremptory challenges of jurors on the basis of race to the reporter’s subjective impressions as to what race they spring from.

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If a defendant in cases such as this believes a prospective juror to be of a particular race, he can bring this fact to the trial court's attention and ensure that it is made a part of the record. Further, if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence, as opposed to leaving the issue to the court reporter who may not make counsel aware of the doubt. In the present case the defendant did not avail himself of this opportunity, despite the trial court's suggestion at the pre-trial hearing that he might wish to do so during jury selection. . . . For whatever reason, counsel chose not to make any such inquiry at trial. Thus, the defendant has failed to demonstrate that the prosecutor exercised peremptory challenges solely to remove members of any particular race from the jury.

Id. at 654-56, 365 S.E.2d at 556-58 (1988) (*purgandum*¹) (emphasis added).

The majority here relies almost exclusively on *Mitchell* to support its proposition that “[i]f there is *not* any question about a prospective juror's race, neither the defendant nor the trial court is required to make inquiry regarding the prospective juror's race.” Based solely on *Mitchell*, further inquiry regarding each juror's race may not always be necessary when a defendant can somehow demonstrate that each juror's race was “clearly discernable.” However, since *Mitchell*, our Supreme Court has effectively held that further inquiry regarding each juror's race is required because perceptions and subjective impressions—standing alone—are insufficient to establish jurors' races.

In *State v. Payne*, our Supreme Court similarly held that “we need not reach the constitutional issues presented by this assignment of error, as we are not presented with a record on appeal which will support the defendant's argument that jurors were improperly excused by peremptory challenges exercised solely on the basis of race.” *State v. Payne*, 327 N.C. 194, 198, 394 S.E.2d 158, 160 (1990). The relevant facts in *Payne* were as follows:

1. Our shortening of the Latin phrase “*Lex purgandum est.*” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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the defendant (who is white) objected to the State's use of peremptory challenges against black jurors. The defendant requested that the courtroom clerk record the race and sex of the "prospective" jurors who had already been seated or excused, but the trial court denied his request. The next morning, the defendant renewed his objection via a written motion for the clerk to record the race and sex of jurors. The motion was supported by an affidavit, subscribed by one of the defendant's attorneys, purporting to contain the name of each black prospective juror examined to that point, and whether the State had peremptorily excused, challenged for cause, or passed the prospective juror to the defense (the defendant says one black juror did sit on the trial jury). The trial court, viewing the affidavit's allegations as true, nonetheless ruled that the defendant had failed to make a prima facie showing of a substantial likelihood that the State was using its peremptory challenges to discriminate against black jurors.

Id. at 198, 394 S.E.2d at 159-60.

Our Supreme Court agreed with the trial court's assessment

that had the defendant made his motion prior to jury selection, the court would have had each prospective juror state his or her race during the court's initial questioning. This would have provided the trial court with an accurate basis for ruling on the defendant's motion, and would also have preserved an adequate record for appellate review. Having not made his motion to record the race of prospective jurors until after the twelve jurors who actually decided his case had been selected, the defendant attempted to support his motion via an affidavit purporting to provide the names of the black prospective jurors who had been examined to that point. That affidavit, however, contained only the perceptions of one of the defendant's lawyers concerning the races of those excused—perceptions no more adequate than the court reporter's or the clerk's would have been, as we recognized in *Mitchell*. For the reasons stated in *Mitchell*, we conclude that the trial court did not err by denying the defendant's motion for the clerk to record the race of "prospective jurors" after they had been excused and the jury had been selected. For similar reasons, we also conclude that the record before

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us on appeal will not support the defendant's assignment of error.

Id. at 200, 394 S.E.2d at 160-61 (citations omitted).

In *State v. Brogden*, our Supreme Court also held that the defendant “failed to provide an adequate record regarding the race of the jurors, both those accepted and those rejected, and has therefore waived any such objection.” *State v. Brogden*, 329 N.C. 534, 545, 407 S.E.2d 158, 165 (1991). Our Supreme Court reasoned that the “defendant, *in failing to elicit from the jurors by means of questioning or other proper evidence the race of each juror*, has failed to carry his burden of establishing an adequate record for appellate review.” *Id.* at 546, 407 S.E.2d at 166 (emphasis added). This holding was based on the fact that “the only records of the potential jurors’ race preserved for appellate review are the subjective impressions of defendant’s counsel and notations made by the court reporter of her subjective impressions.” *Id.*

Although our Supreme Court appeared to limit the need for further inquiry to instances when the jurors’ races were not “easily discernible” in *Mitchell*, 321 N.C. at 655, 365 S.E.2d at 557, subsequent cases have required defendants to provide “proper evidence [of] the race of each juror,” *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166, to establish an adequate record for appellate review. Subjective impressions of a juror’s race made by a court reporter, clerk, or trial counsel are all insufficient to establish an adequate record on appeal. *See Mitchell*, 321 N.C. at 655-56, 365 S.E.2d at 557 (holding that a court reporter or court clerk’s identification of each juror’s race as insufficient); *Payne*, 327 N.C. at 200, 394 S.E.2d at 161 (identifying an affidavit that “contained only the perceptions of one of the defendant’s lawyers concerning the races of those excused” as inadequate); *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166 (reaffirming that the “subjective impressions of defendant’s counsel and notations made by the court reporter of her subjective impressions” of the jurors’ races are insufficient). It follows then that the subjective impressions of a juror’s race made by the trial court would also be insufficient to establish a proper record of a juror’s race on appeal. *See State v. Mitchell*, 321 N.C. at 656, 365 S.E.2d at 557 (“The court reporter, however, is in no better position to determine the race of each prospective juror than the defendant, *the court*, or counsel.”) (emphasis added).

The majority states that the record here “demonstrates that it was ‘clearly discernable’ to the trial court, and the attorneys for the State and Defendant, that five of the 21 prospective jurors questioned on *voir dire* were African-American.” However, the record contains no

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evidence regarding the race of any juror or prospective juror. Not a single juror was ever asked his or her race by Defendant or the trial court. Rather, the record merely contains statements by counsel and the trial court concerning their perceptions and subjective impressions of the prospective jurors' races. This is not enough. We cannot and should not rely on the trial court's and defense counsel's perceptions of the jurors to simply conclude that the jurors' races were "clearly discernible." In the absence of any "proper evidence [of] the race of each juror," *Brogden*, 329 N.C. at 546, 407 S.E.2d at 166, I would find that Defendant has failed to provide a record on appeal sufficient to permit this Court to review his *Batson* claim.

The majority's assertion that a trial court's subjective impressions concerning race equates with a credibility determination misses the mark. The majority would essentially allow judges to take judicial notice of an individual juror's race simply by looking at him or her. It seems unusual that judges have acquired this unique skill which is absent in court reporters, clerks, and lawyers. As our Supreme Court held in *Mitchell*, trial courts are in no better position than court personnel, lawyers, or the parties to determine a juror's race based solely on subjective impressions and perceptions.

Where a party accuses opposing counsel of purposeful racial discrimination in jury selection, that party should take appropriate steps to elicit evidence establishing the race of jurors or prospective jurors. Without proper evidence set forth in the record on appeal, this Court should decline to accept subjective impressions of race as fact.

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[262 N.C. App. 106 (2018)]

STATE OF NORTH CAROLINA
v.
CRAIG DEONTE HAIRSTON, DEFENDANT

No. COA17-1357

Filed 16 October 2018

1. Appeal and Error—preservation of issues—objection outside jury’s presence—failure to object in jury’s presence

Defendant in a first-degree murder trial failed to preserve appellate review of testimony regarding a prior shooting incident where defendant objected to the proffered testimony outside the jury’s presence but failed to object again when the testimony was actually introduced in the jury’s presence.

2. Appeal and Error—invited error—testimony elicited by defendant—request for plain error review

A defendant convicted of first-degree murder was not entitled to plain error review of the admission of expert ballistics testimony where defendant invited the alleged error by eliciting the complained-of statement on cross-examination.

Appeal by Defendant from Judgments entered 14 August 2017 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Marilyn G. Ozer for Defendant.

INMAN, Judge.

Defendant Craig Deonte Hairston (“Defendant”) appeals from two judgments following a jury verdict finding him guilty of conspiring to commit robbery with a firearm and first-degree murder under the felony murder rule. He argues that he is entitled to a new trial because the trial court erred in admitting testimony about Defendant’s use of a firearm in a prior incident and because the trial court erred in permitting a ballistics expert to give an unqualified opinion linking spent shell casings to a single firearm allegedly possessed by Defendant. Because Defendant failed to timely object to the testimony regarding the prior incident and

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invited the expert opinion testimony he asserts was introduced in error, we hold that Defendant has failed to preserve review of these arguments and dismiss his appeal.

I. FACTUAL AND PROCEDURAL HISTORY

The evidence at trial tended to show the following:

On 28 August 2014, Defendant travelled from Virginia to Greensboro, North Carolina to visit a friend, Montray Price (“Price”), at his apartment. Defendant and Price were drinking beer and smoking on the apartment’s balcony when, apropos of nothing, they resolved to head into a nearby patch of woods and shoot guns. Defendant, carrying a .45 caliber pistol, and Price, carrying a .32 caliber firearm, walked from the apartment to the complex’s parking lot, where they decided to simply fire their guns into the air rather than walk all the way to the woods. Defendant and Price fired their guns and left the parking lot without picking up the spent shell casings. A tenant in the complex found the shell casings later that day and called the Greensboro Police Department. The responding officer collected the .45 and .32 casings and logged them into evidence.

A few days later, on 1 September 2014, Defendant again drove down from Virginia to Price’s apartment. There, Defendant met with Price and a third man, Colby Watkins (“Watkins”), and spent the afternoon smoking marijuana and drinking. Their conversation eventually turned to the topic of making money, and the three decided to use Defendant’s and Price’s guns to rob a drug dealer. They ultimately abandoned that plan and returned to drinking and smoking well into the evening. Later that night, Price received a text message from a prostitute, Jessica London (“London”). He asked if she had any drugs, and she replied that she did; Defendant, Price, and Watson thereafter left the apartment to meet with London at a nearby Holiday Inn.

The three men arrived at the Holiday Inn after midnight on 2 September 2014, and London joined them in their car to smoke marijuana. The group drove to a gas station, where Price and Watson went inside while Defendant and London stayed in the car. Inside the gas station, Watson told Price that he wanted to rob London, to which Price said no, reasoning that London likely did not keep any money on her person. Watson and Price returned to Defendant and London in the car, and the four drove back to the Holiday Inn.

Back at the hotel, Price and London went inside to have sex after she called and informed her pimp. Price rejoined Watson and Defendant in the car some time later, and the three drove away from the Holiday

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Inn. As they were leaving; however, Watson saw London's pimp drive by, and the group agreed to rob him.

Watson, Price, and Defendant drove to Price's apartment, retrieved their guns, and parked their car at a Waffle House near the Holiday Inn to plan the robbery. Defendant and Price then walked to the hotel and donned masks while Watson stayed in the car. The pair approached an occupied silver car in the Holiday Inn parking lot and demanded money from the driver, Kevin Millner ("Millner")—a man who was not, in fact, London's pimp or related to her in any way whatsoever. Millner screamed, and a shot rang out. Price and Defendant fled the scene on foot.

After sun-up on 2 September 2014, a maintenance man at the Holiday Inn found a spent .45 caliber shell casing in the hotel parking lot near Millner's car, pocketing it to dispose of later. Sometime thereafter, the maintenance man noticed Millner in his vehicle with the windows closed, believing he was asleep. The assistant general manager of the hotel, at the maintenance man's suggestion, decided to check on Millner due to the unseasonably hot weather. When the assistant general manager approached the vehicle, he realized that Millner was dead and called the police. Law enforcement officers arrived on the scene a short time later; the maintenance worker gave them the shell he had found earlier in the day.

Defendant was indicted on 29 September 2014 on one count of first-degree murder and one count of conspiracy to commit robbery with a dangerous weapon. On the morning of the third day of trial, the State planned to call Price as a witness. However, before the jury was called back in and trial resumed, Defendant's counsel raised an objection to Price's testimony, stating:

While the jury's out, I would like to impose—I think Mr. Montray Price will be the State's witness. The State, during his testimony, may—or will be introducing evidence of some uncharged conduct.

We would pose an objection to the introduction of some shots being fired at [Price]'s apartment by my client as being uncharged conduct, and that it's not relevant to these proceedings under Rule 404 and 403.

But even if it was deemed relevant by the Court, its prejudicial nature outweighs any probative value.

The trial court then heard from the State on Defendant's objection and allowed the State to proffer Price's testimony during *voir dire*, complete

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with direct and cross-examination by both parties. At the conclusion of Price's *voir dire* testimony, the trial judge recessed court for 30 minutes, retired to his chambers, and considered the matter. Once court resumed, the trial judge asked a question of Price and subsequently overruled Defendant's objection. Defendant requested a limiting instruction, which was allowed. The jury returned to the courtroom and the trial resumed. Price testified before the jury concerning the events of 28 August and 2 September 2014. Defendant's trial counsel did not object at that time.

The State also called as a witness Karen Weimorts ("Weimorts"), a firearms and tool mark examiner with the Greensboro Police Department, who provided expert testimony concerning the .45 caliber shells found on 28 August 2014 in the parking lot outside Price's apartment and on 2 September 2014 in the Holiday Inn parking lot. On direct examination, Weimorts testified that "the .45 casing from the homicide was fired in the same firearm as the .45 casings from the scene [outside Price's apartment] on August 28th." On cross-examination, Defendant's counsel eliminated any uncertainty in Weimorts's testimony by engaging in the following exchange:

[Defendant's Counsel]: Is it your opinion that those [matching firing pin marks on the .45 casings] were made by one gun out of all of the .45-caliber pistols that are manufactured and sold in the U.S.?

[Weimorts]: Yes.

At no point did Defendant's counsel object to Weimorts's testimony.

Following the presentation of evidence and arguments of counsel, the jury found Defendant guilty of feloniously conspiring to commit robbery with a firearm and first-degree murder under the felony murder rule. Defendant was sentenced to a minimum of 33 months and maximum of 52 months imprisonment for conspiracy and life imprisonment without parole for murder. He gave notice of appeal in open court.

II. ANALYSIS

Defendant presents two arguments on appeal, asserting that the trial court: (1) committed prejudicial error in admitting Price's testimony concerning the events of 28 August 2014; and (2) committed plain error in admitting Weimorts's unqualified testimony linking the two sets of .45 shell casings to a single firearm. Our review of the record, transcript, and case law, however, discloses that Defendant has failed to preserve either issue for review. As a result, we dismiss Defendant's appeal.

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A. *Price's Testimony*

[1] Rule 10 of the North Carolina Rules of Appellate Procedure establishes that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion” N.C. R. App. P. 10(a)(1) (2018). In construing this language, our Supreme Court has held that “[t]o be timely, an objection to the admission of evidence must be made ‘at the time it is actually introduced at trial.’” *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000) (emphasis omitted)). “It is insufficient to object only to the presenting party’s forecast of the evidence.” *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (citing *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806). Thus, “[a]n objection made ‘only during a hearing out of the jury’s presence prior to the actual introduction of the testimony’ is insufficient.” *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (quoting *Ray*, 364 N.C. at 277, 697 S.E.2d at 322) (citations omitted).

Our Supreme Court’s decision in *Snead* controls our review of Defendant’s argument regarding testimony about the prior shooting incident. In *Snead*, the defendant objected to the introduction of lay witness opinion testimony while the jury was outside the courtroom. 368 N.C. at 813, 783 S.E.2d at 735. The trial court allowed a *voir dire* examination of the witness outside the presence of the jury following the objection, and ruled that the witness could provide the opinion testimony at issue. *Id.* at 813, 783 S.E.2d at 736. The jury was called back in, and the witness gave his opinion testimony without objection from the defendant. *Id.* at 813-14, 783 S.E.2d at 736. On review to this Court, we held that the trial court abused its discretion in admitting the opinion testimony and vacated the defendant’s conviction. *State v. Snead*, 239 N.C. App. 439, 768 S.E.2d 344 (2015). On discretionary review, our Supreme Court reversed our decision, holding that the defendant had failed to preserve the issue for appeal:

Here defendant objected to [the opinion] testimony . . . only outside the presence of the jury. He did not subsequently object when the State elicited [that] testimony before the jury. Therefore, defendant failed to preserve the alleged error for appellate review, and “the Court of Appeals erred by reaching the merits of defendant’s arguments on this issue.”

Snead, 368 N.C. at 816, 783 S.E.2d at 738 (quoting *Ray*, 364 N.C. at 278, 697 S.E.2d at 322).

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Defendant's challenge to Price's testimony on appeal proceeds upon almost precisely the same series of events present in *Snead*. As recounted *supra*, Defendant's counsel objected to Price's testimony outside the presence of the jury and before Price had been sworn in as a witness. The trial court allowed Defendant and the State to conduct a *voir dire* examination of Price and subsequently overruled Defendant's objection. The jury was called back to the courtroom, and Price testified before the jury without objection from Defendant's counsel. On these facts, and following *Snead*, we hold Defendant failed to preserve review of Price's testimony under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure and dismiss this portion of his appeal.

We note that the trial court considered Defendant's objection to Price's testimony to be "timely" when it was raised outside the presence of the jury. But Defendant did not timely object to the testimony when it was elicited before the jury.

In *State v. Williams*, ___ N.C. App. ___, 801 S.E.2d 169 (2017), *reversed in part*, 370 N.C. 526, 809 S.E.2d 581 (2018), this Court held in a split decision that a defendant had preserved an evidentiary ruling despite his counsel's failure to object at the time the evidence was introduced before the jury because, "[b]ased on the exchange between defense counsel and the trial court following *voir dire*, it [was] understandable that counsel [did] not feel compelled to renew his objection in the presence of the jury." ___ N.C. App. at ___, 801 S.E.2d at 174. Holding that the defendant had failed to preserve the issue, the majority reasoned, would therefore be "fundamentally unfair[;]" as a result, we reviewed the issue on appeal. *Id.* at ___, 801 S.E.2d at 174. Judge Dillon dissented based on *Snead* and *Ray*, writing that while he "under[stood] the majority's [unfairness] argument[,]" he would nonetheless hold the issue unpreserved for prejudicial error review, because "we are compelled to follow holdings from our Supreme Court." *Williams*, ___ N.C. App. at ___, 801 S.E.2d at 178 (Dillon, J., dissenting). Ultimately, our Supreme Court reversed in part this Court's decision in *Williams* "for the reasons stated in the dissenting opinion." *Williams*, 370 N.C. at 526, 809 S.E.2d at 581.

Consistent with our Supreme Court's decision in *Williams*, Defendant's counsel had the burden of lodging a timely objection to Price's testimony when it was elicited before the jury—the trial judge's conduct and Defendant's counsel's subjective understanding thereof notwithstanding—and his failure to do so precludes appellate review for prejudicial error. Because Defendant does not request plain error review of this issue, we dismiss this portion of his appeal.

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B. Weimorts's Testimony

[2] Defendant asserts that the trial court committed plain error in allowing Weimorts's testimony, arguing that unqualified tool mark identification is too unreliable to comply with the admissibility requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993).¹ Defendant relies entirely on decisions from other state and federal jurisdictions for this contention. We do not reach the issue, however, because as argued by the State, Defendant invited the error of which he complains. We therefore dismiss his argument.

At the outset of this analysis, we note that Defendant does not contend that firearm identification through tool mark analysis is *per se* inadmissible under *Daubert*; rather, he contends that “*unqualified* scientific opinions are precluded.” (emphasis added). Examining the trial transcript, however, reveals that the Defendant elicited Weimorts's unqualified opinion—the only portion of her testimony Defendant argues constitutes error. As recounted *supra*, the State elicited Weimorts's opinion “[t]hat the .45 casing from the homicide was fired in the same firearm as the .45 casings from the scene [outside Price's apartment] on August 28th.” At no point in the State's questioning did Weimorts state any particular degree of certainty, posit that her finding was absolutely conclusive, claim that her opinion was free from error, or expressly discount the possibility that the .45 casings could have been fired from different guns. That testimony came, instead, on cross-examination when Defendant's counsel asked “[i]s it your opinion that those [matching tool marks on the .45 casings] were made by one gun out of all of the .45-caliber pistols that are manufactured and sold in the U.S.[.]” to which Weimorts replied, “Yes.” Defendant has therefore requested plain error review of language he himself introduced into the record. “Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.” *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citations omitted). “[A] defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review[.]” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), and, having done so here, Defendant's appeal for plain error review of Weimorts's testimony is dismissed.

1. This State has adopted the *Daubert* standard applicable to expert testimony as recognized in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016).

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III. CONCLUSION

For the foregoing reasons, we hold that Defendant failed to preserve review of the trial court’s admission of Price’s testimony. We further hold that the Defendant invited the plain error asserted in Weimorts’s testimony. As a result, we dismiss Defendant’s appeal in its entirety.

DISMISSED.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DENZEL JAMAL HILL, DEFENDANT

No. COA18-107

Filed 16 October 2018

1. Indictment and Information—sufficiency—description of offense—omission of word—assault

An indictment was sufficient to charge defendant with assault with a deadly weapon inflicting serious injury even though it omitted the word “assault” from the description of the offense (“defendant . . . did E.D. with a screwdriver, a deadly weapon”) because the indictment, viewed as a whole, substantially followed the language of the statute and apprised defendant of the charged crime—it correctly listed the offense as “AWDW SERIOUS INJURY” and referenced the correct statute.

2. Indictment and Information—amendments—substantial alteration of charge—underlying crime

The trial court erred by allowing the State to amend an indictment for second-degree kidnapping by changing the underlying crime from “assault inflicting serious injury” (a misdemeanor) to “assault inflicting serious *bodily* injury” (a felony). This substantial alteration required the judgment to be vacated and remanded for resentencing on the lesser-included crime of false imprisonment.

3. Rape—sufficiency of evidence—number of counts

The evidence was sufficient to support defendant’s conviction for 33 counts of statutory rape where the victim testified that

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defendant had sexual intercourse with her at least once per week for 71 weeks.

4. Criminal Law—jury instructions—incorrect instruction—definition of serious bodily injury

The trial court did not plainly err by incorrectly stating in a jury instruction on assault inflicting serious bodily injury that the State’s burden could be satisfied by the defendant causing a substantial risk of serious permanent disfigurement. Given the evidence that the victim actually suffered serious permanent disfigurement, it was not reasonably probable that the outcome would have been different but for the error.

5. Appeal and Error—preservation of issues—failure to object—cruel and unusual punishment

Defendant failed to preserve for appellate review his argument that his consecutive sentences totaling 138 years violated his constitutional right to be free from cruel and unusual punishment where he failed to lodge an objection before the trial court.

Appeal by Defendant from judgments entered 2 May 2017 by Judge James Gregory Bell in Brunswick County Superior Court. Heard in the Court of Appeals 19 September 2018.

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

Richard Croutharmel for the Defendant.

DILLON, Judge.

Denzel Jamal Hill (“Defendant”) appeals from six judgments finding him guilty of one count of first degree sex offense, five counts of statutory rape, and two counts of second degree kidnapping. On appeal, Defendant argues: (A) the indictment for assault with a deadly weapon was facially deficient and the indictment for assault inflicting serious injury was wrongfully amended; (B) the State’s evidence was not sufficient to support the fifty-two (52) counts of statutory rape, sexual offenses and indecent liberties charges on which Defendant was indicted; (C) the court erroneously defined “serious bodily injury” during its jury instructions; and (D) the court’s sentencing violates the Eighth Amendment of the United States Constitution by being grossly disproportionate to the crimes for which Defendant was convicted. We

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find that the trial court did err in allowing the State to amend the second degree kidnapping indictment in 14CRS053569. We find no error as to all other alleged issues.

I. Background

Defendant was indicted for various crimes in connection with a series of sex encounters with two minors, E.D. and F.H. A jury found the Defendant guilty of sixty-nine (69) counts, which the trial court consolidated into six judgments. Defendant was sentenced to consecutive terms of imprisonment. Defendant timely appealed.

II. Analysis**A. Challenges to Certain Indictments**

An indictment purported to be invalid on its face may be challenged at any time. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000). We review the sufficiency of an indictment *de novo*. See *State v. Sturdivant*, 304 N.C. 293, 307-11, 283 S.E.2d 719, 729-31 (1981).

Defendant takes issue with two of the indictments.

1. Assault Indictment (14CRS053566)

[1] First, Defendant argues that the indictment for one of the “assault with a deadly weapon inflicting serious injury” charges (14CRS053566) is defective because the indictment fails to include the word “assault” in its description of the offense.

It is not fatal if an indictment is not perfect with regard to form or grammar if the meaning of the indictment is clearly apparent “so that a person of common understanding may know what is intended.” *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

Here, while the indictment does fail to include the word “assault,” the indictment was sufficient in charging an assault by alleging that Defendant willfully injured one of the victims with a screwdriver, stating as follows:

[T]he jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did E.D. with a screwdriver, a deadly weapon, inflicting serious injury, against the form of the statute in such case made and provided and against the peace and dignity of the State.

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Additionally, the indictment correctly lists the offense as “AWDW SERIOUS INJURY” and references the correct statute, namely, N.C. Gen. Stat. § 14-32(B). N.C. Gen. Stat. § 14-32 (2013) (describing felonious assault with deadly weapon inflicting serious injury). Viewing the indictment as a whole, it substantially follows the language of N.C. Gen. Stat. § 14-32 and its essential elements, and apprised Defendant of the crime in question. Therefore, we conclude it meets the requirements of law. *State v. Randolph*, 228 N.C. 228, 231, 45 S.E.2d 132, 134 (1947).

2. Kidnapping Indictment (14CRS043569)

[2] Defendant also contends that the trial court erred in allowing the State to amend the indictment of second degree kidnapping in 14CRS053569. We agree.

Pursuant to N.C. Gen. Stat. § 15A-923(e) (2013), a bill of indictment may not be amended. This statute has been interpreted to mean “that an indictment may not be amended in a way which ‘would substantially alter the charge set forth in the indictment.’ ” *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994). “In determining whether an amendment is a substantial alteration, we must consider the multiple purposes served by indictments, the primary one being to enable the accused to prepare for trial.” *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006) (internal citations omitted).

One is guilty of kidnapping if he or she confines, restrains, or removes the victim for one of six purposes enumerated in N.C. Gen. Stat. § 14-39. The statutory purpose relevant to this case is where the confinement, restraint, or removal of the victim is for “[f]acilitating the commission of any felony[.]” N.C. Gen. Stat. § 14-39(a)(2) (2013).

Our Supreme Court has held that an indictment for kidnapping based on the commission of a felony need not specify the felony. *State v. Freeman*, 314 N.C. 432, 435-36, 333 S.E.2d 743, 745-46 (1985). Our Supreme Court has also held that if the indictment does specify a crime, Defendant “must be convicted, if convicted at all,” on the felony specified in the indictment. *State v. Faircloth*, 297 N.C. 100, 107-10, 253 S.E.2d 890, 894-96 (1979). Thus, if the indictment does state a specific underlying felony, a jury may not convict on the basis of a different felony than the one included in the indictment. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986).

Here, the indictment in question alleges that Defendant restrained the victim for the purpose of facilitating the following felony: “Assault Inflicting Serious Injury.” However, “assault inflicting serious injury” is

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a Class A1 misdemeanor. N.C. Gen. Stat. § 14-33(c) (2013). During trial, though, the State was allowed to amend its indictment to add the term “bodily” such that the crime specified was “assault inflicting serious *bodily* injury,” which is a Class F felony. N.C. Gen. Stat. § 14-32.4 (2013).

We hold that the State was bound by the crime as alleged in the original indictment. As noted above, pursuant to N.C. Gen. Stat. § 15A-923(e), a bill of indictment may not be amended “in a way which would substantially alter the charge set forth in the indictment.” *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824 (internal citation omitted). As we have held, an amendment from “assault inflicting serious injury” to “assault inflicting serious *bodily* injury” does constitute a substantial change as it raises the underlying crime from a misdemeanor to a felony. *See State v. Moses*, 154 N.C. App. 332, 338, 572 S.E.2d 223, 228 (2002). Thus, the trial court erred in allowing the amendment and sending the charge of second degree kidnapping to the jury.

Nevertheless, the allegations in the indictment do constitute the crime of false imprisonment, a lesser-included offense of kidnapping. *State v. Harrison*, 169 N.C. App. 257, 265-66, 610 S.E.2d 407, 414 (2005), *aff’d per curiam*, 360 N.C. 394 (2006). In *Harrison*, we stated that:

The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39, then the offense is kidnapping. However, if the unlawful restraint occurs without any of the purposes specified in the statute, the offense is false imprisonment.

Id. Further, the jury did find that Defendant committed the acts as alleged in the indictment. *State v. Piggott*, 331 N.C. 199, 210-11, 415 S.E.2d 555, 562 (1992). Therefore, we vacate the judgment finding Defendant guilty of second degree kidnapping and remand for judgment and resentencing for the lesser-included crime of false imprisonment.

B. Motion to Dismiss based on Insufficient Evidence

[3] Defendant next alleges that the trial court erred in denying his motion to dismiss the thirty-three (33) counts of statutory rape, two counts of statutory sex offense, and seventeen (17) counts of indecent liberties as to F.H. Defendant based his motion to dismiss on the ground that there was insufficient evidence put on by the State to prove all of these counts.

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In order to overcome the Defendant's motion to dismiss, the State must have sufficiently provided evidence of each essential element of the statutory rape charge(s), the statutory sexual offense charge(s), and the indecent liberties charge(s). The elements of both statutory rape and statutory sexual offense are "engag[ing] in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7a (2013) (recodified as N.C. Gen. Stat. § 14-27.25 (2015)). The elements of taking indecent liberties with a child are, where one "being 16 years of age or more and at least five years older than the child in question . . . willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" N.C. Gen. Stat. § 14-202.1 (2013).

During the trial, the State provided evidence in the form of testimony from victim F.H. F.H. testified that she was born on 4 December 1998 and that she was in a relationship with Defendant from 1 March 2013 through 18 July 2014, at which time she was fourteen (14) and fifteen (15) years old and Defendant was at least twenty-one (21) years old. F.H. further testified to sexual contact during their relationship; F.H. stated that she and Defendant had vaginal intercourse at least once a week, beginning the day that F.H. met Defendant, and that she performed oral sex before, during, and after each occurrence of sexual intercourse. Two additional witnesses testified to observing Defendant and F.H. have sexual intercourse during this time, one of whom also testified to observing oral sex between Defendant and F.H.

Defendant argues that since the State failed to provide a specific number of times that F.H. and Defendant had sexual intercourse and oral sex and how many times Defendant touched F.H. in an immoral way, the total number of counts is not supported and his motion to dismiss should have been granted. We disagree.

While F.H. did not explicitly state a specific number of times that she and Defendant had sexual relations, we conclude that a reasonable jury could find the evidence, viewed in the light most favorable to the State, sufficient to support an inference for the number of counts at issue. As the State points out in its brief, F.H. testified that she and Defendant had sexual intercourse at least once a week for a span of seventy-one (71) weeks. This testimony amounts to at least seventy-one (71) incidents of sexual intercourse, and Defendant was only indicted and convicted of thirty-three (33) incidents. Our Supreme Court has held that

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if the evidence show[s] a greater number of incidents committed by the defendant than the number of offenses with which he was charged and convicted, no jury unanimity problem existed regarding the convictions because, ‘while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.

State v. Massey, 361 N.C. 406, 408, 646 S.E.2d 362, 364 (2007) (internal citation omitted). We conclude that the trial court was correct in denying Defendant’s motion to dismiss.

C. Jury Instruction of “Serious Bodily Injury”

[4] Defendant next appeals the jury instructions that the trial court gave for the charge of assault inflicting serious bodily injury as to E.D. Specifically, Defendant takes issue with the definition of “serious bodily injury.”

Defendant did not object to the jury instruction at the time it was given; therefore, we review the instruction for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

While this court prefers the use of the North Carolina Pattern Jury Instructions, an instruction is sufficient if it adequately explains each essential element of an offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985). Jury instructions are generally upheld where “it is highly unlikely that omission of [the incorrect] portion of the charge would have produced a different result in the trial.” *State v. Gaines*, 283 N.C. 33, 42, 194 S.E.2d 839, 846 (1973). In *State v. Jones*, the North Carolina Supreme Court held that, “[w]here the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for a reversal.” 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978).

The North Carolina Pattern Jury Instruction provides that “[s]erious bodily injury is bodily injury that creates or causes [a substantial risk of death][serious permanent disfigurement].” N.C. P. I. 120.11. Here, the trial court’s instruction stated, in pertinent part:

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Serious bodily injury is injury that creates or causes a substantial risk of serious permanent disfigurement.

While the trial court's instruction was imperfect as to its definition of serious bodily injury, we are not convinced that the jury was misled by the instructions as given. The instruction, viewed as a whole, correctly placed the burden of proof on the State for the two elements of felonious assault inflicting serious bodily injury. The trial court merely conjoined the language of two parentheticals from the pattern jury instruction. Moreover, the evidence put on by the State goes to prove the creation of serious permanent disfigurement, not a risk of serious substantial disfigurement. Therefore, even though the jury was incorrectly instructed that the State's burden may be satisfied by the Defendant causing a substantial risk of serious permanent disfigurement, the State's evidence sufficiently proved that E.D. actually suffered serious permanent disfigurement. We cannot say that it is reasonably probable that the outcome would have been different, but for the error in the jury instruction.

D. Eighth Amendment Violation

[5] Lastly, Defendant argues that the trial court's consecutive sentences, totaling a minimum of one hundred thirty-eight (138) years, violates his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. Defendant failed to object to the sentencing on constitutional grounds in the trial court. Therefore, Defendant has failed to preserve this argument for appellate review. *See State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009).

In any event, we note that Defendant's constitutional argument appears to lack merit. Article I, Section 27 of the North Carolina Constitution mirrors the Eighth Amendment of the federal constitution in that it protects individuals from "cruel or unusual punishments." A punishment may be "cruel or unusual" if it is not proportionate to the crime for which the defendant has been convicted. *State v. Ysaquire*, 309 N.C. 780, 786, 309 S.E.2d 436, 440 (1983). Our Supreme Court in *Ysaquire* stated that "only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Id.* at 786, 309 S.E.2d at 441.

N.C. Gen. Stat. § 15A-1354 vests the trial court with the discretion to elect between concurrent or consecutive sentences for a defendant faced with multiple sentences of imprisonment. *Id.* at 785, 309 S.E.2d at 440. "The imposition of consecutive sentences, standing alone, does not constitute cruel and unusual punishment." *Id.*, at 786, 309 S.E.2d at 441.

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Here, the trial court utilized the discretion given to it by the legislature and consolidated the seventy (70) verdicts into six identical judgments, each of which were sentenced in the presumptive range. The trial court ordered that these two hundred seventy-six-month (276-month) sentences be served consecutively. In light of the crimes committed in this case, there appears to be no abuse of discretion in the sentencing.

III. Conclusion

We vacate the judgment of guilty of second degree kidnapping in 14CRS053569 and remand the case back to the trial court for an entry of judgment of conviction and sentencing for false imprisonment. We find no other error.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA

v.

ANFERNEE D. KNIGHT, DEFENDANT

No. COA18-10

Filed 16 October 2018

1. Criminal Law—joinder—transactional connection—gang-related shootings

The trial court did not abuse its discretion by declining to sever multiple offenses, arising from two gang-related shootings, that had been consolidated for trial. There was sufficient transactional connection between the offenses because they arose from a continuous course of violent criminal conduct related to gang rivalries, they occurred on the same day, the same pistol was used, and some witnesses were present at both shootings. Further, severance is not required where a defendant argues he would have elected to testify regarding one offense but not others.

2. Appeal and Error—waiver—specific grounds for objection

Defendant waived appellate review of his argument that the trial court's refusal to sever offenses that had been consolidated for trial, arising from two gang-related shootings, prevented a fair trial because it allowed the jury to hear testimony regarding

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defendant's gang ties and evidence of a seven-year-old's murder. Defendant's failure to state this specific ground for objecting to the ruling at trial constituted waiver.

3. Criminal Law—jury instructions—deviation from agreed-upon pattern jury instructions—error—harmless

Although the trial court erred by deviating from the agreed-upon pattern jury instructions regarding reliance on hearsay statements, defendant failed to demonstrate prejudicial error where the trial court had given the instruction six times throughout trial and where the record reflected overwhelming evidence of defendant's guilt.

4. Jury—dismissal—failure to follow instructions—different responses to same question

The trial court did not abuse its discretion by dismissing an impaneled juror in defendant's murder trial where a bailiff reported that the juror had expressed an opinion that the district attorney had behaved rudely, the juror gave a different response to the same question during two separate hearings regarding his statement to the bailiff, and the juror ignored the trial court's instructions.

Appeal by defendant of judgments entered 23 May 2017 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Sarah Holladay for defendant.

BERGER, Judge.

On May 23, 2017, Anfernee D. Knight ("Defendant") was convicted of first-degree murder; assault with a deadly weapon with intent to kill inflicting serious injury; attempted first-degree murder; and two counts of discharging a weapon into an occupied dwelling. Defendant argues that the trial court erred in: (1) denying Defendant's motion for severance; (2) failing to instruct the jury regarding the jury's use of hearsay statements; and (3) dismissing an impaneled juror. We disagree.

Factual and Procedural Background

This appeal arose from two gang-related shootings on July 23, 2014. The first shooting occurred around 4:30 p.m. near National Grocery in

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Wilson (“the National Grocery shooting”). Defendant was sitting in a parked car with Donnell Hill (“Hill”), Demetrius Spells (“Spells”), and Demonte Briggs (“Briggs”). Defendant, Hill, and Spells were members of a local gang. Antonio Pate (“Pate”), a rival gang member, drove past Defendant’s parked car and opened fire. According to the testimony of Hill, Spells, and Briggs, Defendant returned fire and struck Pate in his right shoulder as he fled the scene. Defendant, Hills, Spells, and Briggs left the scene without calling the police. Police later recovered six .45-caliber shell casings and eight 9-mm shell casings from the National Grocery shooting scene.

In retaliation for the National Grocery shooting, Defendant and other members of his gang opened fire on a group associated with Pate’s gang later that evening at Starmount Circle, an apartment complex (“the Starmount Circle shooting”). In preparing to retaliate, Defendant and Spells borrowed Spell’s girlfriend’s green Honda, which was described as very loud. Spells drove and Defendant sat in the back seat, still armed with the 9-mm pistol used in the earlier National Grocery shooting. After picking up Hill, the three men met several others associated with their gang at a local convenience store. After a group discussion, the group split up—three men left in a silver Maxima while Hill, Spells, and Defendant drove away in the loud green Honda. The convenience store’s video surveillance recorded the meeting, which was played for the jury.

Around 9:30 p.m., several witnesses at Starmount Circle observed a dark car with a loud muffler and a silver car approach the apartment complex. Shortly thereafter, gunshots were heard. Seven-year-old Kamari Antonio Jones (“Jones”) was killed when a bullet from the exchange struck him while he was in bed.

At trial, Spells testified that Defendant exited the green Honda when they arrived at Starmount Circle armed with the 9-mm pistol that he used earlier that day. Defendant met two other men from the silver Maxima; and the three men walked between the homes near Starmount Circle. While they were gone, Spells heard gunshots. When Defendant returned to the green Honda, he did not have the 9-mm pistol. Spells drove them away.

Police later recovered three .45-caliber shell casings and four 9-mm shell casings from the Starmount Circle scene. Testing confirmed the 9-mm shell casings recovered from the National Grocery shooting were fired from the same pistol as the 9-mm used in the Starmount Circle shootings. Defendant’s DNA profile also matched the DNA profile obtained from a cigarette located near the Starmount Circle crime scene.

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On May 23, 2017, a Wilson County jury found Defendant guilty of one count of first-degree murder; four counts of attempted first-degree murder; three counts of assault with a deadly weapon with intent to kill; one count of assault with a deadly weapon with intent to kill inflicting serious injury; and two counts of discharging a firearm into an occupied dwelling. Defendant was sentenced to life imprisonment without parole for first-degree murder and consecutive sentences of 157 to 201 months for attempted first-degree murder, 73 to 100 months for assault with a deadly weapon with intent to kill inflicting serious injury, and 64 to 89 months each for two counts of discharging a weapon into an occupied dwelling. Judgment was arrested on the remaining counts, which served as the felonies underlying Defendant's first-degree felony murder conviction. Defendant timely appeals, challenging the trial court's denial of his motion to sever, failure to instruct the jury regarding their limited use of hearsay statements, and dismissal of an impeached juror.

AnalysisI. Severance

[1] Defendant first alleges the trial court erred by denying his motion to sever the National Grocery case from the Starmount Circle case. Defendant asserts that severance was necessary to protect Defendant's constitutional right to testify in his own defense and to prevent the introduction of certain evidence that was relevant to some, but not all charges. We disagree.

"It is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Shipp*, 155 N.C. App. 294, 305, 573 S.E.2d 721, 728 (2002) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Consolidation of offenses for trial is appropriate "when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2017). Our courts generally favor consolidation of offenses for trial because it "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." *State v. Williams*, 355 N.C. 501,

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531, 565 S.E.2d 609, 627 (2002) (citation omitted), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

To determine whether there was a transactional connection between joined offenses, “[w]e consider the following factors to make this determination: (1) the nature of the offenses charged; (2) any commonality of facts between the offenses; (3) the lapse of time between the offenses; and (4) the unique circumstances of each case.” *State v. Perry*, 142 N.C. App. 177, 181, 541 S.E.2d 746, 749 (2001) (citation and quotation marks omitted).

Nevertheless, a motion to sever offenses must be granted if, during trial,

it is found necessary to achieve a fair determination of the defendant’s guilt or innocence of each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

N.C. Gen. Stat. § 15A-927(b)(2) (2017). “The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial.” *State v. Bracey*, 303 N.C. 112, 117, 277 S.E.2d 390, 394 (1981).

Additionally, our Supreme Court and the Supreme Court of the United States have held that severance may be necessary “[i]f such consolidation hinders or deprives the accused of his ability to present his defense.” *State v. Davis*, 289 N.C. 500, 508, 223 S.E.2d 296, 301 (citation omitted), *vacated in part on other grounds*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976); *see also Pointer v. United States*, 151 U.S. 396, 403, 38 L. Ed. 208, 212 (1894) (recognizing the fundamental principal that a court “must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury”).

However, severance is not required merely because the defendant would have elected to testify against one offense without being compelled to testify against another. *Davis*, 289 N.C. at 508, 223 S.E.2d at 301 (citation omitted); *see also Shipp*, 155 N.C. App. at 306, 573 S.E.2d at 729 (“A defendant fails to show abuse of discretion on the part of the trial judge in joining two offenses for trial where defendant’s only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others.” (citation and quotation marks omitted));

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State v. Sutton, 34 N.C. App. 371, 374, 238 S.E.2d 305, 307 (1977), *disc. review denied*, 294 N.C. 186, 241 S.E.2d 521 (1978) (finding the trial court did not abuse its discretion in denying defendant’s motion to sever because his “only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others”).

Here, the transactional connection between the offenses was sufficient for joinder. Each offense arose from a continuous course of violent criminal conduct related to gang rivalries. The evidence tended to show that the Starmount Circle shooting was in retaliation for the earlier National Grocery shooting. The two shootings occurred the same day; the same 9-mm pistol was used in both shootings; and witnesses testified at trial to evidence that applied to both shootings, or testified that they were present at both crime scenes. Thus, joinder was proper.

Additionally, neither the number of offenses nor the complexity of the evidence offered necessitated severance of the offenses for trial. The evidence presented was not unduly complicated or confusing. The jury instructions clearly and carefully separated Defendant’s offenses, and the verdict forms unmistakably distinguished the offenses according to the victim’s names. Therefore, no showing has been made that severance was necessary to ensure a fair determination by the jury on each charge.

Moreover, we reject Defendant’s assertion that severance was necessary to protect Defendant’s constitutional right to *choose* to testify against charges arising from either the National Grocery shooting or the Starmount Circle shooting without testifying regarding the other shooting. This is an insufficient argument to warrant severance. As previously discussed, a trial court does not abuse its discretion by refusing to sever multiple offenses against the same defendant “where defendant’s only assertion of possible prejudice is that he might have elected to testify in one of the cases and not in the others.” *Shipp*, 155 N.C. App. at 306, 573 S.E.2d at 729 (citation and quotation marks omitted); *see also Davis*, 289 N.C. at 508, 223 S.E.2d at 301; *Sutton*, 34 N.C. App. at 374, 238 S.E.2d at 307.

[2] Finally, we decline to address the merits of Defendant’s argument that the trial court’s denial of his motion to sever prevented a fair trial as it allowed the jury to hear testimony regarding Defendant’s gang ties and evidence of seven-year-old Jones’ murder. Defendant waived appellate review of this issue as he did not raise this argument at trial. “In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, *stating the specific grounds for the ruling the party desired* the court to make

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if the specific grounds were not apparent from the context.” N.C.R. App. P. 10(a)(1) (emphasis added).

Accordingly, the trial court did not abuse its discretion by denying Defendant’s motion to sever.

II. Hearsay Jury Instruction

[3] Defendant argues next that the trial court erred by failing to instruct the jury on their limited use of six hearsay statements for corroborative and impeachment purposes only. While we agree that this omission was error, we find the error harmless.

“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). “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). “Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

However, “[w]hen a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.” *State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018). “[A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge’s attention at the end of the instructions.” *Id.* (quoting *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988)). Where the trial court “substantively deviate[s] from the agreed-upon pattern jury instruction, . . . this issue [is preserved] for appellate review under N.C.G.S. § 15A-1443(a).” *Id.*

Per Section 15A-1443(a), a defendant

is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. *The burden of showing such prejudice under this subsection is upon the defendant.* Prejudice also exists in any instance

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in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (2017) (emphasis added).

Here, at least twice during trial, Defendant specifically requested North Carolina Pattern Jury Instruction 105.20 (“Instruction 105.20”), which limits the jury’s permissible reliance on hearsay statements to corroborative and impeachment purposes only. During the charge conference, the parties and trial court further agreed that the jury would be charged with Instruction 105.20. However, the trial court omitted Instruction 105.20 from the final jury charge. We conclude that, by omitting Instruction 105.20 from the final jury charge, the trial court committed error, which we “review under N.C.G.S. § 15A-1443(a).” *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Nevertheless, Defendant has failed to demonstrate 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.” N.C. Gen. Stat. § 15A-1443(a).

The trial court reiterated Instruction 105.20—or a close variation of it—six times to the jury throughout trial. Although the trial court failed to provide Instruction 105.20 during the final jury charge, the jury was sufficiently advised of this instruction throughout relevant portions of the trial.

Moreover, even if the instructions had not been given during the course of the trial, Defendant cannot show prejudice as the record reflects overwhelming evidence of Defendant’s guilt. Defendant does not contest the trial testimony of Spells, his fellow gang member. Spells testified that Defendant returned fire on Pate using his 9-mm pistol at the National Grocery shooting. Spells further testified that Defendant was armed with the same 9-mm pistol when he exited Spells’ car and opened fire at Starmount Circle later that same evening. Moreover, the physical evidence showed that the 9-mm shell casings found at the National Grocery and Starmount Circle scene matched. Finally, police also recovered a cigarette at the Starmount Circle crime scene which connected Defendant to the shooting. Given the overwhelming evidence of Defendant’s guilt, Defendant has failed to demonstrate that but for the trial court’s instructional error, there was a reasonable possibility of a different outcome at trial. Thus, Defendant has failed to demonstrate prejudice pursuant to N.C. Gen. Stat. §15A-1443(a).

III. Removing Impaneled Juror

[4] Finally, Defendant argues that the trial court erred by dismissing an impaneled juror. We disagree.

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Trial courts' "decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error." *State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989) (citation and quotation marks omitted), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). The abuse of discretion standard applies because "[t]he trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate." *State v. Lovin*, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995) (citation omitted). Accordingly, "[t]he decision whether to reopen examination of a juror previously accepted by both the State and defendant . . . is a matter within the sound discretion of the trial judge." *State v. Freeman*, 314 N.C. 432, 437, 333 S.E.2d 743, 746 (1985) (citation and quotation marks omitted).

"If before final submission of the case to the jury, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." N.C. Gen. Stat. § 15A-1215(a) (2017). This section "allows the trial court to replace a juror with an alternate juror should the original one become disqualified or be discharged for some reason." *State v. Richardson*, 341 N.C. 658, 672-73, 462 S.E.2d 492, 502 (1995) (citation omitted).

"The test is whether the challenged juror is unable to render a fair and impartial verdict." *Id.* (citation and quotation marks omitted).

The trial court has the opportunity to see and hear the juror on *voir dire* and, having observed the juror's demeanor and made findings as to his credibility, to determine whether the juror can be fair and impartial. For this reason, among others, it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial.

Id. (citation omitted). Therefore, "[a]bsent a showing that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision, the decision must stand." *Id.* (citation omitted).

Here, five days into the trial and after the jury had been impaneled, the State moved for the trial court to inquire into the competency of Juror 7 to render a fair and impartial verdict. The trial court conducted a hearing on the motion in which a 21-year veteran bailiff took the stand and testified that Juror 7 spoke with him during a break on the previous day. Juror 7 had first asked the bailiff "if they could have prayer during the breaks in the jury room." Juror 7 then said that "he felt it

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was inappropriate and rude for [the District Attorney] to be pointing at people in the audience while a witness was testifying.”

Juror 7 was subsequently questioned about the statements. Juror 7 testified that he did not “remember making any statement pertaining to the case” and agreed that he had not “formed an opinion concerning any of the parties in this case that would affect [him] from being a fair and impartial juror in this matter.” Rather than dismiss Juror 7, the trial court gave curative instructions to the jury.

Later that same day, the State played audio from a jailhouse call between Defendant and Defendant’s mother, which revealed that the Defendant’s mother knew Juror 7. The State renewed its request to dismiss Juror 7. The trial court again asked Juror 7 whether he told “the bailiff yesterday at the lunch break that [he] felt that the District Attorney was rude in that he pointed out certain individuals within the courtroom.” In response, Juror 7 admitted that he could “vaguely remember” discussing the jury’s security and whether he could pray for the jury because he believed that they were “in jeopardy somehow.”

Given this testimony, the trial court made the following findings of fact and conclusions of law:

This matter coming on to be heard and being heard before the undersigned judge presiding on this date, the 19th of May 2017, upon reconsideration of the motion to excuse [Juror 7], . . . for expressing an opinion concerning any matter involved in this case, that sworn testimony was taken from the bailiff this morning in which he testified that [Juror 7] mentioned to him that he was, that he thought that the District Attorney was rude at such time he pointed to certain individuals within the courtroom. Upon given a written transcript of the question and answer session with [Juror 7] earlier today, the record reflects upon my question, “have you discussed this case with anyone in any manner outside of this courtroom” that his response was “no, sir.” Upon questioning him at the, after lunch break concerning this issue, the witness, [Juror 7], among other things, stated that he was not sure and could not remember.

The Court having heard the testimony of the bailiff and having heard his responses to ensure that the Defendant has a right to a neutral and impartial jury, the Court makes a finding, after these findings of fact,

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makes conclusions of law that [Juror 7] made, expressed an opinion about this case in disregard to the Court's instructions. Further, that it is within the sound discretion of the Court concerning jury conduct based upon the foregoing findings of fact and conclusions of law, the Court finds that an opinion was expressed concerning this case in violation of the Court's instructions, therefore, [Juror 7] has been excused by the Court.

Based on the trial court's investigation and findings that Juror 7 provided different response to the same question during two separate hearings and ignored the trial court's instructions, the trial court dismissed Juror 7. Defendant has failed to demonstrate that the trial court's decision to dismiss Juror 7 "was so arbitrary that it could not have been the result of a reasoned decision." *Richardson*, 341 N.C. at 673, 462 S.E.2d at 502 (citation omitted). Therefore, the trial court did not abuse its discretion by dismissing Juror 7.

Conclusion

The trial court did not abuse its discretion by denying Defendant's motion for severance or dismissing Juror 7. Although omitting the requested instruction during the final jury charge was erroneous, this error was harmless. Accordingly, Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges DIETZ and TYSON concur.

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STATE OF NORTH CAROLINA

v.

DESHAWN LAMAR PERRY

No. COA17-1330

Filed 16 October 2018

1. Criminal Law—motion to disqualify prosecutor—conflict of interest—proof required

The trial court did not abuse its discretion by denying defendant's motions to disqualify the entire district attorney's office from prosecuting his case for common law robbery and attaining habitual felon status because there was no proof of an actual conflict of interest. The assistant district attorney who had previously represented defendant in one of the predicate felony convictions supporting habitual felon status had not represented defendant in any proceedings related to the current charges.

2. Appeal and Error—preservation of issues—motion to disqualify prosecutor—ruling required

Defendant's third request to disqualify the entire district attorney office from pursuing habitual felon status against him was not preserved for appellate review because, unlike his first two motions, he did not obtain a ruling from the trial court, and instead elected to forgo the trial and unconditionally plead guilty to habitual felon status.

3. Criminal Law—motion to disqualify prosecutor—previous denials not based on State's assurance

The Court of Appeals rejected defendant's argument that his third motion to disqualify the entire district attorney office from pursuing habitual felon status against him should have been allowed after the participation in the first phase of his trial (for common law robbery) by an assistant district attorney (ADA) who had previously represented defendant in one of the predicate felony convictions. The trial court's first two denials were not conditioned on the ADA not participating; the court merely noted that the prosecutor had "given assurances" that the ADA would not be involved.

Appeal by defendant from judgments entered 21 March and 6 April 2017 by Judge Alan Z. Thornburg in Henderson County Superior Court. Heard in the Court of Appeals 8 August 2018.

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

Meghan Adelle Jones for defendant.

ELMORE, Judge.

Defendant Deshawn Lamar Perry appeals judgments entered after a jury convicted him of misdemeanor resisting a public officer and of felonious common law robbery, he later pled guilty to attaining habitual felon status, and the trial court sentenced him for common law robbery as an habitual felon. He asserts the trial court erred by denying his motion to recuse the entire Henderson County District Attorney's ("HCDA") Office from prosecuting the charges against him because one of the State's attorneys, Henderson County Assistant District Attorney Michael Bender ("ADA Bender"), previously represented him in one of the felonies underlying the habitual felon charge, and because the State later violated the trial court's express condition that ADA Bender not participate in the prosecution.

Because defendant failed to demonstrate an actual conflict of interest existed in ADA Bender participating in the prosecution of the unrelated charges for resisting a public officer and common law robbery, the trial court did not abuse its discretion in denying the disqualification motion as to those particular charges. Although ADA Bender previously represented defendant in one of the predicate felonies underlying the habitual felon charge and briefly participated in the prosecution at the first phase of trial in contradiction to the State's assurances, because the trial court's initial denial was unconditional and defendant never obtained a ruling on his third disqualification motion at the start of the habitual felon phase of trial in light of his decision to unconditionally plead guilty to the habitual offender charge, the trial court did not abuse its discretion in denying the disqualification motion as to that charge. Accordingly, we hold there was no error below.

I. Background

On 2 November 2015, defendant was indicted for injury to personal property in file no. 15 CRS 53958, resisting a public officer and giving false information to police in file no. 15 CRS 53959, and common law robbery in file no. 15 CRS 53960, arising from an incident that occurred 6 October 2015. On 4 January 2016, defendant was indicted for attaining habitual felon status in file no. 16 CRS 25, based upon unrelated prior convictions for (1) attempted common law robbery on 13 May 2011,

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(2) possession with intent to sell or distribute a Schedule II controlled substance on 18 November 2011, and (3) common law robbery on 20 March 2013.

At a pretrial hearing on 11 January 2017, defendant moved for recusal of the entire HCDA's Office from prosecuting the charges against him. He argued that one of the State's two prosecutors, ADA Bender, had previously represented him in one of the three felonies underlying the habitual felon charge. The State's other prosecutor, Henderson County Assistant District Attorney Doug Mundy ("ADA Mundy"), replied he perceived no conflict of interest because ADA "Bender [did] not intend to sit in prosecution of that case"; rather, ADA Mundy was "going to be prosecuting that case." After an unrecorded bench conference, the trial court "den[ie]d the motion at th[at] time" and noted ADA Mundy "has given assurances that [ADA] Bender will in no way be involved in this case."

On 20 March 2017, at the start of trial on the charges of common law robbery, injury to personal property, resisting a public officer, and giving false information to police, defendant renewed his recusal motion "based on [ADA] Bender having represented [his] client in a previous matter which is an ancillary indictment." In response, the trial court "adopt[ed] it[is] previous ruling and order," thereby denying defendant's second recusal motion.

During trial, ADA Mundy served as the primary prosecutor. However, the trial court introduced both ADAs Mundy and Bender to the jury as the State's attorneys, ADA Bender attended bench and chambers conferences, and ADA Bender argued to the trial court on issues concerning jury instructions. After the trial court dismissed the injury to personal property and giving false information to police charges, it instructed the jury on the charges of robbery and resisting a public officer. On 21 March 2017, the jury found defendant guilty of misdemeanor resisting a public officer and of felonious common law robbery.

At the start of the habitual felon phase of trial, defendant's counsel indicated defendant "want[ed] to move forward with the hearing for that portion" and "renew[ed his] motion for recusal." He argued that "previously . . . , we were told that [ADA] Bender was not going to participate in the trial" and "[e]ven though [ADA Bender] wasn't going to participate in the trial, there is an issue when an individual who represented him as a defense attorney is now seated at the prosecuting table, and my client is asking me 'why he is over there?'" After an unrecorded conference in chambers with both parties' attorneys, however, defendant never obtained a ruling on his third motion and instead pled guilty to attaining habitual felon status.

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Following these proceedings, on 21 March 2017 the trial court entered judgment on the resisting a public officer conviction, imposing a sentence of sixty days' imprisonment. The trial court also rendered judgment on the robbery and habitual felon convictions, imposing fifty-eight to eighty-two months' imprisonment. On 6 April 2017, however, the trial court entered a judgment resentencing defendant on the robbery conviction as an habitual felon, imposing a sentence of sixty-six to ninety-two months' imprisonment. Defendant filed written notice of appeal on 11 April 2017.

II. Jurisdiction

As an initial matter, defendant has petitioned this Court to issue a writ of *certiorari* to review the judgment entered on the misdemeanor resisting a public officer conviction. Although defendant's 11 April 2017 written notice of appeal was timely filed as to the 6 April judgment entered on the robbery and habitual offender convictions, it was untimely as to the 21 March judgment on the resisting a public officer conviction. *See* N.C. R. App. P. 4(a)(2) (requiring written notice of appeal be filed within fourteen days from entry of judgment). In its response, the State does not oppose the petition but acknowledges our discretion to issue a writ of *certiorari* when "the right to prosecute an appeal has been lost by failure to take timely action[.]" *See* N.C. R. App. P. 21(a)(1). Based on the arguments advanced in defendant's petition, in our discretion we allow his petition and issue a writ of *certiorari* to review both judgments.

III. Analysis

On appeal, defendant asserts the trial court erred by denying his motions to recuse the entire HCDA's Office from prosecuting the charges against him because ADA Bender previously represented him in one of the three felony convictions underlying the habitual felon charge. He argues the trial court (1) failed to properly inquire into whether ADA Bender divulged any confidential information to other prosecutors in the HCDA's Office regarding the case in which he previously represented defendant that formed part of the habitual felon charge; and (2) should have allowed his disqualification motion because the State violated the condition that ADA Bender not participate in the prosecution. We hold the trial court did not abuse its discretion in denying the motions.

A. Review Standard

We review a trial court's denial of a motion to compel recusal of a prosecutor or an entire district attorney's office, which is more accurately

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considered a motion to disqualify, *see State v. Smith*, ___ N.C. App. ___, ___, 813 S.E.2d 867, 869 (2018) (“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.”), for abuse of discretion, *see State v. Scanlon*, 176 N.C. App. 410, 434, 626 S.E.2d 770, 786 (2006) (“[A]bsent a showing of an abuse of discretion, a decision regarding whether to disqualify counsel ‘is discretionary with the trial judge and is not generally reviewable on appeal.’” (citation 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.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Discussion

[1] “Where disqualification is sought, the trial court must make inquiry as to whether the defendant’s former counsel participated in the prosecution of the case or divulged any confidential information to other prosecutors.” *State v. Camacho*, 329 N.C. 589, 601, 406 S.E.2d 868, 875 (1991) (quoting *Young v. State*, 297 Md. 286, 297, 465 A.2d 1149, 1155 (1983)). “[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.” *Id.* An actual conflict of interest exists

where 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. (emphasis added); *see also* N.C. St. B. Rev. R. Prof’l Conduct r 1.11(d) (“[A] lawyer currently serving as a public officer or employee: (1) is subject to Rule[] . . . 1.9; and (2) shall not: participate in a matter in which the lawyer participated personally and substantially while in private practice”); N.C. St. B. Rev. R. Prof’l Conduct r. 1.9(a) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person *in the same or a substantially related matter* in which that person’s interests are materially adverse to the interests of the former client” (emphasis added)).

Here, to support his first motion to recuse the entire HCDA’s Office from the prosecution, defendant argued ADA Bender represented him “in a case which forms a part of the prosecution’s indictment for habitual

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felon.” To support his second recusal motion at the start of trial on the charges against him in 15 CRS 53958 of injury to personal property, in 15 CRS 53959 of resisting an officer and of providing false information to police, and in 15 CRS 53960 of common law robbery, defendant argued ADA Bender “represented [him] in a previous matter which is an ancillary indictment”—that is, the habitual felon charge. To support his third recusal motion at the start of trial on the habitual felon charge in 16 CRS 25, defendant argued that “previously . . . , we were told that [ADA] Bender was not going to participate in the trial” and “[e]ven though [ADA Bender] wasn’t going to participate in the trial, there is an issue when an individual who represented him as a defense attorney is now seated at the prosecuting table, and my client is asking me ‘why he is over there?’ ”

As ADA Bender did not previously represent defendant in the charges to be tried against him in 15 CRS 53958–60, defendant failed to show the actual conflict of interest required by *Camacho* to disqualify ADA Bender, much less the entire HCDA’s Office, from prosecuting those charges. *Cf. Worley v. Moore*, 370 N.C. 358, 365, 368, 807 S.E.2d 133, 139, 141 (2017) (instructing that the correct legal standard in assessing conflicts of interest under North Carolina State Bar Revised Professional Conduct Rule 1.9(a) “is whether, objectively speaking, ‘a substantial risk’ exists ‘that the lawyer has information to use in the subsequent matter’ ” —not “the outmoded ‘appearance of impropriety’ test”). Without proof of an actual conflict of interest as to those charges, further inquiry or direction by the trial court was unnecessary. Accordingly, defendant has failed to show the trial court’s denial of his disqualification motion as to the prosecution of these particular charges was “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.

[2] As to the habitual felon charge in the second phase of trial, because the record indicates ADA Bender represented defendant in one of the predicate felony convictions, *Camacho* instructs the trial court should have inquired into whether ADA Bender divulged any confidential information to other prosecutors that could have been detrimental to defendant’s trial on the habitual felon charge in order to find whether an actual conflict of interest existed. *Id.* at 601, 406 S.E.2d at 875. Defendant at the start of the habitual felon proceeding initially indicated he intended to proceed with trial and moved for a third time to disqualify the HCDA’s Office, this time on the additional basis that ADA Bender participated in the prosecution at the first phase of trial. However, following an immediate unrecorded chambers conference with both parties’ attorneys,

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defendant never obtained a ruling on this third motion as it related to the habitual felon charge on these grounds, *see* N.C. R. App. P. 10(a)(1) (“It is also necessary for the complaining party to obtain a ruling upon the party’s . . . objection[] or motion.”), and instead elected to forgo the trial and unconditionally plead guilty to attaining habitual felon status as charged.

Even had the trial court conducted a formal hearing on defendant’s motion and found an actual conflict of interest would exist if ADA Bender assisted in prosecuting the habitual felon charge, whether it was a disqualifying conflict was a matter within its sound discretion. *Camacho* instructs disqualifying the entire district attorney’s office under these facts, as defendant requested, would have been impermissibly excessive. *Id.* at 601, 406 S.E.2d at 875 (“Even [if an actual conflict is found to exist], however, any order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information.” (citation omitted)). And given that ADA Bender’s prior representation of defendant was wholly unrelated to the charges in the first phase of trial, the only rulings on the motions were obtained before the jury found defendant guilty of an underlying felony to which a habitual offender charge could attach, two unrecorded attorney conferences were held immediately following defendant’s first and third disqualification motions before and at the start of the habitual offender proceeding, and defendant failed to argue on the record how an actual disqualifying conflict might exist when prior convictions necessary to prove habitual felon status are public records but, rather, appeared instead to argue “the outmoded ‘appearance of impropriety’ test[.]” *Worley*, 370 N.C. at 368, 807 S.E.2d at 141, we cannot conclude the trial court’s decision not to disqualify ADA Bender from the prosecution at the time it rendered its rulings was “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.

[3] Defendant also argues the trial court further erred by not allowing his disqualification motion after the State allegedly violated the condition that ADA Bender not participate in the prosecution. We respectfully disagree with defendant’s interpretation. During its ruling on defendant’s first recusal motion, which it adopted in its second ruling, the trial judge stated: “I’m going to deny the motion at this time. And the Prosecutor has given assurances that [ADA] Bender will in no way be involved in this case.” Although the State concedes ADA Bender, in contradiction to that assurance, did participate in the prosecution, we do not interpret the trial court’s denials as being conditioned upon

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ADA Bender not participating in the first phase of trial and, therefore, overrule this argument.

IV. Conclusion

Based upon the particular facts of this case, defendant has failed to show that the trial court's denial of his motions to disqualify the entire HCDA's Office from prosecuting the charges against him was "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. Accordingly, we hold there was no error below.

NO ERROR.

Judges HUNTER, JR. and ZACHARY concur.

STATE OF NORTH CAROLINA

v.

WILLIAM YATES

No. COA18-158

Filed 16 October 2018

Appeal and Error—record on appeal—transcript—unavailable—adequate alternative—meaningful appellate review

Defendant was awarded a new trial on charges stemming from a sexual assault where a portion of the trial transcript, which included cross-examination of the victim, was missing. Defense counsel made sufficient efforts to reconstruct the missing portion of the transcript, those efforts did not produce an adequate alternative to a verbatim transcript, and the lack of an adequate alternative deprived defendant of meaningful appellate review where defense counsel was precluded from identifying potential meritorious issues for appeal.

Appeal by defendant from judgments entered 23 August 2016 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.

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Mark L. Hayes for defendant-appellant.

ARROWOOD, Judge.

William Yates appeals from judgments entered upon his convictions for second degree kidnapping, communicating threats, assault with a deadly weapon, breaking or entering, assault on a female, first degree rape, and two counts of first degree sexual assault. Because a recording equipment malfunction prevented the court reporter from producing a full transcript of the trial, including crucial portions of the victim's testimony such as cross-examination, defendant is entitled to a new trial.

I. Background

On 13 October 2014, a Cumberland County Grand Jury returned indictments charging defendant with felonious breaking or entering, felonious assault inflicting physical injury by strangulation, misdemeanor assault on a female, first degree kidnapping, misdemeanor communicating threats, misdemeanor assault with a deadly weapon, first degree forcible rape, and two counts of first degree sexual offense. The State moved to join the offenses for trial and the motion was granted on 4 January 2016. Defendant's case was tried in Cumberland County Superior Court before the Honorable Thomas H. Lock beginning on 16 August 2016.

At the end of the State's evidence, the trial court granted defendant's motion to dismiss the felonious assault inflicting physical injury by strangulation charge and denied defendant's motion to dismiss any of the other charges. On 19 August 2016, the jury returned verdicts finding defendant guilty of felonious breaking or entering, assault on a female, first degree kidnapping, communicating threats, assault with a deadly weapon, first degree rape, and two counts of first degree sexual offense. Also on 19 August 2016, the trial court signed an order dismissing the assault inflicting physical injury by strangulation charge. The trial court entered a prayer for judgment continued until 23 August 2016.

On 22 August 2016, defendant filed a motion for appropriate relief ("MAR") seeking to have the verdicts set aside and for a new trial. On 23 August 2016, the trial court denied defendant's MAR and entered judgments. The court first arrested judgment on the first degree kidnapping conviction in favor of entering judgment for second degree kidnapping. The court consolidated the second degree kidnapping, communicating threats, assault with a deadly weapon, breaking or entering, and assault on a female convictions and entered judgment

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sentencing defendant to a term of 35 to 54 months' imprisonment. The court then entered a separate judgment on the first degree rape conviction sentencing defendant to a concurrent term of 336 to 464 months' imprisonment. Lastly, the court consolidated the two first degree sexual offense convictions and entered a third judgment sentencing defendant to a term of 336 to 464 months' imprisonment to begin at the expiration of the sentence imposed for first degree rape. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues that he has been denied a meaningful appeal because a portion of the trial transcript is missing and that the trial court erred in denying his motions to dismiss for insufficiency of the evidence. We grant defendant a new trial based on the incomplete transcript of the trial proceedings.

1. Missing Transcript

In the first issue on appeal, defendant points out that a portion of the trial transcript from 18 August 2016 is missing. Defendant asserts that he is entitled to a new trial because the incomplete transcript has deprived him of a meaningful appeal.

This Court has explained that “[o]ur caselaw contemplates the possibility that the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and that, in such cases, the absence of the transcript would itself constitute a basis for appeal.” *In re Shackelford*, 248 N.C. App. 357, 360, 789 S.E.2d 15, 18 (2016) (citing *State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974)).

However, the unavailability of a verbatim transcript does not automatically constitute reversible error in every case. Rather, to prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error. Moreover, the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal.

Id. at 361, 789 S.E.2d at 18 (internal quotation marks, citations, and emphasis omitted).

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To determine whether the right to a meaningful appeal has been lost, our Courts conduct a three-step inquiry. First, we must determine whether defendant has “made sufficient efforts to reconstruct the [proceedings] in the absence of a transcript.” *Id.* at 361, 789 S.E.2d at 18. Second, we must determine whether those “reconstruction efforts produced an adequate alternative to a verbatim transcript—that is, one that would fulfill the same functions as a transcript” *Id.* at 362, 789 S.E.2d at 19 (internal quotation marks and citation omitted). Third, “we must determine whether the lack of an adequate alternative to a verbatim transcript of the [proceedings] served to deny [defendant] meaningful appellate review such that a new [trial] is required.” *Id.* at 364, 789 S.E.2d at 20.

In the present case, the court reporter delivered a three volume transcript of the trial proceedings to defendant. Volume I of the transcript includes the trial court proceedings on 16 and 17 August 2016, during which the court heard pretrial motions, conducted jury selection, and began to hear the State’s evidence. At the time the trial was adjourned for the evening on 17 August 2016, the State was conducting its direct examination of the alleged victim. Upon releasing the alleged victim from the witness stand, the trial court instructed her “to return in the morning.” Volume I of the transcript ends with a note indicating “[t]he trial adjourned at 5:04 p.m., August 17, 2016, and reconvened at 9:30 a.m., August 18 2016.” Volume II of the transcript, however, begins with a note indicating that “[t]he hearing convened at 11:08 a.m., August 18, 2016[.]” At that time, the State called its next witness.

There is no record of what happened in court on 18 August 2016 from 9:30 a.m. to 11:08 a.m. In place of a verbatim transcript, defendant’s appellate counsel prepared and delivered a narrative form transcript. The narrative form transcript states only that “[b]etween 9:30 AM and 11:08 AM on 18 August 2016, trial proceedings occurred which included, at minimum, the cross examination of the State’s witness[, the alleged victim].” However, given how the proceedings ended on 17 August 2016, it is likely the State also continued its direct examination of the alleged victim during that time. It is also possible that other witnesses testified.

Regarding the first two inquiries set out in *Shackleford*, defendant contends that he made sufficient efforts to reconstruct the missing portion of the transcript and that the alternative is inadequate. We agree.

Defendant’s appellate counsel included with the narrative form transcript a “certificate of transcript” that was verified and notarized. The certificate explains that the missing portion of the transcript is the result

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of a recording malfunction and that, after neither the court reporter nor her supervisor could recover any recording of the proceedings from 9:30 a.m. to 11:08 a.m. on 18 August 2016, this Court granted a motion to prepare the transcript in narrative form. The certificate then details counsel's efforts to reconstruct the missing portion of the transcript.

Those efforts began with the mailing of a letter to the presiding judge, the prosecutor, the court reporter, and defense attorneys on 18 October 2017 requesting that they share their recollection of what occurred during the portion of the trial for which there is no transcript. None of those parties involved in the trial responded to the letter. A follow up email was sent to the prosecutor, the court reporter, and defense attorneys on 13 November 2017 with the original letter attached. The presiding judge was omitted from the email because his email address was unknown. The email once more requested assistance in reconstructing the missing transcript. Again, there was no response. The certificate further explains that the only information defendant's appellate counsel has about the unrecorded portion of the trial is that cross-examination of the alleged victim did take place. Counsel was able to speak with the prosecutor by telephone on 22 August 2017 and the prosecutor confirmed that defense counsel did cross-examine the alleged victim.

Comparing these efforts by defendant's appellate counsel to reconstruct the missing transcript to those efforts determined to be sufficient in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), and *Shackelford*, we hold the efforts in the present case were sufficient.

In *Hobbs*, in which the transcripts of the evidentiary phase of the defendant's trial were unavailable for the defendant's appeal, the defendant's appellate counsel contacted the defendant's trial counsel, the prosecutor, and the presiding judge in an attempt to reconstruct the transcript. 190 N.C. App. at 186-87, 660 S.E.2d at 170-71. Responses were received from the defendant's trial counsel and the presiding judge indicating they either had little memory of the proceedings or had no notes. *Id.* 186-87, 660 S.E.2d 171. There was no indication of a response from the prosecutor. *Id.* at 187, 660 S.E.2d at 171. Although noting in a footnote that "the precise burden imposed upon appellants for reconstructing the records has not been defined[,]" *Id.* at 187 n.3, 660 S.E.2d at 171 n.3, this Court held as follows:

Although the better practice would have been for defendant's appellate counsel to follow up with the prosecutor via telephone after failing to receive a response from her letters, the State has advanced no argument in its brief to

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this Court that the letters were not received. Accordingly, defendant satisfied his burden of demonstrating the absence of available alternatives to the missing transcripts.

Id. at 187, 660 S.E.2d at 171.

Similarly in *Shackleford*, in which the transcript of the respondent's involuntary commitment hearing was unavailable for the respondent's appeal, the respondent's appellate counsel sent letters to those parties present at the hearing, including the judge, deputy clerk, respondent's counsel, respondent, and others, seeking assistance in reconstructing the hearing transcript. 248 N.C. App. at 361, 789 S.E.2d at 17-18. The respondent's trial counsel provided notes from the hearing, but otherwise the responses from those present at the hearing were not helpful. *Id.* at 361, 789 S.E.2d at 18. Relying on *Hobbs*, this Court explained that "[the r]espondent's appellate counsel took essentially the same steps as the appellants' attorney in *Hobbs*. Therefore, we similarly conclude that [r]espondent has satisfied his burden of attempting to reconstruct the record." *Id.* at 362, 789 S.E.2d at 19.

In this case, defendant's appellate counsel's efforts to reconstruct the missing portion of the transcript emulated those efforts determined to be sufficient in *Hobbs* and *Shackleford* and included a follow-up communication that this Court noted in *Hobbs* was "better practice." Thus, we hold defendant has met his burden.

Notwithstanding the efforts of defendant's appellate counsel, defendant was unable to produce an adequate alternative to a verbatim transcript. As detailed above, the reconstructed transcript provides only that "[b]etween 9:30 AM and 11:08 AM on 18 August 2016, trial proceedings occurred which included, at minimum, the cross-examination of the State's witness[, the alleged victim]."

In *Shackleford*, this Court described an "adequate alternative to a verbatim transcript" as "one that 'would fulfill the same functions as a transcript . . .'" *Id.* at 362, 789 S.E.2d at 19 (quoting *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000)). This Court also noted that "in virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only partially incomplete, and any gaps therein were capable of being filled." *Id.* at 362, 789 S.E.2d at 19 (emphasis omitted). *Shackleford*, however, was distinguishable from those cases in which only part of the transcript was missing because in *Shackleford*, "the transcript of the entire proceeding is unavailable, and the only independent account of what took place at the hearing consists of five pages

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of bare-bones handwritten notes that—in addition to not being wholly legible—clearly do not amount to a comprehensive account of what transpired at the hearing.” *Id.* at 363, 789 S.E.2d at 19-20 (emphasis omitted). Thus, this Court concluded in *Shackleford* that the notes from the respondent’s trial counsel did not constitute an adequate alternative to a verbatim transcript of the hearing. *Id.* at 363-64, 789 S.E.2d at 20.

Although only a portion of the transcript was missing in this case, unlike those cases referenced in *Shackleford* in which gaps in the transcripts were capable of being filled, *see id.* at 362, 789 S.E.2d at 19 (citing *In re Bradshaw*, 160 N.C. App. 677, 587 S.E.2d 83 (2003), *State v. Owens*, 160 N.C. App. 494, 586 S.E.2d 519 (2003), and *State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), as examples of cases where it was possible to reconstruct an incomplete transcript), there was no way to reconstruct the missing portion of the transcript in the present case. Despite sufficient efforts to reconstruct the transcript, defendant’s appellate counsel was only able to verify that cross-examination of the alleged victim did take place. Without any suggestion as to the substance of the missing testimony, the alternative produced by defendant’s appellate counsel does not fulfill the same functions as a transcript and is not an adequate alternative.

Having determined defendant made sufficient efforts to reconstruct the missing portion of the transcript and that the alternative is inadequate, we turn to the final step of the inquiry, “whether the lack of an adequate alternative to a verbatim transcript of the [trial] served to deny [defendant] meaningful appellate review such that a new [trial] is required.” *Id.* at 364, 789 S.E.2d at 20.

Defendant argues the incomplete transcript in this case has denied him meaningful appellate review because the missing transcript includes, at the very least, the cross-examination of the alleged victim, whom defendant contends is the State’s chief witness and only eyewitness. Defendant contends that without the alleged victim’s testimony the State could not present a *prima facie* case, and without a complete transcript of the alleged victim’s testimony, or an adequate alternative, there is no way to identify specific errors below to raise on appeal. Defendant, however, has identified potential issues based on pretrial motions, testimony, and closing arguments. These potential issues include the admission of Rule 404(b) evidence that defendant sought to exclude through a motion *in limine*, the admission of cyber evidence, the admission of evidence of jail records regarding visitation, telephone calls, deposits, and emails related to defendant that the defense sought through a subpoena and were the subject of an objection and motion to

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quash by the State, and the admission of evidence of criminal charges against the alleged victim that could have been used to attack her credibility that was the subject of a motion for discovery by defendant, a motion *in limine* by the State, and pre-trial arguments on admissibility that led the trial court to reserve its ruling for trial. Defendant contends that references to particular evidence in the closing arguments, or alternatively, the lack of references to particular evidence, calls into question what rulings the trial court made regarding the above evidence during the unrecorded portion of the trial. Defendant, however, is unable to identify specific errors because there is no transcript.

In response to defendant's argument, the State asserts "[it] is the appellant's responsibility to make sure that the record on appeal is complete and in proper form[.]" *In re L.B.*, 184 N.C. App. 442, 453-54, 646 S.E.2d 411, 417-18 (2007), and that defendant must "demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error[.]" *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (citations omitted). The State argues defendant's contention that there may have been appealable issues that were not transcribed is not enough because the "allegation does not allege specific prejudice as required." The State claims defendant's argument is based on conjecture and speculation.

In *Shackleford*, this Court rejected a similar argument that the respondent had not demonstrated prejudice because he had not identified specific errors. 248 N.C. App. at 365, 789 S.E.2d at 21. As in this case, the respondent in *Shackleford* was "expressly contending that the unavailability of a transcript prejudiced him by depriving him of the ability to determine whether any potentially meritorious issues exist for appellate review." *Id.* at 365, 789 S.E.2d at 21. This Court explained that

an appellant would never be able to show prejudice in cases where . . . the absence of a transcript renders the appellant unable to determine whether any errors occurred in the trial court that would necessitate an appeal in the first place. In such cases, the prejudice is the inability of the litigant to determine whether an appeal is even appropriate and, if so, what arguments should be raised.

Id. at 365, 789 S.E.2d at 21. This Court ultimately held that the respondent in *Shackleford* had demonstrated prejudice and was unable to obtain meaningful appellate review. *Id.* at 366, 789 S.E.2d at 21.

Here, defendant's argument is that he has been denied meaningful appellate review as a result of the incomplete transcript because he does

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not know with certainty what happened during the cross-examination of the alleged victim, a critical stage of the trial. Thus, defendant cannot identify errors below that may have affected the outcome of his trial. As stated in *Shackleford*, this inability to identify potential meritorious issues is the prejudice defendant has shown.

Nevertheless, based on the record available in this case, defendant has identified potential issues related to the admissibility of specific evidence which was the subject of pretrial motions and arguments that were likely addressed by the trial court during the portion of the trial that was not transcribed. Given that the transcript is unavailable, this is the best defendant could do after defendant's appellate counsel's efforts to reconstruct the transcript were fruitless. Because the lack of a complete transcript has prevented defendant from identifying errors below, defendant has been prejudiced and has been denied meaningful appellate review. Therefore, defendant is entitled to a new trial.

2. Motion to Dismiss

Defendant also argues the trial court erred in denying his motions to dismiss for insufficiency of the evidence. However, because defendant is entitled to a new trial and any review of the record evidence by this Court would be a review of an incomplete transcript of the evidence presented below, we do not address this issue further.

III. Conclusion

Because meaningful appellate review is impossible in this case absent a verbatim transcript of the trial below, defendant is entitled to a new trial.

NEW TRIAL.

Judges BRYANT and HUNTER, JR. concur.

TOWN OF APEX v. RUBIN

[262 N.C. App. 148 (2018)]

TOWN OF APEX, PLAINTIFF

v.

BEVERLY L. RUBIN, DEFENDANT

No. COA17-955

Filed 16 October 2018

Jurisdiction—condemnation action—order affecting title and area—mandatory appeal—Rule 59 motion—not a proper substitute

The Court of Appeals did not have jurisdiction to review the denial of plaintiff's motion to reconsider the trial court's determination that a town's eminent domain claim was for a public purpose because the motion was not a proper Rule 59 motion that would toll the thirty-day period for filing notice of appeal. Orders from condemnation proceedings concerning title and area must be immediately appealed; a Rule 59 motion would be proper only upon the discovery of new evidence that was not available at the time of the Section 108 hearing.

Appeal by plaintiff from order entered 24 January 2017 by Judge Elaine M. O'Neal in Wake County Superior Court. Heard in the Court of Appeals 4 June 2018.

Nexsen Pruet PLLC, by David P. Ferrell, for plaintiff-appellant.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and Boxley, Bolton, Garber & Haywood, LLP, by Kenneth C. Haywood, for defendant-appellee.

BRYANT, Judge.

Where the time for filing notice of appeal was not tolled, we find plaintiff's appeal to be untimely. We therefore grant defendant's motion to dismiss plaintiff's appeal and deny plaintiff's petition for writ of certiorari.

Plaintiff Town of Apex filed a condemnation action on 30 April 2015 against defendant Beverly L. Rubin in Wake County Superior Court. Plaintiff sought to acquire an easement across defendant's property and connect sewer access to an adjoining property owned by a private developer.

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Before the case went to trial on the issue of just compensation, both plaintiff and defendant filed motions seeking a “Section 108” hearing under N.C. Gen. Stat. § 136-108 in order to determine if the condemnation was for public or private benefit. On 1 August 2016, a Section 108 hearing was held before the Honorable Elaine M. O’Neal, Judge presiding.

At the hearing, defendant contested that plaintiff’s interest in her property was for a public purpose “to improve the public utility system of the Town of Apex.” Sometime between 2012 and 2013, Parkside Builders, LLC’s manager Brad Zadell acquired multiple properties—formally known as Arcadia East—to the east of defendant’s property and eventually combined these properties to create the proposed subdivision called Riley’s Pond.¹ Zadell applied for Riley’s Pond to be annexed into the Town of Apex, which was approved in late 2013. Zadell continued buying property surrounding defendant’s home. He purchased approximately twenty-nine acres along the western border of defendant’s property and this property became known as Arcadia West. Zadell again petitioned for annexation, which was approved in December 2013.

Plaintiff owned and operated a sewer service in Arcadia West, however, Riley’s Pond subdivision did not have a sewer service line at the time because the land was not developed. Nine months prior to plaintiff’s approval to acquire a sewer easement on defendant’s property, Zadell requested that plaintiff condemn defendant’s property so that Riley’s Pond could be connected to a sewer line, thereby substantially increasing the value of the land. At various times during the annexation and rezoning process, Zadell offered to purchase either defendant’s entire tract or an easement so he could run a sewer to Riley’s Pond. Defendant refused those offers.

Zadell met with Public Works and Utilities Director, Timothy Donnelly, to discuss the status of acquiring the easement and requested that plaintiff use its powers of eminent domain. Donnelly then presented the matter to plaintiff. Sometime prior to an Apex Town Council meeting, plaintiff’s attorney contacted defendant to inquire about plaintiff purchasing an easement to enable it to provide sewer service to Riley’s

1. We note from the record that Parkside Builders, LLC owned the property to the east of defendant’s property. Brad Zadell acted in his official capacity as the manager-owner of Parkside Builders, LLC. On or before 31 December 2014, before condemnation, Parkside Builders, LLC conveyed Riley’s Pond to Transom Row Properties II, LLC, which was another company managed by Zadell. For ease of reading, we refer to Zadell and Zadell-managed companies as “Zadell” throughout this opinion.

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Pond. Defendant was unwilling to sell, and plaintiff considered alternative locations for the sewer line. Given the topography of the property, plaintiff determined the route through defendant's property was the most appropriate one.

On 10 February 2015, Zadell and plaintiff entered into a contract in which Zadell agreed to be responsible for all costs and expenses associated with plaintiff's efforts to acquire a sewer easement through defendant's property. On 26 February 2015, prior to the Apex Town Council meeting, a purchase contract was prepared in which Zadell agreed to sell Riley's Pond for \$2.5 million more than its original purchase price. Five days later, on 3 March 2015, the Apex Town Council approved plaintiff's use of eminent domain to acquire an easement across defendant's property.

On 18 October 2016 following the 1 August Section 108 hearing, Judge O'Neal concluded as a matter of law that the taking was for a private benefit and entered judgment ("Section 108 Judgment"). On 28 October 2016, plaintiff filed a Verified Motion for Reconsideration to Alter, Amend, and/or Seek Relief from Judgment ("Motion for Reconsideration"), citing Rules 59 and 60(b) of the North Carolina Rules of Civil Procedure. The superior court denied this motion by order entered 24 January 2017 (the "Reconsideration Order"). Plaintiff appeals from both the Section 108 Judgment and the Reconsideration Order.

On appeal, plaintiff argues the superior court erred in its conclusion that the plaintiff's claim to defendant's property by eminent domain was for a private purpose. Additionally, plaintiff contends that the superior court erred in denying the Motion for Reconsideration. Defendant argues that plaintiff's Motion for Reconsideration from the Section 108 Judgment did not toll the thirty-day period for filing the notice of appeal, and therefore, plaintiff's appeal from the Section 108 Judgment is untimely. We first address defendant's argument and consider whether this Court has jurisdiction.

Plaintiff filed its notice of appeal on 30 January 2017, which was more than thirty days after the Section 108 Judgment was rendered on 18 October 2016. Accordingly, in order to circumvent the jurisdictional bar to the appeal, plaintiff contends that the Rule 59 Motion for Reconsideration filed on 21 October 2016 tolled the thirty-day period for asserting a timely notice of appeal. We disagree.

Rule 3(c) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal must be filed within thirty days after

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entry of a final judgment. N.C. R. App. P. 3(c) (2017). “Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed.” *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683 (1990). North Carolina courts have consistently held that “orders from a condemnation hearing concerning title and area taken are ‘vital preliminary issues’ that must be *immediately appealed* pursuant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights.” *City of Wilson v. Batten Family, L.L.C.*, 226 N.C. App. 434, 438, 740 S.E.2d 487, 490 (2013) (emphasis added) (quoting *Dep’t. of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999)).

While rulings from a Section 108 hearing are typically interlocutory, an appeal is mandatory as the appropriate remedy for issues involving title and area. See *N.C. State Highway Comm’n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) (“One of the purposes of [a Section 108 hearing is] to eliminate from the jury trial any question as to [the land or area condemned]. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors.” Therefore, “[w]hen [an] appeal is mandatory, the right will be lost if [the] appeal is not made within thirty days after entry of judgment.” *Wilson*, 226 N.C. App. at 438, 740 S.E.2d at 490.

Here, the Section 108 hearing involved whether plaintiff’s taking of defendant’s property was motivated by a public use or benefit. Plaintiff was afforded the opportunity to present evidence and other supporting documents to rebut defendant’s claims of a taking motivated and supported by private interests. Following the hearing, the superior court, considering all the evidence, issued a ruling in favor of defendant. Plaintiff did not immediately appeal but instead filed a Rule 59 Motion for Reconsideration.

Because a Section 108 judgment becomes a final judgment on the issues it addresses if it is not immediately appealed, a *proper* motion for reconsideration under Rule 59 could serve the same purpose if a party to a condemnation action actually discovered new evidence after a Section 108 hearing, and that new evidence would lead to a different determination on the area or interest taken. See N.C. Gen. Stat. § 1A-1, Rule 59(a)(4) (2017).

To qualify as a [proper] Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must “state the grounds therefor” and the grounds stated

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must be among those listed in Rule 59(a). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.

Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d. 415, 417 (1997) (citations and quotation marks omitted).

Although a Rule 59 motion will toll the time for an appeal, we consider the motion based upon its substance. Notwithstanding the grounds listed in the motion, the substance of plaintiff's filing was not a proper Rule 59 motion. Plaintiff cites to Rule 59 generally in its motion for reconsideration which alleges an attempt to present new evidence; however, that evidence was admittedly available at the time of the Section 108 hearing.

In its motion, plaintiff concedes that “[a]lthough most of the evidence and facts discussed herein existed at the time of the ‘all other issues’ [Section 108] hearing, it was not known or reasonably anticipated that this evidence would be necessary. But given the [c]ourt’s ruling in the matter, the [c]ourt should consider this evidence.” Even assuming plaintiff did not reasonably anticipate the evidence needed at the Section 108 hearing, a Rule 59 motion is not intended to be a second bite at the apple where the evidence was in plaintiff’s possession or existed at the time of hearing and plaintiff was afforded “every opportunity to argue all relevant issues in a single [Section 108] hearing.” *Wilson*, 226 N.C. App. at 439, 740 S.E.2d at 491; *see also N.C. All. for Transp. Reform, Inc. v. N.C. Dep’t of Transp.*, 183 N.C. App. 466, 470, 645 S.E.2d 105, 108 (2007) (“Although such deficiency would alone be adequate basis for dismissal of the motion, the trial court also found that petitioners simply sought to reargue matters from the earlier hearing, additionally supporting the court’s conclusions that the Motion to Alter or Amend was not a proper Rule 59(e) motion.”). Therefore, having determined the substance of plaintiff’s Rule 59 motion was not proper, it could not effectively toll the thirty-day notice of appeal. *See N.C. R. App. P. 3(c)*.

Accordingly, as the notice of appeal was untimely, plaintiff’s appeal from the Section 108 Judgment is dismissed. Because plaintiff attempted to use an improper Rule 59 motion as a substitute for appeal, we will not review an appeal from the denial of such an improper motion. *See Musick v. Musick*, 203 N.C. App. 368, 371, 691 S.E.2d 61, 63 (2010) (“Neither a Rule 59 motion nor a Rule 60 motion may be used as a substitute for an appeal.”).

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Following oral argument, plaintiff petitioned this Court, on 22 June 2018, to exercise its discretion and grant a writ of certiorari as an alternative means to review the merits of the superior court's judgment. However, we decline to exercise our discretion to allow a writ of certiorari. *See* N.C. R. App. P. 21(a) (2017). Plaintiff's petition for a writ of certiorari is denied.²

DISMISSED.

Chief Judge McGEE and Judge STROUD concur.

2. Although dicta, we note for plaintiff's benefit that a review of the superior court's findings of fact and conclusions of law in the Section 108 Judgment appear to be supported by evidence in the record. Further, a review of the underlying record, including the transcript and submissions of evidence, appear to support the superior court's denial of the Motion for Reconsideration.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 OCTOBER 2018)

BAKER v. N.C. PSYCHOLOGY BD. No. 18-264	Durham (16CVS3036)	Affirmed
BROWN v. N.C. DEP'T OF PUB. SAFETY No. 17-1220	N.C. Industrial Commission (TA-20198)	Affirmed
FRADY v. FRADY No. 18-141	Transylvania (16CVD37)	Affirmed in Part; Vacated in Part and Remanded
IN RE M.L. No. 18-5	Buncombe (17SPC50235)	Vacated
IN RE Z.B. No. 18-105	Mecklenburg (17JA155) (17JA157) (17JA211) (17JA212)	Affirmed in part, Vacated in part and Remanded
KING HARBOR HOMEOWNERS ASS'N, INC. v. GOLDMAN No. 17-1301	Onslow (14CVS4011)	Reversed and Remanded
STATE v. ALLEN No. 18-195	Union (13CRS54210-13) (14CRS51267) (14CRS696) (16CRS52748-49) (17CRS385) (17CRS50708)	NO ERROR IN PART, VACATED IN PART, AND REMANDED.
STATE v. BARKER No. 18-178	Wilkes (16CRS50208-09)	No Error
STATE v. CHOPPY No. 18-167	Buncombe (97CRS12460-65) (97CRS63565-69) (97CRS63680)	Affirmed
STATE v. GEDDIE No. 18-332	Pasquotank (12CRS51952) (13CRS19) (13CRS33) (14CRS141) (14CRS142) (17CRS767)	No error in part; dismissed in part.

STATE v. ROBINSON No. 17-1190	Duplin (16CRS51619) (16CRS840)	No Error
STATE v. ROBINSON No. 18-74	Forsyth (15CRS59260-61)	NO PREJUDICIAL ERROR IN PART; VACATED IN PART; REMANDED.
STATE v. TURNER No. 17-1400	Caldwell (13CRS538)	Vacated
STATE v. WEBBER No. 17-1015	Cleveland (14CRS55577-78)	No error in part; Remanded for correction of clerical errors.
STATE v. WILLIAMS No. 17-620	Hoke (14CRS51601) (14CRS51695) (14CRS51696)	VACATED IN PART; NO ERROR IN PART.

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APPALACHIAN MATERIALS, LLC, PETITIONER

v.

WATAUGA COUNTY, A NORTH CAROLINA COUNTY, RESPONDENT, AND TERRY COVELL,
SHARON COVELL AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC.,
D/B/A HIGH COUNTRY WATCH, INTERVENORS

No. COA18-188

Filed 6 November 2018

**Zoning—land use ordinance—high-impact land use—asphalt plant
—definition of “educational facility”**

An application for construction of an asphalt plant was improperly denied because of its proposed location within 1,500 feet of a central administrative office for the county’s schools. Based on the plain language of the ordinance, the administrative office did not meet the definition of “educational facility” and thus the asphalt plant was not prohibited at that location.

Judge DILLON concurring in result only by separate opinion.

Appeal by petitioner from order entered 8 September 2017 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 22 August 2018.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for petitioner-appellant.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for respondent-appellee.

DAVIS, Judge.

This case requires us to construe a single provision of a Watauga County land use ordinance prohibiting the construction of an asphalt plant within 1,500 feet of an “educational facility.” Although this appeal arises in the zoning context, the resolution of this issue provides this Court with an opportunity to reiterate fundamental principles of statutory interpretation applicable to the construction of any law or ordinance.

Appalachian Materials, LLC, (“Appalachian”) appeals from the trial court’s order upholding the denial of its application for a High Impact Land Use (“HILU”) permit. The trial court affirmed the denial of Appalachian’s permit because the proposed asphalt plant site was located within 1,500 feet of the Margaret E. Gragg Education Center

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(the “Gragg Center”), a building that serves as the central administrative office for the Watauga County Schools. Because we conclude that the Gragg Center does not qualify as an “educational facility” based on the plain language of the ordinance’s definition of that term, we reverse the trial court’s order.

Factual and Procedural Background

In March 2003, Watauga County adopted an “Ordinance to Regulate High Impact Land Uses” (the “HILU ordinance”) in all unincorporated areas of the county. The ordinance was adopted “for the purpose of promoting the health, safety and general welfare of the citizens of Watauga County” by regulating certain land uses that “by their very nature produce objectionable levels of noise, odors, vibrations, fumes, light, smoke, and other impacts upon the lands adjacent to them.” One such regulated use concerned the location of asphalt plants. Pursuant to the HILU ordinance, an asphalt plant “shall not be within 1,500 feet of a public or private educational facility, a [North Carolina] licensed child care facility, a [North Carolina] assisted living facility, or a [North Carolina] licensed nursing home.” In addition, no applicant wishing to build an asphalt plant is permitted to proceed with construction without having first received a permit from the Watauga County Department of Planning and Inspections.

On 10 November 2013, Appalachian began leasing an 8.5 acre tract of land located along Rainbow Trail in Watauga County upon which it intended to construct and operate an asphalt plant. Appalachian subsequently hired Derek Goddard, the vice-president of Blue Ridge Environmental Consultants, to plan, design, and obtain any necessary permits for the proposed asphalt plant site.

On 9 September 2014, Goddard emailed Joseph Furman, the director of the Watauga County Planning and Inspections Department, to inquire whether Furman could provide him with a map displaying all of the buffers required by the HILU ordinance. The following day, Furman replied by sending Goddard via an email attachment a map (the “HILU map”) containing the heading “High Impact Land Use Spacing.” The HILU map purported to depict facilities in Watauga County subject to the ordinance’s spacing requirements and displayed a 1,500-foot buffer zone around each such facility. The HILU map did not indicate that the site of Appalachian’s proposed asphalt plant was within 1,500 feet of any facility implicated by the HILU ordinance. The Gragg Center was not indicated on the map as being subject to the ordinance’s spacing requirements.

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On 15 June 2015, Appalachian submitted a High Impact Land Use Development Permit Application to the Watauga County Planning and Inspections Department in which it sought approval to construct and operate an asphalt plant in the vicinity of Rainbow Trail. In his capacity as director of the Planning and Inspections Department, Furman denied Appalachian's permit application on 22 June 2015. Furman explained his reasoning for denying the application, in relevant part, as follows:

According to Article II, Section 3(G) Spacing Requirements, the nearest portion of the premises of an asphalt plant may not be established within 1,500 feet of a public or private educational facility. The [Gragg Center] is clearly within 1,500 feet of the premises of this asphalt plant based upon our review of the application.

On 17 July 2015, Appalachian appealed Furman's decision to the Watauga County Board of Adjustment (the "Board") pursuant to N.C. Gen Stat. § 160A-388(b1). Sharon and Terry Covell, homeowners whose property was located next to the proposed asphalt plant, and the Blue Ridge Environmental Defense League, Inc. subsequently filed motions to intervene as parties to Appalachian's appeal. A hearing on the motions to intervene and on Appalachian's appeal was held before the Board beginning on 14 October 2015. The Board first heard evidence on the two motions to intervene and granted both motions. The Board then received evidence with regard to Appalachian's appeal of the denial of its permit application.

Scott Elliot, the superintendent of Watauga County Schools, testified at the hearing concerning the various functions of the Gragg Center. Elliot stated that the Gragg Center served as the central office for Watauga County Schools as well as the meeting place for the Watauga County Board of Education. He further testified that the building primarily housed administrative personnel responsible for coordinating and implementing the education curriculum for the entire Watauga County Schools system. In addition, Elliot stated that professional development training for teachers, student testing, and the Watauga County Spelling Bee also took place at the Gragg Center.

On 30 October 2015, the Board issued a decision upholding Furman's denial of Appalachian's permit application. In its decision, the Board made the following pertinent findings of fact:

2. The [Gragg Center] is located within 1500 feet from the nearest portion of the building, structure, or outdoor storage used as part of the premises for the proposed asphalt plant.

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3. The [Gragg Center] meets the requirements for an Education Facility as defined in the High Impact Land Use Ordinance.

Appalachian sought review of the Board's decision in Watauga County Superior Court on 2 December 2015 by means of a petition for *certiorari*. Following a hearing on 14 August 2017, the Honorable R. Gregory Horne entered an order on 8 September 2017 affirming the Board's decision. Appalachian filed a timely notice of appeal to this Court.

Analysis

Although Appalachian has raised several arguments, we need address only the question of whether the Gragg Center is an "educational facility" as that term is defined by the HILU ordinance because that issue is dispositive of this appeal. This Court has held that "[a] legislative body such as the Board [of Adjustment], when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. Of Aldermen of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (citation omitted), *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000). A board of adjustment's decision "shall be subject to review of the superior court in the nature of *certiorari* in accordance with G.S. 160A-388." N.C. Gen. Stat. § 160A-381(c) (2017). We have described the superior court's role in reviewing the decision of a local board as follows:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Dellinger v. Lincoln Cty., ___ N.C. App. ___, ___, 789 S.E.2d 21, 26 (citation omitted), *disc. review denied*, 369 N.C. 190, 794 S.E.2d 324 (2016).

"If a petitioner appeals an administrative decision on the basis of an error of law, the trial court applies *de novo* review; if the petitioner

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alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test.” *Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 367, 713 S.E.2d 511, 514 (2011) (citation and quotation marks omitted). A reviewing court “does not make findings of fact, but instead, determines whether the Board of Adjustment made sufficient findings of fact which are supported by the evidence before it.” *Crist v. City of Jacksonville*, 131 N.C. App. 404, 405, 507 S.E.2d 899, 900 (1998) (citation omitted).

Our Supreme Court has held that “[t]he rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances.” *Cogdell v. Taylor*, 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) (citation omitted). A basic tenet of statutory construction is that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). Furthermore, courts should “give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process.” *Midrex Techs., Inc., v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and quotation marks omitted).

As noted above, the HILU ordinance provides that “[t]he location of asphalt plants . . . shall not be within 1,500 feet of a public or private educational facility[.]” The version of the HILU ordinance in effect during the time period relevant to this appeal defined “educational facility” as follows:

Educational Facility — Includes elementary schools, secondary schools, community colleges, colleges, and universities. Also includes any property owned by those facilities used for educational purposes.¹

Thus, the first sentence of the definition lists five specific entities. Each of the five is a specific type of school or educational institution. Under the *expressio unius est exclusio alterius* canon of statutory construction, “the expression of one thing implies the exclusion of another.”

1. The HILU ordinance has since been amended on multiple occasions. The version of the ordinance currently in effect defines an “educational facility,” in pertinent part, as “[e]lementary schools, secondary schools, community colleges, colleges, and universities, including support facilities such as administration for all of the preceding.”

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Jeffries v. Cty. of Harnett, __ N.C. App. __, __, 817 S.E.2d 36, 50 (2018). See *Evans v. Diaz*, 333 N.C. 774, 780, 430 S.E.2d 244, 247 (1993) (“[W]hen a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.” (citation omitted)); *Jolly v. Wright*, 300 N.C. 83, 89, 265 S.E.2d 135, 141 (1980) (“[W]hen certain things are specified in a statute, an intention to exclude all others from its operation may be inferred.” (citation omitted)), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). Thus, because the Gragg Center is not an elementary school, a secondary school, a community college, a college, or a university, it does not come within the first sentence of the definition.

The second sentence of the definition provides that the meaning of the term “educational facility” extends to “any property owned by *those facilities* used for educational purposes.” (Emphasis added.) Clearly, the phrase “those facilities” refers to the entities listed with specificity in the first sentence. It is undisputed that the Gragg Center is not owned by an elementary school, secondary school, community college, college, or university and is instead owned by the Watauga County Board of Education. Thus, the Gragg Center likewise fails to qualify as an “educational facility” under the second sentence of the definition.

Watauga County nevertheless argues that a ruling that the Gragg Center does not fit within the definition of “educational facility” would “subvert the goal and spirit of the HILU” and “create an absurd or illogical result.” It further contends that although the Gragg Center is not itself a school, its various uses are essential to the operation of the Watauga County Schools system.

The County’s argument, however, runs counter to basic principles of statutory construction. As explained above, it is axiomatic that where the language of a statute or ordinance is clear and unambiguous this Court “does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.” *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (citation and quotation marks omitted). Given that the Gragg Center is neither one of the entities listed in the first sentence of the definition nor is it property owned by one of those entities, our analysis must necessarily end there.

While the County asks us to accept its representation that the definition contained in the ordinance was intended to encompass buildings such as the Gragg Center, our determination of the intent underlying this provision must be based on the words actually contained therein. See

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Lenox, Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (“If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms[.]” (citation omitted)). This Court lacks the authority to engage in the exercise of guessing what additional types of buildings the County *might* have meant to encompass within this definition where doing so would require us to substitute language of our own choosing for the words actually used in the ordinance itself. See *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (“When the language of a statute is clear and unambiguous . . . the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” (citation omitted)).

Moreover, with regard to the County’s position that the adoption of the interpretation advocated by Appalachian would lead to an absurd result, this argument fails for two reasons. First, there is nothing “absurd” about a local government’s decision to prohibit the placement of high impact land uses near actual schools that serve as places of instruction for students on a regular basis while permitting such uses near primarily administrative facilities such as the Gragg Center.

Second, and more fundamentally, our Supreme Court has made clear that courts are not permitted to avoid a so-called “absurd result” by rewriting a statute or ordinance in order to reach a more “logical” meaning. See *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (the clear meaning of a statute “may not be evaded by . . . a court under the guise of construction. We will not engage in judicial construction merely to assume a legislative role and rectify what defendants argue is an absurd result.” (internal citations and quotation marks omitted)).

Finally, the County makes the argument that a ruling in favor of Appalachian would render the second sentence of the definition meaningless because elementary and secondary schools are not authorized to own property. As an initial matter, counsel for Appalachian conceded at oral argument that colleges and universities are, in fact, legally permitted to own property. Thus, by Appalachian’s own admission, the second sentence actually does possess some meaning in that property owned by those entities would fall within the definition as long as said property was being used for educational purposes.

This argument fails for a more basic reason as well. Even if the second sentence of the definition did not actually encompass any additional specific locations within Watauga County other than those enumerated

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in the first sentence, this Court would still lack a license to engage in the legislative function of rewriting this sentence in accordance with our own subjective belief as to what other locations might be deserving of protection from nearby asphalt plants. *See Cochran v. City of Charlotte*, 148 N.C. App. 621, 628, 559 S.E.2d 260, 264 (“It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.” (citation and quotation marks omitted)), *disc. review denied*, 356 N.C. 160, 568 S.E.2d 189 (2002).

The definition of “educational facility” in the HILU ordinance does not mention the Watauga County Board of Education. Had the County intended for any building owned by the Board of Education possessing some type of educational purpose to be encompassed within the ordinance’s definition, it would have been a simple matter to say so in the definition itself. But language to this effect does not exist.

Were we to accept the County’s invitation to effectively add new words to this provision of the ordinance, we would be creating a new definition out of whole cloth rather than interpreting the one that is currently before us. This we cannot do. Courts do not possess the authority to insert language into an ordinance or statute that *could* have been included therein but was not. *See Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (“[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.” (citation omitted)). Simply put, in construing the HILU ordinance this Court lacks the authority to add words that the drafters themselves left out.

The concurrence ultimately reaches the correct result in this case but does so by using a mode of statutory construction that is at odds with the rules of interpretation discussed above. Rather than apply the language that the drafters of the HILU ordinance actually used, the concurrence instead plucks out of thin air the phrase “physical locations” and makes it the focal point of its analysis — despite the fact that such a phrase appears nowhere in the definition of “educational facilities.” Based largely on this invented terminology, the concurrence mistakenly concludes that the second sentence of the definition (1) lacks any meaning at all as actually worded; and (2) can only be given meaning by the addition of language the drafters themselves did not see fit to add.

With regard to the first proposition, the concurrence employs a mode of construction that can only be described as odd. While it is axiomatic that courts should strive to find meaning in a statutory provision based on the words used therein, *see State v. Williams*, 286 N.C. 422, 431, 212

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S.E.2d 113, 119 (1975) (“[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage.” (citation omitted)), the concurrence does the precise opposite — instead opting for a method of interpretation guaranteed to render the plain language of the second sentence of the definition at issue meaningless.

As for its second conclusion, by means of judicial sleight-of-hand the concurrence sees fit to change the phrase “property owned by [the entities listed in the first sentence]” to the quite different phrase “property owned by *the owners of* [the entities listed in the first sentence].” The concurrence’s assertion of authority to add new language to the ordinance’s definition under the guise of interpretation finds no refuge in the jurisprudence of our appellate courts. Moreover, its interpretation is rendered illogical by virtue of the fact that the Watauga County Board of Education *does not own* community colleges, colleges, or universities located within the county’s borders.

The concurrence’s assurance that its interpretation would give effect to Watauga County’s “obvious intent” in drafting the HILU ordinance is also puzzling since there is simply no evidence to suggest that this was, in fact, the County’s intent. To the contrary, the plain language employed in the definition suggests that this was not the drafters’ intent at all. Guided by nothing more than its own subjective belief as to what would have constituted a wise definition, the concurrence violates the cardinal rule of statutory construction that prohibits courts from assuming a legislative role. *See Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (“When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.” (citation and quotation marks omitted)).

* * *

Words matter — be they contained in an ordinance, statute, contract, will, deed, or any other document possessing legal significance. Our holding today is not the result of a hypertechnical reading of the HILU ordinance. Rather, it applies longstanding principles of statutory construction by relying on the ordinance’s plain language, which simply does not lend itself to the interpretation sought by the County in this appeal. Accordingly, we hold that the trial court erred in affirming the Board’s decision to uphold the denial of Appalachian’s permit application.

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Conclusion

For the reasons stated above, we reverse the 8 September 2017 order of the trial court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge ELMORE concurs.

Judge DILLON concurs in result only by separate opinion.

DILLON, Judge, concurring in result only.

I. Background

Appalachian Materials, LLC, applied for a permit to build an asphalt plant within 1,500 feet of the administrative offices of the Watauga County Board of Education (the “BOE”). Watauga County denied the permit, in part, because its ordinances do not allow any property to be developed as an asphalt plant if that property is located within 1,500 feet of an “educational facility,” concluding that the BOE property is an “educational facility” under the ordinance.

When Appalachian Materials applied for its permit, the term “educational facility” was defined by the County ordinance as follows:

Educational facility – includes elementary schools, secondary schools, community colleges, colleges, and universities. Also includes any property owned by those facilities used for educational purposes.

I agree with the majority that the BOE property does not meet this definition of “educational facility.” The majority, though, bases its conclusion on the fact that the BOE property is not “owned by [any of] those facilities” referenced in the first part of the definition. I base my conclusion, however, on the fact that the BOE property is not property “used for educational purposes.”

II. Rules of Construction

In construing a statute or ordinance, our Supreme Court has instructed that our “goal” is “to accomplish the legislative **intent**.” *Wilkie v. Boiling Springs*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (emphasis added).

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“The best indicia of that intent are **the language** of the [ordinance].” *Id.* (emphasis added). And the general rule is that “[w]here the language of the statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using **its plain meaning**.” *Id.* (emphasis added).

However, our Supreme Court has also instructed that “a statute must be construed, if possible, **to give meaning and effect to all of its provisions**,” and that an interpretation which would render a provision “**meaningless . . . is not permitted**.” *HCA Crossroads v. N.C. Dept. of Hum. Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) (emphasis added).

For example, in *Teachy v. Coble Dairies*, our Supreme Court refused to construe the 1975 version of Rule 14(c) of our Rules of Civil Procedure by the plain meaning of certain words used by our General Assembly because “were [those words] interpreted strictly and literally, [the provision] would be nugatory.” *Teachy v. Coble Dairies*, 306 N.C. 324, 330, 293 S.E.2d 182, 186 (1982). Rather, our Supreme Court determined that these words constituted a “clerical error” and that to apply a strict construction would “thwart the obvious legislative intent and [would] render [the act] meaningless.” *Teachy*, 306 N.C. at 331, 293 S.E.2d at 186. The Court did not apply the plain meaning, reasoning that construing an act in a manner which would render it meaningless “would be anomalous, aberrant, and abhorrent.” *Id.*

III. Analysis of the Watauga County Ordinance

The definition of “educational facility” is plainly describing physical locations; that is, physical locations near which an asphalt plant cannot be developed. The plain meaning of the word “facility” is a *physical location*; the term “facility” is never used in English parlance to describe *an entity* which owns a physical location.

The definition of “educational facility” is broken up into two parts.

The first part is plainly describing physical locations used either as an elementary or secondary school or as a college or university, near which an asphalt plant may not be developed. It is plainly *not* describing school entities in the abstract. For instance, the term “universities” as used here would include the Appalachian State University campus, not the University entity. I agree with the majority that the BOE property does not fit the first part of the definition of “educational facility.” The BOE property is not a facility used as a school or college.

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The second part further defines an “educational facility” as “property owned by those facilities [referenced in the first part] used for educational purposes.” The majority reasons that the BOE property is not a “property owned by those facilities [referenced in the first part of the definition] because the BOE property is not owned by an elementary or secondary school or by a college or university.” I reason that the BOE property is not being “used for educational purposes.”

I conclude that adopting a construction based on the plain reading of the language used in the second part would render the second part meaningless. Under North Carolina law, a real estate “facility” cannot own real property; only people and entities are capable of owning real property. The majority, though, suggests that a construction based on the plain language would not render the second part meaningless because some of the “facilities” in the first part are capable of owning property; for example, “universities” are capable of owning property. The majority essentially suggests, however, that the word “facilities” may be read to also refer to abstract entities, not just to physical locations. However, this suggestion ignores the plain meaning of the word “facilities.” Further, it ignores a plain reading of the first part as referring only to physical locations, not to abstract entities. “Appalachian State University” may sometimes refer to a physical location in Boone: “I am heading to ASU this weekend to watch a football game.” “Appalachian State University” may also refer an abstract entity: “I work for Appalachian State University.” But the term “universities,” as used in the first part, plainly refers only to physical locations, not to abstract entities.

Therefore, since construing the second part by giving the language used therein its plain reading would render the second part meaningless, as “facilities” cannot own property, we must adopt a construction, if possible, to give effect to County’s obvious intent.

Since “facilities” themselves are not capable of owning real estate, I conclude that the County’s obvious intent was to include within the definition “property owned by **[the owners of]** the facilities [referenced in the first part].” For example, the definition includes not only property used as an elementary and secondary school, but also other property owned by *the owner of* any elementary and secondary school used to educate students from that school. Here, the BOE owns the public elementary and secondary schools in the County. I conclude that the intent was to include within the scope of “educational facilities” not only the elementary and secondary school locations owned by the BOE, but also any other locations owned by the BOE where public school students participate in educational activities.

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Under the majority's construction, "educational facilities" could only include off-site locations owned by a college, university, or private school entity. Since public schools are not owned by separate school entities, but rather by the BOE, the majority's construction would not include any off-site facility used to educate students attending public schools. I do not think it was the County's obvious intent to include only off-site facilities used to educate private school students.

In any event, I believe that the BOE property is not being used for "educational purposes" as that phrase is used in the ordinance. The term "educational purposes" is a bit ambiguous. If read broadly, "educational purposes" could include, for example, property used as a gravel pit owned by the BOE where the income generated was used to fund education. But to the extent the term is ambiguous, we are to construe it narrowly. *See Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 138-39, 431 S.E.2d 183, 188 (1993) ("Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof.").

I construe "educational purposes" narrowly, to include only those facilities which are primarily used for activities where students are present. Indeed, this construction fits the context: The first part of the definition generally describes locations *primarily used* for activities *where students are present*. The evidence in the record demonstrates that the BOE property is used primarily for administrative purposes, and that the BOE property is only sporadically used for events where students are present. Therefore, I concur in the majority's result.

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BOONE FORD, INC., D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, PLAINTIFF

v.

IME SCHEDULER, INC., A NEW YORK CORPORATION, DEFENDANT

AND

CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, PLAINTIFF

v.

BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, DEFENDANT

No. COA16-750-2

Filed 6 November 2018

1. Appeal and Error—preservation of issues—failure to act below

The appellants (IME Scheduler and Cash for Crash) did not preserve for appeal the issue of whether the trial court erred by denying a motion notwithstanding the verdict on a conversion claim where there was no motion for directed verdict at the close of all the evidence.

2. Appeal and Error—inconsistent verdict—no motion for a new trial

The argument that a jury verdict was inconsistent was overruled in an action involving multiple claims relating to funds transferred between the parties where the appropriate motion (for a new trial) was never made.

3. Contracts—negligent representation claim—directed verdict

The trial court did not err by granting a directed verdict for plaintiff in a negligent misrepresentation claim in an action involving funds transferred between the parties where the evidence, taken in the light most favorable to the moving party (defendants), did not establish that plaintiff owed defendants any separate duty of care beyond that of the contractual relationship. Moreover, any error was harmless.

Appeal by IME Scheduler, Inc., and Cash for Crash, LLC (“appellants”), from judgment entered 1 March 2016 by Judge William H. Coward and order entered 21 April 2015 by Judge Jeff Hunt in Watauga County Superior Court. Originally heard in the Court of Appeals 25 January 2017. By opinion issued 18 April 2017, a divided panel of this Court, ___ N.C. App. ___, 800 S.E.2d 94 (2017), vacated Judge Hunt’s 21 April 2015 consolidation order and remanded to the superior court for two separate

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trials, therefore declining to reach appellants' arguments as to Judge Coward's 1 March 2016 judgment. By opinion issued 17 August 2018, our Supreme Court, ___ N.C. ___, 817 S.E.2d 364 (2018), reversed and remanded the case to this Court to address those remaining arguments.

Miller and Johnson, PLLC, by Nathan A. Miller, for defendant-appellant IME Scheduler, Inc., and plaintiff-appellant Cash for Crash, LLC.

Walker DiVenere Wright, by Anné C. Wright, for plaintiff-appellee and defendant-appellee Boone Ford, Inc.

ELMORE, Judge.

Previously, a divided panel of this Court, *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. App. ___, 800 S.E.2d 94 (2017) ("*Boone Ford I*"), vacated Judge Hunt's pretrial consolidation order, which effectively set aside the jury verdict and vacated Judge Coward's final judgment, and "remand[ed] the cases to superior court[,]" *id.* at ___, 800 S.E.2d at 98, for two separate trials. The majority panel thus determined its "holding and disposition render[ed] moot the other issues [as to the propriety of Judge Coward's judgment] raised on appeal." *Id.* The dissenting judge reasoned that because Judge Hunt's pretrial consolidation order was interlocutory, it was not binding when Judge Coward presided over the jury trial, and because neither appellants moved to sever the cases but proceeded with the consolidated trial, they failed to preserve their argument for appellate review and awarding them a new trial was unwarranted. *Id.* at ___, 800 S.E.2d at 99 (Dillon, J., dissenting).

On 17 August 2018, our Supreme Court reversed our decision in *Boone Ford I* and remanded "to consider other issues that [our] decision did not reach." *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. ___, ___, 817 S.E.2d 364, 368 (2018). Appellants' remaining arguments were that (1) "the trial court and the trier of fact erred in denying C[]ash for Crash, LLC's motions in regards to the conversion allegation and in determining that Boone Ford, Inc. had not converted C[]ash for C[r]ash, LLC's money"; (2) "[t]he jury's finding in paragraph 25(1) of the Judgment and Order for Costs [was] inconsistent with the entirety of paragraph 25 of the Judgment and Order for Costs"; and (3) "[t]he trial court erred in granting . . . Boone Ford, Inc.'s motion for a directed verdict denying . . . IME Scheduler, Inc.'s negligent misrepresentation claim under N.C. R. Civ. P. 50." After careful review, we affirm Judge Coward's judgment.

BOONE FORD, INC. v. IME SCHEDULER, INC.

[262 N.C. App. 169 (2018)]

I. Background

The facts and trial procedure of this case are more fully discussed in our prior opinion. Relevant for addressing the remaining issues on remand, after Boone Ford sued IME Scheduler for the failed Raptor transaction, IME Scheduler filed counterclaims against Boone Ford alleging, *inter alia*, unfair and deceptive trade practices (“UDTP”) and negligent misrepresentation. Cash for Crash also sued Boone Ford alleging, *inter alia*, a claim of conversion.

After IME Scheduler’s case-in-chief, the trial court granted Boone Ford’s motion for a directed verdict on IME Scheduler’s negligent misrepresentation claim. After the presentation of all evidence, the jury rendered a verdict finding that Boone Ford did not convert the money wired from Cash for Crash and thus found Boone Ford not liable on Cash for Crash’s conversion claim. The trial court later denied Cash for Crash’s oral motion for a judgment notwithstanding the verdict (“JNOV”) on that claim. In its verdict sheet in response to questions concerning IME Scheduler’s UDTP claim, the jury also found that Boone Ford had wrongfully retained \$40,385.50 from IME Scheduler, that this act was in and affecting commerce, but that Boone Ford’s conduct did not proximately cause injury to IME Scheduler. Additionally, in response to the question “[i]n what amount has IME been injured?” the jury answered “\$0.00.”

Based on the jury’s findings that Boone Ford was entitled to \$20,000.00 in compensatory damages from IME Scheduler due to fraud, and that Boone Ford was entitled to \$50,000.00 in punitive damages from IME Scheduler due to UDTP, the trial court on 1 March 2016 entered a final judgment and order for costs awarding Boone Ford \$70,000.00 in total damages from IME Scheduler.

II. Analysis

In *Boone Ford I*, appellants raised the following three issues we declined to address based upon our disposition of their first issue: (1) whether the trial court erred by denying Cash for Crash’s motion for JNOV on its conversion claim against Boone Ford, (2) whether the jury’s findings on IME Scheduler’s UDTP claim against Boone Ford were inconsistent, and (3) whether the trial court erred by granting Boone Ford’s directed verdict motion on IME Scheduler’s negligent misrepresentation claim.

A. Cash for Crash’s Motion for JNOV as to its Conversion Claim

[1] Appellants first contend the jury erroneously found that Boone Ford did not unlawfully convert the \$206,596.00 wired from Cash for Crash

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and, on this basis, that the trial court erred by denying Cash for Crash's motion for JNOV on its conversion claim. This argument is not preserved for appellate review.

North Carolina Civil Procedure Rule 50(b)(1) requires a party to move for a directed verdict at the close of evidence to preserve the right to move for JNOV. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2017); *see also id.* official cmt. (“[M]aking an appropriate motion for a directed verdict is an *absolute prerequisite* for the motion for judgment NOV.” (emphasis added) (citations omitted)). Stated differently, “a motion for [JNOV] must be preceded by a motion for directed verdict at the close of all the evidence.” *Graves v. Walston*, 302 N.C. 332, 338, 275 S.E.2d 485, 489 (1981) (interpreting N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (1979)).

Here, although Cash for Crash made an oral motion for JNOV on its conversion claim immediately after the jury returned its verdict, the transcript reveals it never moved for a directed verdict on that claim and thus waived its right to move for JNOV. *See, e.g., Graves*, 302 N.C. at 338, 275 S.E.2d at 489 (“In the present case, plaintiffs did not move for directed verdict at the close of plaintiffs’ evidence or at the close of all the evidence. Plaintiffs thus had no standing after the verdict to move for [JNOV] and for that reason the trial court was without authority to enter [JNOV] for plaintiffs.”). Therefore, Cash for Crash’s “JNOV arguments are waived on appeal.” *Martin v. Pope*, ___ N.C. App. ___, ___, 811 S.E.2d 191, 195 (2018); *see also Tatum v. Tatum*, 318 N.C. 407, 408, 348 S.E.2d 813, 813 (1986) (“Plaintiff failed to move for a directed verdict at the close of all the evidence. Therefore, plaintiff failed to preserve her right to move for [JNOV].” (citing *Graves*, 302 N.C. at 338, 275 S.E.2d at 489)).

B. Damage Calculation as to IME Scheduler’s UDTP Claim

[2] Appellants next challenge the jury’s verdict as to IME Scheduler’s UDTP claim against Boone Ford and, relatedly, the amount of compensatory damages awarded to Boone Ford. They argue that because “[t]he jury found that Boone Ford, Inc. had wrongfully retained IME Scheduler’s \$40,385.50 and that Boone Ford, Inc.’s act was in and affecting commerce[,]” the jury’s finding that Boone Ford’s conduct was not a proximate cause of injury to IME Scheduler was “inconsistent . . . and should be overturned.” Appellants contend further that because the jury found Boone Ford was entitled to \$32,000.00 in actual damages from IME Scheduler, “the only appropriate judgment would be to award IME Scheduler, Inc. at least the difference between the amount wrongly retained by Boone Ford, Inc. and the amount awarded to Boone Ford,

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Inc. which at a minimum would be \$8,385.50.” Thus, appellants request on appeal that this Court

reverse the jury’s conclusion that IME Scheduler, Inc. was damaged as a result of Boone Ford Inc.’s wrongful retention of IME Scheduler Inc.’s money and either make a finding that IME Scheduler, Inc. should be awarded the amount of \$8,385.50 or that a new trial limited to the exact amount of damages due to IME Scheduler, Inc. pursuant to IME Scheduler, Inc.’s claim for [UDTP] be held.

Appellants have failed to cite to any relevant legal authority to support these arguments. N.C. R. App. P. 28(b)(6). Nonetheless, we disagree with their contentions and decline their requests for appellate relief.

The challenged portion of the verdict sheet reads as follows:

25. [] Did Boone do or commit at least one of the following:

1. [W]rongly retain IME’s \$40,385.50 or any portion thereof? (if “yes”, answer the following question)

Answer: Yes.

- Was that conduct in commerce or affecting commerce? (if “yes”, answer the following question)

Answer: Yes.

• Was that conduct a proximate cause of injury to IME?

Answer: No.

Additionally, in response to the related verdict sheet question on this claim “[i]n what amount has IME been injured?” the jury answered “\$0.00.”

“Where the jury’s answers to the issues are allegedly contradictory, a motion for a new trial under Rule 59 is the appropriate motion.” *Walker v. Walker*, 143 N.C. App. 414, 421, 546 S.E.2d 625, 630 (2001) (citing *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947)). Here, because IME Scheduler never moved for a new trial on its UDTP claim, “the question of whether the [jury’s] verdict was inconsistent was not properly preserved for review on appeal.” *Id.* at 422, 546 S.E.2d at 630; *see also* N.C. R. App. P. 10(a)(1). Further, a jury finding that a party committed an UDTP act does not compel a finding that that act proximately caused injury. IME Scheduler does not challenge the trial court’s proximate cause instruction and, as reflected, the jury neither found that

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Boone Ford's conduct proximately caused injury to IME Scheduler nor that IME Scheduler suffered any monetary damages as to its UDTP claim. IME Scheduler's failed UDTP claim provides neither a basis for offsetting the compensatory damages awarded to Boone Ford, nor for ordering a new trial on the issue of damages as to that claim. Accordingly, we overrule this argument.

C. Directed Verdict of Cash for Crash's Negligent Misrepresentation Claim

[3] Last, appellants assert the trial court erred by granting Boone Ford's directed verdict motion on IME Scheduler's negligent misrepresentation claim. We disagree.

"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." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)). A directed verdict is proper only where "it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id.* (quoting *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)). Recovery in tort arising out of a breach of contract is generally barred by North Carolina's economic loss rule:

[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Rountree v. Chowan Cty., ___ N.C. App. ___, ___, 796 S.E.2d 827, 830 (2017) (quoting *Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30–31 (2007); other citation omitted). Where parties were privy to a contract, a viable tort action "must be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties." *Croker v. Yadkin, Inc.*, 130 N.C. App. 64, 69, 502 S.E.2d 404, 407–08 (1998) (quoting *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983)).

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Here, the trial court submitted both IME Scheduler's and Boone Ford's breach of contract and fraud claims to the jury but granted both parties' motions for directed verdict on their negligent misrepresentation claims. "The tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (quoting *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000)). The evidence, taken in the light most favorable to IME Scheduler, failed to establish that Boone Ford owed IME Scheduler any separate duty of care beyond that of the contractual relationship. IME Scheduler's negligent misrepresentation claim was barred by the economic loss rule. Accordingly, we affirm the trial court's ruling.

As a secondary matter, we note that even had the trial court erred by directing verdict on IME Scheduler's negligent misrepresentation claim, it would not be grounds for appellate relief in this case. N.C. Gen. Stat. § 1A-1, Rule 61 (2017) ("[N]o error . . . in any ruling . . . is ground[s] for granting a new trial or setting aside a verdict . . . , unless refusal to take such action amounts to the denial of a substantial right."). Boone Ford's trial position was that the parties contracted for the Raptor with the VIN number ending in 6435, while IME Scheduler's position was that they contracted for the Raptor with the VIN number ending in 7953. To prevail on its negligent misrepresentation claim, IME Scheduler was required to prove as alleged that, inter alia, it justifiably relied on Boone Ford's alleged false representation as to which Raptor was under contract. *Walker*, 211 N.C. App. at 30, 712 S.E.2d at 244.

The jury's finding that "the parties enter[ed] a contract with the terms contended by Boone" establishes that IME Scheduler's reliance on Boone Ford's alleged false representation would have been unjustified. *Cf. Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1410 (11th Cir. 1998) ("In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, *as a matter of law*, to establish that his reliance is justifiable." (citations omitted)). Accordingly, even if IME Scheduler's negligent misrepresentation claim should have been submitted to the jury, any error arising from the ruling was harmless. *See, e.g., Sledge v. Miller*, 249 N.C. 447, 453-54, 106 S.E.2d 868, 874 (1959) (holding the trial court's refusal to submit the issue of damages for trespass was harmless where "[t]he finding of the jury that defendants were the owners of the land from which the

timber was cut negated plaintiff's claim of trespass and defeated his claim for damages").

III. Conclusion

Because the trial court properly denied Cash for Crash's motion for JNOV on its conversion claim against Boone Ford, the compensatory damages awarded Boone Ford were supported by the jury's verdict, and the trial court properly granted Boone Ford's directed verdict motion on IME Scheduler's negligent misrepresentation claim, we affirm the trial court's judgment.

AFFIRMED.

Judges DILLON and ZACHARY concur.

LEWIS SCOTT CARLTON AND THOMAS P. WOOD, PLAINTIFFS
v.
BURKE COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA18-62

Filed 6 November 2018

1. Appeal and Error—preservation of issues—sovereign immunity—not argued below

Defendant, a county board of education, did not preserve for appellate review the issue of whether sovereign immunity barred a negligent infliction of emotional distress claim where the issue was not argued below. The question of whether the invasion of privacy claim would be barred by sovereign immunity was not addressed for reasons stated elsewhere in the opinion.

2. Emotional Distress—negligent infliction—duty owed

Plaintiffs produced sufficient evidence that defendant (a county board of education) owed a duty to plaintiffs where plaintiffs brought an issue to defendant's attention through written documents marked as confidential and with the assurance of the chairperson that confidentiality would be maintained, and those documents became public.

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3. Emotional Distress—negligent infliction—breach of duty—sufficiency of evidence

Plaintiffs presented sufficient evidence that defendant (a county board of education) breached its duty to them in an action for negligent infliction of emotional distress arising from plaintiffs' confidential complaint to defendant about the superintendent of the school board where the complaint became public. The superintendent ultimately filed a lawsuit against plaintiffs.

4. Emotional Distress—negligent infliction—foreseeability—sufficiency of evidence

Plaintiffs presented sufficient evidence of the reasonable foreseeability of emotional distress in an action for the negligent infliction of emotional distress arising from the disclosure of plaintiffs' confidential complaint to a school board about the school superintendent. Defendant's motion to dismiss an invasion of privacy claim was not considered because the jury awarded the full amount to both plaintiffs and did not divide the amount between the two claims.

5. Appeal and Error—preservation of issues—lost profits—motion in limine—appeal argued on different grounds

Defendant (a county board of education) did not preserve for appeal the issue of lost profits in an action arising from a confidential complaint to defendant about a school superintendent and a defamation action. Defendant did not base its motion in limine on the same grounds argued on appeal.

6. Emotional Distress—instructions—theory—included in pleading

The trial court did not err in a negligent infliction of emotional distress action by instructing the jury on failure to secure information. The negligent act plaintiffs brought forward at trial was within the pleadings.

7. Appeal and Error—motion for new trial—basis—inflammatory and irrelevant evidence—not raised at trial—not warranting new trial

The trial court correctly denied defendant's motion for a new trial where defendant alleged that highly inflammatory and irrelevant evidence had been admitted. Of the five instances cited by defendant, three were not raised at trial and the other two did not warrant a new trial.

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8. Costs—motions for dismissal—properly denied—costs denied

The trial court did not err by awarding costs in a negligent infliction of emotional distress action where defendant's motions to dismiss were properly denied.

Appeal by Defendant from order entered 6 June 2016 by Judge Yvonne Mims Evans and judgment entered 12 October 2016 and order entered 22 November 2016 by Judge W. Todd Pomeroy in Burke County Superior Court. Heard in the Court of Appeals 4 September 2018.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellees.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog and Meredith Taylor Berard, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Burke County Board of Education (“Defendant”) appeals following jury verdicts finding Defendant liable for negligent infliction of emotional distress and invasion of privacy. On appeal, Defendant argues the trial court committed the following errors: (1) denying its motion to dismiss based on sovereign immunity; (2) denying its motion to dismiss for failure to state a claim, motion for directed verdict, and motion for judgment notwithstanding the verdict; (3) denying its motion for new trial; and (4) awarding Plaintiffs costs and expenses. We affirm.

I. Factual and Procedural Background

On 29 July 2014, Lewis Scott Carlton and Thomas P. Wood (“Plaintiffs”) filed a complaint for invasion of privacy, breach of contract, negligent infliction of emotional distress, and civil conspiracy.¹ Plaintiffs asserted Defendant waived its right to assert sovereign immunity by purchasing liability insurance coverage. The complaint alleged the following narrative.

On 28 March 2011, Wood attended a “closed” session of a Burke County Board of Education (“Board”) meeting. Speaking on behalf of himself and Carlton, Wood addressed the Board “about a highly confidential matter.” The Board asked him to submit the information in a

1. Plaintiffs initially included Dr. Arthur Stellar as a defendant, but dismissed, without prejudice, their claims against Stellar on 17 March 2016.

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written statement. Through its chairperson,² Defendant “represented . . . it would maintain the confidentiality” of the information.

On 11 April 2011, Plaintiffs “confidentially” sent envelopes to every member of the Board. In each envelope, Plaintiffs included a letter and “supporting documentation.” All papers were placed “under seal[,]” with “Confidential” written on the envelope. (Emphasis in original). In the letter, Plaintiffs “raised serious concerns” about the superintendent of the Board, Dr. Arthur Stellar. Specifically, Plaintiffs alleged Stellar engaged in an “improper relationship” with Amy Morgan, a Board employee. Had Defendant not assured Plaintiffs of confidentiality, Plaintiffs “would never have submitted said materials[.]”

A member of the Board gave a copy of the letter and supporting documents to Stellar. In August 2011, Stellar gave a copy to Morgan. On 11 August 2011, the Board voted to “buy out” Stellar’s contract, and Morgan resigned from her position in the school system.

On 31 October 2011, Morgan sued Plaintiffs for libel. As a result of the lawsuit, Plaintiffs “were viciously and maliciously attacked in the media and on the internet.” Plaintiffs feared for their safety, suffered damage to their reputations and businesses, suffered severe mental and emotional distress, and spent “large sums” of money defending themselves in the Morgan lawsuit. On 1 April 2013, a court dismissed Morgan’s lawsuit.

On 14 October 2014, Defendant filed a motion to dismiss, pursuant to Rule 12(b)(1)-(2), (4)-(6) of the Rules of Civil Procedure. After a hearing on 20 January 2015, the court entered an order on 10 February 2015 on Defendant’s motion to dismiss pursuant to Rule 12(b)(6). The court dismissed Plaintiffs’ breach of contract claim. The court denied Defendant’s motion on the invasion of privacy, negligent infliction of emotional distress, and civil conspiracy claims.

On 16 March 2015, Defendant filed its answer. Defendant raised the defenses of contributory negligence, sovereign immunity, and expiration of the statute of limitations.

On 20 May 2016, Defendant filed a notice of hearing for 31 May 2016 on its motion to dismiss pursuant to Rule (12)(b)(1)-(2). That same day, Defendant filed an affidavit by Keith Lawson, its finance officer. Lawson asserted Defendant did not waive the defense of sovereign immunity as to the invasion of privacy claim by purchasing liability insurance.

2. The complaint did not state who chaired the Board.

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Lawson highlighted specific portions of Defendant's insurance policy, which covered only bodily injury and property damage caused by an accident. The policy, as explained by Lawson, did not cover "Personal and advertising injury[.]" including "Knowing Violation Of Rights of Another" or any injury arising from "Oral or written publication, in any manner, of material that violates a person's right to privacy[.]" Defendant attached its insurance policy as an exhibit to the affidavit.

On 31 May 2016, the court held a hearing on Defendant's motion to dismiss. Plaintiffs objected to the court's consideration of Lawson's affidavit and accompanying attachments.³ Plaintiffs asserted Defendant violated Rule 26(c) of the Rules of Civil Procedure because Defendant did not list Lawson as a person with knowledge of the matter in its answer to Plaintiffs' request for interrogatories. Defendant argued it only waived sovereign immunity to the extent its insurance covered the claims. Defendant further asserted its insurance policies did not cover intentional torts.

In an order entered 6 June 2016, the court sustained Plaintiffs' objection to consideration of Lawson's affidavit and accompanying attachments. The court also concluded: (1) Defendant should have disclosed the identity of Lawson and the insurance policy earlier in discovery; (2) the "unseasonable" disclosure prejudiced Plaintiffs; (3) the late disclosure deprived Plaintiffs of the opportunity to depose Lawson; and (4) Defendant violated Rules 26, 33, and 34 of the Rules of Civil Procedure. Accordingly, the court denied Defendant's motion to dismiss pursuant to Rule (12)(b)(1)-(2).

The court called the case for trial on 20 September 2016.⁴ Plaintiff Wood testified on his own behalf. Wood lived in Burke County and owned a photography business. Wood had two school-aged children and was "[v]ery active" in their education. At a Board meeting in January 2011, Wood heard rumors about Stellar closing the schools in Burke County. One of the county principals, Ross Rumbaugh, suggested someone else "speak . . . for the school." The parents at the meeting asked Wood to act as a spokesman and talk with Stellar. After coordinating with other parents and the parent teacher organization, Wood, other parents, Rumbaugh, and Stellar met. Stellar "in a whirlwind[.]" told others he would have to close the schools because of a "huge" budget deficit.

3. Plaintiffs filed a written version of their objection on 2 June 2016.

4. The court originally called the case for trial on or about 8 June 2016. However, on 29 June 2016, the court declared a mistrial.

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On 28 March 2011, the Board held a meeting to vote on closing the schools in Burke County. Twelve to fifteen hundred people attended. Wood presented, began to comment about a county employee (Morgan), and read a letter from a school employee, in which the school employee called Stellar a “bully.” The Board chairperson, Catherine Thomas, “cut [him] off[.]” Thomas told Wood any personnel issues must be discussed in a closed session.

At the end of the open session, the Board went into closed session. Wood told the Board he presented on behalf of himself and Carlton. Wood wanted to bring forward “sensitive issues” and “needed to know that they could be kept confidential.” Thomas responded, “[T]hat’s fine[.]” and the other Board members remained silent. Wood started his statement about “the manager of strategic alliance position[.]” but the Board cut him off.⁵

After the closed session ended, Wood and Thomas spoke. Wood told Thomas both he and Carlton had more information about Stellar and Morgan and asked if he needed to attend another closed Board session. Thomas instructed Wood to “submit it to the board confidentially in writing . . . so that they can take a look at it.”

The next day, Plaintiffs met and started drafting a letter. On 11 April 2011, prior to another Board meeting, Plaintiffs again met and assembled envelopes for each Board member and the Board attorney, Chris Campbell. On the outside of each envelope, Carlton wrote “Confidential.” The envelope included a letter, which stated:

Please find attached documentation of several issues we wish to bring before the Burke County School Board detailing disturbing allegations regarding Dr[.] Arthur Stellar and others within our school system. As concerned business owners, parents and stakeholders in Burke County we wish to respectfully request further investigation into these issues to ensure the optimal operation of our schools and more importantly the welfare of our children and this county.

We are not lawyers or educators. Although we cannot personally attest to the veracity of the claims herein and make no representation any or all of the claims are factual or presented in their entirety, we do ask for a complete

5. Wood did not testify about which Board member interrupted his statement.

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and thorough investigation. We trust you to ascertain the facts as our elected officials[.]

We chose to represent these items for individuals within the school system and our county who say they are simply too afraid to speak on their own behalf. These people need their jobs, especially in such tough economic times. However they do not need to perform their jobs under such stressful and hostile conditions. For this reason please consider the source of all items herein to be anonymous or strictly confidential.

We wish to apologize for the obvious lack of complete supporting documentation in some of the areas we present. This is intentional because we fear destruction of pertinent evidence if requested through normal channels. We have already been informed of such incidents with key documents related to the claims herein.

We will gladly cooperate with the board in any way possible that does not endanger jobs or personal assets. We request these communications remain confidential to protect the reputations of anyone innocently accused. We fully trust that the appropriate action can and will be taken without the necessity of the Stakeholders of Burke County having to seek legal counsel[.]

(Emphasis omitted).

At the 11 April 2011 Board meeting, which Wood did not attend, Carlton handed out the envelopes. Without Thomas's promise of confidentiality, Wood would not have compiled or submitted the information.

In November 2011, Morgan sued Plaintiffs for defamation of character. Prior to the suit, Wood did not know the Board broke the confidentiality of the letter. Three newspapers, a radio station, and a local blogger covered the lawsuit. The media coverage was "embarrassing" and "humiliating" and "destroyed [his] reputation." Clients stopped using his photography business because "[n]obody wants to be associated with, with that."

Plaintiffs called Donald Vaughan and tendered him as an expert in the field of state and local government administration and leadership. Vaughan reviewed Plaintiffs' complaint, Defendant's answer, affidavits, and depositions. Vaughan also reviewed the applicable statutes. Vaughan explained the difference between open and closed Board sessions,

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specifically stating “the information that is brought into that [closed] session is expected to be closed.” He opined “a citizen ought to be able to rely on the promise of a chairman of the board.”⁶

Plaintiff Carlton testified on his own behalf. Carlton lived in Burke County and owned Express Lube and Wash, a car maintenance business. Carlton had one son, who attended school in Burke County. In 2011, Carlton attended several Board meetings. Stellar, the superintendent at the time, discussed closing schools in Burke County, claiming the Board suffered from a deficit. However, in June 2011, financial records showed the county actually had a ten to twelve million dollar surplus.

On 28 March 2011, Carlton could not attend a Board meeting, but Wood spoke on his behalf. After the meeting, Plaintiffs compiled an envelope to give to the Board about issues with Stellar. Carlton thought the information needed to be confidential for two reasons—to protect the people mentioned and to protect Plaintiffs from retaliation. Carlton attended the Board meeting on 11 April 2011. Before the meeting began, pursuant to Board procedures, Carlton gave eight envelopes to the Board’s secretary for distribution to Board members.

On 18 August 2011, the Board bought out Stellar’s contract, releasing him prior to the end of his contract. The next morning, Morgan resigned. Carlton first learned of the breach of confidentiality and Morgan’s lawsuit through rumors online. After reading about the suit on a local blogger’s website, a deputy served Carlton with the complaint at his business, in front of customers. Three newspapers, a radio station, and a local blogger covered the lawsuit. As a result of the suit and coverage, Carlton resigned from his deaconship at his church. Longstanding customers stopped coming to Carlton’s business. Consequently, Carlton closed the car wash portion of his business.

Plaintiff called Catherine Thomas, a former member and Chair of the Board. In fall 2010, the Board hired an outside attorney, Chris Campbell, to investigate complaints about Stellar. In a closed session on 22 November 2010, Campbell reported his findings to the Board and the Board’s attorney. After his report, the Board gave “[t]hose documents” back to Campbell, to store at his office, so they did not become public.

6. Defendant objected and moved to strike this portion of Vaughan’s testimony. The court had Plaintiffs’ counsel reword the question and instructed Vaughan to answer “that limited question.” Vaughan answered, “Should be able to rely on it.”

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On 28 March 2011, the Board held an open session. Wood spoke at the session, first about schools closing and then about Stellar and Morgan. Thomas interrupted Wood and told him, “You can’t discuss personnel matters in, in public like that.” Thomas told Wood he could finish his speech during a closed session. When Wood later attended a closed session, “he complained about Dr. Stellar . . . [and] probably talked about Amy Morgan as well[,]” though Thomas did not recall “specifically” what Wood said. The closed session ended before Wood could finish his speech. Thomas instructed Wood to “put it in writing and submit it confidentially.” It was Thomas’s “intention” to tell Wood to “submit it so that it could be reviewed in closed session[.]”⁷ At that time, Thomas did not expect that the information Wood gave would be turned over to Stellar.

At the next Board meeting, on 11 April 2011, each Board member’s seat had an envelope marked “Confidential.” Inside the envelope, Board members found a cover letter and other documents “that detailed allegations about Dr. Stellar and Ms. . . . Amy [Morgan.]” During a following closed session, Thomas read the materials. When other members asked what to do with the envelope, Thomas replied, “It’s confidential and we’ll discuss it later.” Additionally, “[t]he school board knew that personnel matters were confidential and had been trained on that many times.” Thomas gave her envelope to attorney Campbell. Other members of the Board took the envelope and documents home.

Sometime after the meeting, Thomas asked Campbell to investigate the allegations in the report. On 25 April 2011, Campbell reported his findings in a closed session, without Stellar present. The Board did not take any action on the allegations at that meeting.

In August 2011, the Board decided to buy out Stellar’s contract. The next day, Morgan resigned from her position. Thomas did not “think” the Board took any adverse action against Morgan. Thomas voted in favor of buying out Stellar’s contract, in part based on the allegations in the envelope Plaintiffs submitted. On 31 October 2011, Thomas learned the documents became public because of a local blog. However, she did not give the documents to anyone besides Campbell.

Plaintiff next called Susan Stroup, a former Board member. At the March 2011 closed session, Wood, amongst others, lodged complaints against Stellar. When asked about the complaints she heard from others and if Wood specifically mentioned an inappropriate relationship

7. This wording is from Plaintiffs’ counsel’s question, to which Thomas responded in the affirmative.

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between Stellar and Morgan, Stroup answered, “I don’t remember that specifically. I just –. I just know that it was directed towards Dr. Stellar’s – lots of things about him, just various issues about him. Inappropriate relationships, as well as, other things, but I, I don’t remember exactly what it was.”

At the 11 April 2011 meeting, Stroup found an envelope marked “Confidential” in her seat. She was not surprised to see an envelope in her seat, because Stellar often left packets out for Board members. Stroup “glanc[ed]” at the documents, which did not contain any information she did not already know. The information “was pretty common knowledge[.]” Stroup took the documents home with her. However, another Board member, Rob Hairfield, left his envelope on the desk. Hairfield, due to health difficulties, often left things on his desk, and Stellar’s secretary “usual[ly]” got what Hairfield left. Stroup could not specifically remember if the secretary picked up Hairfield’s envelope at the April 2011 meeting. The Board never voted to keep the documents away from Stellar and Morgan. After her last Board meeting, Stroup gave the envelope and documents to “the central office to the superintendent’s secretary.”

Plaintiffs rested.⁸ Defendant moved for directed verdict. The trial court denied the motion for directed verdict.

Defendant called Robert Armour, a current member of the Board. At the 11 April 2011 meeting, Armour saw an envelope in his chair. Armour did “nothing” with the materials at the meeting and took the envelope home. At home, he opened the envelope and read documents “that implied . . . that referred to rumors and conjecture” he already heard about Stellar and Morgan. Armour did not give the documents to another.

Armour also described Board practice during closed sessions. When in closed session, the Board members “are trained . . . to keep whatever goes on in closed session meeting quiet.” “Quiet” means “[n]ot to discuss it with anyone else outside the meeting.” However, at the meeting, the Board did not explicitly vote to keep the information Plaintiffs gave confidential.

Defendant called Karen Sain, another former Board member. Sain attended the 11 April 2011 Board meeting and received the envelope from Plaintiffs. She opened the envelope at the meeting, but did not review it there. Sain took the envelope and documents home and burned

8. Plaintiffs also called five other witnesses, but their testimonies are not pertinent to the issues on appeal.

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them. The Board did not vote to keep the documents confidential or from Stellar. Sain also described how the Board acts in closed sessions. Specifically, Sain testified the chairperson cannot make a decision on her own, as the Board “perform[s] as a body.”

Defendant called Samuel Wilkinson, a member of the Board. Wilkinson attended the 11 April 2011 meeting. However, Wilkinson did not “specifically remember receiving” the envelope and documents, though he was “sure that packet was delivered.” He also did not remember receiving anything from Plaintiffs. He did not give any materials received as a member of the Board to Stellar or Morgan.

Defendant called Timothy Buff, another former Board member. Buff attended the 11 April 2011 meeting, where there was an envelope in his seat. Buff did not review the materials at the meeting and took the envelope home. At the meeting, Thomas did not say the information in the envelope must remain confidential, and the Board did not vote to keep the information confidential. Buff did not give the envelope to anyone.

Defendant called Chris Campbell. Campbell did not work “in-house” as the Board’s attorney, but as “an independent attorney hired for legal matters.” In 2010, the Board hired Campbell to investigate Stellar. In April 2011, Campbell received one of the envelopes distributed to Board members. In August 2011, Stellar asked Campbell for copies of complaints “made against him in the process of the review[.]” Campbell did not consult with the Board and sent Stellar the cover letter and other documents which were in the envelopes Plaintiffs compiled. Campbell considered the complaint to be a part of Stellar’s personnel file.

Defendant rested and renewed its motion for directed verdict. The court denied the motion.⁹ The jury found Defendant liable for invasion of privacy and negligent infliction of emotional distress as to both Plaintiffs. The jury awarded Plaintiffs \$250,000 each. On 12 October 2016, the trial court entered judgment in accordance with the jury verdicts.

On 24 October 2016, Defendant filed a motion for judgment notwithstanding the verdict and a motion for new trial, pursuant to Rule 59(a)(1), (7)-(9). On 16 November 2016, Plaintiffs filed a motion for recovery of litigation costs and expenses. On 22 November 2016, the court held a hearing on the parties’ motions. After argument, the court denied Defendant’s motions. The court awarded Plaintiffs \$4,281.85 in costs and expenses.

9. Plaintiffs moved for directed verdict on Defendant’s defense of contributory negligence. The court granted Plaintiffs’ motion.

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The same day, the court entered orders in accordance with its oral rulings. On 20 December 2016, Defendant filed notice of appeal.

II. Jurisdiction

Our Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(1) (2017).

III. Standard of Review

We apply several standards of review to examine Defendant's appeal.

First, we review a trial court's determination on sovereign immunity *de novo*.¹⁰ *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013) (citations omitted) (“[A]lthough not explicitly stated previously, it is apparent that we have employed a *de novo* standard of review in other cases involving sovereign immunity.”).

Second, the standard of review for a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). We use the same standard of review for the denial of a motion for directed verdict and the denial of a motion for judgment notwithstanding the verdict. *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000) (citation omitted). The standard is “whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.” *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (citation omitted).

10. We note whether sovereign immunity is a challenge to personal jurisdiction or subject matter jurisdiction is unsettled in North Carolina law. See *M. Series Rebuild, LLC v. Town of Mount Pleasant, Inc.*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012) (citations omitted) (“A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.”).

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There must be more than a “scintilla of evidence supporting each element of the non-movant’s claim.” *Denson v. Richmond Cty.*, 159 N.C. App. 408, 412, 583 S.E.2d 318, 320 (2003) (quotation marks and citation omitted). “A scintilla is some evidence, and is defined by this Court ‘as very slight evidence.’” *Mace v. Pyatt*, 203 N.C. App. 245, 251, 691 S.E.2d 81, 87 (2010) (some quotation marks and citation omitted). “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 [judgment notwithstanding the verdict] should be denied.” *Green v. Freeman*, 367 N.C. 136, 140-41, 749 S.E.2d 262, 267 (2013) (quotation marks, citation, and alteration omitted). We review the trial court’s denial *de novo*. *Denson*, 159 N.C. App. at 411, 583 S.E.2d at 320 (citation omitted).

Third, “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) (citations omitted). “Consequently, 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. However, if the motion for a new trial is based on an error in law occurring at the trial and objected to by the party making the motion, our Court reviews *de novo*. *Greene v. Royster*, 187 N.C. App. 71, 78, 652 S.E.2d 277, 282 (2007) (citations omitted).

IV. Analysis

Defendant contends the trial court erred in the following ways: (1) denying its motion to dismiss based on immunity; (2) denying its motion to dismiss for failure to state a claim, motion for directed verdict, and motion for judgment notwithstanding the verdict; (3) denying its motion for new trial; and (4) awarding Plaintiffs costs and expenses.

A. Motion to Dismiss Based on Sovereign Immunity

[1] Defendant first contends the court erred by denying its motion to dismiss based on immunity. In its brief, Defendant asserts sovereign immunity barred both the invasion of privacy and negligent infliction of emotional distress claims. At oral argument, however, Defendant conceded it failed to argue below sovereign immunity barred Plaintiffs’ claim for negligent infliction of emotional distress. Thus, Defendant’s argument as to the negligence claim is not properly before this Court, and we do not address it. For reasons stated *infra*, we need not address

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whether Defendant's argument that sovereign immunity barred Plaintiffs' invasion of privacy claim would have been meritorious.

B. Motion to Dismiss Based on Failure to State a Claim, Motion for Directed Verdict, and Motion for Judgment Notwithstanding the Verdict

[2] Defendant next contends the trial court erred by denying its motions to dismiss pursuant to Rule 12(b)(6), for directed verdict, and for judgment notwithstanding the verdict. Defendant argues Plaintiffs failed to present sufficient evidence of duty, breach of duty, and reasonable foreseeability in support of their claim for negligent infliction of emotional distress.

First, Defendant argues it did not, and could not, owe Plaintiffs any duty for three reasons: (1) the documents submitted (and information contained therein) were public information; (2) the closed nature of the Board session did not mean the matters were confidential; and (3) Thomas's assertions of confidentiality did not bind the Board because she acted alone. Plaintiffs contend a duty arose from the circumstances.

Vaughan, Plaintiffs' expert on state and local government and administration and leadership, testified:

BY [PLAINTIFFS' COUNSEL]:

Q. Well, let me just ask you, in terms of the closed session in this case, could you explain what we're talking about and how that impacts --

A. Sure.

Q. -- the issues in this case?

A. In a closed session, information is presented to a body without the public being in. The public could be in this particular meeting. They could, could fill the whole courthouse if they were interested enough in this particular case. A closed session is the participants in the closed meeting of, of the board. In this case they had requested that their information be held confidential.

[DEFENDANT'S COUNSEL]: Objection. Move to strike.

THE COURT: Sustained. Motion to strike is allowed as to the "keep it confidential." Next question, please.

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BY [PLAINTIFFS' COUNSEL]:

Q. Let me ask you, in this case is it typical when a, a school board or any public entity wants to go into closed session, they have to make a motion to go into closed session and that has to be voted on by the school board?

A. That's correct. The statutes are pretty specific. Closed sessions are a rare animal. Ninety -- I would guess 90 percent of, of all -- 95 percent of all sessions of every board, board meeting in North Carolina this week would be in open session. There are just particular things that allow a board to go into closed session.

Q. Okay. And in this case the board went into closed session --

A. That's correct.

Q. -- correct? And then once the board went into closed session, tell the jury about the importance of citizens being able to share information with a school board or city council or county commissioners in closed session.

A. It's --

Q. What, what does that mean?

A. It's the reason -- It's the whole basis of democracy. You have elected the people on a school board to represent you and your best interest on school-board-type related matters. They are the people's representative, and they make the decisions based on the information that they have.

And it's the right of citizens, it's the basic tenant of government in North Carolina, that, that citizens can go before those boards and express their concerns, grievances, whatever they want to express. That's, that's why we have government and not monarchs and dictators and other things. That's why we have the government the way we have it in North Carolina.

Q. Okay. And once the citizens go before a governmental entity like a school board in closed session and whatever statements they make or discussions there are in that closed session, is that information that they say or people

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question, promises made – is that information that would be open or public or would that information be –

A. “Closed” means closed.

[DEFENDANT’S COUNSEL]: Objection, Your Honor. Move to strike.

THE COURT: Overruled.

BY [PLAINTIFFS’ COUNSEL]:

Q. Go, go ahead and explain your answer.

A. Closed sessions are closed sessions. They are not open to the public. And the information that is brought into that session is expected to be closed.

Q. Now, let me ask you this: Assuming that the evidence in this case will tend to show by its greater weight that during the first closed session in which Mr. Wood made a presentation to the Burke County Board of Education in their closed session and made a statement that he wanted whatever information he shared or gave to the school board to be kept in confidence, do you have an opinion satisfactory to yourself as to whether or not during the course of that actual session that if the chairperson of the school board told him that the information would be kept confidential that he could rely on her promise?

[DEFENDANT’S COUNSEL]: Objection, Your Honor.

THE COURT: Sustained as to the form.

[PLAINTIFFS’ COUNSEL]: Okay.

BY [PLAINTIFFS’ COUNSEL]:

Q. State whether or not in a closed session that citizens can rely on a promise of confidentiality by the chair of, of a school.

[DEFENDANT’S COUNSEL]: Objection, Your Honor.

THE COURT: Sustained as to the form.

BY [PLAINTIFFS’ COUNSEL]:

Q. Just explain to us the significance of a – the closed session as it relates to whatever is promised or said in a closed session by the chairman of the governmental –

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A. I think a citizen ought to be able to rely on the promise of the chairman of a board.

[DEFENDANT'S COUNSEL]: Objection. Move to strike. Your Honor, may we approach?

THE COURT: Yes. Wait one second. The response is nonresponsive to the question. Restate your question. Listen to the question. Answer the question. The question again, please.

BY [PLAINTIFFS' COUNSEL]:

Q. Well, the question is: Explain to the jury how the closed session relates to any statements made in closed session by the citizens going before the, the governmental body or any statements made by the chairman of, of a school board or any promises made by the chairman of the school board. How, how do those two things fit together?

[DEFENDANT'S COUNSEL]: Objection, Your Honor.

THE COURT: Overruled as to that. You may answer to that limited question. Answer, please.

BY [PLAINTIFFS' COUNSEL]:

A. Should be able to rely on it. That's the whole basis--

Additionally, Thomas instructed Wood to submit the information confidentially. Plaintiffs both testified about how the promise of confidentiality influenced their decision to submit the letter and supporting documents. Plaintiffs marked "Confidential" on the front of each envelope and asked for confidentiality in the letter. Wood testified he began his speech during the closed session by saying he wanted to bring forward "sensitive issues" and "needed to know that they could be kept confidential." Former Board member, Robert Armour, testified when in closed session, Board members "are trained . . . to keep whatever goes on in closed session meeting quiet." "Quiet" means "[n]ot to discuss it with anyone else outside the meeting." After reviewing the evidence in the light most favorable to the non-movant Plaintiffs, we conclude Plaintiffs produced sufficient evidence of Defendant's duty owed.¹¹

11. Defendant also contends the Public Records Act required it to provide Stellar and Morgan with their personnel files, which included Plaintiffs' identities. N.C. Gen. Stat. § 115C-319 defines a personnel file as:

Personnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment

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[3] Second, Defendant argues Plaintiffs failed to present more than a scintilla of evidence Defendant breached any duty. Specifically, Defendant contends Plaintiffs only presented evidence showing attorney Campbell, who did not work as the Board’s attorney at the time, gave Stellar Plaintiffs’ identities. Defendant further argues that at trial, Plaintiffs proceeded under a “fail[ure] to secure” theory of negligence—that Defendant failed to properly secure the confidential information. However, viewing the evidence in the light most favorable to Plaintiffs and resolving all contradictions in Plaintiffs’ favor, we conclude Plaintiffs presented sufficient evidence—more than mere speculation—Defendant breach its duty to keep Plaintiffs’ identities confidential.

[4] Finally, Defendant argues Plaintiffs failed to present sufficient evidence of the reasonable foreseeability they would suffer severe emotional distress. Defendant points to evidence Wood attempted to openly discuss Stellar’s and Morgan’s alleged behavior and relationship at the 28 March 2011 Board meeting. Our review of the evidence, in the light most favorable to Plaintiffs, reveals sufficient evidence of reasonable foreseeability. Plaintiffs explicitly marked “Confidential” on each envelope and stated several times in the letter their request for confidentiality. Wood testified when he attended the Board’s closed session, he told the Board he needed to discuss “sensitive issues” and “needed to know

with local boards of education shall not be subject to inspection and examination as authorized by G.S. 132-6. For purposes of this Article, a personnel file consists of any information gathered by the local board of education which employs an individual, previously employed an individual, or considered an individual’s application for employment, and which information relates to the individual’s application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment wherever located or in whatever form.

N.C. Gen. Stat. § 115C-319 (2017).

Defendant argues because Plaintiffs asked the Board to terminate or put Stellar and Morgan on leave, the letter (and Plaintiffs’ identities) were a part of Stellar’s and Morgan’s personnel files. In a footnote, Defendant argues the information was not confidential because Stellar has a “right to judicial review of the reasons and validity of his removal.” Plaintiffs argue “[t]he information submitted by Plaintiffs does not relate to any promotion, demotion, [or] termination” Plaintiffs argue the Board bought out Stellar’s contract—did not demote or terminate him—and Morgan resigned. While Defendant is correct Stellar would have a right to his personnel file, Plaintiffs made clear in their letter and at the trial court the confidential information was not just the allegations within the letter, but also Plaintiffs’ identities as the source of the information. Indeed, the cover letter explicitly stated, “please consider the source of all items herein to be anonymous or strictly confidential.” Thus, the Board could inform Stellar of the reasons for the buyout, without disclosing Plaintiffs’ confidential information—their identities.

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that they could be kept confidential.” Chairperson Thomas replied, “[T]hat’s fine[.]” Wood also testified without Thomas’s promise of confidentiality, he would not have submitted the letter. Thus, we conclude Plaintiffs presented sufficient evidence of reasonable foreseeability of emotional distress.

Accordingly, the trial court did not err by denying Defendant’s motion to dismiss, motion for direct verdict, or motion for judgment notwithstanding the verdict for Plaintiffs’ negligent infliction of emotional distress claim.¹² Below, the jury awarded both Plaintiffs \$250,000 for both negligent infliction of emotional distress and invasion of privacy. The verdict sheets show the jury awarded the full amount for both claims to both Plaintiffs and did not divide the amount between the two claims. Thus, we need not analyze Defendant’s motions as to the invasion of privacy claim, for the judgment still stands, as we affirm the trial court’s denial of Defendant’s motions as to the negligence claim.

C. Motion for New Trial

Defendant next argues the trial court erred by denying its motion for new trial because the court “allowed inadmissible and highly prejudicial testimony and instructed the jury on an unsupported theory of negligence.” (All capitalized in original). Defendant’s argument is three-fold and concerns: (1) testimony on lost future profits; (2) instructing the jury on failure to secure information; and (3) “[p]rejudicial and [i]rrelevant” testimony.

i. Carlton’s Testimony on Lost Profits

[5] Defendant and Plaintiffs disagree as to whether Defendant preserved this argument as a ground for its motion for new trial and on appeal. Defendant asserts it preserved the issue on appeal because it filed and argued a motion *in limine* and objected during Carlton’s testimony. However, as argued at the trial court, Defendant did not base its motion *in limine* on the same grounds now argued on appeal. Below, Defendant argued Carlton was not an expert and did not give Defendant his 2015 tax return. During Carlton’s testimony, Defendant did object several times, but, again, not on the grounds argued on appeal. N.C. R. App. P. 10(a)(1) (2017) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired the court to make[.]”). Defendant contended some numbers were based on

12. We conclude the allegations in Plaintiffs’ complaint, taken as true, were sufficient to withstand Defendant’s motion to dismiss for failure to state a claim.

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speculation, Carlton was not an expert, and Plaintiffs' counsel impermissibly asked leading questions. Defendant did not object to Carlton's testimony (or to jury instructions) that "lost business profits are not a proper measure of damage in this type of tort case." Accordingly, Defendant did not present this argument below, and it not properly before us on appeal.

ii. Theory of Negligence Outside the Pleadings

[6] Defendant next argues the trial court erred in instructing the jury on failure to secure the information when Plaintiffs did not include this theory of negligence in their pleadings. Defendant further contends this theory "was directly contrary to the only basis alleged for their claim – that a Board member actively gave the information to Stellar." At the outset, Plaintiffs pled multiple theories, two of which were an intentional act by the Board and negligence by the Board. In their complaint, Plaintiffs did not limit their allegation of a negligent act to a specific act. Plaintiffs' complaint alleges "Defendants committed a negligent act[.]" Thus, the negligent act Plaintiffs forwarded at trial (failure to secure information) was within the pleadings, as the pleadings were not limited.¹³

iii. Prejudicial and Irrelevant Testimony

[7] Defendant contends "[t]he trial court continually allowed highly inflammatory and irrelevant testimony about Stellar which had nothing to do with the legal issues and which, taken together, painted a negative picture of the management of the school system which easily could have colored the jury's view of the Board." Defendant specifically points to five portions of testimony. However, Defendant did not include three of the five portions in its motion for new trial (points one, three, and five). As for the two portions of testimony properly before this Court, we reviewed the record below and conclude neither warrants a new trial. Accordingly, we affirm the trial court's order denying Defendant's motion for new trial.

D. Costs and Expenses

[8] Lastly, Defendant contends "[a]s the Board was entitled to dismissal, and/or directed verdict and/or JNOV and/or new trial, plaintiffs were not entitled to costs and expenses." As stated above, we hold the

13. Defendant is correct in its assertion Plaintiffs pled "That upon information and belief, around the early part of August, 2011 when Dr. Stellar was still Superintendent of the Board, he leaked a copy of the confidential packet to Amy Morgan." However, Plaintiffs also asserted a broad claim of negligence in their complaint.

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trial court properly denied Defendant's motions for dismissal, directed verdict, judgment notwithstanding the verdict, and new trial. Thus, the trial court did not err in awarding Plaintiffs costs and expenses.

V. Conclusion

For the foregoing reasons, we affirm the trial court's orders and judgment.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

CARLOS CHAVEZ, PETITIONER

v.

IRWIN CARMICHAEL, SHERIFF, MECKLENBURG COUNTY, RESPONDENT

LUIS LOPEZ, PETITIONER

v.

IRWIN CARMICHAEL, SHERIFF, MECKLENBURG COUNTY, RESPONDENT

No. COA18-317

Filed 6 November 2018

1. Appeal and Error—mootness—prisoners released to Immigration and Customs Enforcement—public interest exception

In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency, the appeal was not moot even though the defendants were no longer in the sheriff's custody after being turned over to ICE. The appeal fell within the public interest exception because of the need to resolve whether state courts possess jurisdiction to review habeas corpus petitions of suspected alien detainees held under the authority of the federal government, a determination that would impact habeas petitions filed by other detainees.

2. Appeal and Error—judicial notice—materials not submitted to lower court—relevant to subject matter jurisdiction

In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency,

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the 287(g) agreement signed between the Mecklenburg County Sheriff and ICE was properly included in the record on appeal despite not being submitted to the trial court, because appellate courts may consider important public documents that were not before the lower tribunal to determine the existence of subject matter jurisdiction.

3. Habeas Corpus—jurisdiction—subject matter—state habeas corpus petition—federal immigration law

In a matter involving habeas corpus petitions filed by two criminal defendants seeking relief from detention by a county sheriff acting under a 287(g) agreement with the federal Immigration and Customs Enforcement (ICE) agency, the Court of Appeals rejected petitioners' argument that N.C.G.S. § 162-62 prevented the sheriff from detaining them on behalf of ICE. Section 128-1.1, a more specific statute and therefore controlling, expressly authorizes state and local law enforcement officers to enter into formal cooperative agreements and perform the functions of immigration officers, including detention of suspected aliens.

4. Habeas Corpus—jurisdiction—subject matter—federal immigration detainer—exclusive jurisdiction of federal government

The trial court lacked subject matter jurisdiction to review two petitioners' habeas corpus petitions seeking relief from a federal immigration hold, and was therefore without authority to order a county sheriff to release petitioners from custody, because immigration matters are within the exclusive jurisdiction of the federal government.

5. Jurisdiction—state court—federal immigration detainer—exclusive jurisdiction of federal government

State courts may not infringe on the federal government's exclusive jurisdiction over immigration matters, even in the absence of a formal cooperative agreement between a state or local authority and the federal Immigration and Customs Enforcement agency, since federal law authorizes such cooperation with or without a formal agreement.

6. Habeas Corpus—petition in state court—federal immigration detainer—infringement on federal authority

The trial court lacked jurisdiction to issue habeas relief to two petitioners seeking release from a federal immigration detainer enforced by a county sheriff, because state courts have no jurisdiction to review habeas petitions, other than to dismiss for lack

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of jurisdiction, nor do they have authority to issue writs of habeas corpus or intervene in any way with detainees being held under the authority of the federal government. State and local law enforcement officers acting pursuant to formal cooperative agreements with the Department of Homeland Security or Immigration and Customs Enforcement are de facto federal officers performing immigration functions, including detention and turnover of physical custody.

Judge DIETZ concurring with separate opinion.

Appeal by respondent from orders entered 13 October 2017 by Judge Yvonne Mims-Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2017.

National Immigration Project of the National Lawyers Guild, by Sejal Zota, and Goodman Carr, PLLC, by Rob Heroy, for petitioners Luis Lopez and Carlos Chavez.

Womble Bond Dickenson (US) LLP, by Sean F. Perrin, for respondent.

U.S. Department of Justice Civil Division, by Trial Attorney Joshua S. Press, for amicus curiae United States Department of Justice.

TYSON, Judge.

Mecklenburg County Sheriff Irwin Carmichael (“the Sheriff”) appeals, in his official capacity, from two orders of the superior court ordering the Sheriff to release two individuals from his custody. We vacate the superior court’s orders and remand to the superior court to dismiss the *habeas corpus* petitions for lack of subject matter jurisdiction.

I. Background

A. *287(g) Agreement and ICE Detainer Requests*

The Sheriff and Immigration and Customs Enforcement (“ICE”), an agency under the jurisdiction and authority of the United States Department of Homeland Security (“DHS”), entered into a written agreement (the “287(g) Agreement”) on 28 February 2017 pursuant to 8 U.S.C. § 1357(g)(1).

The federal Immigration and Nationality Act (“INA”) authorizes DHS to enter into formal cooperative agreements, like the 287(g)

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Agreement, with state and local law enforcement agencies and officials. *See* 8 U.S.C. § 1357(g). Under these agreements, state and local authorities and their officers are subject to the supervision of the Secretary of Homeland Security and are authorized to perform specific immigration enforcement functions, including, in part, investigating, apprehending, and detaining illegal aliens. 8 U.S.C. §§ 1357(g)(1)-(9). In the absence of a formal cooperative agreement, the United States Code additionally provides local authorities may still “communicate with [ICE] regarding the immigration status of any individual . . . or otherwise cooperate with [ICE] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10)(A)-(B).

Upon request from DHS, state and local law enforcement may “participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities.” *Id.* However, state and local officers may not make unilateral decisions concerning immigration enforcement under the INA. *Id.*

Federal agencies and officers issue a Form I-247 detainer regarding an alien to request the cooperation and assistance of state and local authorities. 8 C.F.R. § 287.7(a), (d). An immigration detainer notifies a state or locality that ICE intends to take custody of an alien when the alien is released from that jurisdiction’s custody. *Id.* ICE requests the state or local authority’s cooperate by notifying ICE of the alien’s release date and by holding the alien for up to 48 hours thereafter for ICE to take custody. *Id.* In addition to detainers, ICE officers may also issue administrative warrants based upon ICE’s determination that probable cause exists to remove the alien from the United States. *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (citing *Abel v. United States*, 362 U.S. 217, 233-34, 4 L. Ed. 2d 668 (1960) and 8 U.S.C. § 1226(a)).

B. Chavez and Lopez’ Habeas Petitions**1. Luiz Lopez**

On 5 June 2017, Luiz Lopez (“Lopez”) was arrested for common law robbery, felony conspiracy, resisting a public officer, and misdemeanor breaking and entering. Lopez was incarcerated at the Mecklenburg County Jail under the Sheriff’s custody. Later that day, following his arrest, Lopez was served with a Form I-200 administrative immigration arrest warrant issued by DHS. Also the same day, the Sheriff’s office was served with a Form I-247A immigration detainer issued by DHS. The Form I-247A requested the Sheriff to maintain custody of Lopez for up

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48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of Lopez. Lopez was held in jail on the state charges under a \$400 secured bond.

2. Carlos Chavez

On 13 August 2017, Carlos Chavez ("Chavez") was arrested for driving while impaired, no operator's license, interfering with emergency communications, and assault on a female, and was detained at the Mecklenburg County Jail. That same day, Chavez, under his name "Carlos Perez-Mendez," was served with a Form I-200 administrative immigration warrant issued by DHS.

The Sheriff's office was served with a Form I-247A immigration detainer, issued by DHS, requesting the Sheriff to detain "Carlos Perez-Mendez" for up to 48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of him. Chavez was held in jail for the state charges on a \$100 cash bond.

At approximately 9:00 a.m., on 13 October 2017, Lopez' release from jail on state criminal matters was resolved when his \$400 secured bond was purportedly made unsecured by a bond modification form. That same day, Chavez posted bond on his state criminal charges. The Sheriff continued to detain Lopez and Chavez ("Petitioners") at the county jail pursuant to the Form I-247A immigration detainers and I-200 arrest warrants issued by DHS.

At 9:13 a.m. on 13 October 2017, Chavez and Lopez filed petitions for writs of *habeas corpus* in the Mecklenburg County Superior Court. Petitioners recited three identical grounds to assert their continued detention was unlawful: (1) "the detainer lacks probable cause, is not a warrant, and has not been reviewed by a judicial official therefore violating [Petitioners'] Fourth Amendment rights under the United States Constitution and . . . North Carolina Constitution"; (2) "[the Sheriff] lacks authority under North Carolina General Statutes to continue to detain [Petitioners] after all warrants and sentences have been served"; and (3) "[the Sheriff's] honoring of ICE's request for detention violates the anti-commandeering principles of the Tenth Amendment . . ." In his petition for writ of *habeas corpus*, Chavez alleged that he was held at the county jail pursuant to the immigration detainer and administrative warrant listing his name as "Carlos Perez-Mendez."

Later that morning, the superior court granted both Petitioners' petitions for writs of *habeas corpus*, and entered return orders, which ordered that the Petitioners "be immediately brought before a judge of Superior Court for a return hearing pursuant to N.C.G.S. 17-32 to

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determine the legality of [their] confinement.” The trial court also ordered the Sheriff to “immediately appear and file [returns] in writing pursuant to N.C.G.S. 17-14.”

Based upon our review of a chain of emails included in the record on appeal, Mecklenburg County Public Defender’s Office Investigator, Joe Carter, notified Marilyn Porter, in-house legal counsel for the Sheriff’s office, the petitions for writs of *habeas corpus* had been filed. At 9:30 a.m. on October 13, Porter forwarded Carter’s email to the Sheriff; Sean Perrin, outside legal counsel for the Sheriff; and eight other individuals affiliated with the Sheriff’s office. Porter stated in her email that “I do not acknowledge receipt of any of [Carter’s] emails on this topic. We will see who is the subject of this Writ – and what Judge signed.”

In the same chain of emails, Sheriff’s Captain Donald Belk responded he had received notice from the clerk of court that Petitioners’ “cases are on in 5350 this morning.” Belk also wrote, “CHAVEZ, CARLOS 451450, he was put in ICE custody this morning. I have informed Lock Up that Chavez is in ICE custody and should not go to court.” Belk’s email also stated, “LOPEZ, LUIS 346623, he is in STATE custody.”

After the superior court signed its return orders, Public Defender Investigator Carter went to the Sheriff’s office. An employee at the front desk informed him that neither the Sheriff nor his in-house counsel, Porter, were present at the office. The front desk receptionist refused to accept service of the superior court’s return orders and the Petitioners’ *habeas* petitions. Carter left copies of the orders and petitions on the Sheriff’s front desk at 10:23 a.m. Carter then went to the county jail and left copies of the orders and petitions with a sheriff’s deputy at 10:26 a.m.

At 11:57 a.m. that morning and without notice of the hearing to the Sheriff, the superior court began a purported return hearing on Petitioners’ *habeas* petitions. The Sheriff did not appear at the hearing, did not produce Petitioners before the court, and had not yet filed returns pursuant to N.C. Gen. Stat. § 17-14 (2017).

During the return hearing, Petitioners’ counsel provided the court with Carter’s certificates of service of the Petitioners’ *habeas* petitions and the court’s return orders. Petitioners’ counsel informed the court about the email sent by Carter to the Sheriff’s in-house counsel, Porter, earlier that day. The court ruled Petitioners’ continued detention was unlawful and ordered the Sheriff to immediately release Petitioners.

Later that day, after the superior court had ordered Petitioners to be released, counsel for the Sheriff timely filed written returns for both Petitioners’ cases within the limits allowed by N.C. Gen. Stat. § 17-26

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(2017). Before the superior court issued its orders to release Petitioners, the Sheriff's office had turned physical custody of both Petitioners over to ICE officers.

On 6 November 2017, the Sheriff filed petitions for writs of certiorari with this Court to seek review of the superior court's 13 October 2017 orders. The Sheriff also filed petitions for a writ of prohibition to prevent the superior court from ruling on *habeas corpus* petitions filed in state court, premised upon the Sheriff's alleged lack of authority to detain alien inmates subject to federal immigration warrants and detainer requests. On 22 December 2017, this Court allowed the Sheriff's petitions for writs of certiorari and writ of prohibition.

On 22 January 2018, the Sheriff served a proposed record on appeal. Petitioners objected to inclusion of two documents, a version of the Form I-200 immigration arrest warrant for Lopez signed by a DHS immigration officer and the 287(g) Agreement between ICE and the Sheriff's office. The trial court held a hearing to settle the record on appeal. The trial court ordered the 287(g) Agreement to be included in the record on appeal and the signed Form I-200 warrant for Lopez not to be included.

The record on appeal was filed and docketed with this Court on 27 March 2018. Prior to the Sheriff submitting his brief, Petitioners filed a motion to strike the 287(g) Agreement and a petition for writ of certiorari challenging the trial court's order, which had settled the record on appeal. By an order issued 4 May 2018, this Court denied Petitioners' petition for writ of certiorari "without prejudice to assert argument in direct appeal." Petitioners' motion to strike the 287(g) Agreement from the record on appeal was dismissed by an order of this Court entered 12 September 2018.

On 27 April 2018, the United States filed a motion for leave to file an *amicus curiae* brief. By an order dated 1 May 2018, this Court allowed the United States' ("*Amicus*") motion.

On 27 April 2018, the Sheriff filed his appellate brief. Included in the appendix to the brief was a copy of the ICE Operations Manual. On 2 July 2018, Petitioners filed a motion to strike the ICE Operations Manual from the Sheriff's brief. This Court denied Petitioners' motion to strike the ICE Operations Manual by an order entered 12 September 2018.

II. Jurisdiction

Jurisdiction to review this appeal lies with this Court pursuant to the Court's order granting the Sheriff's petitions for writs of certiorari and prohibition entered 22 December 2017. N.C. Gen. Stat. § 1-269 (2017).

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III. Analysis

The Sheriff, Petitioners, and *Amicus* all present the same arguments with regard to both Petitioners. We review the parties' arguments as applying to both of the superior court's orders.

The Sheriff argues the superior court was without jurisdiction to consider Petitioners' petitions for writs of *habeas corpus*, or to issue the writs, because of the federal government's exclusive control over immigration under the United States Constitution, the authority delegated to him under the 287(g) Agreement, and under the administrative warrants and immigration detainers issued against Petitioners. *See* 8 U.S.C. § 1357(g)(10)(A)-(B).

A. *Mootness*

[1] Petitioners initially argue the cases are moot, because the Sheriff has turned Petitioners over to the physical custody of ICE. The Sheriff argues that even if the cases are moot, the issues fall within an exception to the mootness doctrine.

"Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed [as moot.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted).

The issues in the case before us are justiciable where the question involves is a "matter of public interest." *Matthews v. Dep't of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). "In such cases the courts have a duty to make a determination." *Id.* (citation omitted).

Even if the Sheriff is not likely to be subject to further *habeas* petitions filed by Chavez and Lopez or orders issued thereon, this matter involves an issue of federal and state jurisdiction to invoke the "public interest" exception to mootness. Under the "public interest" exception to mootness, an appellate court may consider a case, even if technically moot, if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). Our appellate courts have previously applied the "public interest" exception to otherwise moot cases of clear and far-reaching significance, for members of the public beyond just the

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parties in the immediate case. *See, e.g., Granville Cty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) (applying the “public interest” exception to review case involving location of hazardous waste facilities); *In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (applying the “public interest” exception to police officers’ challenge of a State Bureau of Investigation procedure for handling personnel files containing “highly personal information” and recognizing that “the issues presented . . . could have implications reaching far beyond the law enforcement community”).

Similar to the procedural posture of the Sheriff’s appeal, this Court applied the “capable of repetition, but evading review” as well as the “public interest” exception in *State v. Corkum* to review a defendant’s otherwise moot appeal, which was before this Court on a writ of certiorari. *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of felon’s confinement credit under structured sentencing under the Justice Reinvestment Act of 2011 required review because “all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge’s discretion from being resolved”).

The Sheriff’s appeal presents significant issues of public interest because it involves the question of whether our state courts possess jurisdiction to review *habeas* petitions of alien detainees ostensibly held under the authority of the federal government. This issue potentially impacts *habeas* petitions filed by suspected illegal aliens held under 48-hour ICE detainers directed towards the Sheriff and the many other court and local law enforcement officials across the state. The Sheriff’s filings show that several other *habeas* petitions filed by ICE detainees were pending and acted upon, but held in abeyance after a writ of prohibition was issued by this Court. Prompt resolution of this issue is essential because it is likely other *habeas* petitions will be filed in our state courts, which impacts ICE’s ability to enforce federal immigration law.

Resolution of the Sheriff’s appeal potentially affects many other detainees, local law enforcement agencies, ICE, and other court and public officers and employees. For the reasons above and in the interest of the public, we review the Sheriff’s appeal. *See Randolph*, 325 N.C. at 701, 386 S.E.2d at 186; *Corkum*, 224 N.C. App. at 132, 735 S.E.2d at 423.

B. *Judicial Notice of 287(g) Agreement*

[2] The Sheriff included the 287(g) Agreement between his office and ICE in the record to this Court to support his arguments on appeal.

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Notwithstanding the multiple prior rulings on this issue, Petitioners argue this Court should not consider the 287(g) Agreement between the Sheriff and ICE in deciding the matter because the 287(g) Agreement was not submitted to the superior court.

As previously ruled upon by the superior court and this Court, the 287(g) Agreement is properly in the record on appeal and bears upon the issue of whether the superior court possessed subject matter jurisdiction to consider the petitions and issue these writs of *habeas corpus*. An appellate court may also consider materials that were not before the lower tribunal to determine whether subject matter jurisdiction exists. *See N.C. ex rel Utils. Comm'n. v. S. Bell Tel.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323-24 (1976); N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017) (“A court may take judicial notice, whether requested or not”).

The device of judicial notice is available to an appellate court as well as a trial court. This Court has recognized in the past that important public documents will be judicially noticed. Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic[.]

S. Bell, 289 N.C. at 288, 221 S.E.2d at 323-24 (internal quotation and citations omitted).

In *Bell*, the Supreme Court of North Carolina judicially noticed an order from the Utilities Commission to assess whether an appeal by a telephone company was moot. *Id.*; see also *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977) (taking judicial notice of the North Carolina Rate Bureau’s filing with the Commissioner of Insurance).

The 287(g) Agreement between the Sheriff and ICE is a controlling public document. ICE maintains listings and links to all the current 287(g) agreements it has entered into with local law enforcement entities across the United States on its website, including the 28 February 2017 Agreement with the Sheriff. *See* U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <https://www.ice.gov/287g> (last visited Oct. 18, 2018).

As part of the record on appeal and as verified above, we review the 287(g) Agreement, as an applicable public document, for the purpose of considering the trial court’s subject matter jurisdiction to rule upon Petitioners’ *habeas* petitions. *See S. Bell*, 289 N.C. at 288, 221 S.E.2d at

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323-24. Petitioners' argument that we should not consider the 287(g) Agreement because it was not presented to the superior court is wholly without merit and is dismissed.

C. Superior Court Lacked Subject-Matter Jurisdiction

[3] The Sheriff and *Amicus* assert the superior court lacked subject matter jurisdiction to review Petitioners' *habeas* petitions, issue writs of *habeas corpus*, and order Petitioners' release. The Sheriff argues the superior court "had no jurisdiction to rule on immigration matters under the guise of using this state's *habeas corpus* statutes, because immigration matters are exclusively federal in nature." Petitioners respond and assert the superior court had jurisdiction to issue the writs of *habeas corpus* because "the Sheriff and his deputies did not act under color of federal law."

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). Whether subject matter jurisdiction exists over a matter is firmly established:

Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial. The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.

In re T.B., 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006) (citations and internal quotation marks omitted).

"The standard of review for lack of subject matter jurisdiction is *de novo*." *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009). "In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings." *Id.*

Before addressing the Sheriff's argument, we initially address Petitioners' contention that the superior court could exercise subject matter jurisdiction on these matters. Petitioners argue "North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]"

Pursuant to 8 U.S.C. § 1357(g)(1):

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State,

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pursuant to which an officer . . . of the State . . . , who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or *detention of aliens* in the United States . . . may carry out such function at the expense of the State . . . *to the extent consistent with State and local law.* (emphasis supplied).

The General Assembly of North Carolina expressly enacted statutory authority for state and local law enforcement agencies and officials to enter into 287(g) agreements with federal agencies. The applicable statute states:

Where authorized by federal law, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency. State and local law enforcement officers authorized under this provision are authorized to hold any office or position with the applicable federal agency required to perform the described functions. (emphasis supplied).

N.C. Gen. Stat. § 128-1.1(c1) (2017). 8 U.S.C. § 1357(g)(1) permits the Attorney General to enter into agreements with local law enforcement officers to authorize them to “perform a function of an immigration officer” to the extent consistent with state law.

Petitioners contend N.C. Gen. Stat. § 162-62 prevents local law enforcement officers from performing the functions of immigration officers or to assist DHS in civil immigration detentions. N.C. Gen. Stat. § 162-62 (2017) provides:

(a) When any person charged with a felony or an impaired driving offense is confined for any period in a county jail . . . the administrator . . . shall attempt to determine if the prisoner is a legal resident of the United States by an inquiry of the prisoner, or by examination of any relevant documents, or both.

(b) *If the administrator . . . is unable to determine if that prisoner is a legal resident or citizen of the United States . . . the administrator . . . shall make a query of Immigration and Customs Enforcement of the United*

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States Department of Homeland Security. If the prisoner has not been lawfully admitted to the United States, the United States Department of Homeland Security will have been notified of the prisoner's status and confinement at the facility by its receipt of the query from the facility.

(c) Nothing in this section shall be construed to deny bond to a prisoner or to prevent a prisoner from being released from confinement *when that prisoner is otherwise eligible for release.* (Emphasis supplied).

Petitioners purport to characterize N.C. Gen. Stat. § 162-62(c) as forbidding sheriffs from detaining prisoners who are subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Petitioners' assertion of the applicability of this statute is incorrect.

N.C. Gen. Stat. § 162-62 specifically refers to a sheriff's *duty to inquire* into a prisoner's immigration status and, if that prisoner is within the country unlawfully, mandates the sheriff "shall" notify DHS of the prisoner's "status and confinement." *Id.* N.C. Gen. Stat. § 162-62 does not refer to a 287(g) agreement, federal immigration detainer requests, administrative warrants or prevent a sheriff from performing immigration functions pursuant to a 287(g) agreement, or under color of federal law. *See id.*

N.C. Gen. Stat. § 162-62(c) only provides that "[n]othing in this section shall be construed . . . to prevent a prisoner from being released from confinement when that prisoner is *otherwise eligible for release.*" (Emphasis supplied). This statute does not mandate a prisoner must be released from confinement, only that nothing in that specific section dealing with reporting a prisoner's immigration status shall prevent a prisoner from being released when they are "otherwise eligible." *Id.*

N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements under 8 U.S.C. § 1357(g) and perform the functions of immigration officers, including detention of aliens. No conflict exists in the statutes between N.C. Gen. Stat. §§ 162-62 and 128-1.1.

Even though Petitioners assert these two statutes are inconsistent, N.C. Gen. Stat. § 128-1.1 controls over N.C. Gen. Stat. § 162-62, as the more specific statute. "[W]here two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

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N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement agencies to enter into agreements with the federal government to perform the functions of immigration officers under 8 U.S.C. § 1357(g), as present here. The express language of 8 U.S.C. § 1357(g)(1) lists the “detention of aliens within the United States” as one of the “function[s] of an immigration officer.”

N.C. Gen. Stat. § 162-62 does not specifically regulate the conduct of sheriffs acting as immigration officers pursuant to a 287(g) agreement under 8 U.S.C. § 1357(g), or under color of federal law. Instead, N.C. Gen. Stat. § 162-62 imposes a specific and mandatory duty upon North Carolina sheriffs, as administrators of county jails, to inquire, verify, and report a detained prisoner’s immigration status. N.C. Gen. Stat. § 162-62.

Contrary to Petitioners’ argument, North Carolina law does not forbid state and local law enforcement officers from performing the functions of federal immigration officers, but the policy of North Carolina as enacted by the General Assembly, expressly authorizes sheriffs to enter into 287(g) agreements to permit them to perform such functions. *See* N.C. Gen. Stat. § 128-1.1. We reject and overrule their contention that “North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]”

D. *Federal Government’s Supreme and Exclusive Authority over Immigration*

[4] The Sheriff contends the superior court did not possess subject matter jurisdiction in these cases. We agree.

The Supremacy Clause of the Constitution of the United States establishes that the Constitution and laws of the United States “shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Nearly 200 years ago, the Supreme Court of the United States held the Supremacy Clause prevents state and local officials from taking actions or passing laws to “retard, impede, burden, or in any manner control” the execution of federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4 L. Ed. 579 (1819).

“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona v. United States*, 567 U.S. 387, 394, 183 L. Ed. 2d 351, 366 (2012). This broad authority derives from the federal government’s delegated and enumerated constitutional power “[t]o establish an uniform Rule of Naturalization[.]” U.S. Const. art. I, § 8, cl. 4. “Power to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*,

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424 U.S. 351, 354, 47 L. Ed. 2d 43 (1976), *superseded by statute on other grounds as recognized in Arizona*, 567 U.S. at 404, 183 L. Ed. 2d at 372.

The Sheriff cites several other states' appellate court decisions, which hold state courts lack jurisdiction to consider petitions for writs of *habeas corpus* and other challenges to a detainee's detention pursuant to the federal immigration authority. *See Ricketts v. Palm Beach County Sheriff*, 985 So. 2d 591 (Fla. Dist. Ct. App. 2008); *State v. Chavez-Juarez*, 185 Ohio App. 3d 189, 192, 923 N.E.2d 670, 673 (2009).

In *Ricketts*, the Court of Appeals of Florida addressed a similar situation to the instant case. *Ricketts* was arrested on a state criminal charge and detained by the sheriff. *Ricketts*, 985 So. 2d at 591. His bond was set at \$1,000; however, the sheriff refused to accept the bond and release *Ricketts*, due to a federal immigration hold issued by ICE. *Id.* As in the present case, *Ricketts* first sought *habeas corpus* relief in state court. *Id.* at 592. The trial court denied all relief, reasoning that the issues were within the exclusive jurisdiction of the federal government. *Id.*

On appeal, the Court of Appeals of Florida agreed with the trial court "that appellant cannot secure *habeas corpus* relief from the state court on the legality of his federal detainer." *Id.* The court reasoned that the constitutionality of his detention pursuant to the immigration hold "is a question of law for the federal courts." *Id.* at 592-93. The court further explained that "a state court cannot adjudicate the validity of the federal detainer, as the area of immigration and naturalization is within the exclusive jurisdiction of the federal government." *Id.* at 593 (citing *Plyler v. Doe*, 457 U.S. 202, 225, 72 L. Ed. 2d. 786, 804 (1982); and *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43 ("Power to regulate immigration is unquestionably exclusively a federal power")).

The Court of Appeals of Ohio followed the Florida Court of Appeals' decision in *Ricketts* and reached a similar conclusion in *Chavez-Juarez*. *Chavez* was arrested for operating a vehicle under the influence of alcohol. *Chavez-Juarez*, 185 Ohio App. at at 193, 923 N.E.2d at 673. After arraignment, the state court ordered *Chavez* released; however, he was held pursuant to a federal immigration detainer, was turned over to ICE, and deported to Mexico. *Id.* at 193-94, 923 N.E.2d at 674. His attorney filed a motion to have ICE officers held in contempt for violating the state court's release order. *Id.* at 194, 923 N.E.2d at 674.

The trial court concluded that it lacked jurisdiction over ICE and denied the contempt motion, because the federal courts have pre-emptive jurisdiction over immigration issues. *Id.* at 199, 923 N.E.2d at 679. The Ohio Court of Appeals recognized "Control over immigration and

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naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.” *Id.* (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 10, 53 L. Ed. 2d 63 (1977)).

The Ohio Court of Appeals affirmed the trial court’s denial of the contempt motion, and stated:

Under federal regulation, the Clark County Sheriff’s Office was required to hold Chavez for 48 hours to allow ICE to assume custody. Chavez’s affidavit indicates that he was held in state custody for approximately 48 hours after the trial court released him on his own recognizance. If Chavez wished to challenge his detention, the proper avenue at that point would have been to file a petition in the federal courts, not an action in contempt with the state court, which did not have the power to adjudicate federal immigration issues.

Id. at 202, 923 N.E.2d at 680.

We find the reasoning in both *Ricketts* and *Chavez-Juarez* persuasive and their applications of federal immigration law to state proceedings to be correct.

A state court’s purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government’s exclusive federal authority over immigration matters. *See Plyler*, 457 U.S. at 225, 72 L. Ed. 2d. at 804; *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43. The superior court did not possess subject matter jurisdiction, or any other basis, to receive and review the merits of Petitioners’ *habeas* petitions, or issue orders other than to dismiss for lack of jurisdiction, as it necessarily involved reviewing and ruling on the legality of ICE’s immigration warrants and detainer requests.

E. State Court Lacks Jurisdiction Even Without Formal Agreement

[5] Even if the express 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law permits and empowers state and local authorities and officers to “communicate with [ICE] regarding the immigration status of any individual . . . or otherwise to cooperate with [ICE] in the identification, apprehension, *detention*, or removal of aliens not lawfully present in the United States” in the absence of a formal agreement. 8 U.S.C. § 1357(g)(10)(A)-(B) (emphasis supplied).

A state court’s purported exercise of jurisdiction to review petitions challenging the validity of federal detainees and administrative warrants

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issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration. *See* U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. VI, cl. 2.; *Nyquist*, 432 U.S. at 10, 53 L. Ed. 2d at 63; *Plyler*, 457 U.S. at 225, 72 L. Ed. 2d. at 804; *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43.

F. State Court Lacks Jurisdiction to Order Release of Federal Detainees

[6] An additional compelling reason that prohibits the superior court from exercising jurisdiction to issue *habeas* writs to alien petitioners, is a state court's inability to grant *habeas* relief to individuals detained by federal officers acting under federal authority.

Nearly 160 years ago, the Supreme Court of the United States held in *Ableman v. Booth* that "No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524, 6 L. Ed. 169, 176 (1859).

The Supreme Court of the United States reaffirmed this principle in *In re Tarble*, in which the Court stated:

State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused.*

...

But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United

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States. If he has committed an offence against their laws, *their tribunals alone* can punish him. If he is wrongfully imprisoned, *their judicial tribunals can release him* and afford him redress.

. . .

[T]hat the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, *it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.*

In re Tarble, 80 U.S. (13 Wall) 397, 409-11, 20 L. Ed. 597, 601-02 (1871) (emphasis supplied) (citations omitted).

In sum, if a prisoner's *habeas* petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of *habeas corpus*. *See id.*

It is undisputed the Sheriff's continued detention of Petitioners, after they were otherwise released from state custody, was pursuant to the federal authority delegated to his office under the 287(g) Agreement. Appendix B of the 287(g) Agreement states, in relevant part:

This Memorandum of Agreement (MOA) is between the U.S. Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) and the Law Enforcement [Mecklenburg County Sheriff's Office] (MCSO), pursuant to which selected MCSO personnel are authorized to perform immigration enforcement duties in specific situations *under Federal authority*. (Emphasis supplied).

Although the 287(g) Agreement was not attached to Petitioners' *habeas* petitions, the petitions indicated to the court the Sheriff was acting under color of federal authority, if not actual federal authority. Petitioners' petitions acknowledge and specifically assert the Sheriff was purporting to act under the authority of the United States by detaining

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them after they would have otherwise been released from custody for their state criminal charges.

Petitioners' petitions both acknowledge and assert the Sheriff was detaining them "at the behest of the federal government." Petitioners' *habeas* petitions refer to the 287(g) Agreement. Copies of the Form I-200 immigration arrest warrant and Form I-247A detainer request were attached to Chavez's *habeas* petition submitted to the superior court.

A copy of the Form I-200 warrant was attached to Lopez's *habeas* petition, and the petition itself refers to the existence of the Form I-247A detainer, stating: "the jail records, which have been viewed by counsel, indicate that there is an immigration detainer lodged against [Lopez] pursuant to a Form I-247[.]"

Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under a 287(g) agreement. The statute provides: "In performing a function under this subsection [§ 1357(g)], an officer or employee of a State or political subdivision of a State *shall be subject to the direction and supervision of the Attorney General [of the United States.]*" 8 U.S.C. § 1357(g)(3) (emphasis supplied).

The Sheriff was acting under the actual authority of the United States by detaining Petitioners under the immigration enforcement authority delegated to him under the 287(g) Agreement, and under color of federal authority provided by the administrative warrants and Form I-247A detainer requests for Petitioners issued by ICE. Petitioners' own *habeas* petitions also indicate the Sheriff was acting under color of federal authority for purposes of the prohibitions against interference by state courts and state and local officials. *See Tarble*, 80 U.S. (13 Wall) at 409, 20 L. Ed. at 601.

The next issue is whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining Petitioners pursuant to the detainer requests and administrative warrants. *See id.* After careful review of state and federal authorities, no court has apparently decided the issue of whether a state or local law enforcement officer is considered a federal officer when they are performing immigration functions authorized under a 287(g) Agreement.

In contexts other than immigration enforcement, several federal district courts and United States courts of appeal for various circuits have held state and local law enforcement officers are "federal officers" when they have been authorized or deputized by federal law enforcement

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agencies, such as the Drug Enforcement Agency, Federal Bureau of Investigation, and the United States Marshals Service. *United States v. Martin*, 163 F. 3d 1212, 1214-15 (10th Cir. 1998) (holding that local police officer deputized to participate in a FBI narcotics investigation is a federal officer within the meaning of 18 U.S.C. § 115(a)(1)(B) [defining the crime of threatening to murder a federal law enforcement officer]); *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988) (holding that local police officer deputized to participate in a DEA investigation is a federal officer within the meaning of 18 U.S.C. § 111 [defining the crime of assault on a federal official]); *United States v. Diamond*, 53 F.3d 249, 251-52 (9th Cir. 1995) (holding that a state official specially deputized as a U.S. Marshal was an officer of the United States even though he was not technically a federal employee); *DeMayo v. Nugent*, 475 F. Supp. 2d 110, 115 (D. Mass. 2007) (“State police officers deputized as federal agents under the DEA constitute federal agents acting under federal law”), *rev’d on other grounds*, 517 F. 3d 11 (1st Cir. 2008).

The United States Court of Appeals for the Fourth Circuit specifically recognized an employee of the State of North Carolina as being a federal officer for purposes of the assault on a federal officer statute, when the state employee was assisting the Internal Revenue Service. *United States v. Chunn*, 347 F. 2d 717, 721 (4th Cir. 1965). The Fourth Circuit has also held that under a 287(g) Agreement, local law enforcement officers effectively become federal officers of ICE, as they are deputized to perform immigration-related enforcement functions. *United States v. Sosa-Carabantes*, 561 F. 3d 256, 257 (4th Cir. 2009) (“The 287(g) Program permits ICE to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement.” (citing 8 U.S.C. § 1357(g)(1))).

The United States Court of Appeals for the Fifth Circuit recently stated, “Under [287(g) agreements], state and local officials become de facto immigration officers[.]” *City of El Cenizo v. Texas*, 890 F. 3d 164, 180 (5th Cir. 2018); *see also People ex rel. Norfleet v. Staton*, 73 N.C. 546, 550 (1875) (“[T]here is no difference between the acts of *de facto* and *de jure* officers so far as the public and third persons are concerned”).

To the extent personnel of the Sheriff’s office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find these federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants. *See Martin*, 163 F.3d at 1214-15; *Torres*, 862 F. 2d at 1030; *Sosa-Carabantes*, 561 F. 3d at 257; *El Cenizo*, 890 F.3d at 180.

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Petitioners' *habeas* petitions clearly disclosed Petitioners were being detained under express, and color of, federal authority by the Sheriff, who was acting as a *de facto* federal officer. *See El Cenizo*, 890 F. 3d at 180. Under the rule enunciated by the Supreme Court of the United States in *Ableman* and expanded upon in *Tarble*, the superior court was without jurisdiction, or any other basis, to receive, review, or consider Petitioners' *habeas* petitions, other than to dismiss for want of jurisdiction, to hear or issue writs of *habeas corpus*, or intervene or interfere with Petitioner's detention in any capacity. *Ableman*, 62 U.S. (21 How.) at 524, 6 L. Ed. at 176; *Tarble*, 80 U.S. (13 Wall.) at 409. 20 L. Ed. at 607.

The superior court should have dismissed Petitioners' petitions for writs of *habeas corpus*. *See* N.C. Gen. Stat. § 17-4(4) (2017) ("Application to prosecute the writ [of *habeas corpus*] shall be denied . . . [w]here no probable ground for relief is shown in the application."). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The orders of the superior court, which purported to order the release of Petitioners, are vacated. *Id.*

The proper jurisdiction and venues where Petitioners may file their *habeas* petitions is in the appropriate federal tribunal. *See* 28 U.S.C. §2241(a); *Tarble*, 80 U.S. (13 Wall.) at 411, 20 L. Ed. at 602 ("If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release").

IV. Conclusion

The superior court lacked any legitimate basis and was without jurisdiction to review, consider, or issue writs of *habeas corpus* for alien Petitioners not in state custody and held under federal authority, or to issue any orders related thereon to the Sheriff. State or local officials and employees purporting to intervene or act constitutes a prohibited interference with the federal government's supreme and exclusive authority over the regulation of immigration and alienage. *See* U.S. Const. art. I, § 8, cl. 4; *Ableman*, 62 U.S. (21 How.) at 524, 6 L. Ed. at 176; *Tarble*, 80 U.S. at 409. 20 L. Ed. at 607.

The superior court was on notice the Petitioners were detained under the express, and color of, exclusive federal authority. The Sheriff was acting as a federal officer under the statutorily authorized and

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executed 287(g) Agreement. The orders appealed from are vacated for lack of jurisdiction and remanded to the trial court with instructions to dismiss Petitioners' *habeas* petitions.

A certified copy of this opinion and order shall be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar. *It is so ordered.*

VACATED and REMANDED.

Judge BERGER concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring.

I concur in the majority opinion. I write separately to address the majority's language ordering a certified copy of this opinion to be delivered to the ethical bodies that oversee lawyers and judges. Last year, this Court entered a writ of prohibition barring the trial court from issuing any further writs of habeas corpus on this issue. Based on timeframes discussed at oral argument, and the fact that at least one trial judge entered an order addressing the merits of a similar habeas petition while the writ of prohibition was in effect (although that judge properly held the order in abeyance pending the outcome of this appeal), this Court is concerned that our writ of prohibition may not have been followed with respect to other undocumented immigrants involved in other habeas cases not before the Court. The majority thus orders a copy of the opinion to be sent to the State Bar's Disciplinary Hearing Commission and the Judicial Standards Commission so that these governing bodies are aware of it, should there be any allegations that this Court's writ of prohibition was ignored. But I recognize that this language in the majority opinion can be misinterpreted as a suggestion that lawyers or judges involved in the proceedings described in this opinion committed misconduct. To be clear, they did not.

NATIONSTAR MORTG. LLC v. CURRY

[262 N.C. App. 218 (2018)]

NATIONSTAR MORTGAGE LLC, d/B/A CHAMPION MORTGAGE COMPANY, PLAINTIFF
v.
JERRY CURRY AND PAMELA CURRY; MELISSA CARLTON HOLMES; RAY M. WARREN,
JR.; J. GREGORY MATTHEWS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EULALA
WARREN McNEIL; SECRETARY OF HOUSING & URBAN DEVELOPMENT; AND
SATTEFIELD LEGAL, PLLC, AS TRUSTEE, DEFENDANTS

No. COA18-351

Filed 6 November 2018

1. Process and Service—notice of special proceeding—affidavit of service—presumption of valid service

In a special proceeding to sell property to repay the debts of an estate, an affidavit of service meeting the requirements of N.C.G.S. § 1-75.10 sufficiently showed proof of service to provide notice to the holder of a deed of trust on the subject property. The holder of the deed of trust failed to rebut the presumption of valid service arising from the affidavit, and admitted it had been served and received prior notice of the special proceeding, despite not being named in the caption of the petition.

2. Liens—special proceeding—sale of estate property—prior recorded lien extinguished

In a special proceeding to sell property to repay the debts of an estate, the trial court did not err in concluding the sale of the property extinguished a prior recorded lien on the property. Since the lienholder was made a party to and therefore was bound by the special proceeding, its lien followed the proceeds of the sale. Even though the proceeds were embezzled, the buyers paid for the property and took it free and clear of the lien.

Appeal by plaintiff from order entered 27 September 2017 by Judge Susan E. Bray in Wilkes County Superior Court. Heard in the Court of Appeals 3 October 2018.

McGuireWoods, LLP, by Christopher B. Karlsson, for plaintiff-appellant.

McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellees Jerry Curry and Pamela Curry.

TYSON, Judge.

NATIONSTAR MORTG. LLC v. CURRY

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Nationstar Mortgage, LLC, d/b/a Champion Mortgage Company (“Champion”), appeals from the trial court’s order, which granted Jerry and Pamela Curry’s (collectively “the Currys”) motion for judgment on the pleadings. We affirm.

I. Background

In 2011, Eulala W. McNeil, now deceased, owned two tracts of real property located in Wilkes County (“the Property”). On 25 January 2011, McNeil obtained a loan from and executed a promissory note payable to Sidus Financial, LLC (“Sidus”), which was secured by a deed of trust on the Property in favor of Sidus (“the Deed of Trust”). The Deed of Trust was recorded with the Wilkes County Register of Deeds on 31 January 2011 and encumbered the Property.

That same day, Sidus transferred its rights in the Deed of Trust to Metlife Home Loans, a division of Metlife Bank, N.A. (“Metlife”), through an assignment of deed of trust that was also properly recorded. Subsequently, Metlife assigned the Deed of Trust to Champion on 15 October 2012. Champion properly recorded this assignment of deed of trust the same day.

McNeil died on 11 August 2012, and Melissa Carlton Holmes was subsequently appointed as executrix of McNeil’s estate. On 13 December 2012, Holmes filed a petition (“the Petition”) in special proceeding 12 SP 368 (“the Special Proceeding”) to seek a sale of the Property in order to repay the debts of the estate. The only respondent party named in the Petition was Ray M. Warren, an heir of McNeil.

On 18 December 2012, Holmes filed an amended petition (“the Amended Petition”), adding Metlife, Sidus, and “HUD” as additional respondent parties. Neither petition named Champion in the caption of the case. However, both the Petition and Amended Petition described Champion’s Deed of Trust on the Property as a debt of the estate. Specifically, the Petition stated one of the debts of the estate was “[t]he previously stated reverse mortgage owed to Champion Lender in the current amount of \$66,988.86” and petitioner prayed for the court to “sell [the Property] in order to create assets to pay the taxes and above referenced debts of the Estate.”

On 26 March 2013, Robert G. Green, Jr., Esq., the attorney of record in the Special Proceeding, filed an affidavit of service by certified mail (“the Affidavit of Service”) stating he had served Champion “with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons” by certified mail. Green also attached a copy of

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the signed receipt, which showed Champion had received these documents on 23 March 2013.

On 26 April 2013, the Wilkes County Clerk of Superior Court entered an order (“the Order of Sale”) authorizing the sale of the Property. The Order of Sale listed the “reverse mortgage owed to Champion” as one of the debts of the estate and concluded as a matter of law that the Property should be sold to create assets to pay “the above referenced debts of the Estate.” Pursuant to the Order of Sale, the appointed commissioner posted a notice of sale (“the Notice of Sale”), which included the following statements: “This sale is subject to ad valorem taxes and such other liens as may appear of record[,]” and “[t]his sale is made subject to all prior liens and encumbrances, and unpaid taxes and assessments.”

The sale of the Property was conducted on 26 July 2013. After the sale remained open for a period of time for upset bids to expire, the Currys became the final bidder and purchased the Property for and paid \$90,000. On 16 September 2013, the commissioner deducted fees and expenses and disbursed \$84,692.69 to the executrix of the McNeil estate as proceeds from the sale of the Property. On 19 September 2013, the commissioner executed and delivered a deed for the Property to the Currys. After receiving the net sale proceeds in her capacity as executrix of the McNeil estate, Holmes embezzled the money and did not remit and pay the proceeds from the sale to extinguish the outstanding balance of the Deed of Trust to Champion.

Champion commenced this action by filing a complaint on 21 February 2017 in superior court to seek a declaration that Champion’s Deed of Trust is a first lien on the Property and an order for judicial foreclosure of the Deed of Trust. In their answer, the Currys alleged (1) an affirmative defense that, by operation of collateral estoppel, the Special Proceeding Order of Sale barred Champion’s claims (“the Second Affirmative Defense”), and (2) asserted a counterclaim for a declaration that Champion’s lien was extinguished by the sale of the Property in the Special Proceeding and their payment of the purchase price (“the First Counterclaim”).

The Currys subsequently filed a motion for judgment on the pleadings asserting their First Counterclaim and Second Affirmative Defense. Following a hearing on 18 September 2017, the trial court entered judgment on the pleadings in favor of the Currys on both their First Counterclaim and Second Affirmative Defense. The trial court’s order decreed that (1) “Champion Mortgage is collaterally estopped from seeking a judicial sale of [the Property]” and (2) the “Curry[s] hold title to [the Property] free and clear of the lien of [Champion’s] Deed of Trust.”

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Champion filed timely notice of appeal from the trial court's order granting the Currys' motion for judgment on the pleadings.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2017).

III. Issues

Champion argues the trial court erred by concluding as a matter of law Champion was a named party to and bound by the Special Proceeding. Champion also argues the trial court erred by granting judgment on the Currys' First Counterclaim by decreeing the Special Proceeding extinguished Champion's prior recorded lien on the Property. Lastly, Champion argues the trial court erred in applying the doctrine of collateral estoppel in granting judgment on the Currys' Second Affirmative Defense.

We need not reach the issue of whether Champion was collaterally estopped from seeking a judicial sale of the Property. Because Champion was on notice of and was a party to the Special Proceeding, the Currys acquired the Property free and clear of Champion's Deed of Trust.

IV. Standard of Review

The trial court's order granted the Currys' motion for judgment on the pleadings pursuant to North Carolina Rule of Civil Procedure 12(c). However, when "matters outside the pleadings [have been] considered by the [trial] court in reaching its decision on the judgment on the pleadings, the motion [is] treated as if it were a motion for summary judgment" under Rule 56 on review by this Court. *Helms v. Holland*, 124 N.C. App. 629, 633, 478 S.E.2d 513, 516 (1996) (citation omitted).

In making its decision on the Currys' motion for judgment on the pleadings, the trial court's order stated the court had considered the pleadings and exhibits, arguments of counsel at the hearing, and certain documents from the Special Proceeding file submitted during the 18 September 2017 hearing. One of these documents from the Special Proceeding file was the Affidavit of Service asserting Champion was served "with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons" by certified mail with return receipt. With these documents outside the pleadings being considered, the 12(c) motion for judgment on the pleadings will be treated for review as a motion for summary judgment under Rule 56 on appeal. *See Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617

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(2012) (“Our case law has consistently treated submission of affidavits as a matter outside the pleadings.” (citation omitted)).

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law.” *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff’s case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff’d per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

“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) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). “The evidence produced by the parties is viewed in the light most favorable to the non-moving party.” *Hardin v. KCS Int’l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citation omitted). “If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.” *Vernon, Vernon, Wooten, Brown & Andrews, P.A. v. Miller*, 73 N.C. App. 295, 298, 326 S.E.2d 316, 319 (1985).

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V. Party to the Special Proceeding

[1] Champion argues the trial court erred by concluding as a matter of law Champion was a party to and bound by the orders and judgment from the Special Proceeding. Champion asserts “[i]n the absence of a summons and a petition naming, and properly served on, Champion, it could not have been a party to the Special Proceeding.” The Currys assert the Affidavit of Service from the Special Proceeding complies with the requirements for proof of service and shows Champion was a party to and bound by the Special Proceeding.

Rule 4(j)(1)(c) of our Rules of Civil Procedure permits service by certified mail “[b]y mailing a copy of the summons and of the complaint, . . . return receipt requested, addressed to the party to be served, and delivering to the addressee.” N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2017). Once service by certified mail is complete, the serving party may make proof of service by filing an affidavit in accordance with N.C. Gen. Stat. § 1-75.10. N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2017).

Under N.C. Gen. Stat. § 1-75.10(a)(4) (2017), the affidavit must aver:

- a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
- b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
- c. That the genuine receipt or other evidence of delivery is attached.

Such an affidavit, when filed along with a return receipt signed by the individual who received the mail, “raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]” N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2); *see also Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 490-91, 586 S.E.2d 791, 796 (2003).

Here, the Affidavit of Service comports with N.C. Gen. Stat. § 1-75.10. The Affidavit of Service states the petitioner in the Special Proceeding attempted to serve Champion “with a copy of the Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons in the [Special Proceeding] by certified mail, return receipt requested,” and that Champion had, in fact, received service of the documents. Attached

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to the Affidavit of Service is the return receipt showing delivery to Champion. Therefore, the Currys are entitled to a rebuttable presumption of valid service. *See Carpenter v. Agee*, 171 N.C. App. 98, 100, 613 S.E.2d 735, 736 (2005) (“By filing a copy of the signed return receipt, along with an affidavit that comports with N.C. Gen. Stat. § 1-75.10, plaintiff is entitled to a rebuttable presumption of valid service.”).

Champion has failed to rebut this presumption. At the 18 September 2017 hearing, Champion argued the person who had signed the receipt was not its registered agent. However, to rebut the presumption of regular service, Champion needed to “present evidence that service of process failed to accomplish its goal of providing [it] with notice of the [Special Proceeding], rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons.” *Granville*, 160 N.C. App. at 493, 586 S.E.2d at 797.

Champion’s own admission shows that it had received prior notice of the Special Proceeding. Paragraph 59 of the Currys’ First Counterclaim states: “[Champion] was made party to the Special Proceeding and was served with summons and a copy of the Petition.” In response, Champion stated the following: “[Champion] admits that it was included *as a party to be noticed in the Special Proceedings action . . .*” (emphasis supplied). This statement shows the Affidavit of Service “accomplish[ed] its goal of providing [Champion] with notice of the [Special Proceeding.]” *See id.* Champion has failed to rebut the presumption of proper service.

Champion further asserts that the trial court erred in concluding it was a party to the Special Proceeding because Champion was never identified in the caption of either the Petition or Amended Petition. Champion cites *Lee v. County of Cumberland* in support of its contention. ___ N.C. App. ___, 809 S.E.2d 407, 2018 WL 710085 at *1 (2018) (unpublished). *Lee* is an unpublished opinion and, therefore, lacks precedential value. N.C. R. App. P. 30(e)(3). Nonetheless, this Court finds it instructive.

In *Lee*, the plaintiff sent the defendant, Keating, a copy of the amended complaint by certified mail; however, the plaintiff failed to name Keating in the caption of his complaint and never mentioned Keating in the body of the complaint. *Id.* at *7. This Court held “[b]ecause Plaintiff failed to name Keating in the caption of his complaint, and because Plaintiff failed to mention Keating in the body of the complaint, we conclude the trial court properly granted the motion to dismiss as to Keating.” *Id.*

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In reaching this decision, the Court relied on *Roberts v. Hill*, stating:

In *Roberts v. Hill*, . . . the plaintiff named a defendant in the complaint's caption, but failed to make any allegations against that defendant *in the body of his complaint*. Our State Supreme Court directed the defendant's name be stricken from the complaint *since there were no allegations against that defendant*. Here, as in *Roberts*, Plaintiff fails to make any allegations against Keating in the body of his complaint, in addition to failing to name Keating in his complaint's caption.

Id. (emphasis supplied) (citation omitted) (quoting *Roberts v. Hill*, 240 N.C. 373, 377, 82 S.E.2d 373, 377 (1954)).

The facts here are readily distinguishable from both *Lee* and *Roberts*. Although neither petition named Champion as such in the caption, the body of both the Petition and Amended Petition described Champion's Deed of Trust mortgage, listed the amount owed to Champion on this mortgage, and stated the Property should be sold to pay off Champion's debt. Because the body of the Petition and Amended Petition alerted Champion to the nature of the Special Proceeding and asserted allegations specifically naming Champion, the mere failure to include Champion's name in the caption is not fatal. *See Roberts*, 240 N.C. at 377, 82 S.E.2d at 377.

The Affidavit of Service shows the sale to the Currys was entitled to a rebuttable presumption of valid service of the "Petition, Amended Petition, Notice of Hearing, and Special Proceedings Summons[.]" and Champion has failed to rebut this presumption. Further, Champion's own admission indicates that it had been served and received prior notice of the Special Proceeding. Although the Petition and Amended Petition failed to name Champion in the caption, the body of these documents specifically named Champion's mortgage and provided Champion with notice of the Special Proceeding. For these reasons, Champion was a named party within and bound by the Special Proceeding. This assignment of error is dismissed.

VI. Status of Champion's Deed of Trust

[2] Champion argues the trial court erred by granting judgment on the Currys' First Counterclaim by declaring the Special Proceeding had extinguished Champion's prior recorded lien on the Property. We disagree.

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As an initial matter, Champion, in its complaint, requested the trial court to declare that equitable title to the Property is vested in Champion and legal title is vested in the trustee of the Deed of Trust. Under North Carolina law, “[a] mortgage or deed of trust to secure a debt passes legal title to the mortgagee or trustee, as the case may be, but the mortgagor or trustor is looked on as the equitable owner of the land” *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 101, 258 S.E.2d 379, 385 (1979). N.C. Gen. Stat. § 28A-15-2(b) (2017) states:

The title to real property of a decedent is vested in the decedent’s heirs as of the time of the decedent’s death; but the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent’s death[.]

Here, at the time of the Special Proceeding, legal title to the Property was held by the trustee of the Deed of Trust for the benefit of Champion, and Ray M. Warren, Jr. and Melissa Carlton Holmes held equitable title to the Property, as devisees and executrix under the will of Eulala W. McNeil. *See id.*; *see also Complex Inc.*, 43 N.C. App. at 101, 258 S.E.2d at 385.

Chapter 28A of the North Carolina General Statutes governs the administration of a decedent’s estate. Section 28A-15-1(a) provides: “All of the real and personal property, *both legal and equitable*, of a decedent shall be assets available for the discharge of debts and other claims against the decedent’s estate[.]” N.C. Gen. Stat. § 28A-15-1(a) (2017) (emphasis supplied).

The executrix or personal representative of the estate may “apply to the clerk of superior court of the county where the decedent’s real property . . . is situated, by petition, to sell such real property for the payment of debts and other claims against the decedent’s estate.” N.C. Gen. Stat. § 28A-17-1 (2017). “When real property sought to be sold, or any interest therein, is claimed by another person, such claimant may be made a party to the proceeding.” N.C. Gen. Stat. § 28A-17-6 (2017) (emphasis supplied). In addition, the beneficiary of the deed of trust, not the trustee, is the proper party to be joined in the proceeding to sell real estate of the decedent. *See* N.C. Gen. Stat. § 45-45.3(c) (2017) (“[T]he trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust[.]”).

Here, the Wilkes County Clerk of Superior Court had the authority to enter the Order of Sale authorizing the sale of the Property. *See*

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N.C. Gen. Stat. §§ 28A-15-1(a); 28A-17-1 (2017). Holmes, as executrix of McNeil's estate, petitioned the clerk of superior court for an order to sell the Property in order to create liquid assets to pay the debts of the estate and the mortgage owed to Champion. As outlined above, Champion was a party to, named in and bound by the Special Proceeding; therefore, the clerk of court had the authority to sell both legal and equitable title in the Property. *See id.*; *see also* N.C. Gen. Stat. §§ 28A-17-6; 45-45.3(c) (2017).

Champion contends that its lien remained attached to the Property *after* the Special Proceeding, regardless of whether it was a named party to the proceeding or not. This contention is without merit for several reasons.

Although Chapter 28A does not expressly provide for a sale of real property owned by an estate pursuant to the clerk's order to be free and clear of liens, North Carolina's long standing decisional law supports the view that where the lienholder is named as a party to the proceeding and the order authorizing the sale does not specify that the sale is subject to the lien, the property is sold free and clear of the lien to the purchaser. When the purchase price is paid by the purchaser, said lien is transferred to the proceeds of the sale. *See Jerkins v. Carter*, 70 N.C. 500 (1874); *see also Town of Tarboro v. Pender*, 153 N.C. 427, 69 S.E. 425 (1910); *Moore v. Jones*, 226 N.C. 149, 36 S.E.2d 920 (1946); *Williams v. Johnson*, 230 N.C. 338, 53 S.E.2d 277 (1949).

In *Moore*, the administrator of the estate petitioned the court to have real property of the decedent sold to make liquid assets available to pay the following debts of the estate: (1) costs of administration, (2) a judgment docketed against the decedent, and (3) a deed of trust on real property. 226 N.C. at 150, 36 S.E.2d at 921. The trial court ordered the costs of administration be paid first because N.C. Gen. Stat. § 28-105 (now N.C. Gen. Stat. § 28A-19-6) required personal property to be distributed to the cost of administration before all other debts of the estate. *Id.* at 150-51, 36 S.E.2d at 921-22.

Our Supreme Court reversed the trial court and held that under section 28-105, the statute dictating the order in which debts were to be paid, related exclusively to the application of personal property, and not the realty. *Id.* at 151, 36 S.E.2d at 922. The Supreme Court went on to conclude "when the land is sold to make assets the proceeds remain real estate until all liens are discharged and are to be applied to the payment of such liens in the order of their priority." *Id.*

Champion contends our Supreme Court in *Moore* "made [it] clear that a lien on property sold to make assets remains after the sale."

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However, Champion misinterprets this decision. Our Supreme Court in *Moore* held that when real property, which is burdened by a lien, is sold to make assets, the proceeds must first be distributed to satisfy the lien, rather than being distributed in accordance with the priority set by the statute governing the distribution of funds from personal property. *Id.*; see also *Pender*, 153 N.C. at 430, 69 S.E.2d at 426 (holding when the court ordered decedent's real property to be sold, the proceeds must be applied according to the priority of the liens); *Williams*, 230 N.C. at 345, 53 S.E.2d at 282 (holding when real property is sold to make assets, "the proceeds of the sale retain the quality of real property to the extent necessary to discharge all liens thereon").

Because the trial court had incorrectly applied the priority of payment of the proceeds and was reversed, our Supreme Court in *Moore* did not address whether the lien would remain on the real estate if the proceeds of the sale were insufficient to pay off the debt. See *Moore*, 226 N.C. at 152, 36 S.E.2d at 922-23. Nevertheless, *Moore* supports the position that the lien is transferred to the proceeds of the sale and when payment is made the buyer takes the property free and clear when the lienholder is made a party to the sale.

We find additional justification for this position from our Supreme Court in *Jerkins*. See 70 N.C. at 501. In *Jerkins*, our Supreme Court stated the following:

The order of payment of the debts of the decedent is regulated by [statute,] which declares that judgments docketed are in force, have priority to the extent to which they are a lien on the property of the deceased at his death. The extent of the lien is the amount of the judgment, if the land is of greater value, but if the real estate is of less value, the extent of the lien is the value of the land only. Thus, if the value of the real estate is only five hundred dollars, and the personal assets fifteen hundred dollars, and the judgment is for one thousand dollars, the plaintiff would be entitled as a credit, upon his judgment, to five hundred dollars out of the real assets, that is, the value of the real estate, and for the residue of his judgment, he would come in *pro rata* with other creditors, as to the remaining personal assets.

Id. The precedents of *Jerkins*, *Pender*, *Moore*, and *Williams*, read and taken together, support the proposition that when a lienholder is joined in a proceeding to sell land to make liquid assets to satisfy debts for a

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decedent's estate, the lienholder's lien follows the *proceeds* of the sale and the purchaser of the real estate who paid the purchase price in excess of the lien, takes title free and clear of the lien.

Here, Chapter 28A sets out the procedures for the disposition of a decedent's property and Holmes, as the qualified executrix, followed these procedures. The Order of Sale disposed of both the legal and equitable title to the property, which included Champion's deed of trust, and the Order of Sale specified the purpose of the sale was to make liquid assets to pay the debts of the estate, including the Champion Deed of Trust. *See* N.C. Gen. Stat. § 28A-15-1(a). Because Champion was a party to the Special Proceeding, its lien followed the proceeds of the sale and the Currys took title to the Property free and clear of Champion's lien. *See Jerkins*, 70 N.C. at 501; *Pender*, 153 N.C. at 430, 69 S.E. at 425; *Moore*, 226 N.C. at 151, 36 S.E.2d at 922; *Williams*, 230 N.C. at 345, 53 S.E.2d at 282.

Champion also contends its lien remains upon the Property because the Order of Sale did not explicitly state the sale was to be "free and clear" and the Notice of Sale included the following language: "This sale is subject to ad valorem taxes and such other liens as may appear of record[,] and "[t]his sale is made subject to all prior liens and encumbrances, and unpaid taxes and assessments."

Even if the Order of Sale did not explicitly state the sale of the real property was to be free and clear of Champion's lien, it did specify that "it [was] in the best interests of the Decedent's Estate and for the necessity of paying the Decedent's just debts" to sell the Property "to create assets with which to pay the taxes and the above referenced debts of the Estate." The Order of Sale listed one of these referenced debts as the "mortgage owed to Champion Mortgage in the current amount of \$66,988.86[.]"

The Property was sold pursuant to N.C. Gen. Stat. § 28A-17-1 *et seq.*, which allows the administrator to sell both the legal and equitable title and claims of all parties to the proceeding. As concluded above, Champion was a named party to, was served notice of, and bound by the Special Proceeding. The commissioner of the Special Proceeding under the clerk's order had the judicial authority to sell and convey all interests in the Property. Although the Notice of Sale said the sale was subject to prior liens, the substance of the Order of Sale made it clear the proceeds generated from the sale were directed to pay off these liens and debts of the estate.

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Although Champion never received the payoff, due to the executrix absconding with the proceeds, this does not change the fact that the Currys, as last and highest bidder at the sale, paid for the Property and took the Property free and clear of Champion's lien. *See Cherry v. Woolard*, 244 N.C. 603, 613, 94 S.E.2d 562, 568 (1956) (“[I]t [is] not incumbent upon the purchaser at the judicial sale to see that the money paid for the property was properly disbursed.” (citation omitted)). “When the purchaser paid his bid into court, or to its officer duly authorized to receive it, he was relieved of any further responsibility in connection with the interest then being sold.” *Id.* at 613, 94 S.E.2d at 569 (citation and internal quotation marks omitted). Here, the Currys paid the purchase price, which was well in excess of Champion's lien, to the commissioner under the clerk's order, and had no further duty to ensure that the commissioner or the executrix paid Champion. *See id.*

In North Carolina, an executrix is under a duty to ensure that creditors of the estate are paid according to their class. *See* N.C. Gen. Stat. § 28A-19-13 (2017). If the personal representative fails to pay out claims of the estate in accordance with their class, the personal representative commits a *devastavit*. *Id.*; *see also Coggins v. Flythe*, 113 N.C. 102, 113, 18 S.E. 96, 99 (1893) (“The general rule, both at law and in equity, is that it would be a *devastavit* if an executor or administrator should give preference to a debt of lower class over those duly presented of a higher dignity[.]” (citation omitted)). However, in addressing the respective claims of Champion and the Currys only, which is all that is before us in this case, it is unnecessary for us to address any claims Champion may assert against the commissioner of the Special Proceeding and Holmes as the executrix of McNeil's estate.

Champion was made a party to and received notice of the Special Proceeding. The procedure followed in the Special Proceeding allowed the commissioner to sell the Property to the Currys, as the highest and last bidder at the sale, upon their payment, free and clear of Champion's lien. Although the Notice of Hearing erroneously stated the sale was subject to all prior liens, Champion's lien followed the proceeds, and the substance of the Order of Sale showed the sale of the Property was to be conveyed upon payment as free and clear of Champion's lien. The trial court properly granted judgment on the Currys' First Counterclaim by declaring the Special Proceeding extinguished Champion's prior recorded lien on the Property.

VII. Conclusion

The Affidavit of Service created a rebuttable presumption of valid service of the petition and summons and Champion failed to rebut this

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presumption. The trial court did not err by concluding as a matter of law Champion was a named party to and bound by the Special Proceeding. The trial court also did not err in concluding as a matter of law the Special Proceeding extinguished Champion's prior recorded lien on the Property, which was converted into the paid proceeds of the sale.

The trial court also correctly ruled the Currys, upon payment of proceeds exceeding the lien, took the Property free and clear of the lien. As a result, it is unnecessary for this Court to address Champion's remaining arguments concerning the trial court's application of the doctrine of collateral estoppel.

The order of the trial court granting judgment on the pleadings, as reviewed on appeal for summary judgment under Rule 56, is affirmed. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

PHG ASHEVILLE, LLC, PETITIONER
v.
CITY OF ASHEVILLE, RESPONDENT

No. COA18-251

Filed 6 November 2018

1. Zoning—conditional use permit—denied by city council—de novo review by superior court

In a conditional use case involving the building of a hotel, the superior court review of a city council decision to deny the permit appropriately applied de novo review to determine the initial legal issue of whether petitioner had presented competent, material, and substantial evidence. The superior court's order showed that it did not weigh the evidence.

2. Zoning—conditional use permit-city council decision—findings—judicial review—individual findings not specifically addressed

The trial court did not misapply the standard of review in a zoning case involving a conditional use permit for a hotel where it did not specifically address each of the city council's 44 findings

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because no competent, material, and substantial evidence was presented to rebut petitioner's prima facie showing. The council's 44 findings were unnecessary, improper, and irrelevant.

3. Appeal and Error—abandonment of issues—failure to argue

In an appeal by respondent city in a zoning action involving a conditional use permit, the petitioner's compliance with the seven requirements for a conditional use permit in the city's Uniform Development Ordinance were either unchallenged and established as a matter of law, or the city abandoned any arguments on appeal.

4. Zoning—conditional use permit—prima facie entitlement—impact on adjoining property—material evidence

A petitioner seeking a conditional use permit for a hotel presented material evidence to the city council about the hotel's impact on adjoining property. Petitioner's expert testimony had a logical connection to whether the project would impair the value of adjoining property and the city council's lay notion that the expert's analysis was based upon an inadequate methodology did not constitute competent rebuttal evidence.

5. Zoning—conditional use permit—hotel—harmony with neighborhood

Petitioner's "use or development" of a property for a hotel established a prima facie case of harmony with the area or neighborhood under the city's Uniform Development Ordinance (UDO). Although the city contended that "use" should be distinguished from "development" in the UDO, petitioner's expert witness established a prima facie case of harmony of the use and development within the area.

6. Zoning—conditional use permit—hotel—traffic

Although the city argued in a zoning action involving a conditional use permit for a hotel that petitioner did not establish a prima facie case that the proposed hotel would not cause undue traffic congestion or create a traffic hazard, no competent, material, and substantial evidence was presented to refute an analysis from petitioner's expert traffic engineer. The speculations of lay members of the public and unsubstantiated opinions of city council members did not constitute competent evidence to rebut the expert.

Appeal by respondent from order entered 2 November 2017 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 20 September 2018.

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Smith Moore Leatherwood LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for petitioner-appellee.

City of Asheville City Attorney's Office, by City Attorney Robin Tatum Currin and Assistant City Attorney Catherine A. Hofmann, for respondent-appellant.

TYSON, Judge.

The City of Asheville (“the City”) appeals from an order of the superior court reversing the City’s denial of a conditional use permit to PHG Asheville, LLC for the construction of a hotel. We affirm.

I. Background

PHG Asheville, LLC (“Petitioner”), a North Carolina business entity, submitted an application to the City for a conditional use permit (“CUP”) on 27 July 2016. Petitioner planned to construct an eight-story, 178,412 square foot Embassy Suites hotel, with 185 rooms and on-site parking structure, to be built upon a 2.05 acre parcel located in downtown Asheville at 192 Haywood Street (the “Project”). The property is zoned “Central Business District,” (“CBD”), which includes hotels as a permitted use. The property is also located within the “Downtown Design Review Overlay District” (“DDROD”) under the City’s Uniform Development Ordinance (“UDO”). Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1) (2016).

Development projects designed to contain a gross floor area greater than 175,000 square feet to be built on parcels zoned CBD and located in the DDROD are subject to the City’s “Level III site plan” review. This multi-level review includes a quasi-judicial hearing for issuance of a CUP from the Asheville City Council. Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1),(7) (2016).

The UDO provides the following criteria for issuance of a CUP:

Conditional use standards. The Asheville City Council shall not approve the conditional use application and site plan unless and until it makes the following findings, based on the evidence and testimony received at the public hearing or otherwise appearing in the record of the case:

(1) That the proposed use or development of the land will not materially endanger the public health or safety;

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(2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;

(3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property;

(4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located;

(5) That the proposed use or development of the land will generally conform with the comprehensive plan, smart growth policies, sustainable economic development strategic plan, and other official plans adopted by the city;

(6) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities; and

(7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

Asheville, N.C., Code of Ordinances, § 7-16-2(c) (2016).

Petitioner's Project was reviewed by, and received recommendations for approval from, the City's planning department staff, the Technical Review Committee, the Downtown Commission, and the Asheville Planning & Zoning Commission. All of these recommendations were submitted to the City Council. The City Council conducted a quasi-judicial public hearing on Petitioner's CUP application on 24 January 2017.

Petitioner presented three expert witnesses, who testified and were questioned and who submitted detailed reports at the hearing. No evidence was offered in opposition to Petitioner's CUP application. One area resident present at the hearing questioned whether the hotel could possibly create a sight line issue that could affect traffic safety.

At the close of the hearing, the City Council voted to deny Petitioner's application for a CUP. Three weeks later on 14 February 2017, the City issued an order containing 44 written findings of fact and 2 conclusions of law, detailing why it denied Petitioner's requested CUP. The City

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concluded the CUP should be denied because Petitioner did not produce competent, material and substantial evidence establishing criteria 1, 2, 3, 4, 5 or 7 of § 7-16-2(c) of the UDO. Aside from its additional 44 findings of fact, the City ultimately found:

2. In this case, the City Council finds that the CUP should be denied, for the following reasons, pursuant to UDO Section 7-16-2(c):

(1) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not materially endanger the public health or safety;

(2) The Applicant failed to produce competent, material and substantial evidence that the Hotel is reasonably compatible with significant topographic features of the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant;

(3) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not substantially injure the value of the adjoining or abutting property;

(4) The Applicant failed to produce competent, material and substantial evidence that the Hotel will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located and, moreover, the evidence instead showed the Hotel would not be in harmony with the scale, bulk, coverage and character of the area and neighborhood.

(5) The Applicant failed to produce competent, material and substantial evidence that the Hotel will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City and, moreover, the evidence instead showed the Hotel would not generally conform to the City's 2036 Vision Plan; and

(7) The Applicant failed to produce competent, material and substantial evidence that the Hotel will not cause undue traffic congestion or create a traffic hazard.

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On 16 March 2017, Petitioner filed a petition for writ of certiorari in superior court to seek review of the City's decision. The superior court entered an order after determining *de novo* Petitioner had established a *prima facie* case for entitlement to a CUP. The court concluded the City's decision to deny Petitioner a CUP was arbitrary and capricious, and it reversed and remanded the matter with an order to the City Council to grant Petitioner's requested CUP on 2 November 2017. The City timely appealed from the superior court's order.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of right from a final judgment of the superior court. N.C. Gen. Stat. § 7A-27(b) (2017).

III. Standard of Review

"Judicial review of town decisions to grant or deny conditional use permits is provided for in G.S. 160A-388(e), which states, *inter alia*, 'Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.'" *Coastal Ready-Mix Concrete Co. v. Bd. Of Comm'rs*, 299 N.C. 620, 623, 265 S.E.2d 379, 381 (1980).

[T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

- (1) [r]eviewing the record for errors in law,
- (2) [i]nsuring that procedures specified by law in both statute and ordinance are followed,
- (3) [i]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) [i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) [i]nsuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383.

"The standard of review of the superior court depends upon the purported error." *Little River, LLC v. Lee Cty.*, __ N.C. App. __, __, 809 S.E.2d 42, 46 (2017) (citing *Morris Commc'ns Corp. v. Bd. of Adjustment*

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of *Gastonia*, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003)). “When a party alleges the [decision-marking board’s] decision was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew.” *Dellinger v. Lincoln Cty.*, __ N.C. App. __, __, 789 S.E.2d 21, 26 (2016) (citation omitted).

“When 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.” *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) (citation and quotation marks omitted). “The whole record test requires that the [superior] court examine all competent evidence to determine whether the decision was supported by substantial evidence.” *Morris Commc’ns*, 159 N.C. App. at 600, 583 S.E.2d at 421. The initial issue of whether a petitioner has presented competent, material, and substantial evidence to obtain a special use permit is subject to *de novo* review. *Am. Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012).

“[T]he terms ‘special use’ and ‘conditional use’ are used interchangeably[.] . . . [A] conditional use or a special use permit ‘is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.’ ” *Concrete Co.*, 299 N.C. at 623, 265 S.E.2d at 381 (quoting *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 467, 202 S.E.2d 129, 136 (1974) (other citation omitted)).

A particular standard of review applies at each of the three levels of this proceeding—the [council], the superior court, and this Court. First, the [council] is the finder of fact in its consideration of the application for a special use permit. The [council] is required, as the finder of fact, to follow a two-step decision-making process in granting or denying an application for a special use permit. If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. *If a prima facie case is established, [a] denial of the permit [then] should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.*

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Davidson Cty. Broad., Inc. v. Rowan Cty. Bd. of Comm'rs, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007) (emphasis supplied) (citation and internal quotation marks omitted), *disc. review denied*, 362 N.C. 470, 666 S.E.2d 119 (2008).

“When this Court reviews a superior court’s order regarding a zoning decision by a [decision-making board], we examine the order to: ‘(1) determin[e] whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly.’” *Id.* at 87, 649 S.E.2d at 910 (citations omitted).

IV. Analysis

A petitioner’s burden on an application for a CUP is well established. An applicant for a CUP must establish a *prima facie* case, by competent, material, and substantial evidence, meeting all the conditions in the zoning ordinance. *Humble Oil* 284 N.C. at 467, 202 S.E.2d at 136. “Material evidence” has been recognized by this Court to mean “[e]vidence having some logical connection with the facts of consequence or issues.” *Innovative 55, LLC v. Robeson Cty.*, __ N.C. App. __, __, 801 S.E.2d 671, 676 (2017) (citing Black’s Law Dictionary 638 (9th ed. 2009)). “Substantial evidence” has been defined to mean such relevant “evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation omitted).

It must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Humble Oil, 284 N.C. at 471, 202 S.E.2d at 137 (citations and quotation marks omitted).

It is well established that:

When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.

Dellinger, __ N.C. App. at __, 789 S.E.2d at 27 (citing *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136).

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“[G]overnmental restrictions on the use of land are construed strictly in favor of the free use of real property.” *Morris Commc’ns v. City of Bessemer Zoning Bd. of Adjustment*, 365 N.C. 152, 157, 712 S.E.2d 868, 871 (2011).

Council members sitting in a quasi-judicial capacity must base their decision to grant or deny a CUP on objective factors, which are based upon the evidence presented, and not upon their subjective preferences or ideas. *See id.* “A city council may not deny a conditional use permit in their unguided discretion or because, in their view, it would adversely affect the public interest.” *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002). “[T]he denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the requested use.” *Id.*

Petitioner is not seeking a rezoning, but rather a CUP to conduct a use that is expressly permitted in the CBD zoning district by the UDO. *See Asheville, N.C., Code of Ordinances, § 7-5-9.1(a)(1)*. The legislative and policy decision of whether to allow a hotel use in a CBD zoning district has already been made by the City Council in adopting the UDO ordinance. “A conditional use permit is one issued for a use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist.” *Woodhouse v. Bd. of Comm’rs of the Town of Nags Head*, 299 N.C. 211, 215, 261 S.E.2d 882, 886 (1980) (citation and quotation marks omitted).

Governing bodies sitting in a quasi-judicial capacity are performing as judges and must be neutral, impartial, and base their decisions solely upon the evidence submitted. *See Handy v. PPG Indus.*, 154 N.C. App. 311, 321, 571 S.E.2d 853, 860 (2002) (“Neutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes”). The property rights of CUP applicants must be respected and protected and the due process procedures must be followed.

A quasi-judicial hearing is a judicial proceeding and not a legislative function. *See Butterworth v. City of Asheville*, 247 N.C. App. 508, 511, 786 S.E.2d 101, 105 (2016) (“In making quasi-judicial decisions, the decision-maker must exercise discretion of a judicial nature.” (citation and quotations omitted)). It is not an occasion to revisit the zoning or permitted uses of a property. Council members’ personal or policy preferences are irrelevant and immaterial. *See Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 276, 533 S.E.2d 525, 530 (2000) (“speculative assertions or mere expression of opinion

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about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body”).

In quasi-judicial proceedings, no board or council member should appear to be an advocate for nor adopt an adversarial position to a party, bring in extraneous or incompetent evidence, or rely upon *ex parte* communications when making their decision. It is incumbent upon city and county attorneys to advise and inform decision-making boards of their proper roles and procedures required in quasi-judicial proceedings.

A. *Superior Court Applied the Correct Standard of Review*

[1] The City argues the superior court misapplied the standards of review in assessing the City’s written decision to deny Petitioner a CUP. The City contends the superior court “expressly and erroneously applied *de novo* review in evaluating whether the evidence was ‘sufficient’ ” based upon the court’s conclusion 4:

4. Exercising *de novo* review, the Court concludes as a matter of law that the evidence presented by PHG and other supporting witnesses was competent, material and substantial and sufficient to establish a *prima facie* case of entitlement to a conditional use permit. In deciding otherwise, the Council made an error of law. A court reviews “*de novo* the initial issue of whether the evidence presented by a petitioner met the requirement of being competent, material, and substantial.” *Blair Investments, LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013).

This conclusion 4, and the superior court’s citation to this Court’s decision in *Blair Investments*, clearly shows the superior court appropriately applied *de novo* review in determining whether Petitioner had presented “competent, material, and substantial” evidence to establish a *prima facie* case. When a petitioner meets its initial burden to present competent, material, and substantial evidence that it is entitled to a CUP, petitioner has established a *prima facie* case to issuance of the CUP. *See Am. Towers*, 222 N.C. App. at 641, 731 S.E.2d at 701 (“We must determine whether petitioner presented competent, material, and substantial evidence. If so, then petitioner has made out a *prima facie* case”).

Presuming *arguendo*, the superior court correctly determined Petitioner’s evidence was competent, material, and substantial, then Petitioner’s evidence was necessarily “sufficient” to make out a *prima facie* case. *See id.* The superior court’s order shows it did not weigh

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evidence, but properly applied *de novo* review to determine the initial legal issue of whether Petitioner had presented competent, material, and substantial evidence. The City's argument is overruled.

[2] The City also argues the superior court improperly made a *de novo* review of the evidence without applying whole record review to the City Council's 44 findings of fact. The City asserts Petitioner was required to specifically challenge the City Council's 44 findings of fact before the superior court. We disagree.

In *Little River*, the Lee County Board of Adjustment made 15 findings of fact to support its denial of the petitioner's requested special-use permit. ___ N.C. App. ___, 809 S.E.2d at 42. This Court determined the Petitioner had met its *prima facie* showing of entitlement to the SUP under *de novo* review. *Id.* at ___, 809 S.E.2d at 52. Rather than specifically addressing each of the Board of Adjustment's findings of fact, this Court stated: "Many of the Board's findings of fact to support its conclusions are based solely upon opponents' evidence and wholly ignore the evidence presented to make a *prima facie* showing by Petitioner." *Id.* at ___, 809 S.E.2d at 50.

This Court then held: "The Board's findings are unsupported by competent, material, and substantial evidence, and its conclusions thereon are, as a matter of law, erroneous. Respondent-Intervenors did not present substantial, material, and competent evidence to rebut Petitioner's *prima facie* showing of entitlement to a SUP." *Id.* at ___, 809 S.E.2d at 51. Here, as in *Little River*, it was unnecessary for the superior court, and is unnecessary for this Court, to specifically address each of the City Council's 44 findings of fact, because no "competent, material, and substantial evidence" *contra* was presented to rebut Petitioner's *prima facie* showing. *Id.*

"[F]indings of fact are not necessary when the record sufficiently reveals the basis for the decision below or *when the material facts are undisputed and the case presents only an issue of law.*" N.C. Gen. Stat. § 160A-393(I)(2) (2017) (emphasis supplied). The City Council's 44 findings of fact were unnecessary, improper, and irrelevant. No competent, material, and substantial evidence was presented to rebut Petitioner's *prima facie* case, and no conflicts in the evidence required the City Council to make findings to resolve any disputed issues of fact. *See Dellinger*, ___ N.C. App. at ___, 789 S.E.2d at 27.

Under the terms of its own order, the City Council did not have to make 44 findings of fact to weigh or resolve conflicts in the evidence. The City Council made the initial legal determination Petitioner had failed

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to present competent, material, and substantial evidence to establish a *prima facie* case of entitlement to a CUP. Once the City Council made this legal determination, it was unnecessary and erroneous to make 44 findings of fact on unchallenged evidence beyond the required ultimate findings on the 7 criteria specified by the UDO. Asheville, N.C., Code of Ordinances, § 7-16-2(c).

Additionally, once the superior court made the initial *de novo* determination that Petitioner had presented competent, material, and substantial evidence to establish a *prima facie* case, and no competent, material, and substantial evidence *contra* was presented in opposition or rebuttal to Petitioner's evidence, Petitioner was entitled to a CUP as a matter of law. See *Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27. Further, any purported whole record review by the superior court of the City Council's extraneous and superfluous 44 "findings of fact" would have been unnecessary.

The City's argument that Petitioner was required to assign specific error to any of the 44 extraneous and superfluous findings of fact is without merit. The City's argument the trial court misapplied its standards of review by not conducting whole record review of the City Council's unnecessary 44 findings of fact on unchallenged and un rebutted evidence is overruled.

B. *Preservation of Arguments*

[3] Before this Court, the City only argues Petitioner has failed to establish 3 of the 7 required criteria for issuance of a CUP under the UDO. These criteria are 3, 4, and 7. Asheville, N.C., Code of Ordinances, § 7-16-2(c). The City Council denied the requested CUP on the grounds Petitioner had failed to establish a *prima facie* case of entitlement to the CUP under criteria 1, 2, 3, 4, 5, and 7. The City has abandoned any arguments related to the superior court's conclusion of Petitioner's *prima facie* satisfaction of criteria 1, 2, 5 and 6. 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"). Petitioner's *prima facie* compliance with criteria 1, 2, 5 and 6 is unchallenged and established as a matter of law. *Id.*

C. *Criteria 3: Impact on Adjoining or Abutting Property*

[4] The City contends Petitioner has failed to meet its burden of establishing a *prima facie* case of entitlement to a CUP, because it has not presented material evidence. The City concedes Petitioner's expert testimony and reports were properly admitted without objection and this evidence was competent and substantial. "Material evidence" is defined

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to mean “[e]vidence having some logical connection with the facts of consequence or the issues.” *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676 (internal citation omitted).

The City argues the superior court erred by reversing the City Council’s conclusion that Petitioner had failed to meet its burden of producing competent, material, and substantial evidence that the Project “will not substantially injure the value of adjoining or abutting property.” Asheville, N.C., Code of Ordinances, § 7-16-2(c)(3).

The City contends Defendant’s expert witness’s uncontradicted testimony and report were not material, because the City Council found inadequacies in the methodologies employed by the expert. The City cites this Court’s opinions in *American Towers* and *SBA v. City of Asheville City Council* to support its assertions that the City Council could determine Petitioner failed to establish a *prima facie* case under criteria 3 because of “perceived inadequacies” in Petitioner’s expert’s analysis. We disagree.

In *American Towers*, an applicant applied to the Town of Morrisville for a special use permit to erect a telecommunications tower. 222 N.C. App. at 642, 731 S.E.2d at 702. One of the criteria for obtaining a special use permit was “that the proposed development or use will not substantially injure the value of adjoining property.” *Id.* At a hearing before the town board, the applicant offered the testimony and report of an appraiser, who had been admitted as an expert witness. *Id.* at 639, 731 S.E.2d at 700. No expert testimony was presented to rebut the applicant’s expert appraiser. *Id.*

The town board denied the applicant’s requested special use permit based, in part, upon the applicant’s failure to establish a *prima facie* case that the tower “would not substantially injure the value of adjoining properties.” *Id.* at 646, 731 S.E. 2d at 704. The superior court affirmed the town board’s decision to deny the special use permit. *Id.* at 638, 731 S.E.2d at 700.

This Court affirmed the superior court’s order upholding the town board’s denial of the special use permit. *Id.* This Court recited the town board’s reasons for concluding the applicant had failed to establish a *prima facie* case that the tower “would not substantially injure the value of adjoining properties[,]” as follows:

- 1) the report was not benchmarked against other developments or against the market in general, 2) in the two subdivisions studied by Mr. Smith the cell tower was in place

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before the neighboring homes were built. (as opposed to the case at hand here), 3) the report did not attempt to study the effect of possible devaluation of property, and 4) the report did not take into account any potential loss of value due to the loss of “curb appeal” with the tower rising above the adjoining residential neighborhood.

Id. at 645, 731 S.E.2d at 703.

This Court in *American Towers* summarized the Court’s prior holding in SBA, as follows:

This Court was faced with a virtually identical fact situation in the case of *SBA v. City of Asheville City Council*. 141 N.C. App. 19, 539 S.E.2d 18 (2000). In SBA, one of the bases for rejecting the application for a conditional use permit to erect a telecommunications tower was the failure of petitioner to establish a *prima facie* case that the value of adjoining properties would not be adversely affected. We noted that:

City Code § 7-16-2(c)(3) requires a showing that the value of properties adjoining or abutting the subject property would not be adversely affected by the proposed land use. The City’s Staff Report submitted to respondent expressed concern that petitioners’ Property Value Impact Study did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City. Petitioners’ evidence was about other neighborhoods and other towers in the City. Their study did not even include information with respect to an existing cellular tower a short distance from the proposed site that potentially affected the same neighborhoods. Petitioners simply did not meet their burden of demonstrating the absence of harm to property adjoining or abutting the proposed tower as required by § 7-16-2(c)(3).

Id. at 27, 539 S.E.2d at 23.

Based upon the holding of *SBA*, respondent was permitted to find that petitioner failed to present a *prima facie* case based upon perceived inadequacies in the methodology of

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its expert. We are bound by this ruling. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989).

Id. at 645-46, 731 S.E.2d at 704.

Here, Petitioner presented the testimony and report of Tommy Crozier, who was tendered and admitted as an expert witness in land appraisal and valuation without objection. Crozier certified that his report was prepared in conformity with the “Uniform Standards of Professional Appraisal Practice” (“USPAP”). Crozier’s oral testimony and report identified three properties, which directly adjoin or abut the property comprising the Project, and two properties located directly across the street. The adjoining and abutting properties are Carolina Apartments; First Church of Christ, Scientist; and the Asheville Broad Center. The properties across the street from the Project are a Hyatt Place hotel and an office building occupied by the Salvation Army. The report states in relevant part:

The proposed hotel will consist of a new, ±\$25M project located amidst 50+ year old structures that have historically been valued for tax purposes well below \$3.0M. *The presence of the new hotel should meaningfully enhance the values of surrounding properties. This Principle of Progression has already materialized in the immediate area, evidenced by record high transaction prices since the nearby Hotel Indigo opened in 2009.* (emphasis supplied).

...

There have been numerous examples of property value enhancement as the result of revitalization (and as a result of new hotel development specifically) in comparable leisure markets like Charleston, Wilmington, Chattanooga, Savannah and Greenville, SC[.]

Crozier’s report also contains an estimated value of \$50.00 per square foot for the implied land values of the properties adjoining the Project. Crozier’s estimate was based upon the sale prices for “vacant sites or improved sites acquired for redevelopment where the existing improvements were considered to have little to no contributory value.” Crozier’s report compares the \$50.00 per square foot implied land values of the adjoining properties to the substantially lower assessed *ad valorem* values from the Buncombe County tax assessment conducted prior to Petitioner’s purchase of the subject property located at 192 Haywood Street.

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The City's reliance upon *SBA* and *American Towers* is misplaced. Neither of these Court's opinions in *SBA* nor *American Towers* contains any indication that the expert reports at issue in those cases were prepared in accordance with the applicable USPAP standards of the property appraisal licensure or other governing bodies. See *SBA*, 141 N.C. App. at 27, 539 S.E.2d at 18; *Am. Towers*, 222 N.C. App. at 645-46, 731 S.E.2d 698, 703-04.

Additionally, the expert reports in *SBA* and *American Towers* were immaterial to the issue of whether the telecommunications towers would adversely impact the value of adjoining property. The expert witness' report in *American Towers* was based upon an analysis of the values of adjoining properties built later than neighboring cell phone towers. *Am. Towers*, 222 N.C. App. at 645, 731 S.E.2d at 703 (“[I]n the two subdivisions studied by Mr. Smith the cell tower was in place before the neighboring homes were built.”).

The expert witness' report in *SBA* “did not address properties in the vicinity of the subject property, but rather focused on towers and properties in other parts of the City.” *SBA*, 141 N.C. App. at 27, 539 S.E.2d at 23. Unlike the report in *SBA*, Crozier's findings and conclusions specifically analyzes and addresses the values of properties adjoining, abutting, and neighboring the Project in Asheville.

Crozier certified that “[t]he reported analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics & Standards of Professional Appraisal Practice of the Appraisal Institute, which includes the Uniform Standards of Professional Appraisal Practice.” No competent, material, and substantial expert evidence *contra* was presented at the hearing to show Crozier's analysis was unsound or utilized an improper methodology.

Any competent, material, and substantial evidence to rebut Crozier's admitted expert testimony and report would have to have been presented by an expert witness in land valuation. N.C. Gen. Stat. § 160A-393(k)(3)(a) (2017) (“The term ‘competent evidence,’ as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he use of property in a particular way would affect the value of other property”). The City Council's lay notion that Crozier's analysis is based upon an inadequate methodology does not constitute competent evidence under the statute to rebut his expert testimony and report. *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 678 (“Speculative and general lay opinions and bare or vague assertions do not constitute

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competent evidence before the [decision-making body] to overcome the applicant's *prima facie* entitlement to the CUP").

Crozier's admitted and uncontroverted testimony and report meets the low threshold of being "material evidence" as his analysis has a "logical connection" to whether the Project "will impair the value of adjoining or abutting property." *Id.* at ___, 801 S.E.2d at 676. Crozier's analyses and conclusions that: (1) adjoining and nearby property values in the neighborhood of the Project have increased since the Hotel Indigo opened in 2009; (2) values of neighboring properties in other markets have appreciated since the hotels were opened; and, (3) implied values of the adjoining properties have substantially increased since the neighboring Hyatt Hotel opened, all reinforce a "logical connection" to whether the Project will affect the value of "adjoining or abutting property." Crozier's report and testimony constitutes material, as well as competent and substantial, evidence to show *prima facie* compliance with criteria 3. The City's argument that Crozier's testimony and report are not "material" is contrary to the statute and controlling precedents, and is overruled.

D. *Criteria 4: Harmony with the Neighborhood*

[5] The City also argues Petitioner failed to present material evidence "[t]hat the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located." Asheville, N.C., Code of Ordinances, § 7-16-2(c)(4).

Under our binding precedents, "The inclusion of the particular use in the ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Woodhouse*, 299 N.C. at 216, 261 S.E.2d at 886. "[W]here a use is included as a conditional use in a particular zoning district, a *prima facie* case of harmony with the area is established." *Habitat for Humanity of Moore Cty., Inc. v. Bd. of Comm'rs*, 187 N.C. App. 764, 768, 653 S.E.2d 886, 888 (2007).

Here, the City does not dispute that a hotel is a permitted "use" in the CBD zoning district under the UDO. The City argues that even though the *use* of the subject property as a hotel in the CBD is a permitted use, the *development* of a hotel is not presumed to "be in harmony with the area." The statute, long-established precedents and the UDO contain no basis that "development" of a use is to be treated, analyzed, or distinguished from the "use" itself for purposes of criteria 4. Asheville, N.C., Code of Ordinances, § 7-16-2(c)(4) ("the proposed use or development . . . will be in harmony"); *see, e.g., Petersilie v. Town of Boone Bd. of*

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Adjustment, 94 N.C. App. 764, 767, 381 S.E.2d 349, 351 (1989) (using “use” and “development” interchangeably in discussing special-use permit ordinance similar to Asheville’s UDO); *Habitat*, 187 N.C. App. at 768, 653 S.E.2d at 888 (treating “use” the same as “development” in applying presumption that use is in harmony with an area when it is included as a permitted use in the zoning district).

In addition, Petitioner presented the testimony of an expert witness, Blake Esselstyn. Esselstyn prepared a map showing the location of similar structures in the area compared to the proposed Project. He testified that the “scale, bulk and coverage” of the Project would be similar to a number of these similar structures. The density of the Project would be similar to the Carolina Apartments, Vanderbilt Apartments, and Battery Park Apartments located within the area of the Project. Esselstyn also testified that the contemporary architectural style of the Project would be harmonious with the area.

Petitioner’s “use or development” of the property for the conditional use of a hotel in the permitted CBD zone establishes a *prima facie* case of harmony with the area. *Habitat*, 187 N.C. App. at 768, 653 S.E.2d at 888. Although the City asserts “use” should be distinguished from “development” in the UDO, Petitioner’s expert witness, Esselstyn, established a *prima facie* case of harmony of the Project’s use and development within the CBD area under criteria 4. The City’s argument is overruled.

E. *Criteria 7: Undue Traffic Congestion or Traffic Hazard*

[6] The City also argues Petitioner failed to present material evidence to establish a *prima facie* case under criteria 7. Criteria 7 requires: “That the proposed use will not cause undue traffic congestion or create a traffic hazard.” Asheville, N.C., Code of Ordinances, § 7-16-2(c)(7).

Petitioner presented the testimony and report of traffic engineer Kevin Dean, who was accepted and admitted as an expert witness without objection at the City Council hearing. Dean’s report contains the data and results from a traffic analysis he conducted on the streets and intersections adjacent to the Project. Dean testified he had “coordinated with the City’s traffic engineer, and [were] told that all we needed to provide was the trip generation table . . . as well as our anticipated distribution of those trips.” Both the trip generation table and trip distributions were included in Dean’s report.

Dean performed a “capacity analysis” and “collected peak hour traffic counts on [Thursday,] November 10th” 2016. Dean testified he performed the traffic analysis on a Thursday to accord with industry

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standards, which specify traffic should be analyzed on days between Tuesday and Thursday.

Proposed traffic to and from the Project was estimated based upon industry standard data promulgated by “the Institute of Transportation Engineers.” Dean’s analysis showed the Project would increase the delays caused by traffic at nearby intersections by “five percent . . . or less.” Dean testified that if his analysis had been performed on days when there was more traffic volume on the roads, the estimated traffic impact generated from the Project would impact a smaller percentage of overall traffic, due to higher traffic volumes at those intersections from sources other than the Project.

Dean’s report indicates and concludes that “[w]ith the hotel in place, all of the study intersections are expected to continue to operate at acceptable levels of service with only minor increases in delay. Some of the intersections are expected to experience a reduction in overall delay. . . .” Additionally, Dean concluded “traffic entering the site should not conflict with traffic exiting the site.”

Based upon his analysis, Dean testified to his professional opinion that the Project “will not cause undue traffic congestion or a hazard[.]”

Despite Dean’s expert testimony, and the absence of any expert testimony to the contrary, the City Council found that Dean’s analysis was deficient, in part, because: (1) Dean’s traffic analysis only included data for November 10th and not for other times of the year; (2) Dean was not aware of whether environmental conditions could have affected traffic volumes; (3) Dean did not conduct his traffic analysis during the weekend; and (4) the traffic analysis “did not account for traffic that will be generated by future hotels and apartments in the downtown area. . . .”

The City Council also found Dean’s analysis was deficient because a “sight distance check” was not conducted to determine if a “blind hill with limited visibility in the vicinity of the Hotel’s parking deck’s entrance and exit” would “endanger driver or pedestrian safety.” This “finding” is apparently based upon a question posed by Charles Rawls, a lay member of the public, at the City Council hearing. Rawls questioned whether there was a potential sight distance problem for traffic coming over a purportedly blind hill near the Project’s planned parking deck.

No competent, material, and substantial evidence was presented to refute Dean’s traffic analysis. Dean testified his study was conducted in accordance with industry standards and used standard industry data

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and methods. The speculations of lay members of the public and unsubstantiated opinions of City Council members do not constitute competent evidence *contra* under the statute or precedents to rebut Dean's traffic analysis. N.C. Gen. Stat. § 160A-393(k)(3)(b) (" 'competent evidence,' as used in this subsection, shall not be deemed to include the opinion testimony of lay witnesses as to . . . [t]he increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety"); *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 ("denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague or merely an excuse to prohibit the requested use").

Dean's expert testimony and admitted report clearly constitute "material evidence" because they bear "a logical connection" to the issues of whether Petitioner's Project will impact traffic congestion or create a traffic hazard. *Innovative 55*, __ N.C. App. at __, 801 S.E.2d at 676. Although lay members of the City Council may disagree with Petitioner's experts' testimony and reports, that does not rebut the legal determination of whether the evidence is "material." *See id.* at __, 801 S.E.2d at 675 ("Whether . . . material . . . evidence is present in the record is a conclusion of law." (citation omitted)). The City has failed to show that any of Petitioner's experts' testimony and evidence was incompetent, immaterial, unsubstantial, or rebutted by contrary evidence meeting the same statutory and precedential standards to deny the CUP. The City's arguments are overruled.

V. Conclusion

Applying *de novo* review, the trial court properly concluded Petitioner had presented a *prima facie* showing of entitlement to a CUP to construct their hotel as a permitted use in the CBD zone. Petitioner satisfied its burden of production and, in the absence of competent, material, and substantial evidence to the contrary, is entitled to issuance of the CUP as a matter of law. *See Dellinger*, __ N.C. App. at __, 789 S.E.2d at 27. The City Council's denial of the application was not based upon any competent, material, and substantial evidence *contra* to rebut the Petitioner's *prima facie* showing.

Once the superior court made the initial *de novo* determination that Petitioner had presented competent, material, and substantial evidence to establish a *prima facie* case, and no competent, material, and substantial evidence *contra* was presented in opposition or rebuttal to Petitioner's evidence, the superior court properly reversed and remanded for issuance of the CUP as a matter of law. *See id.* Further, any purported

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whole record review by the superior court of the City Council's extraneous and superfluous 44 "findings of fact" was unnecessary.

The superior court's order reversing the City's denial of Petitioner's application and remanding for issuance of the CUP is affirmed. This cause is remanded to the superior court for further remand to the City to issue the CUP to Petitioner. *It is so ordered.*

AFFIRMED.

Judges INMAN and BERGER concur.

QUB STUDIOS, LLC AND ERIC ROBERT, PLAINTIFFS
v.
PHILLIP MARSH AND ASHLEY JENKINS, DEFENDANTS

No. COA18-205

Filed 6 November 2018

1. Civil Procedure—Rule 60—jurisdiction—reference in complaint to exhibits—clerical error—not an error of law

While it is true N.C.G.S. § 1A-1, Rule 60(b) is not designed for review of errors of law, plaintiffs' Rule 60 motion was premised on the initial complaint properly referencing only one of two exhibits. The error was clerical, not an error of law, and the trial court had jurisdiction to review the motion.

2. Civil Procedure—Rule 60—lack of evidence or argument

The trial court did not err by granting plaintiffs' motions under N.C.G.S. § 1A-1, Rule 60(b)(1) and (b)(6); defendant failed to show that plaintiffs' attorney erred in a negligent manner evincing a lack of due care, which would preclude Rule 60(b)(1) relief, and failed to present any argument regarding Rule 60(b)(6), the catch-all provision, thus abandoning that issue.

3. Civil Procedure—motion to amend—relation back

The trial court did not err by allowing an amendment to the complaint under N.C.G.S. § 1A-1, Rule 15(c) where the only difference between the original and the amended complaint was a reference to attached exhibits. The original complaint clearly gave notice of the subject matter to both defendants.

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4. Civil Procedure—Rule 60—relief from summary judgment—separate action—collateral attack

The trial court did not err by denying defendant's Rule 60(b) motions for relief where the motions constituted an impermissible collateral attack on the original summary judgment which this action sought to enforce.

5. Jurisdiction—subject matter—enforcement of prior judgment

Subject matter jurisdiction was present where a complaint seeking enforcement of a prior judgment was proper and not challenged by defendant, the amended complaint related back, and the trial court had jurisdiction to consider plaintiffs' motion for relief.

6. Pleadings—amended complaints—statute of limitations—relation back

The trial court did not err by denying defendant's Rule 12(b)(6) motion to dismiss which was based on the argument that the amended complaint would have violated the statute of limitations. It was held elsewhere in the opinion that the amendment properly related back to the original complaint and complied with the statute of limitations.

7. Jurisdiction—personal—motion to dismiss denied

The trial court did not err by denying defendant's motion to dismiss for lack of personal jurisdiction where defendant offered general case law but no factual basis for the court lacking personal jurisdiction over him specifically. Moreover, this action was premised on a prior judgment to which defendant was a party and in which he participated.

8. Pleadings—judgment on the pleadings—prior summary judgment order

The trial court did not err by granting plaintiffs' motion for judgment on the pleadings in a matter based on a summary judgment in a prior proceeding. Defendant's assertions of affirmative defenses constituted impermissible collateral attacks on the summary judgment order in the prior action.

9. Pleadings—judgment on the pleadings—judicial notice of prior action

In an action based on a summary judgment in a prior action, the trial court's judicial notice of the prior proceeding did not convert the current proceeding for judgment on the pleadings into one for summary judgment.

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10. Judgments—on the pleadings—findings

In a matter based on a summary judgment in prior matter, where there were motions to dismiss on multiple grounds, the trial court did not abuse its discretion by denying defendant's motion for written findings and conclusions on a motion for judgment on the pleadings. While it is appropriate for the trial court to enter findings and conclusions on Rule 60(b) motions, if the trial court had to determine facts, a judgment on the pleadings—a matter of law—would not have been appropriate.

Appeal by defendant from order and judgment entered 18 August 2017 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 3 October 2018.

Roberson Haworth & Reese, P.L.L.C., by Christopher C. Finan and Shane T. Stutts, for plaintiff-appellees.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Kara V. Bordman and Lyn K. Broom, for defendant-appellant Ashley Jenkins.

CALABRIA, Judge.

Where plaintiffs' motion to reconsider was premised upon clerical error, and not an error of law, the trial court had jurisdiction to consider it. Where defendant does not challenge the trial court's decision to grant a motion for relief pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure, such argument is abandoned and we find no error. Where plaintiffs' original complaint gave clear notice of the subject matter to defendants, and their amended complaint served only to properly reference a previously-attached exhibit, the trial court did not err in permitting the amended complaint to relate back to the original. Where defendant's motions for relief constituted an impermissible collateral attack, the trial court did not err in denying them. Where the trial court possessed subject matter jurisdiction, it did not err in denying defendant's motion to dismiss for lack of subject matter jurisdiction. Where plaintiffs' amended complaint related back to their original complaint, the trial court did not err in denying defendant's motion to dismiss for failure to state a claim.

Where defendant failed to offer any evidence that the trial court lacked personal jurisdiction over him, and in fact participated in the prior litigation in this matter, the trial court did not err in denying his

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motion to dismiss for lack of personal jurisdiction. Where no material issues of fact remained to be resolved, the trial court did not err in granting plaintiffs' motion for judgment on the pleadings. Where the trial court entered judgment on the pleadings, the entry of findings of fact would have been inappropriate, and the trial court did not err in denying defendant's request for written findings of fact. We affirm.

I. Factual and Procedural Background

On 20 June 2006, summary judgment was entered against Phillip Marsh ("Marsh") and Ashley Jenkins ("Jenkins") (collectively, "defendants"), in favor of QUB Studios, LLC ("QUB") and Eric Robert ("Robert") (collectively, "plaintiffs"). This judgment ordered defendants to pay damages to plaintiffs. On 8 June 2016, plaintiffs filed a complaint against defendants, alleging that defendants had failed to pay, and seeking treble damages plus attorney's fees. On 15 August 2016, the Clerk of Court entered default against Marsh for failure to plead.

On 19 September 2016, Jenkins filed his answer, denying the allegations in the complaint, and moving to dismiss pursuant to Rules 12(b)(1), (2), (4), and (6) of the North Carolina Rules of Civil Procedure, and pursuant to the statute of limitations. Jenkins further moved for relief from the original summary judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, and for a jury trial.

On 17 November 2016, plaintiffs moved for summary judgment. On 10 March 2017, the trial court granted summary judgment in favor of plaintiffs against Marsh, against whom default had been entered. That same day, in a separate order, the trial court held that plaintiffs' complaint failed to state a claim upon which relief could be granted with respect to Jenkins. It therefore granted Jenkins' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure; denied plaintiffs' motion for summary judgment; and denied Jenkins' remaining motions.

On 22 March 2017, plaintiffs filed a motion to reconsider, seeking relief from judgment and to amend their complaint, alleging that Jenkins' motion to dismiss was successful due to "a mere technicality of pleading." On 17 April 2017, the trial court granted the motion, set aside its prior order, and allowed plaintiffs to amend their complaint. On 16 June 2017, plaintiffs moved for judgment on the pleadings. On 17 July 2017, Jenkins requested that the court make findings of fact and conclusions of law on each of its rulings on his motions, pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure.

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On 18 August 2017, the trial court entered its order on plaintiffs' motion for judgment on the pleadings and Jenkins' motions to dismiss and for relief from judgment. The court denied Jenkins' motions, with prejudice, granted plaintiffs' motion for judgment on the pleadings, and awarded damages to plaintiffs. Jenkins appeals.

II. Jurisdiction

In his first argument, Jenkins contends that the trial court lacked jurisdiction to consider plaintiffs' motion to reconsider and motion to amend. We disagree.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

[1] Plaintiffs' motions for relief and reconsideration were filed pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure, and premised upon "mistake, inadvertence, surprise, or excusable neglect." On appeal, however, Jenkins contends that the trial court lacked jurisdiction to consider these motions.

Jenkins contends, and we recognize, that "Rule 60(b) provides no specific relief for 'errors of law' and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for 'errors of law.'" *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988). Jenkins argues that plaintiffs' motion, seeking "to correct an error of law[.]" was therefore not proper.

It is here that we must disagree with Jenkins. It is true that Rule 60(b) is not designed to review errors of law, and does not provide relief therefrom. But plaintiffs' motion was not premised upon an error of law. Plaintiffs' motion was premised upon the fact that their initial complaint included two exhibits, but only properly referenced one of them. The error plaintiffs cited was therefore not an error of law, but rather an error of the clerical variety.

Because plaintiffs' motion sought relief based upon plaintiffs' inadvertent clerical error, and not an error of law, relief pursuant to Rule 60(b) was appropriate. We therefore hold that the trial court possessed the jurisdiction to consider the motion.

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III. Motions for Relief

In his second and third arguments, Jenkins contends that the trial court erred in granting plaintiffs' motion for relief, and in denying Jenkins' motions for relief. We disagree.

A. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

B. Plaintiffs' Motion to Reconsider

[2] Jenkins contends that plaintiffs "did not submit any evidence/facts to meet the requirements of Rule 60(b)(1) or (6) in order for the trial court to have a basis to grant [plaintiffs'] Rule 60 motion." Accordingly, Jenkins contends that the trial court erred in granting the motion.

Rule 60 of the North Carolina Rules of Civil Procedure governs motions for relief from a judgment or order. Specifically, Rule 60(b) provides that:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

...

(6) Any other reason justifying relief from the operation of the judgment.

N.C.R. Civ. P. 60(b). Jenkins contends, and we acknowledge, that although attorney error may constitute grounds for relief pursuant to Rule 60(b)(1), ignorance, carelessness, or similarly negligent mistakes evincing a lack of due care do not. *See Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). However, what is required is some showing that counsel not only erred, but did so in a negligent manner evincing a lack of due care. Jenkins offers nothing to support a contention that plaintiffs' counsel was negligent in its mistake.

If Jenkins made such a showing, however, that argument would apply only to plaintiffs' motion pursuant to Rule 60(b)(1). Jenkins makes no argument with respect to the motion pursuant to Rule 60(b)(6), the catch-all "any other reason" provision of the rule. Because Jenkins fails

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to argue this, we deem such argument abandoned. *See* N.C.R. App. P. 28(b)(6) (“[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”). In the absence of an argument that the trial court erred in granting plaintiffs’ motion pursuant to the catch-all provision of Rule 60(b), we hold that the trial court did not err.

C. Plaintiffs’ Motion to Amend

[3] Jenkins further contends that allowing the amendment of the complaint to relate back was prejudicial and erroneous. However, Rule 15(c) of the North Carolina Rules of Civil Procedure, which governs the relation back of amended pleadings, provides that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” N.C.R. Civ. P. 15(c).

In the instant case, the original complaint named each of the parties, the judgments, and the events central to plaintiffs’ claim. The only difference between the original complaint and the complaint plaintiffs sought to introduce as amended was the reference, in the complaint itself, to the attached exhibits. Clearly, the complaint gave notice of the subject matter to both defendants, and Rule 15(c) permitted the amended complaint to relate back to the original. Again, we hold that the trial court did not err in permitting the complaint to relate back.

D. Jenkins’ Motions for Relief

[4] In response to plaintiffs’ complaint and amended complaint, Jenkins sought relief from the original summary judgment motion upon which the entire complaint was predicated, pursuant to multiple subsections of Rule 60(b). On appeal, Jenkins contends that the trial court erred in denying these motions for relief.

We note that, unlike plaintiffs’ standalone Rule 60(b) motion, which clearly and in detail explained plaintiffs’ position and reason for seeking relief, the Rule 60(b) motions found in Jenkins’ answers are summary and lack any explanation or support. We further note that, on appeal, Jenkins addresses only his motions pursuant to Rule 60(b)(4) and (6). Since Jenkins raises no arguments with respect to his other Rule 60(b) motions, we deem such arguments abandoned. *See* N.C.R. App. P. 28(b)(6) (“[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”).

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All this said, Jenkins' unsuccessful Rule 60(b) motions differ from plaintiffs' in one key detail. Plaintiffs' motion sought relief from a prior order in the instant case. Jenkins' motions, however, sought relief from an order in a separate case.

“A collateral attack is one in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid.” *Clayton v. N.C. State Bar*, 168 N.C. App. 717, 719, 608 S.E.2d 821, 822 (2005) (quoting *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (1969)). “North Carolina does not allow collateral attacks on judgments.” *Id.* (quoting *Regional Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (2003)). Jenkins' motions for relief in the instant case could not have been granted unless the judgment in the prior case was adjudicated invalid. Jenkins' motions, had they been made in the prior case, may have been appropriate, but here they constituted an impermissible collateral attack. Accordingly, we hold that the trial court did not err in denying Jenkins' Rule 60(b) motions.

IV. Motions to Dismiss

In his fourth argument, Jenkins contends that the trial court erred in denying his motions to dismiss. We disagree.

A. Standard of Review

“We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings.” *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). “The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.” *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). With regard to Rule 12(b)(6), “[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.” *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

Jenkins moved to dismiss the complaint pursuant to Rule 12(b)(1), governing subject matter jurisdiction; Rule 12(b)(2), governing personal jurisdiction; and Rule 12(b)(6), governing failure to state a claim. On

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appeal, he contends that the trial court erred in denying his motions to dismiss.

[5] With respect to subject matter jurisdiction, we first note that the instant complaint, seeking enforcement of the prior judgment, was proper. Jenkins does not challenge it, and such challenge is therefore deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (“[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”). Moreover, as we have already discussed above, the trial court had jurisdiction to consider plaintiffs’ motion for relief, and plaintiffs’ amended complaint properly related back to the original. Accordingly, we hold that the trial court had subject matter jurisdiction, and did not err in denying Jenkins’ motion to dismiss pursuant to Rule 12(b)(1).

[6] With respect to failure to state a claim, Jenkins contends that the amended complaint would have been dated 2017, more than the ten-year statute of limitations beyond the original 2006 order which plaintiffs sought enforced. Jenkins contends that the amended complaint does not relate back to the original, and thus fails to satisfy the statute of limitations on its face. Again, however, we have addressed this argument above. The amended complaint properly related back to the original complaint, and therefore complied with the necessary statute of limitations. We hold that the trial court therefore did not err in denying Jenkins’ motion to dismiss pursuant to Rule 12(b)(6).

[7] Lastly, with respect to personal jurisdiction, Jenkins’ argument is oddly conclusory. Jenkins cites North Carolina’s two-prong analysis to determine whether a non-resident is subject to personal jurisdiction. Jenkins then cites the case of *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887 (1982), along with a brief summary of its facts. Jenkins then concludes, simply, that “[o]n these facts, our Court of Appeals concluded that there was no personal jurisdiction, . . . and there is none here with regard to Jenkins.” Thus, although Jenkins offers case law concerning personal jurisdiction generally, he offers no factual basis as to why the trial court lacked personal jurisdiction over him specifically. Nor does he indicate any evidence in the record, nor can we find any, which may support this otherwise summary and unsubstantiated defense. Moreover, it cannot be overstated that this matter is premised upon a prior judgment which was entered in Guilford County, to which Jenkins was a party and in which Jenkins participated. As such, we hold that the trial court did not err in denying Jenkins’ motion to dismiss pursuant to Rule 12(b)(2).

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For all these reasons, we hold that the trial court did not err in denying Jenkins' motions to dismiss.

V. Judgment on the Pleadings

In his fifth argument, Jenkins contends that the trial court erred in granting plaintiffs' motion for judgment on the pleadings. We disagree.

A. Standard of Review

"This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, 764 (2008). "[A] motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984).

B. Analysis

[8] Jenkins contends that he "asserted affirmative defenses including assertions of fact which if taken as true, created fact issues to be decided by a jury." If this were true, it would have precluded the trial court from granting judgment on the pleadings. However, the examples Jenkins gives are various collateral attacks on the original summary judgment order. As we stated above, these collateral attacks are impermissible. Notwithstanding Jenkins' contentions to the contrary, it is undisputed that summary judgment was entered against Jenkins and Marsh in the prior proceeding.

[9] Jenkins additionally contends that the trial court "took judicial notice of the entire contents of the court file for the 2006 matter which converted the motion to one for summary judgment." Jenkins contends that the trial court erred in doing so.

Although there is not significant case law on point within our jurisdiction, we note that the Supreme Court of the United States has addressed this issue unambiguously, stating that "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 168 L. Ed. 2d 179, 193 (2007). We find this reasoning persuasive, and agree. The distinction between a Rule 12(c) motion for judgment on the pleadings and a Rule 56 motion for summary judgment is that the latter may require an evidentiary hearing. In

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the situation where the trial court takes judicial notice of an established fact – such as the record of the prior proceeding – no hearing is required. As such, the trial court did not convert the proceeding into one for summary judgment by taking judicial notice.

Jenkins presents no other purported issues of fact which might preclude a judgment on the pleadings. Accordingly, we hold that the trial court did not err in granting plaintiffs’ motion for judgment on the pleadings.

VI. Request for Findings

In his sixth argument, Jenkins contends that the trial court erred in denying his request for findings of fact. We disagree.

A. Standard of Review

“Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party.” *Nations v. Nations*, 111 N.C. App. 211, 214, 431 S.E.2d 852, 855 (1993) (citing N.C.R. Civ. P. 52(a)(2)).

B. Analysis

[10] Prior to the entry of the trial court’s written order, Jenkins filed a motion pursuant to Rule 52(a) of the North Carolina Rules of Civil Procedure, requesting that the trial court enter findings of fact and conclusions of law when entering its written order. The trial court denied this motion. On appeal, Jenkins contends that this was error.

Jenkins notes, and we agree, that it is appropriate for the trial court to enter findings of fact and conclusions of law when ruling on motions for relief pursuant to Rule 60(b). See *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 (2000). In such a circumstance, it would be appropriate for a party to actively request such findings and conclusions pursuant to Rule 52(a).

However, this Court has noted that, where judgment is appropriate as a matter of law, the entry of findings of fact is contraindicated. For example, this Court has held that “Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper.” *Stone v. Conder*, 46 N.C. App. 190, 195, 264 S.E.2d 760, 763 (1980). In that same case, this Court held that “[i]n determining a motion for summary judgment, the trial judge is not required to make finding [sic] of fact and conclusions of law and *when he does make same, they are disregarded on appeal.*” *Id.* (emphasis added, citation and quotation marks omitted).

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In the instant case, the matter was decided on the pleadings pursuant to Rule 12(c) – that is, as a matter of law. Findings of fact were not necessary for the trial court to reach its determination. Rather, if the trial court had to determine facts, judgment on the pleadings would not have been appropriate. *Id.* Accordingly, we hold that the trial court did not abuse its discretion in denying Jenkins' motion for written findings of fact and conclusions of law.

VII. Conclusion

We hold that the trial court possessed subject matter jurisdiction to hear this case. The trial court did not err in granting plaintiffs' Rule 60 motion, nor in denying Jenkins'. The trial court did not err in denying Jenkins' motions to dismiss. The trial court did not err in granting judgment on the pleadings in favor of plaintiffs. Because judgment on the pleadings is a judgment as a matter of law, findings of fact would have been inappropriate, and the trial court did not err in denying Jenkins' motion for written findings of fact.

AFFIRMED.

Judges TYSON and ZACHARY concur.

 TERESSA B. ROUSE, PETITIONER

v.

FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA17-884

Filed 6 November 2018

1. Public Officers and Employees—career employees—dismissal—procedural due process—notice of potential punishment

A county department of social services (DSS) violated a career DSS employee's procedural due process rights by failing to provide her with sufficient notice of the potential punishment to be determined during a pre-disciplinary conference and then subsequently dismissing her. The notice stated that the punishment being considered was dismissal from the Family and Children's *Division* of the county DSS agency, while the actual punishment being considered was dismissal from the county DSS agency.

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2. Public Officers and Employees—career employees—dismissal—just cause—grossly inefficient job performance

An administrative law judge's findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of grossly inefficient job performance. The employee performed her job according to the directions given by her management group during the incident that gave rise to her dismissal.

3. Public Officers and Employees—career employees—dismissal—just cause—unacceptable personal conduct

An administrative law judge's findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of unacceptable personal conduct. There was no just cause for dismissal where the employee had a long, discipline-free career with respondent-employer, had a record of good job performance, and performed her job as directed by her management group.

4. Public Officers and Employees—career employees—wrongful termination—back pay—attorney fees

An administrative law judge lacked authority to award back pay and attorney fees to a career local social services employee who had been wrongfully terminated from employment.

Appeal by respondent from final decision entered 18 April 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Court of Appeals 20 March 2018.

Elliot Morgan Parsonage, PLLC, by Benjamin P. Winikoff, for petitioner-appellee.

Office of Forsyth County Attorney, by Assistant County Attorney Gloria L. Woods, for respondent-appellant.

BRYANT, Judge.

Where the record provided substantial evidence to support the trial court's findings of fact and the conclusions of law, we affirm the Administrative Law Judge's (ALJ) final decision. Where the ALJ lacked

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authority to award back pay and attorney's fees, we vacate the portion of the final decision to award back pay and attorney's fees.

Petitioner Teresa B. Rouse was employed by respondent Forsyth County Department of Social Services. She began her employment on 21 January 1997. In 2001, she was promoted to the position of Social Worker. By 2011, she had been promoted to a Senior Social Worker and began working in the respondent's Family and Children's Division After Hours Unit. As a Senior Social Worker, petitioner's duties included receiving and screening reports for abuse, neglect, and dependency. Since 2000, she had consistently received review ratings that her work "exceeded expectations." And prior to the event that gave rise to the underlying action, "[p]etitioner had no prior disciplinary action in her record." During her nineteen years of employment, there is no indication that respondent ever accused petitioner of failing to make a report. In her most recent employee evaluation, petitioner's supervisor wrote that petitioner had a "strong knowledge base" and a "grasp of afterhours protocols and guidelines."

Part of respondent's protocols called for social workers to utilize computer-generated "CPS reports" created by the State to guide a social worker through a "decision tree" to recommend if the information received should be "screened in" for an investigation or "screened out" if no investigation was required. The State provided training on how to generate the reports and protocols and directed that every report that was "screened out ha[d] second and third levels of review to make sure that the screening was accurate." In addition to the State-required screen in and screen out options, respondent instituted a third option—"supportive counseling." The protocol for "supportive counseling" was not reduced to writing, and respondent provided no formal training on the procedure. Some social workers called supportive counseling "a 'usual practice' of not making a report if there is no abuse, neglect, or dependency. . . . Other workers called it the 'after hours protocol' when a social worker decide[d] not to document a call in any way."

Victor Isley, Division Director for [respondent's] Family and Children Services, testified that the county chose to implement this practice, because they "don't want to be off base with their screen out percentages" by including "*general inquiry calls*" in the CPS online assessment tools. . . . This is because the percent of cases "screened out" is collected and shared with the State; having every call put in to a CPS report would "skew" their data.

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(emphasis added). However, respondent provided no formal training on how to distinguish a general inquiry from a non-general inquiry, and no second or third level of review was made following a determination that a call was a non-general inquiry call.

On 20 June 2018, petitioner was working an after-hours shift when she was assigned a walk-in appointment made by a homeless man (the father) seeking temporary housing for his twelve year old son (the son). Petitioner engaged the father about potential family members and natural supports with whom the son could stay. The man stated that he had tried to communicate with the son's mother (the mother) but communication between them was difficult. Petitioner allowed the father to use her phone to contact the mother. During the ensuing conversation father and mother began to argue before petitioner interjected, introduced herself, and explained to the mother that the father and the son had come to respondent seeking a temporary residence for the son.

The mother became irate complaining about the father and listing several reasons why she did not want her son. Petitioner asked the mother for a specific reason why the son could not stay with her. As petitioner explained the foster care process, which the mother said she didn't want on her record, she then blurted out, "Oh, yeah. He molested my daughters." Petitioner immediately followed up with questions she had been trained to ask: "Who is he?" "My son," the mother responded. "Are you telling me that he molested your daughters?" "I didn't say that," the mother responded. "Well, did you call law enforcement? Did you make a report?" "No, I didn't say that," the mother responded. "I didn't say he molested my daughters, I said he had tendencies." Petitioner questioned both the father and the son, and each denied the allegations.

In seeking to find housing for the son, petitioner gave no credibility to the mother's statement that the son molested her daughters, as the mother had immediately retracted the statement. Petitioner counseled the mother telling her that she "[could not] go around and you should not go around saying these things, kind of things, especially if it didn't happen, because you can get some people in trouble."

Ultimately, it was agreed the son would spend the night with his paternal grandmother and, thereafter, stay with his mother. At the end of her after-hours shift, an email was sent informing respondent of petitioner's efforts on behalf of the father and the son, and that petitioner had provided supportive counseling to the walk-in appointment.

In mid-July 2016, respondent received a request for assistance from Wilkes' County DSS (WCDSS) regarding an allegation of child-on-child

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sexual misconduct. The victim's family was the same family with whom petitioner had spoken on 20 and 21 June. On 26 July, a meeting was held between petitioner, respondent's Family and Children Division Director Victor Isler, Program Manager Linda Alexander, and petitioner's supervisor, Alicia Weaver, to discuss petitioner's interactions with the mother, the father, and the son.

At the end of the meeting, Division Director Isler informed petitioner that she would not go to work that night and that she would be reassigned to the day shift. There would be an internal investigation. By letter, petitioner was informed that she was being reassigned due to an internal investigation and that the reassignment was effective until 29 August 2016.

On 12 September, petitioner received a "preconference document" informing her of a conference on 15 September 2016 to discuss dismissing her from her Senior Social Worker position within respondent's Family and Children Services Division. On 15 September 2016, petitioner met with the agency director who informed petitioner that the recommendation was for dismissal from respondent's agency, not simply the division of Family and Children Services. On 22 September 2016, petitioner received a formal dismissal letter from the agency.

On 21 October 2016, petitioner filed a petition for a formal case hearing with the Office of Administrative Hearings contending that she was discharged without just cause. A hearing on the matter was commenced on 21 January 2017 in the Guilford County Courthouse before the Honorable J. Randall May, ALJ presiding. On 18 April 2017, ALJ May filed a final decision concluding that respondent substantially prejudiced petitioner's rights, failed to act as required by law, and acted arbitrarily and capriciously when dismissing petitioner. ALJ May ordered that petitioner be reinstated to her position as Senior Social Worker, or a comparable position, with all applicable back pay and benefits. In addition, respondent was ordered to pay petitioner's attorney fees. Respondent appeals.

On appeal, respondent challenges the 18 April 2017 final decision arguing that the ALJ erred by concluding respondent failed to establish grossly inefficient job performance, failed to establish unacceptable personal conduct, and violated petitioner's procedural rights. Respondent raises five issues on appeal: whether the ALJ erred by (I) concluding that respondent lacked just cause to dismiss petitioner; (II) concluding that respondent violated petitioner's procedural rights; (III) making unsupported findings of fact; (IV) making unsupported conclusions

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of law; and (V) concluding that petitioner was entitled to an award of attorney's fees.

Standard of Review

Respondent appeals from the final decision of an ALJ who reviewed a final agency decision issued in accordance with the North Carolina Human Resources Act and the Administrative Procedures Act. N.C. Gen. Stat. §§ 126-34.02, 150B-34 (2017). Now on appeal before this Court, review is governed by General Statutes, section 150B-51:

(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.

(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(b), (c) (2017).

I

[1] Respondent contends that the ALJ erred as a matter of law by concluding that respondent violated petitioner's procedural rights. We disagree.

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“Procedural due process restricts governmental actions and decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (citation omitted). “The fundamental premise of procedural due process protection is notice and the opportunity to be heard.” *Id.* at 322, 507 S.E.2d at 278 (citation omitted).

“The North Carolina General Assembly created, by enactment of the . . . [North Carolina Human Resources Act], a constitutionally protected ‘property’ interest in the continued employment of career State employees.” *Id.* at 321, 507 S.E.2d at 277; *see generally* N.C. Gen. Stat. § 126-35(a) (2017) (“No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.”). Our General Assembly also provided that the provisions of the State’s Human Resources Act, codified in General Statutes, Chapter 126, “shall apply to: . . . (2) All employees of the following local entities: . . . b. Local social services departments.” N.C. Gen. Stat. § 126-5(a)(2)b. (2017)¹; *see also* *Watlinton v. Dep’t of Soc. Servs. Rockingham Cty.*, ___ N.C. App. ___, ___, 799 S.E.2d 396, 401 (2017) (“The [State Human Resources Act] applies to . . . certain local government employees, including those who work for local social services departments.”); *Early v. Cty. of Durham DSS*, 172 N.C. App. 344, 354, 616 S.E.2d 553, 560 (2005) (“[T]his Court has also held broadly: Local government employees . . . are subject to the . . . [Human Resources Act]. As such, they cannot be ‘discharged, suspended, or demoted for disciplinary reasons, except for just cause.’ G.S. § 126–35.” (citation omitted)).

It is well settled that a career State employee enjoys a “property interest of continued employment created by state law and protected by

1.

For the purposes of [General Statutes, Chapter 126], unless the context clearly indicates otherwise, “career State employee” means a State employee or an employee of a local entity who is covered by this Chapter pursuant to G.S. 126-5(a)(2) who:

- (1) Is in a permanent position with a permanent appointment, and
- (2) Has been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months.

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the Due Process Clause of the United States Constitution. As a consequence, respondent could not rightfully take away this interest without first complying with appropriate procedural safeguards.” *Nix v. Dep’t of Admin.*, 106 N.C. App. 664, 666, 417 S.E.2d 823, 825 (1992) (citations omitted). This applies equally to local career DSS employees, such as petitioner. *See* N.C.G.S. § 126-5(a)(2)b.; *Early*, 172 N.C. App. at 354, 616 S.E.2d at 560.

Pursuant to our Administrative Code,

[b]efore an employee may be dismissed, an agency must comply with the following procedural requirements:

. . . .

(d) The agency director or designated management representative shall conduct a pre-dismissal conference with the employee The purpose of the pre-dismissal conference is to review the recommendation for dismissal with the affected employee and to listen to and to consider any information put forth by the employee, in order to insure that a dismissal decision is sound and not based on misinformation or mistake.

25 N.C. Admin. Code 01I .2308(4)(d) (2018).

Respondent challenges four findings of fact and nine conclusions of law. We focus first on conclusion of law number 74 stating that respondent violated petitioner’s procedural due process rights by, *inter alia*, failing to properly notify petitioner of the punishment to be determined by the pre-disciplinary conference.

As set out in Issue II below, on 12 September 2016, petitioner was handed a written statement notifying her of a pre-disciplinary conference scheduled for 15 September 2016. Petitioner was advised that the basis of the pre-disciplinary conference was unacceptable personal conduct and grossly inefficient job performance. Per the written statement, “[t]he purpose of the conference is to discuss the recommendation of the [respondent] [to] dismiss you from the position of Senior Social Worker with the *Family and Children’s Division* of [respondent].” (emphasis added). Petitioner sought to contact Agency Director Donahue and her county human resources office representative, but was denied a meeting with both. Petitioner testified to her understanding that the pre-disciplinary conference was to discuss her dismissal from respondent’s Family and Children’s Division; however, during the pre-disciplinary conference she was informed that the conference was

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to discuss her dismissal from the respondent's *agency*. As the ALJ found in the final decision, the following statements were made during the pre-disciplinary conference:

73. . . . I know [respondent] recommended dismissal of me from the division; really I am ok with that; I have spoken with you [Debra Donahue] regarding other interests that I have in the agency, I just want to use my services to make a difference in the agency/community.
74. [Agency Director] Donahue responded, "Let me give you clarity regarding the recommendation; the recommendation is to dismiss you from the agency, not the Division."
75. Petitioner responded,
"Thank you for the clarity, I thought it was dismissal from the Division; in 19 years, I have never had a written warning, I am floored, almost speechless; it really bothers me that people think I would intentionally harm or place a child in harm[']s way; I have always followed the letter of the law when it comes to child welfare, I have never taken a shortcut, never a written warning, I'm just taken aback."

Thereafter, petitioner received no further written notice or opportunity to be heard in a pre-disciplinary conference, as to dismissal from respondent, as opposed to a division of respondent. On 22 September 2016, petitioner received her dismissal letter which stated that "you are dismissed from your position as a Senior Social Worker with [*respondent*]."

As dismissal from a division within an agency and dismissal from the agency are different punishments, respondent failed to provide petitioner with sufficient notice of the potential punishment to be determined during the pre-disciplinary conference. Reasonable notice of dismissal encompasses notice of sanctions or from what employment the accused may be dismissed. *See Peace*, 349 N.C. at 322, 507 S.E.2d at 278 ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard." (citation omitted)). We uphold the ALJ's conclusion that respondent's lack of notice violated petitioner's procedural due process rights. Accordingly, respondent's argument on this point is overruled.

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Having determined petitioner's due process right to notice and opportunity to be heard have been violated, we need not address whether prolonging her investigatory period without authorization was a violation of petitioner's due process rights.

II & III

[2] Respondent argues that the ALJ erred by concluding that respondent failed to establish just cause for petitioner's dismissal due to grossly inefficient job performance. Respondent challenges several of the findings of fact as unsupported by substantial evidence and conclusions of law as unsupported by the findings of fact.

Pursuant to our General Statutes, “[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. . . . The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause.” N.C. Gen. Stat. § 126-35(a) (2017). Pursuant to the North Carolina Administrative Code, Title 25 (“Office of State Human Resources”) (previously codified within our General Statutes, Chapter 126), the two bases for “the discipline or dismissal of employees under the statutory standard of ‘just cause’ as set out in G.S. 126-35 [include] . . . [d]iscipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.” 25 N.C. Admin. Code 11.2301(c)(1) (2018) (Just Cause for Disciplinary Action).

Gross Inefficiency (Grossly Inefficient Job Performance) occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in:

- (1) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public or to a person(s) over whom the employee has responsibility; or
- (2) the loss of or damage to agency property or funds that result in a serious impact on the agency or work unit.

25 N.C. Admin. Code 011.2303(a).

This Court has held that to determine if just cause exists to dismiss an employee for grossly inefficient job performance “the [agency]

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must prove that (1) the employee failed to perform his job satisfactorily and (2) that failure resulted in the potential for death or serious bodily injury.” *Donoghue v. N.C. Dep’t of Corr.*, 166 N.C. App. 612, 616, 603 S.E.2d 360, 363 (2004) (citation omitted).

On appeal, respondent contends that because petitioner failed to generate a formal or informal, handwritten or computerized CPS report following the interview with the father, the son, and the mother, she created the potential for serious harm to a family in violation of General Statutes, section 7B-301(a),² the North Carolina Child Abuse Reporting Law.

Respondent challenges several (A) findings of fact and (B) conclusions of law on the topic of grossly inefficient job performance.

A.

Respondent specifically challenges the following findings of fact:

44. Petitioner treated this as a “general inquiry” about foster care, because none of the parties wished to make a report and she had *no independent cause* to suspect that child abuse had occurred.

46. On or about mid July 2016, Respondent received a request for assistance from Wilkes County Department of Social Services regarding an allegation of child on child sexual misconduct because the mother was not cooperating; and the father stated that none of it was true and wanted to work with the social worker that he had met in Forsyth County. . . .

47. On July 26, 2016, a meeting was held with Petitioner, Victor Isler; Program Manager, Linda Alexander; and Petitioner’s supervisor, Alicia Weaver. During this meeting, it was discovered that this family was the same family that Petitioner had interacted with on June 20, 2016. . . .

48. Petitioner was honest and forthcoming . . . She also informed that she had received a phone call from the attorney of the mother threatening Petitioner and the father

2. “Any person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment, shall report the case of that juvenile to the director of the department of social services in the county where the juvenile resides or is found.” N.C. Gen. Stat. § 7B-301(a) (2017).

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because the mother was not letting him visit her son in [sic] the previous week.

(emphasis added).

Petitioner's testimony—as set forth in other unchallenged findings of fact—support finding of fact number 44 that she had no cause to suspect abuse. For instance, petitioner first spoke with the mother during an “aggressive” conversation between the mother and the father after the father had brought the son into respondent's agency seeking a temporary residence for him. As petitioner was exploring alternative options to foster care placement, the mother gave the following reasons why she did not want the son to live with her:

- That she is now married
- That her two daughters do not acknowledge the father as their father
- That she wanted her new husband to adopt their daughters
- That the father's other relatives should take care of the son
- That the father was verbally and physically abusive
- That the son called her a crack whore when he was six
- That she is in nursing school and had a busy schedule
- That she had no room for her son

When informed that none of those reasons indicated why her son could not come live with her, the mother continued to express her strong dislike for the father. When asked if the mother wanted the son to be placed in foster care, the mother responded, “Well, I don't want that, I don't want that on my record.” At a later point, “the mother blurted out, ‘Oh, yeah. He molested my daughters.’ ”

35. Petitioner immediately launched into her trained follow up questions. Petitioner asked, “Well, who is he?” and the mother said, “My son”. [sic] Petitioner asked for clarification, “Are you telling me that he molested your daughters?” The mother immediately recanted and stated, “I didn't say that.” Petitioner then asked the mother, “Well, did you call law enforcement? Did you make a report?” The mother continued to deny, “No. I didn't say that.” The mother then said, “I didn't say he molested my daughters, I said he had tendencies.”

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36. Petitioner questioned both the father and the son, and asked if this was true; the father and son each denied the allegation. . . .

. . . .

45. The next day, the mother, the father, and the grandmother informed Petitioner that the mother was taking the son and that the issue was resolved.

Even during the hearing on respondent's disciplinary action of terminating petitioner, the ALJ found that "the mother testified at the hearing, under oath, that she never stated to Petitioner that her son had molested her daughters. . . ."

The record provides substantial evidence in support of the ALJ's finding of fact number 44, "[p]etitioner . . . had no independent cause to suspect . . . child abuse[, neglect, or dependency]."

In finding of fact number 46, respondent contends that WCDSS contacted respondent because of allegations of sexual activity prior to respondent's facilitation of the son's placement with the mother and her daughters. Respondent's contention is without merit.

On the contrary, the finding of fact shows that WCDSS requested assistance from respondent as petitioner had previously been involved with the family. This finding is supported in part by the mother's testimony where she denies saying her son had sexually molested his siblings. When asked, she responded:

Absolutely not. Where that came from I have no idea. If at any time I have thought he would have molested my daughters or had have, regardless of how old he was, I would have done then what I did on June – July 16th and had my daughters at Brenner's Hospital, the Wilkes County Sheriff's Department at my house, as well as Wilkes County DSS.

Finding of fact 42 is related to finding of fact 46 and is supported by testimony in the record from at least two witnesses.

While respondent urges there is contrary testimony as to finding of fact number 48, it is clear from petitioner's testimony concerning her telephone call, that there is substantial evidence to support this finding by the ALJ.

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B.

Respondent next challenges portions of the ALJ's conclusions of law related to respondent's claims of grossly inefficient job performance.

30. . . . With respect to the policy violations cited, the weight of the evidence fails to show Petitioner's violation of the policies named by Respondent in the dismissal letter.

31. The greater weight of the evidence does not establish a violation of N.C.G.S. § 7B-301. N.C.G.S. § 7B-301 makes it a class 1 misdemeanor to knowingly or wantonly fail to report the case of a juvenile, when that person has cause to suspect that any juvenile is abused, neglected, or dependent. The North Carolina Courts have not defined "cause to suspect;" [sic] however, the North Carolina School of Government provides:

The standard is not just a suspicion but cause to suspect. However, a person deciding whether to make a report also must consider a child's statements, appearance, or behavior (or other objective indicators) in light of the context; the person's experience; and other available information." Janet Mason, *Reporting Child Abuse and Neglect in North Carolina* 67 (3d ed. 2013), available at https://www.sog.unc.edu/sites/www.sog.unc.edu/files/full_text_books/Mason_%20Reporting-Child-Abuse_complete.pdf.

Petitioner was the only person to provide first-hand testimony of what she heard and observed that day. Petitioner testified extensively, and throughout Respondent's investigation, that based on the context of the statements, her experience, and ability to observe and interact with the child, she had no cause to suspect abuse. It is Respondent's burden to prove that Petitioner had cause to suspect abuse and knowingly chose not to report the abuse. This was not established by the greater weight of evidence.

32. The greater weight of evidence does not establish a violation of 10A N.C.A.C. 70A .0105, which dictates that

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the “county director shall receive and initiate an investigation on all reports of suspected child abuse, neglect, or dependency, including anonymous reports.”

33. Petitioner never admitted that she violated 10A N.C.A.C. 70A .0105(a); instead, she remained adamant that she followed Respondent’s “supportive counseling policy.” Nowhere in 10A N.C.A.C. 70A .0105(a) does it state that Petitioner must inform her supervisor of all facts when providing supportive counseling and must generate a FDCSS report for all intakes.

35. The majority of the credible evidence presented indicated that Petitioner may have violated Respondent’s “supportive counseling policy.” However, Respondent did not list that as a basis for Petitioner’s dismissal, and it is not addressed here.

36. Even if Respondent had presented sufficient evidence that Petitioner failed to satisfactorily perform job requirements, the grossly inefficient job performance claim fails because Respondent was required to make an evidentiary connection between Petitioner’s actions and the harm. Respondent failed to do this. See *Clark v. N.C. Dep’t of Pub. Safety*, No. COA15-624, 2016 N.C. App. LEXIS 897 (Ct. App. Sep[t]. 6, 2016)[.]

As to conclusions of law numbered 30, 31, 32, and 33, respondent generally argues that petitioner failed to create a report in compliance with State policy that would have initiated a second level of review and allowed petitioner’s supervisor to make a determination of whether the information gathered during the initial intake meeting with the father and the son constituted abuse, neglect, or dependency, or warranted further investigation.

As set forth in the final decision, our Administrative Code sets out that

Gross Inefficiency (Grossly Inefficient Job Performance) occurs in instances in which the employee fails to satisfactorily perform job requirements as specified in the job description, work plan, or as directed by the management of the work unit or agency and that failure results in:

- (1) the creation of the potential for death or serious harm to a client(s), an employee(s), members of the public

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or to a person(s) over whom the employee has responsibility; or

- (2) the loss of or damage to agency property or funds that result in a serious impact on the agency or work unit.

25 N.C. Admin. Code 01I.2303(a).

As the ALJ concluded, petitioner had performed the job requirements as directed by the management group for the agency for which she worked. The substantial evidence and findings of fact indicate that petitioner provided supportive counseling to the father and the son on 20 and 21 June 2016 and notified her supervisor of the counseling provided during her work shift. Supportive counseling was not included in the State's intake CPS reporting mechanism, but was a practice utilized by respondent's management.

Moreover, in the ALJ's unchallenged findings of fact, during the investigation of petitioner's 20 June 2016 incident, petitioner's supervisor, Stanfield, was not asked to provide a written account of what he recalled, and he was not provided with a written copy of petitioner's statement of the events on that date.

As the substantial evidence and findings of fact indicate that petitioner provided supportive counseling to the father, the mother, and the son on 20 June 2016, that supportive counseling was not a stated ground for petitioner's dismissal, and because petitioner's supervisor failed to indicate what information he had received, the ALJ concluded that petitioner's dismissal could not be upheld on the ground of grossly inefficient job performance. We agree and overrule respondent's challenge to conclusions of law 30, 31, 32, 33, and 35.

Respondent lists conclusion of law number 36 ("Respondent was required to make an evidentiary connection between Petitioner's actions and the harm. Respondent failed to do this.") as one challenged on appeal, but does not otherwise specifically address this conclusion in its brief before this Court. *See* N.C. R. App. P. 28(a) (2018) ("Issues not presented and discussed in a party's brief are deemed abandoned."). We note that we overruled respondent's challenge to finding of fact number 44 ("Petitioner . . . had no independent cause to suspect . . . child abuse[, neglect, or dependency].") under subsection A, *supra*. Therefore, we dismiss respondent's challenge to this conclusion of law.

Accordingly, we overrule or dismiss respondent's challenges to the ALJ's findings of fact and conclusions of law addressing grossly inefficient job performance.

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IV

[3] Next, respondent argues that the ALJ erred by concluding that respondent failed to establish just cause for dismissal based on unacceptable personal conduct.

Our Administrative Code provides that “[e]mployees may be dismissed for a current incident of unacceptable personal conduct.” 25 N.C. Admin. Code 01I .2304(a) (2018) (Dismissed for Personal Conduct). Unacceptable personal conduct is defined in pertinent part as:

- (1) conduct for which no reasonable person should expect to receive prior warning; or
- (2) job related conduct which constitutes violation of state or federal law; or
-
- (4) the willful violation of known or written work rules; or
- (5) conduct unbecoming an employee that is detrimental to the agency's service[.]

25 N.C. Admin. Code 01I .2304(b)(1), (2), (4), and (5).

Using the test for determining just cause for discipline due to unacceptable personal conduct as presented in *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), the ALJ stated

- (a) did the employee engage in the conduct the employer alleges;
- (b) does the employee's conduct fall within one of the categories of unacceptable conduct provided in the Administrative Code; and
- (c) if the employee's actions amount to unacceptable personal conduct, did the misconduct amount 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.

See generally id. at 381, 726 S.E.2d at 924–25.

Respondent alleges unacceptable personal conduct under sections (1), (2), (4), and (5). After extensive review, the ALJ determined respondent did not have just cause to dismiss petitioner for unacceptable

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personal conduct. On appeal, respondent challenges six of the ALJ's findings of fact (16, 17, 18, 24, 42, and 43) and nine conclusions of law (44, 45, 48, 49, 50, 51, 54, 55, and 56). We address primarily the findings of fact and conclusions of law related to part (c) of the *Warren* test (“[D]id the misconduct amount to just cause for the disciplinary action taken?”).

In the final decision, under the heading “Did Petitioner engage in the conduct as alleged?” the ALJ concluded

the preponderance of the evidence shows that Petitioner engage[d] in the conduct alleged by Respondent. While there is some evidence to the contrary . . . the greater weight of evidence demonstrates that Petitioner did not inform her supervisor of the allegations of child on child sexual abuse and did not create a FCDSS Computerized Report.

However, the ALJ further concluded that “[e]ven if Petitioner’s action(s) were, at some level, considered to be some type of unacceptable personal conduct, Petitioner’s actions did not constitute just cause for dismissal when the equities in this case are balanced.” The ALJ made the following conclusions:

51. Even if Petitioner’s action(s) were, at some level, considered to be some type of unacceptable personal conduct, Petitioner’s actions did not constitute just cause for dismissal when the equities in this case are balanced. Those include the following: 1) Petitioner’s substantial, 19 year, discipline-free employment history with Respondent, as well as her record of good performance in her duties as recorded in her performance reviews; 2) Petitioner received no training in “supportive counseling”; 3) the supportive counseling policy was not in writing; 4) Donahue and Isler admitted that they did not look at Petitioner’s employment evaluations or the length of her employment before reaching their decisions; 5) the supportive counseling policy was not frequently enforced; 6) there was at least one other time that Respondent listened to allegations of abuse by local police and were told not to document it; and 7) Petitioner was honest and forthcoming throughout the entire investigation.

....

54. Respondent’s investigation and treatment of Petitioner was also fundamentally unfair. This began with

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violating Petitioner's procedural rights by erroneously prolonging her investigatory period without authorization. Respondent never spoke with Petitioner to learn why she applied "supportive counseling" or who trained her that way. Respondent then created self-serving hypotheticals to try to justify that this harm was not part of improper oversight and training on behalf of Respondent. Mr. Isler learned that intake workers were no longer applying "supportive counseling" after this incident, and did not inform the agency director. The pre-dismissal letter stated that the recommended discipline was a dismissal from the division, not the agency. The agency director refused to meet with Petitioner prior to her pre-disciplinary conference. Respondent's HR department told Petitioner to go back to the agency director. When the agency director learned, during the pre-disciplinary conference, that Petitioner understood [t]hat the recommendation was dismissal from the agency, she made no effort to correct the written notice of a second pre-disciplinary conference after she was made aware of the misrepresentation.

55. Respondent has met its burden of proof to show that Petitioner engaged in unacceptable conduct ["the greater weight of evidence demonstrates that Petitioner did not inform her supervisor of the allegations of child on child sexual abuse and did not create a . . . Computerized Report,"] however, after considering the totality of the facts and circumstances, Respondent did not have just cause to dismiss Petitioner from her employment.

56. Respondent substantially prejudiced Petitioner[']s rights; acted erroneously; failed to act as required by law; and acted arbitrarily and capriciously when Respondent dismissed Petitioner without just cause.

The findings of fact, supported by substantial evidence, indicate that on 26 July 2016, petitioner met with Victor Isler, Program Manager Linda Alexander, and Supervisor Alicia Weaver. Petitioner was honest and forthcoming regarding the events which had occurred 20 and 21 June 2016 while counseling the father, the mother, and the son. Petitioner stated that she applied respondent's supportive counseling policy as she understood it—a policy that was never set out or reduced to writing. Isler informed petitioner that there would be an investigation and that she would be temporarily reassigned to the dayshift due to

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the investigation. The reassignment was to last 33 calendar days, until 29 August 2016. Respondent demanded that petitioner document her statements during the 26 July 2016 meeting and to create a CPS report. Petitioner complied with both requests. On 29 August 2016, respondent informed petitioner that her temporary assignment was extended until 12 September to “further investigate” and “allow time to schedule and conduct a pre-disciplinary conference subject to agency findings.”

During the investigation, social workers were individually invited to meet with Isler, Alexander, and Weaver and posed hypothetical questions to determine how the social workers would respond with regard to applying supportive counseling. The social workers were aware that petitioner had been reassigned due to an internal investigation regarding supportive counseling. At least two responses indicated that “[i]n the past, we would have offered supportive counseling, but currently we’re going to make a report,” and “two weeks ago I would have provided information, but now I document everything.” The findings from the social worker interviews were not shared with Agency Director Debra Donahue. Petitioner was not asked how she was trained to apply supportive counseling, and petitioner was not asked to respond to the hypotheticals. Petitioner’s after-hours supervisor, Michael Stanfield, was not asked to provide a written account of what he recalled of the 20 June 2016 events and was not provided petitioner’s written account of her statements made during the 26 July 2016 meeting with Isler, Alexander, and Weaver.

On 12 September 2016, petitioner was notified of a pre-disciplinary conference scheduled for 15 September to address unacceptable personal conduct and grossly inefficient job performance. “The purpose of the conference is to discuss the recommendation the [respondent] dismiss you from the position of Senior Social Worker with the Family and Children’s division of [respondent].” Petitioner asked to speak with Agency Director Donahue, but was told that Donahue could not speak with her about the conference. Petitioner contacted her county human resources representative and made an appointment to meet on 14 September. On 13 September, petitioner received an email cancelling the meeting with the human resources representative.

During the 15 September pre-disciplinary conference on petitioner’s dismissal, Agency Director Donahue informed petitioner that the conference was to consider petitioner’s dismissal from the *agency*, not just the *division*. Petitioner’s response was that she was “floored, almost speechless.” Respondent did not provide petitioner with a new notice for a pre-disciplinary conference or a new pre-disciplinary conference.

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On 22 September 2016, petitioner received a ten page dismissal letter stating “effective as of today . . . you are dismissed from your position as a Senior Social Worker with [respondent].”

Upon review of the record and respondent’s arguments, we hold respondent has failed to raise a meritorious argument significantly challenging these conclusions of law or the underpinning findings of fact. Therefore, we hold that substantial evidence supports the findings of fact, and that the findings of fact support the ALJ’s challenged conclusions of law 51, 54, 55, and 56. Accordingly, we overrule respondent’s arguments.

V

[4] Lastly, respondent argues that the ALJ erred by concluding that petitioner is entitled to remedies under 25 N.C.A.C. 01J.1306, including an award of attorney’s fees and back pay. We agree.

In his final decision, the ALJ

ORDERED that Petitioner . . . be reinstated to her position as Senior Social Worker, or comparable position Petitioner shall be retroactively reinstated to this position of employment with the Respondent, with all applicable back pay and benefits. Respondent shall pay to Petitioner and her attorney all reasonable attorney fees and cost incurred in this Contested Case pursuant to N.C.G.S. § 150B-33(11).

Back Pay

Pursuant to Subchapter J of Title 25 within our Administration Code, in a grievance an employee may receive back pay “in all cases in which back pay is warranted by law.” 25 N.C. Admin. Code 01J.1306(1) (2018). This Court has held that Title 25’s Subchapter J applies to State employees, while Subchapter I applies to local government employees. *Wattlington*, ___ N.C. App. at ___, 799 S.E.2d at 403. “[A] local government employee shall mean those employees of local social services departments, public health departments, mental health centers and local offices of civil preparedness which receive federal grant-in-aid funds.” 25 N.C. Admin. Code 01A .0103(6) (2018).

Title 25 contains the rules adopted by the [State Human Resources] Commission and includes distinct subchapters on various personnel topics. . . .

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Subchapter I, “Service to Local Governments,” provides the procedures and rules specific to the personnel system developed for local government employees, including subsections on recruitment and selection, classification, and compensation. *See* 25 NCAC 01I.1800, .1900, and .2100 (2016). Subchapter I includes a separate subsection on “Disciplinary Action: Suspension, Dismissal and Appeals,” which includes rules regarding just cause and dismissal for unacceptable personal conduct. 25 NCAC 01I.2301 and .2304 (2016). These rules vary slightly from the rules and procedures stated under Subchapter J. *See* 25 NCAC 01J.0603–.0618.

Id. at ___, 799 S.E.2d at 402.

Respondent argues that it is a local government agency that is governed by Subchapter I of the N.C. Admin. Code, Title 25—not Subchapter J. We agree. Therefore, the ALJ erred in awarding petitioner back pay pursuant to Title 25 N.C. Admin. Code 01J.1306. On this ground, we vacate the portion of the order in the final decision to award back pay.

Attorney’s Fees

“N.C. Gen. Stat. § 150B-33(b)(11) allows [an] ALJ to award attorney’s fees . . . under certain circumstances[.]” *Watlinton*, ___ N.C. App. at ___, 799 S.E.2d at 405. Pursuant to General Statutes, section 150B-33, “[a]n administrative law judge may . . . [o]rder the assessment of reasonable attorneys’ fees . . . against the *State agency* involved in contested cases decided . . . under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.” N.C. Gen. Stat. § 150B-33(b)(11) (2017) (emphasis added).

Here, respondent is not a State Agency. Accordingly, the ALJ was without authority to award petitioner’s attorneys’ fees pursuant to section 150B-33(b)(11). Accordingly, we vacate the portion of the order in the final decision to award attorney’s fees.

AFFIRMED IN PART; VACATED IN PART.

Judges DILLON and TYSON concur.

STATE v. ALLEN

[262 N.C. App. 284 (2018)]

STATE OF NORTH CAROLINA

v.

CHRISTOPHER ISAIAH ALLEN

No. COA18-34

Filed 6 November 2018

Constitutional Law—effective assistance of counsel—no direct appeal

The direct appeal of an ineffective assistance of counsel claim was dismissed without prejudice to the right to file a motion for appropriate relief in the trial court where the record was inadequate for review on appeal.

Appeal by defendant from judgment entered 6 January 2017 by Judge Daniel A. Kuehnert in Burke County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

ZACHARY, Judge.

Christopher Isaiah Allen (“Defendant”) appeals from the trial court’s judgment entered upon a jury verdict finding him guilty of sexual offense with a child. After careful review, we conclude that the record is insufficient to enable our review of Defendant’s claim that he received ineffective assistance of counsel at trial. Accordingly, we dismiss his appeal without prejudice to his right to pursue this claim by filing a motion for appropriate relief in the trial court.

Background

On 2 March 2015, the Burke County Grand Jury indicted Defendant for sexual offense with a child. Defendant’s case came on for trial on 4 January 2017. Two days later, the jury found Defendant guilty of sexual offense with a child. Defendant gave oral notice of appeal.

On appeal, Defendant argues that he received ineffective assistance of counsel because: (1) Defendant’s trial counsel neither objected to nor moved to edit or redact portions of prejudicial, inadmissible evidence;

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and (2) in the alternative, the cumulative errors made by trial counsel deprived Defendant of a fair trial.

Discussion

Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002). “A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel” at a full evidentiary hearing on the merits of the ineffective assistance of counsel claim. *Id.* at 554, 557 S.E.2d at 547 (quoting *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000)).

The United States Supreme Court has also advised against reviewing ineffective assistance of counsel claims on direct appeal:

When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), a defendant claiming ineffective counsel must show that counsel’s actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. *The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel’s alternatives were even worse. . . .* Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Massaro v. United States, 538 U.S. 500, 504-05, 155 L. Ed. 2d 714, 720-21 (2003) (emphasis added).

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In this case, our review is limited to the record before us, “without the benefit of information provided by defendant to trial counsel, as well as defendant’s thoughts, concerns, and demeanor that could be provided in a full evidentiary hearing on a motion for appropriate relief.” *Stroud*, 147 N.C. App. at 554-55, 557 S.E.2d at 547 (citation, original alteration, and quotation marks omitted). Particularly where Defendant’s arguments “concern potential questions of trial strategy and counsel’s impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues.” *Id.* at 556, 557 S.E.2d at 548. As our Supreme Court has instructed, “should the reviewing court determine that [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s rights to reassert them during a subsequent [motion for appropriate relief] proceeding.” *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

Conclusion

Defendant’s ineffective assistance of counsel claim is premature in that the record before this Court is inadequate and precludes our review of whether Defendant’s counsel was ineffective and whether counsel’s errors, if any, were prejudicial. Accordingly, Defendant’s appeal is dismissed without prejudice to his right to file a motion for appropriate relief in the trial court.

APPEAL DISMISSED.

Judges STROUD and MURPHY concur.

STATE v. BENNETT

[262 N.C. App. 287 (2018)]

STATE OF NORTH CAROLINA

v.

LEON BENNETT, DEFENDANT

No. COA18-294

Filed 6 November 2018

Constitutional Law—motion for appropriate relief—immigration consequences of plea agreement—*Padilla* not retroactive

The trial court erred in granting defendant’s motion for appropriate relief in which defendant challenged his 1997 no contest plea on the basis that he was not properly informed by his counsel of the impact his conviction would have on his immigration status, including the risk of deportation. The case relied on by defendant for support, *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not apply retroactively.

Appeal by the State from order entered 13 June 2017 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 3 October 2018.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellee.

STROUD, Judge.

On issuance of a writ of certiorari, the State challenges an order granting defendant’s motion for reconsideration and motion for appropriate relief. Because the requirements for counsel to advise a defendant of the immigration consequences of a plea agreement established by *Padilla* do not apply retroactively, we reverse.

In 1997, defendant pled no contest to possessing cocaine with the intent to sell or deliver. In 2015, defendant filed a motion for appropriate relief. Defendant alleged that at the time of his plea, “no factual basis existed in fact or in law to support that Defendant’s possession of cocaine was with intent to sell and/or deliver.” On 19 July 2016, at the hearing on the matter, defendant raised a claim under *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), and argued he was not informed of the

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impact his conviction would have on his immigration status, particularly the risk of deportation. The trial court specifically noted defendant was raising a ground not part of his filed MAR but allowed defendant to amend his written motion.

On 22 July 2016, defendant filed his amended MAR, alleging that when he entered his plea, he was not advised, as required by *Padilla*, “that a criminal felony conviction could be a basis for deportation proceedings.” On 18 August 2016, the trial court entered an order denying defendant’s MAR. The trial court found that “Defendant was advised of the consequences regarding the possibility of deportation, exclusion from this country, and the denial of naturalization under federal law at the time the plea was entered, as evidenced by the transcript of plea contained in the court file[.]” The order also decreed that “Petitioner’s failure to assert any other grounds in his Motion is a BAR to any other claims, assertions, petitions, or motions he might hereafter file in this case, pursuant to N.C.G.S. §15A-1419[.]” (Emphasis in original).

In 2017, defendant filed a motion to reconsider his amended MAR. Defendant’s motion for reconsideration alleged he was entitled to reconsideration under *State v. Nkaim*, 369 N.C. 61, 791 S.E.2d 457 (2016). The application of *Padilla* as discussed in *Nkaim* was the only ground for reconsideration defendant alleged. The trial court held a hearing on the motion to reconsider on 1 June 2017, and on 13 June 2017, the trial court entered an order granting defendant’s motion for reconsideration and his MAR. The trial court found that defendant “was not informed of the absolute consequences that he would be removed and/or deported by the Federal Government as a result of his ‘nolo contendere’ plea for a time served sentence” and decreed that he was “not provided effective counsel,” “denied the right to trial by jury[.]” and convicted “in violation of the Constitution of the United States or the Constitution of North Carolina.” (Quotation marks omitted.) The State filed a petition for a writ of certiorari, which this Court allowed.

As noted, defendant’s motion for reconsideration was based on *Nkaim*, and his argument at the hearing also focused on *Nkaim*, which his counsel argued “surprised a lot of the bar” and placed a “fairly heavy burden” on defense counsel by going “beyond what a lot of people interpreted *Padilla*” required “as just advising of risk.” *Nkaim* was decided by this Court in 2015, and the North Carolina Supreme Court ultimately concluded *per curiam* that discretionary review was improvidently allowed. See *Nkaim*, 369 N.C. 61, 791 S.E.2d 457. Defendant’s counsel argued that when the trial court denied his original MAR, the precedential value of *Nkaim* was “pretty much clouded” but since the Supreme

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Court had dismissed the appeal, *Nkaim* had become “the law of this state[.]” Defense counsel argued that because *Nkaim* required counsel to advise an immigrant defendant he would be deported, and not just that he had a risk of deportation, his plea was not entered knowingly and voluntarily under *Padilla*. Defendant argued no basis for reconsideration or for his MAR other than his counsel’s failure to advise him of the consequences of his plea based upon *Padilla* and *Nkaim*.

On appeal, the State contends the trial court erred in allowing defendant’s motion for appropriate relief because *Padilla* does not apply retroactively to defendant. The State is correct; in *State v. Alshaiif*, this Court determined *Padilla* did not apply retroactively and concluded:

Padilla raises the question of the extent to which attorneys can be expected to anticipate the expansion of their obligations under *Strickland* and the Sixth Amendment. We conclude that *Padilla* was a significant departure from prior requirements and hold that the decision therefore created a new rule, *the retroactive application of which would be unreasonable*. We therefore hold that the trial court did not err by concluding that *Padilla* was inapplicable to Defendant’s case.

State v. Alshaiif, 219 N.C. App. 162, 171, 724 S.E.2d 597, 604 (2012) (emphasis added).

Defendant entered his plea in 1997; *Padilla* was decided in 2010, and is not applied retroactively. *See id.* Defendant’s and the trial court’s reliance upon *Nkaim* is misplaced because it does not address retroactivity. In *Nkaim*, the defendant entered his plea in 2013, so the requirements of *Padilla* applied. *See generally State v. Nkaim*, 243 N.C. App. 777, 778, 778 S.E.2d 863, 864 (2015). Based upon *Padilla*, *Nkaim* held that counsel must advise the defendant not just of a *risk* of deportation if the consequence of the particular conviction is clearly deportation. *Id.* at 786, 778 S.E.2d at 869. But since *Padilla* does not apply retroactively, *Nkaim* also has no application to defendant’s plea or MAR. We therefore reverse the trial court’s order. Because we are reversing based on *Padilla*, we need not address the State’s other issue on appeal.

Defendant contends this Court should affirm the order because the trial court found a second ground, not based on *Padilla*, for allowing his MAR. Defendant further argues that since the State has failed to address any basis for the MAR other than *Padilla* in its brief, the State has waived by failing to challenge the alternate ground. Defendant bases this argument mostly on the trial court’s statement near the end of the

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hearing, “I’m thinking out loud, does that make this plea not a knowing, willful, understanding or as they say on the back here, it’s the informed choice of the defendant made freely, voluntarily and understandingly, *without even considering Padilla*[.]” (Emphasis added.) Defendant also contends the order is based upon something other than *Padilla* based upon the portion of the order which states, “[t]he Court further finds his plea was not the result of an effective waiver of his State and Federal Constitutional rights to trial by jury, nor was he effectively advised of the same[.]” But defendant’s argument takes the trial court’s “thinking out loud” and the quoted portion of the order entirely out of context. Defendant’s amended MAR and motion to reconsider raised only one basis for relief: that he was not properly informed of the consequences of his plea under *Padilla*. Defendant’s argument at the hearing addressed the same issue and no other. In fact, defendant does not argue any possible facts that could even support a conclusion he did not enter into his plea voluntarily and understandingly other than failure to be sufficiently advised of his rights under *Padilla*.

Because *Padilla* does not apply retroactively, the trial court erred by granting defendant’s MAR on this basis, so we reverse and remand.

REVERSED and REMANDED.

Judges DILLON and BERGER concur.

STATE OF NORTH CAROLINA

v.

JALA NAMREH BOOKER

No. COA18-165

Filed 6 November 2018

1. Embezzlement—indictment—fraudulent intent—acts constituting embezzlement

The Court of Appeals rejected defendant’s argument that her embezzlement indictment was invalid for failure to allege fraudulent intent and to specify the acts constituting embezzlement. The concept of fraudulent intent was contained within the meaning of “embezzle” and the allegation that she “embezzled \$3,957.81 entrusted to her in a fiduciary capacity as an employee of Interstate All Battery Center” adequately apprised her of the charges against her.

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2. Criminal Law—jury instructions—disjunctive—appropriate theory supported by evidence

The trial court's error in instructing the jury on an alternative theory of embezzlement unsupported by the evidence did not rise to the level of plain error where the appropriate theory of embezzlement was supported by overwhelming evidence.

3. Evidence—post-arrest silence—door opened by defendant

The trial court did not plainly err by permitting testimony concerning defendant's post-arrest silence where defendant opened the door for the prosecutor to ask a police detective about his attempts to contact her. Even assuming that the portion of the testimony concerning the extent to which other defendants facing embezzlement charges had spoken to the detective was improper, there was no probable impact on the jury given the overwhelming evidence against defendant.

Appeal by defendant from judgment entered 20 July 2017 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Joseph P. Lattimore for defendant-appellant.

DAVIS, Judge.

In this appeal, we address whether (1) an indictment for embezzlement was legally sufficient where it failed to expressly allege fraudulent intent and did not specify the acts allegedly constituting embezzlement; (2) the trial court committed plain error by instructing the jury on an element of embezzlement not supported by the evidence; and (3) the trial court plainly erred by allowing testimony concerning the defendant's post-arrest silence. After a thorough review of the record and applicable law, we conclude that the defendant received a fair trial free from prejudicial error.

Factual and Procedural Background

The State introduced evidence at trial tending to show the following facts: In 2013, Marjorie Hetzel owned Interstate All Battery Center franchises in Danville, Virginia and Greensboro, North Carolina. In November 2013, Hetzel hired Jala Namreh Booker ("Defendant") as

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the office manager for the Greensboro franchise. As part of her duties as office manager, Defendant was responsible for the daily reports generated from the register, managing accounts payable and receivable, and occasionally assisting with sales. None of the store's other employees were responsible for bookkeeping or "keeping track of the money" in any capacity.

At the close of business each day, Defendant was required to generate a daily activity report from the cash register summarizing the store's monetary transactions for that day. After verifying that the cash register actually contained the amount of money listed in the daily activity report, she was supposed to place the money from the cash register in a bank deposit bag and lock the bag in a cabinet on the store's premises overnight. On the following business day, Defendant was expected to take the money in the bag to the bank and deposit it.

Prior to June 2015, Hetzel did not have any concerns about Defendant's job performance or her handling of the business's finances. That month, Defendant called Hetzel to express confusion over how she should handle five dollars that an outside salesman had placed in the cash register. Upon arriving at the store, Hetzel asked Defendant for the applicable deposit ticket. In response, Defendant retrieved from her car five separate envelopes containing cash, checks, and deposit slips. Together, the envelopes contained over \$10,000.

Hetzel immediately began reviewing the business's financial records and noticed that the previous deposit made by Defendant was \$447 short. When Hetzel asked her about the missing funds, Defendant stated that the money was in the envelopes she had retrieved from her car. Hetzel told Defendant to deposit the money in the envelopes immediately, and she did so. Hetzel fired Defendant the following day.

On 22 June 2015, Hetzel contacted the Greensboro Police Department regarding financial discrepancies in her business records and subsequently discussed her concerns with Detective Edward Bruscano. After analyzing various financial documentation and bank records provided to him by Hetzel, Detective Bruscano determined that discrepancies existed during the time period when Defendant was employed between the amount of money that should have been deposited and the amount that was actually deposited.

Detective Bruscano focused his investigation on the months of December 2014 and March 2015 because those "were the months that truly showed where cash was missing from multiple deposits." On numerous dates during those months, Defendant had either deposited

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less money than the business's financial records indicated should have been deposited or she did not make a deposit at all. At no point during her employment did Defendant ever inform Hetzel about any financial discrepancies related to the business.

Defendant was indicted by a grand jury on 23 January 2017 on the charge of embezzlement. A jury trial was held beginning on 19 July 2017 before the Honorable Michael D. Duncan in Guilford County Superior Court. At the close of the State's evidence, Defendant moved to dismiss the embezzlement charge, and the trial court denied the motion. She renewed her motion to dismiss at the close of all the evidence, which was once again denied.

On 20 July 2017, the jury found Defendant guilty of embezzlement. The trial court sentenced her to a term of 6 to 17 months imprisonment, suspended the sentence, and placed Defendant on supervised probation for a period of 60 months. The court also ordered her to pay restitution in the amount of \$4,100.67. Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred by (1) denying her motion to dismiss the embezzlement charge on the ground that the indictment was facially invalid; (2) instructing the jury on an element of embezzlement not supported by the evidence; and (3) permitting testimony concerning her post-arrest silence. We address each argument in turn.

I. Motion to Dismiss

[1] Defendant first contends that the trial court erred by denying her motion to dismiss. Specifically, she asserts that the indictment was invalid because it failed to allege any fraudulent intent on her part and did not specify the acts committed by her that constituted embezzlement. We disagree.

An indictment must contain

a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

State v. Jones, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (citation, quotation marks, and brackets omitted). An indictment that "fails to

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state some essential and necessary element of the offense” is fatally defective, *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (citation and quotation marks omitted), and if an indictment is fatally defective, the trial court lacks subject matter jurisdiction over the case. *State v. Justice*, 219 N.C. App. 642, 643, 723 S.E.2d 798, 800 (2012).

An indictment “is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution of the same offense.” *State v. Stroud*, __ N.C. App. __, __, 815 S.E.2d 705, 709 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, __ N.C. __, 817 S.E.2d 573 (2018). A defendant has received sufficient notice “if the illegal act or omission alleged in the indictment is clearly set forth so that a person of common understanding may know what is intended.” *State v. Haddock*, 191 N.C. App. 474, 477, 664 S.E.2d 339, 342 (2008) (citation and quotation marks omitted). Furthermore, “while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” *State v. Harris*, 219 N.C. App. 590, 592, 724 S.E.2d 633, 636 (2012) (citation and quotation marks omitted). On appeal, this Court reviews the sufficiency of an indictment *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008).

N.C. Gen. Stat. § 14-90 provides, in pertinent part, as follows:

(a) This section shall apply to any person:

....

(4) Who is an officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person.

(b) Any person who shall:

(1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or

(2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, any money, goods or other chattels, bank note, check or order for the payment of money . . . or any other valuable security whatsoever that (i) belongs to any other person or corporation . . . which shall

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have come into his possession or under his care,
shall be guilty of a felony.

N.C. Gen. Stat. § 14-90 (2017).

This Court has explained that in order to convict a defendant of embezzlement the State must prove the following essential elements:

(1) [T]hat defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal; (2) that he received money or valuable property of his principal in the course of his employment and through his fiduciary relationship; and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use the money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Melvin, 86 N.C. App. 291, 298, 357 S.E.2d 379, 383 (1987) (citation omitted). With regard to the third element, “[t]he State does not need to show that the agent converted his principal’s property to the agent’s own use, only that the agent fraudulently or knowingly and willfully misapplied it[.]” *State v. Parker*, 233 N.C. App. 577, 580, 756 S.E.2d 122, 124-25 (2014) (citation omitted).

In the present case, Defendant’s indictment stated, in pertinent part, as follows:

[D]efendant named above unlawfully, willfully and feloniously did embezzle three thousand nine hundred fifty seven dollars and eighty one cents (\$3,957.81) in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center. At the time the defendant was over 16 years of age and was the employee of AMPZ, LLC d/b/a Interstate All Battery Center and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property.

Defendant first argues that her indictment failed to adequately allege that she acted with fraudulent intent. As quoted above, the indictment stated that Defendant “unlawfully, willfully and feloniously did embezzle” \$3,957.81 in her capacity as an employee of Interstate All Battery Center. Defendant nevertheless contends that her indictment was facially invalid because it merely stated that she “did embezzle” a sum of money without specifically alleging that she did so with a

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fraudulent intent. However, “embezzle” has been defined as “to appropriate (as property entrusted to one’s care) fraudulently to one’s own use.” Webster’s Ninth New Collegiate Dictionary 406 (9th ed. 1991); *see also State v. Smithy*, 15 N.C. App. 427, 429, 190 S.E.2d 369, 370 (1972) (“Fraudulent intent which constitutes a necessary element of the crime of embezzlement . . . is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held.” (citation and quotation marks omitted)).

Thus, the concept of fraudulent intent is already contained within the ordinary meaning of the term “embezzle.” As noted above, a defendant receives sufficient notice where the allegations in the indictment permit a “person of common understanding [to] know what is intended.” *Haddock*, 191 N.C. App. at 477, 664 S.E.2d at 342 (citation and quotation marks omitted). Defendant makes no contention in her appellate brief that she was prejudiced in her ability to prepare a defense based upon a misapprehension of the meaning of the term “embezzle.”

Moreover, this Court has held that an allegation that a defendant acted willfully “implies that the act is done knowingly” and “suffice[s] to allege the requisite knowing conduct” for purposes of determining the validity of an indictment. *Harris*, 219 N.C. App. at 595-96, 724 S.E.2d at 637-38 (citation and quotation marks omitted). As discussed above, in order to convict a defendant of embezzlement the State is required to prove that she “fraudulently *or* knowingly and willfully misapplied or converted to [her] own use” the property of her principal. *Melvin*, 86 N.C. App. at 298, 357 S.E.2d at 383 (emphasis added). Thus, the allegation contained in Defendant’s indictment that she “unlawfully, willfully and feloniously did embezzle” can fairly be read to allege that she “knowingly and willfully” embezzled from her employer. Therefore, we are satisfied that the indictment is not insufficient for failing to specifically allege a fraudulent intent on the part of Defendant.

We find similarly unavailing Defendant’s contention that her indictment was defective for failing to specify the acts constituting embezzlement. She makes the conclusory assertion that “the ambiguous term ‘embezzle’ ” was inadequate to properly inform her of the charge against her. However, we find nothing vague or insufficiently particular about the allegations contained in the indictment. Indeed, it alleges that Defendant embezzled \$3,957.81 entrusted to her in a fiduciary capacity as an employee of Interstate All Battery Center. We fail to see how these allegations would not adequately apprise Defendant as to the charges facing her or prejudice her ability to prepare a defense. Accordingly,

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we hold that the trial court did not err in denying Defendant's motion to dismiss. *See State v. Lowe*, 295 N.C. 596, 604, 247 S.E.2d 878, 884 (1978) (upholding validity of indictment where "Defendant was sufficiently informed of the accusation against him").

II. Jury Instructions

[2] Defendant next contends that the trial court erred by instructing the jury that it could convict her of embezzlement based upon the theory that she "did take and make away with U.S. currency with the intent to embezzle" where the State's sole theory at trial was instead that she "misapplied" the money. Although Defendant concedes that the trial court did, in fact, correctly charge the jury as to the theory of misapplication, she nevertheless asserts that the erroneous instruction on an alternative theory entitles her to a new trial.

Because Defendant failed to object to the trial court's jury instructions, our review of this issue is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Our appellate courts have held that a new trial is required where a trial court instructs the jury — over the objection of the defendant — on a theory of the defendant's guilt that is not supported by the evidence presented at trial. *See, e.g., State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (holding new trial required where trial court instructed jury on alternative theory unsupported by the evidence); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) ("Where

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the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial.” (citation omitted)).

However, a new trial is not necessarily required as a result of such an error in cases where no objection is raised at trial.

Recently . . . , our Supreme Court has declared that such instructional errors not objected to at trial are not plain error *per se*. In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), the Supreme Court, adopting a dissent from this Court, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), declared an additional requirement for a defendant arguing an unpreserved challenge to a jury instruction as unsupported by the evidence. The Court in *Boyd* shifted away from the long standing assumption that the jury based its verdict on the theory for which it received an improper instruction, and instead placed the burden on the defendant to show that an erroneous disjunctive jury instruction had a probable impact on the jury’s verdict.

State v. Malachi, __ N.C. App. __, __, 799 S.E.2d 645, 649 (2017) (internal citations and quotation marks omitted). Thus, a reviewing court conducting a plain error analysis in this context “is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory.” *State v. Robinson*, __ N.C. App. __, __, 805 S.E.2d 309, 318 (2017) (citation and quotation marks omitted).

In the present case, the trial court instructed the jury, in pertinent part, as follows:

The defendant in this case, members of the jury, has been charged with embezzlement by virtue of employment. For you to find the defendant guilty of this offense, the state must prove three things beyond a reasonable doubt: First, that the defendant was an agent or clerk of AMPZ, LLC, doing business as Interstate All Battery Center.

Second, that while acting as an agent or clerk, U.S. currency came into the defendant’s possession or care.

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And third, that the defendant *did take and make away with* U.S. currency with the intent to embezzle and fraudulently, knowingly, and willfully misapply and/or convert U.S. currency into the defendant's own use.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant was an agent or clerk of AMPZ, LLC, doing business as Interstate All Batteries Center, that while the defendant was acting as agent or clerk, U.S. currency came into the defendant's possession or care, and that the defendant embezzled and/or fraudulently or knowingly and willfully misapplied or converted to the defendant's own use U.S. currency with the intent to embezzle, fraudulently or knowingly and willfully misapply or convert U.S. currency to the defendant's own use, it would be your duty to return a verdict of guilty.

(Emphasis added.)

Defendant argues that the trial court committed plain error by instructing the jury on an alternative theory of guilt not supported by the evidence — namely, by including as an element of embezzlement that she “did take and make away with” money entrusted to her in a fiduciary capacity. She concedes, however, that the jury was “correctly instructed on the law arising from the evidence” during the trial court's summation of the elements of embezzlement. Nevertheless, Defendant contends that the trial court deprived her of the right to a unanimous verdict by charging the jury “correctly at one point and incorrectly at another.”

We are unable to conclude that the trial court's instructions amounted to plain error. Here, Defendant was the only store employee responsible for depositing money into Interstate All Battery Center's bank account. She was also the only employee whose duties included maintaining financial records and “keeping track of the money.” Detective Bruscano testified with regard to numerous dates throughout Defendant's employment on which she should have made cash deposits but either did not deposit any cash at all or deposited less money than she should have. Furthermore, Defendant never expressed any concerns to Hetzel regarding difficulty in balancing the books or the existence of discrepancies in financial records.

The evidence that Defendant misapplied money entrusted to her in a fiduciary capacity was overwhelming. Therefore, it cannot reasonably

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be argued that the jury “probably would have returned a different verdict,” *see Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327, but for the trial court’s error in instructing it upon the alternative theory that Defendant “did take and make away with” her employer’s money. Accordingly, we hold that the trial court’s error did not rise to the level of plain error. *See Robinson*, __ N.C. App. at __, 805 S.E.2d at 319 (no plain error where improper instruction on alternative theory not supported by the evidence “did not play a significant role in the jury’s decision”).

III. Testimony Concerning Post-Arrest Silence

[3] Finally, Defendant argues that the trial court plainly erred by permitting Detective Bruscano to testify with regard to her post-arrest silence. Specifically, she asserts that the admission of this testimony violated her Fifth Amendment right against self-incrimination. Once again, we disagree.

“Whether the State may use a defendant’s silence at trial depends on the circumstances of the defendant’s silence and the purpose for which the State intends to use such silence.” *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). This Court has held that “a defendant’s pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting the defendant’s prior silence is inconsistent with his present statements at trial.” *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010) (citation omitted).

At trial, the following exchange took place between Defendant’s counsel and Detective Bruscano on cross-examination:

[DEFENSE COUNSEL]: Did you ever interview [Defendant] in connection with this case?

[DETECTIVE BRUSCINO]: I did not.

[DEFENSE COUNSEL]: Did you attempt to try to locate her before you issued a warrant to speak with her about it?

[DETECTIVE BRUSCINO]: Yes. We went to multiple locations looking for her. We had many, many addresses to go to, but we didn’t go to all of them. We could only go to a few of them. And we weren’t able to locate [Defendant].

[DEFENSE COUNSEL]: Did you come to find out how this warrant was served on her?

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[DETECTIVE BRUSCINO]: I did not. All I got was notification that it was served.

[DEFENSE COUNSEL]: Okay. So you weren't ever notified that she turned herself in on this case?

[DETECTIVE BRUSCINO]: No.

. . . .

[DEFENSE COUNSEL]: So did you go to the Rankin King address?

[DETECTIVE BRUSCINO]: The Rankin King address? Yes, we did. We knocked on that door.

[DEFENSE COUNSEL]: Okay. And do you know what happened when you knocked on that door?

[DETECTIVE BRUSCINO]: No one was home. Typically when no one is home, we leave a business card with a phone number on it.

[DEFENSE COUNSEL]: Did you come to find out later that was her mother's address?

[DETECTIVE BRUSCINO]: I did not.

[DEFENSE COUNSEL]: So you didn't go back at any point to try to knock on the door again later?

[DETECTIVE BRUSCINO]: No. We had left a card, as well as that was the address on her license.

[DEFENSE COUNSEL]: Okay. So after [Defendant] did turn herself in when she found out about the warrant, did you try to make an interview with her after that?

[DETECTIVE BRUSCINO]: I did not.

Immediately after the above-quoted testimony from Detective Bruscino, the following exchange took place on redirect examination:

[PROSECUTOR]: Detective Bruscino, after you left your card at the residence listed on [Defendant's] driver's license, when was it after you did that that [Defendant] called you to talk to you?

[DETECTIVE BRUSCINO]: [Defendant] never made contact with me.

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[PROSECUTOR]: After you took out charges and [Defendant] was served, when did [Defendant] call you so she could come in and talk to you about this?

[DETECTIVE BRUSCINO]: She never contacted me.

[PROSECUTOR]: Has [Defendant] ever emailed you, voicemail you or anything to come in and discuss all of this with you?

[DETECTIVE BRUSCINO]: She's never made contact with me.

[PROSECUTOR]: And have you met with people accused of embezzlement and gone over records and things with people who are facing these type of charges?

[DETECTIVE BRUSCINO]: Yes. Many times people will come in to discuss any allegations against them.

[PROSECUTOR]: And do you consider that part of your job?

[DETECTIVE BRUSCINO]: Yes.

Defendant contends that Detective Bruscino's testimony on redirect examination violated her Fifth Amendment right against self-incrimination. The State argues, in response, that Defendant "opened the door" to such testimony. The legal concept of "[o]pening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Ligon*, 206 N.C. App. 458, 467, 697 S.E.2d 481, 487 (2010) (citation and quotation marks omitted). Thus, "the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself." *Id.* at 466, 697 S.E.2d at 487 (citation, quotation marks, and brackets omitted). The State asserts that Defendant opened the door to Detective Bruscino's testimony by pursuing a line of inquiry on cross-examination centered around his attempts to contact Defendant both prior to and following her arrest.

We agree with the State that Defendant opened the door for the prosecutor to ask Detective Bruscino about his attempts to contact her. However, we are not persuaded that Defendant similarly opened the door for testimony concerning the extent to which *other* defendants facing embezzlement charges had spoken to Detective Bruscino in the past.

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Nevertheless, even assuming *arguendo* that this portion of Detective Bruscinio's testimony was improper, because Defendant failed to object to this exchange at trial she is once again limited to plain error review on appeal. See *State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 580 (2016) ("Defendant did not object to this testimony at trial. Therefore, our review is limited to plain error." (citation omitted)), *disc. review denied*, 369 N.C. 483, 795 S.E.2d 221 (2017).

Based on our thorough review of the record, we fail to see how this portion of Detective Bruscinio's testimony could have had a probable impact on the jury's verdict. Therefore, we hold that the trial court's admission of the challenged testimony did not constitute plain error. See *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached.").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and DILLON concur.

STATE OF NORTH CAROLINA

v.

WILLIAM JESSE BUCHANAN, DEFENDANT

No. COA16-697-2

Filed 6 November 2018

False Pretense—checks—affidavit to obtain credit—single taking rule

Defendant met his burden of showing plain error in a prosecution arising from his having submitted one false affidavit to obtain credit from a bank for three checks. The bank extended credit for only one of the three checks and defendant was convicted of obtaining property by false pretense and attempting to obtain property by false pretense, in violation of the single taking rule. Defendant committed a single act—filing one affidavit, not three — and there was

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no evidence from which the jury could have inferred three affidavits. The trial court erred by not instructing the jury that it could not convict on both counts.

Appeal by Defendant from judgments entered 15 March 2016 by Judge Alan Z. Thornburg in Yancey County Superior Court.

Originally heard in the Court of Appeals 31 January 2017. By opinion filed 6 June 2017, this Court found no reversible error.

By Order entered 20 September 2018, our Supreme Court vacated the portion of our 6 June 2017 opinion “discussing jury instructions, the single taking rule, and double jeopardy,” and remanded the matter for us to consider whether “the trial court committed plain error by failing to instruct the jury that it could not convict Mr. Buchanan of obtaining property by false pretense and attempting to obtain property by false pretense because such a verdict would violate the ‘single taking rule.’”

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for Defendant.

DILLON, Judge.

Upon certification by our Supreme Court, we review whether the trial court committed plain error by failing to instruct the jury that it could not convict the Defendant of obtaining property by false pretenses and attempting to obtain property by false pretense because such a verdict would violate the “single taking rule.” We conclude that the trial court committed plain error in this regard and, therefore, vacate one of the two judgments, namely, the judgment for attempting to obtain property by false pretenses in 15CRS050081.

I. Background

Defendant was indicted for two counts of false pretenses for signing a “Check Fraud/Forgery Affidavit” with his bank, disputing three checks written off his account totaling \$900. Evidence showed, however, that Defendant, in fact, had pre-signed the three checks, gave them to the mother of his daughter, and authorized her to use them in the care of their daughter. Based on Defendant’s representation in the affidavit, the bank gave Defendant temporary credit for one of the three checks, a \$600 check, but denied him credit for two other checks, a \$200 check and a

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\$100 check. A more detailed recitation of the facts may be found in our prior opinion. *State v. Buchanan*, ___ N.C. ___, 801 S.E.2d 366 (2017).

Defendant was tried by a jury and convicted of (1) obtaining property by false pretense for a \$600 provisional credit placed in his bank account and separately of (2) attempting to obtain property by false pretense for \$100 and \$200 checks. After being convicted of both counts, Defendant pleaded guilty to being an habitual felon. The trial court sentenced him to two active terms to run concurrently.

In the first appeal, Defendant argued that his multiple convictions violated the “single taking rule,” contending that his act of signing a single affidavit could only constitute one crime. We held that his argument was constitutional in nature, as a double jeopardy issue, and concluded that Defendant failed to preserve his constitutional argument. Accordingly, we found no error.

Our Supreme Court, though, has vacated our holding and has remanded for our Court to consider whether the trial court committed plain error in failing to instruct the jury on the “single taking rule.” On remand from our Supreme Court, we now consider that issue.

II. Analysis

Defendant argues that the trial court erred in its jury instructions. More specifically, Defendant alleges that the trial court’s instructions violated the “single taking rule.” Since Defendant did not object to the instructions at trial, we review the trial court’s instruction for plain error. *State v. Lawrence*, 365 N.C. 506, 507-08, 723 S.E.2d 326, 327-28 (2012).

Our Supreme Court has adopted the plain error standard for unpreserved instructional or evidentiary error. *State v. Odom*, 307 N.C. 655, 658-62, 300 S.E.2d 375, 377-79 (1983). “In deciding whether a defect in the jury instruction constitutes ‘plain error,’ [we] must examine the entire record and determine if the instructional error had a *probable impact* on the jury’s finding of guilt.” *Id.* at 661, 300 S.E.2d at 378-79 (emphasis added).

The crime of obtaining property by false pretenses can be satisfied if a defendant either “obtains” or “*attempts to obtain* value from another” by way of a false representation. N.C. Gen. Stat. § 14-100(a) (2015) (emphasis added). That is, under the language of N.C. Gen. Stat. § 14-100, one has completed the crime even if he merely attempts to obtain property by false pretenses.

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At trial, the following instructions were given:

Now, the defendant has been charged with obtaining property by false pretenses. For you to find the defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was, in fact, deceived by this representation; and fifth, that the defendant thereby obtained property from the victim.

[. . .]

Now, the defendant has also been charged with attempt to obtain property by false pretenses. For you to find the defendant guilty of this offense the State must prove five things beyond a reasonable doubt: first, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive; fourth, that the victim was, in fact, deceived by this representation; and fifth, that the defendant thereby attempted to obtain property from the victim.

Upon review of the whole record, we are satisfied that Defendant has met his burden in showing that the error amounted to plain error. Defendant submitted one affidavit, disputing three checks; there is no conflicting evidence on this fact. The submission of the one affidavit is the one act, or one false representation, for which Defendant was charged. Therefore, as explained in more detail below, we conclude that there was only a single act or taking under the “single taking rule.” *State v. Rawlins*, 166 N.C. App. 160, 165-66, 601 S.E.2d 267, 271-72 (2004) (citing *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992)).

The “single taking rule” prevents a defendant from being charged or convicted multiple times for a single continuous act or transaction. *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) (“[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place.”); see also *State v. Marr*, 342 N.C. 607, 613, 467 S.E.2d 236, 239 (1996).

Our Court has applied the “single taking rule” to the crime of obtaining property by false pretenses in the context of indictments. *Rawlins*, 166 N.C. App. 160, 601 S.E.2d 267. In *Rawlins*, we concluded that the single taking rule did not apply where a defendant used stolen credit cards

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on three separate, distinct occasions to obtain property, even though the three credit card swipes occurred within a twenty (20) minute period: “In this case, there were three distinct transactions separated by several minutes in which different credit cards were used. Thus, we conclude the indictments were not duplicative.” *Id.* at 166, 601 S.E.2d at 272.

Applying the reasoning in *Rawlins* and the above-cited Supreme Court opinions, it follows that the number of acts committed by a defendant generally determines how many counts or crimes as to which he or she may be convicted. For instance, if a defendant purchased three items with one swipe of a stolen credit card, the act would constitute a single offense under N.C. Gen. Stat. § 14-100; and, if the combined value of the items was over \$50,000, the defendant would be guilty of one Class C felony (as opposed to three Class H felonies). By contrast, if a defendant purchased the three items in three different credit card transactions separated by some amount of time, the defendant would be guilty of three distinct felonies because his actions would not constitute a “single taking.”

In this case, there was evidence that the Defendant filed a single affidavit to obtain credit for the three checks, evidence which would support only a “single taking.” The fact that Defendant was unsuccessful in obtaining a credit for all three checks is irrelevant – Defendant committed only one act, making a single false representation. Indeed, in the above example, if the defendant had attempted to purchase three items with a stolen credit card involving a single swipe, but was informed by the clerk that the card limit only allowed for the purchase of one of the items, the defendant would still only be guilty of a single crime.

We further conclude that the error in failing to instruct the jury on the “single taking rule” amounted to plain error. Specifically, the evidence in the light most favorable to the State demonstrates that Defendant obtained or attempted to obtain bank credit by signing a single affidavit;¹ there was no evidence from which the jury could have inferred that Defendant obtained or attempted to obtain credit for the three checks by signing multiple affidavits. Therefore, the failure to

1. It is true that Defendant signed each of the checks at different times for the mother of his child to use. However, the crimes for which Defendant was convicted did not involve pre-signing these checks. They involved his actions with his bank in attempting to obtain credit for those checks. Indeed, a defendant is guilty of only one count of obtaining property by false pretenses if he buys three shirts at once with a stolen credit card, even though he removed each shirt from a display rack at different points in time while in the store.

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instruct on the “single taking rule” had a “probable impact” on the jury’s finding Defendant guilty of two counts, rather than of only one count.

We note that the trial court entered two judgments: (1) a judgment based on one of the false pretense convictions and (2) a consolidated judgment based on the second false pretense conviction and the habitual felon conviction. We remand the matter to the trial court with instructions to vacate one of the false pretense convictions, to consider whether the vacation of the conviction affects Defendant’s habitual felon status, and to re-sentence Defendant accordingly.

VACATED AND REMANDED.

Judges DAVIS and INMAN concur.

STATE OF NORTH CAROLINA

v.

DWAYNE RAYSHON DEGRAFFENRIED

No. COA18-37

Filed 6 November 2018

Criminal Law—prosecutor’s closing arguments—defendant’s right to a jury trial—plain error analysis

There was no plain error in a prosecution for trafficking in cocaine where the prosecutor improperly argued that defendant had exercised his right to a jury trial despite the evidence against him. The evidence against defendant was overwhelming.

Appeal by defendant from judgment entered 23 August 2017 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General E. Burke Haywood, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

TYSON, Judge.

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Dwayne Rayshon Degraffenried (“Defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of trafficking cocaine by transportation and trafficking cocaine by possession. We find no error.

I. Background

Guilford County sheriff’s deputies entered the home of Jamie Yarborough to execute a search warrant they had obtained after several weeks of prior observation and surveillance. The search yielded approximately 28 grams of cocaine inside Yarborough’s home. Greensboro Police officers arrived to participate in the investigation after the seizure of the cocaine.

Immediately after his arrest, Yarborough volunteered to contact his supplier, who officers later identified as Defendant. Yarborough called Defendant and requested he deliver approximately nine ounces of cocaine to Yarborough’s home. Defendant arrived alone carrying a black drawstring bag. A sheriff’s deputy deployed a “flash bang” to disorient Defendant and Yarborough, which caused both men to fall to the ground. Defendant, along with the black bag he carried, and Yarborough were taken into custody.

A North Carolina State Crime Lab forensic scientist later tested the white powder found inside the black bag carried by Defendant and determined it contained 248.25 grams of cocaine. Defendant was indicted for trafficking by possessing 200 or more but less than 400 grams of cocaine, and trafficking by transporting 200 or more but less than 400 grams of cocaine.

During closing arguments, the prosecutor, without objection, made references to Defendant’s right to a jury trial and noted he had exercised that right despite “[a]ll of the evidence” being against him. The jury returned verdicts finding Defendant guilty of both charges. The court consolidated the offenses and sentenced Defendant to a minimum of 70 months and a maximum of 93 months of imprisonment. Defendant filed written notice of appeal the same day.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury’s verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issue

Defendant argues the trial court erred by failing to intervene *ex mero motu* during the State’s closing argument.

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IV. Standard of Review

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, [o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Waring, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (internal quotation marks and citations omitted), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011).

V. Analysis

North Carolina General Statutes require of an attorney in closing arguments that:

an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2017). We tender this statute to all counsel for review and compliance therewith as officers of the court.

“[A] criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial.” *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997) (internal citations omitted). Defendant challenges the following portion of the State's closing argument as an improper reference to his exercise of his right to a jury trial:

Truth be told, some cases, ladies and gentlemen, are tried because there is a genuine question with regard to

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the facts; one side claims this and the other side claims that. I would suggest, ladies and gentlemen, that that is not our scenario.

Some cases are tried when there is a genuine question regarding the application of the law. There's a consensus about what actually occurred, but one side claims that it was not a violation of the law and the other side claims that it was. And this, again, ladies and gentlemen, is certainly not the case in our instance.

All of the evidence is that the defendant knowingly possessed cocaine and transported it from one place to another. So[,] the question is, why is this case being tried. I would respectfully submit, ladies and gentlemen, it is because the defendant is facing a mandatory prison term.

Simply put, the defendant is looking to exercise his right to a trial by jury, and he is entitled. Under our system of justice, one cannot be stripped of their liberty without due process of law. He wants a trial and he is granted a trial.

“[W]hen defense counsel fails to object to the prosecutor’s improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where this Court “finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief.” *Id.* (emphasis supplied)

“[I]t is not enough that the prosecutors’ remarks were undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citation and internal quotation marks omitted). The “relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* (citation and internal quotation marks omitted).

The prosecutor’s comments were improper and satisfy the first prong of *Huey*. 370 N.C. at 179, 804 S.E.2d at 469. Counsel is admonished for minimalizing and referring to Defendant’s exercise of his right to a trial by jury in a condescending manner.

Moving to the second step, Defendant has failed to show any reversible error by the trial court’s failure to intervene *ex mero motu* under the

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second prong of *Huey*. *Id.* Where overwhelming evidence of the defendant's guilt exists, our appellate courts "have not found statements that are improper [in and of themselves] to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

The evidence of Defendant's guilt was overwhelming. Yarborough identified Defendant as his cocaine supplier. Yarborough, in cooperation with sheriff's deputies and police officers, called Defendant to ask for another delivery of cocaine.

Defendant arrived alone at Yarborough's home and was apprehended with a black drawstring bag, which was later determined to contain almost 250 grams of cocaine. While the comments were improper, Defendant has failed to show the prosecutor's comments were so prejudicial to render Defendant's trial fundamentally unfair and to warrant the trial court's *ex mero motu* intervention in the absence of any objection. This argument is overruled.

VI. Conclusion

The trial court did not commit plain error by declining to intervene *ex mero motu* during the State's closing argument in the absence of Defendant's failure to object or preserve error. Defendant received a fair trial, free from preserved or prejudicial error. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO PLAIN ERROR.

Judges CALABRIA and ZACHARY concur.

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[262 N.C. App. 313 (2018)]

STATE OF NORTH CAROLINA
v.
KEVIN DARNELL GUY, DEFENDANT

No. COA18-67

Filed 6 November 2018

1. Appeal and Error—preservation of issues—pro se motion—writ of certiorari

A writ of certiorari was granted by the Court of Appeals for a robbery defendant where defendant filed a pro se notarized, hand-written “Motion for Appeal” with the superior court but failed to serve his motion on the State.

2. Constitutional Law—right to confrontation—deceased victim—statements to officer—nontestimonial

The trial court did not violate defendant’s Sixth Amendment right to confront witnesses in a prosecution for robbery and other offenses by admitting testimony from an officer about statements made to him by the victim, subsequently deceased, after the robbery but before defendant had been apprehended. The Confrontation Clause of the Sixth Amendment only applied to testimonial statements. These statements were nontestimonial because they were provided in an effort to assist the police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects.

3. Robbery—acting in concert—sufficiency of the evidence

The trial court did not err by denying defendant’s motion to dismiss a charge of robbery with a dangerous weapon where, even though defendant was not identified at the scene of the crime, the jury could have made reasonable inferences from the evidence that defendant acted in concert to commit the robbery.

4. Possession of Stolen Property—constructive possession—drugs and stolen debit card—sufficiency of evidence

The trial court did not err by denying defendant’s motions to dismiss felony charges of possession of stolen goods and possession of marijuana. Both a stolen debit card and marijuana were found close to defendant and his car, and defendant and those with whom he acted in concert had the ability to exercise control over the contraband.

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5. Criminal Law—prosecutor’s closing argument—reference to gang affiliation—no ex mero motu intervention

There was no abuse of discretion in a robbery prosecution where the trial court did not intervene ex mero motu when the State’s argument included a reference to defendant’s gang affiliation. The prosecutor merely commented on the evidence presented by defendant at trial and did not focus on defendant’s gang involvement. It has been consistently held that a prosecutor may argue that a jury is the voice and conscience of the community.

6. Criminal Law—jury instruction—acting in concert—supported by the evidence

The trial court did not commit plain error by instructing the jury on acting in concert where defendant contended that the instruction was not supported by the evidence. Even if defendant was not the person who had robbed the victim, there was substantial evidence that defendant was aiding or otherwise assisting others in a common plan or purpose to rob the victim and flee the scene.

7. Constitutional Law—double jeopardy—robbery and possession of stolen goods—sentencing

Although it was not raised below in a prosecution for robbery and possession of stolen goods, defendant’s double jeopardy rights were violated where he was convicted of both crimes, requiring judgment to be arrested on the conviction for possession of stolen goods.

8. Sentencing—consolidated sentence—judgment arrested—remanded for resentencing

Defendant’s consolidated sentence for misdemeanor possession of stolen goods and possession of marijuana was remanded where the judgment for possession of stolen goods was arrested. A defendant with this prior record level can only be sentenced to a maximum of 20 days in custody and the possession of marijuana sentence was for 60 days.

Appeal by defendant from final judgments entered 23 August 2017 by Judge Robert H. Hobgood in Granville County Superior Court. Heard in the Court of Appeals 23 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

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Lisa A. Bakale-Wise for defendant.

BERGER, Judge.

Kevin Darnell Guy (“Defendant”) appeals from his convictions for robbery with a dangerous weapon, possession of stolen goods, and simple possession of marijuana. Defendant asserts that (1) his right to confront the witnesses against him under the Sixth Amendment of the United States Constitution was violated; (2) the trial court erred in denying his motions to dismiss; (3) the trial court failed to intervene *ex mero motu* when the prosecutor made references to Defendant’s gang affiliation during closing arguments; (4) the trial court erred in instructing the jury on acting in concert; and (5) his constitutional protection from double jeopardy was violated when the trial court sentenced him for both robbery with a dangerous weapon and possession of stolen goods. We review each argument in turn.

Factual and Procedural Background

On November 3, 2015, Joseph Ray (“Ray”), now deceased, went to an ATM to withdraw money, but was unsuccessful because his disability check had not yet been deposited. Upon returning around 1:20 a.m. to his home in Colonial Mobile Home Park in Butner, North Carolina, he was robbed of his debit card at gunpoint.

His mother, Shirley P. Spalding (“Spalding”), testified that Ray entered the home “pale as a ghost” and “shaking real bad.” He was “stuttering his words,” but was able to say “I got robbed.” He further relayed to her that a man had put a gun to his head while another individual wearing a clown mask was standing in front of him. After Ray told the individuals that he had no cash but had his debit card, they took his debit card and fled the scene in a car.

Ernest Pipkin (“Pipkin”) was inside Ray’s home at the time of the robbery. Pipkin testified that, as he walked out of the mobile home, he saw “a car fly by” and “jump the hump” of a large speed bump on the road that ran through the mobile home park. Pipkin testified that he thought one of the tires on the car “caught a flat” because he heard a loud “pow” when the car hit the speed bump.

Butner Public Safety Officer Kevin Rigsby (“Officer Rigsby”) was on patrol that night with three other officers when they received a report from 911 communications that an armed robbery had just taken place and that the suspects had not been apprehended. When Officer Rigsby

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arrived at Ray's home, Ray was "very shaken up, he was fumbling over his words and talking so fast, it sounded like he was speaking another language." Officer Rigsby further testified that:

[Ray] said that a silver -- It was four black subjects, four black males is what he thought robbed him and one of them had a short snubnosed revolver to the back of his head . . . [and] [a]t that time the only information he provided was that a silver car fled toward East C Street, and that he wasn't sure if all three subjects got into the vehicle or not. The only clothing description he gave me was that one of the subjects that he saw run around the 90 degree turn in the mobile home park back toward the get away car was wearing red. He couldn't tell me whether it was a red hat, red pants, he just said red.

As Officer Rigsby was speaking with Ray, he heard on his radio that Officer Cecilia Duke ("Officer Duke") had located a vehicle and suspects, which matched the description provided by the Sheriff's Department, less than a quarter-mile away from Ray's residence.

Officer Rigsby immediately left Ray to assist Officer Duke. He considered the ongoing search an "emergency situation" because "[i]t was known that the robbery included handguns and [O]fficer Duke was by herself with three to four possible subjects." When Officer Rigsby arrived at Piedmont Village, he saw Defendant changing a tire on the vehicle; a suspect wearing a red ball cap, a gray t-shirt, red pants and red shoes; and a female suspect. Officer Rigsby also observed a black mask in the open trunk of the silver car which was similar to the mask described by Ray. Defendant admitted that the silver car was his. Once the suspects had been detained, Officer Rigsby canvassed the area and found a loaded snubnosed revolver fifteen to twenty feet away from Defendant's car. Officer Duke also found Ray's stolen debit card and a bag of marijuana near the handgun.

On December 7, 2015, Defendant was indicted for possession of a firearm by a felon; robbery with a dangerous weapon; possession of stolen goods; possession with intent to manufacture, sell, or deliver marijuana; keeping or maintaining a vehicle for the keeping or sale of marijuana; and possession of a stolen firearm. On August 16, 2017, Defendant filed a motion to suppress statements made by the victim shortly after the alleged robbery. Before his trial began, Defendant's motion to suppress was denied and the charges of possession of a firearm by a felon and possession of a stolen firearm were dismissed.

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On August 23, 2017, Defendant was convicted of robbery with a dangerous weapon, possession of stolen goods, and possession of marijuana. Defendant was found not guilty of maintaining or keeping a vehicle for the keeping or selling of marijuana. He was sentenced to a term of 96 to 128 months in prison for his conviction of robbery with a dangerous weapon and concurrent terms of sixty days for possession of stolen goods and possession of marijuana.

[1] Defendant gave notice of appeal on August 24, 2017. On September 6, 2017, Defendant filed a pro se notarized, handwritten “Motion for Appeal” with the Granville County Superior Court, but failed to serve his motion on the State.

“A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.” N.C. Gen. Stat. § 15A-1444(a) (2017). “[A] jurisdictional default, such as a failure to comply with Rule 4 precludes the appellate court from acting in any manner other than to dismiss the appeal.” *State v. Hammonds*, 218 N.C. App. 158, 162, 720 S.E.2d 820, 823 (2012) (citation and quotation marks omitted). However, a writ of certiorari may be issued “to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1) (2017). The power to do so is discretionary and may only be done in “appropriate circumstances.” *Id.* We grant Defendant’s petition for a writ of certiorari and now address the merits. We find no error in part, arrest judgment in part, and remand for sentencing in part.

Analysis

I. Sixth Amendment Right to Confront Witnesses

[2] Defendant first asserts that the trial court erred by allowing Officer Rigsby to testify about statements made to him by Ray after the robbery but before Defendant had been apprehended. He argues this violated his Sixth Amendment right to confront the witness against him. We disagree.

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). “A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless [we find] 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. Stat. § 15A-1443(b) (2017).

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“The Confrontation Clause of the Sixth Amendment prohibits admission of “testimonial” statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness.” *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004)). In this context, testimonial means “at a minimum[,] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [statements given in] police interrogations.” *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203. Additionally,

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

“In determining whether a declarant’s statements are testimonial, courts should look to all of the relevant circumstances.” *Michigan v. Bryant*, 562 U.S. 344, 369, 179 L. Ed. 2d 93, 114 (2011). Factors for the courts to consider include:

(1) the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred; (2) objective determination of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement.

Glenn, 220 N.C. App. at 26, 725 S.E.2d at 61 (citation and quotation marks omitted).

Here, Ray’s statements to Officer Rigsby were made in an effort to assist in the apprehension of armed suspects. When Officer Rigsby arrived at Ray’s home to investigate the robbery call, the armed suspects had not been found, and Ray was “very shaken up, was fumbling over his words and talking so fast, it sounded like he was speaking another

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language.” Once Ray had calmed down, he informed Officer Rigsby that a group of black males had robbed him, that one of them had put a snub-nosed revolver to the back of his head, and that another had worn a clown mask, and that the suspects had fled in a silver car. Ray also provided information that one of the individuals involved in the robbery had on red apparel.

Shortly after Ray had made these statements, Officer Duke informed Officer Rigsby that she had found the vehicle and suspects matching the description provided by 911 communications. Officer Rigsby immediately left Ray to assist Officer Duke because “[i]t was known that the robbery included handguns and [O]fficer Duke was by herself with three to four possible subjects.”

Even though the suspects had already fled Ray’s home, there was still an ongoing emergency that posed danger to the public. Under these circumstances, Ray’s statements to Officer Rigsby were nontestimonial because they were provided in an effort to assist police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects. The Confrontation Clause of the Sixth Amendment only applies to testimonial statements and, so, does not bar the introduction of Ray’s statements to Officer Rigsby. Therefore, the trial court did not err in allowing Ray’s statements to be admitted into evidence.

II. Motion to Dismiss

Defendant next argues that the trial court erred in denying his motion to dismiss each of the charges against him. We discuss each charge in turn.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.” *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

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A. Robbery with a Dangerous Weapon

[3] Defendant contends the trial court erred in denying his motion to dismiss the robbery charge because the evidence failed to show that Defendant either committed the robbery himself or acted in concert with the actual perpetrators. We disagree.

“The essential elements of the crime of robbery with a dangerous weapon, or armed robbery, are: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.” *State v. Sullivan*, 216 N.C. App. 495, 501-02, 717 S.E.2d 581, 585-86 (2011) (*purgandum*¹).

In the commission of a crime, to prove that a defendant was acting in concert,

[i]t is not . . . necessary for a defendant to do *any particular act* constituting at least part of a crime in order to be convicted of that crime under the concerted action principal so long as (1) he is present at the scene of the crime and (2) the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Williams, 299 N.C. 652, 656-57, 263 S.E.2d 774, 778 (1980) (citation omitted). “If two or more persons join in a purpose to commit robbery with a dangerous weapon, each of them, if actually or constructively present, is guilty of that crime if the other commits the crime, if they shared a common plan to commit that offense.” *State v. Hill*, 182 N.C. App. 88, 92, 641 S.E.2d 380, 385 (2007).

“While actual distance from the crime scene is not always controlling in determining constructive presence, the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime.” *State v. Buie*, 26 N.C. App. 151, 153, 215 S.E.2d 401, 403 (1975) (citations omitted). Furthermore, “[t]he theory of acting in concert does not require an express agreement between the parties.

1. Our shortening of the Latin phrase “*Lex purgandum est.*” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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All that is necessary is an implied mutual understanding or agreement to do the crimes.” *Hill*, 182 N.C. App. at 93, 641 S.E.2d at 385 (2007) (citation omitted).

In the present case, even though Defendant was not identified at the scene of the crime, the jury could have made reasonable inferences from the evidence that Defendant acted in concert to commit robbery with a dangerous weapon. At trial, Pipkin, who was at the scene of the crime, testified that he saw a car fly by him and heard that same car hit a large speed bump and blow out a tire as it was fleeing. The Granville County Sherriff’s Department reported a silver car was involved in an armed robbery involving three to four suspects. Officer Duke testified that less than a minute after receiving the 911 communication over the radio, she found Defendant changing a flat tire on his vehicle, along with two other individuals, less than a quarter mile away from the scene of the crime. Additionally, Ray’s debit card was found in close proximity to Defendant’s vehicle where Defendant was changing the flat tire. The mask, snubnosed revolver, and the suspect wearing a red hat and red clothing all matched the descriptions provided by Ray and were located or recovered at or near Defendant’s vehicle.

When viewed in the light most favorable to the State, substantial evidence was introduced at trial sufficient to support a reasonable inference that Defendant acted in concert to commit robbery with a dangerous weapon. Therefore, the trial court did not err by denying Defendant’s motion to dismiss the robbery with a dangerous weapon charge.

B. Possession of Stolen Goods and Possession of Marijuana

[4] Defendant argues that the trial court erred in denying his motions to dismiss the felony charges of possession of stolen goods and possession of marijuana because he never had actual or constructive possession of the stolen debit card or the marijuana. We disagree.

The elements of the crime of possession of stolen goods are: “(1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose.” *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (citation omitted). “[A] conviction for felonious possession of marijuana requires proof that defendant was in possession of more than one and one-half ounces (or approximately 42 grams) of marijuana.” *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 476 (2010) (citation and quotation marks omitted).

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Our Supreme Court has explained what is necessary to prove possession:

In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of nonexclusive, constructive possession is sufficient. Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the [contraband]. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [contraband] [is] found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (citations and quotation marks omitted). “Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury.*” *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) (citation omitted), *aff’d*, 356 N.C. 141, 567 S.E.2d 137 (2002).

This court has previously found incriminating circumstances sufficient to prove non-exclusive, constructive possession where there was: (1) evidence the defendant had a “specific or unique connection to the place where the [items] were found”; (2) evidence the defendant “behaved suspiciously, made incriminating statements . . . , or failed to cooperate with law enforcement”; (3) indicia of the defendant’s control over the place where the contraband was found; or (4) other incriminating evidence in addition to the fact that the items were located near the defendant. *Ferguson*, 204 N.C. App. at 460-64, 694 S.E.2d at 477-80 (2010) (citations omitted).

Here, the State presented substantial evidence that tended to establish that Defendant had constructive possession of both the debit card and the marijuana. The debit card with Ray’s name on it and the marijuana were both found in close proximity to Defendant and his car, which he admitted he owned. Because of their proximity to the debit card and marijuana, Defendant and those with whom he acted in concert had the

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ability to exercise control over the contraband. Additionally, Officer Duke spotted Defendant's car and the suspects about one minute after receiving information from the Granville County Sheriff's Department. The brief period of time between the robbery and the locating of the suspects with the stolen debit card supports an inference that Defendant had knowledge of the robbery and the presence of Ray's debit card.

Based upon the totality of the circumstances, there was substantial evidence from which a reasonable juror could conclude that Defendant had constructive possession of both the debit card and the marijuana. The "evidence is for the jury to weigh, not the trial court, and it is certainly not for the appellate courts to reweigh . . . [because] [w]hen a trial court rules on a motion to dismiss, the court gives considerable deference to the State's evidence." *State v. Chekanow*, 370 N.C. 488, 499, 809 S.E.2d 546, 554 (2018) (*purgandum*). Therefore, the trial court did not err in denying Defendant's motion to dismiss because the State introduced sufficient incriminating circumstances to prove that Defendant had constructive possession of both the stolen debit card and the marijuana.

III. Closing Arguments

[5] Defendant next argues that the trial court abused its discretion in failing to intervene *ex mero motu* when the State referred to Defendant's gang ties in its closing argument. We disagree.

North Carolina General Statute § 15A-1230(a) provides that in closing arguments,

an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2017).

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Waring*, 364 N.C. 443, 499, 701 S.E.2d 615, 650 (2010) (citation and quotation marks omitted). "In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have

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intervened on its own accord.” *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citation omitted).

“[W]hen defense counsel fails to object to the prosecutor’s improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *Huey*, 370 N.C. at 179, 804 S.E.2d at 469. Our Supreme Court explained:

[A]lthough control of jury argument is left to the discretion of the trial judge, trial counsel must nevertheless conduct themselves within certain statutory parameters. It is improper for lawyers in their closing arguments to become abusive, inject their personal experiences, express their personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record. Within these statutory confines, we have long recognized that prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.

If an argument is improper, and opposing counsel fails to object to it, the second step of the analysis requires a showing that the argument is *so grossly* improper that a defendant’s right to a fair trial was prejudiced by the trial court’s failure to intervene. Our standard of review dictates that only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. It is not enough that the prosecutors’ remarks were undesirable or even universally condemned. For an appellate court to order a new trial, the relevant question is whether the prosecutors’ comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Id. at 179-80, 804 S.E.2d at 469-70 (*purgandum*).

Here, Defendant challenges the following statements made by the State during closing arguments:

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I contend to you that they're gang members from Durham, and when he says he is like his big brother, I'll bet he is. He's his big brother gang member and they're going to do anything to protect their gang member. Because they got caught. And they have nothing to lose. They're pulling their time, now. But they want to help their gang member buddy out. And that's why they got up here and told so many lies, to help their big brother gang member out. We have to figure what kind of society and what kind of county we want to live in. Do want to live somewhere where gang people from Durham can come and rob a little old man who didn't have anything. He gave them all that he [had] which was the debit card, but there wasn't any money in his account because he hadn't even gotten his disability check. Is that the kind of county and society we want to live in?

Defendant called co-defendants John Morrell III and Tyquon Smith as witnesses. Both testified they were gang members, and Smith admitted that he was in the same gang as Defendant. The two admitted they did not live in Butner, and John Morrell stated they drove to Butner from Durham on the night of the robbery.

The prosecutor's statements here merely commented on the evidence presented by Defendant at trial, i.e., Defendant and his associates were Durham gang members. Also, the State's argument did not center around Defendant's gang-involvement. The prosecutor's only reference to gang-involvement was in one paragraph during her entire closing argument. As such, in light of the overall factual circumstances, the prosecutor's reference to Defendant's gang membership did not infect "the trial with unfairness [such] that they rendered the conviction fundamentally unfair." *Waring*, 364 N.C. at 500, 701 S.E.2d at 650 (citation omitted). Moreover, the prosecutor's commentary on the evidence has not been shown to be "calculated to lead the jury astray." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107-08. Instead, the prosecutor's statements were supported by the evidence introduced by Defendant at trial, and in light of the evidence presented at trial, were not improper.

In addition, "[t]his Court has consistently held that a prosecutor may argue that a jury is the voice and conscience of the community . . . and [a] prosecutor may also ask the jury to send a message to the community regarding justice." *State v. Barden*, 356 N.C. 316, 367, 572 S.E.2d 108, 140 (2002) (*purgandum*). Here, the prosecutor ended her argument by urging the jury to be the voice and conscience of Granville

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County by thinking about “the kind of county and society we want to live in.” The prosecutor’s argument was simply a reminder to the jury that they should carefully consider their duties and responsibilities as jurors, and that the quality of justice in Granville County ultimately rests with citizens who properly perform their function as jurors. Because the prosecutor’s statements during closing arguments were not improper, we find no error.

IV. Jury Instruction

[6] Defendant argues that the trial court committed plain error by instructing the jury on “acting in concert” because it was unsupported by the evidence and directly impacted the jury’s decision to convict. We disagree.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1) (2017). “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4) (2017). Defendant concedes that he failed to object at trial, but specifically argues plain error on appeal.

“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). Plain error review “requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.” *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

“Under the doctrine of acting in concert, if two or more persons are acting together in pursuance of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuance of the common plan.” *State v. Barts*, 316 N.C. 666, 688-89, 343 S.E.2d 828, 843 (1986); *State v. Williams*, 299 N.C. 652, 656-57, 263 S.E.2d 774, 777-78 (1980). Even if the Defendant had timely objected to the acting in concert jury instruction, the instruction was supported by the evidence and did not amount to error.

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Here, Defendant and two others were located approximately a quarter-mile from the location where the robbery took place. Defendant was changing a tire on a car that matched the description of the vehicle in which the robbers had fled the scene and a witness heard a tire blew out. Defendant had a mask in his vehicle that matched the description of the mask used in the robbery; the victim's stolen debit card was located in close proximity to Defendant, as was a snubnosed revolver similar to the one used in the robbery.

Again, Pipkin testified that he saw a car fly by him and heard that same car hit a large speed bump as it was fleeing. Officer Duke found Defendant changing a flat tire of a car less than a quarter mile away from the scene of the crime after hearing the 911 communications report that a silver car was involved in an armed robbery. In addition, the snub-nosed handgun reported to have been used at the scene of the crime was about fifteen feet from Defendant's car.

Even if Defendant was not the person who had robbed Ray of his debit card, there was substantial evidence that in the early morning hours of November 3, 2015, Defendant was aiding or otherwise assisting others in a common plan or purpose to rob Ray and flee the scene. Thus, an acting in concert instruction was supported by the evidence, and, therefore, the trial court did not err in giving this instruction. Because Defendant has not shown that the trial court erred in giving the acting in concert instruction, he cannot show plain error.

V. Double Jeopardy

[7] Defendant argues, for the first time on appeal, that he was improperly sentenced for both robbery with a dangerous weapon and possession of stolen goods, when the latter involved proceeds from the former, in violation of the Constitution's prohibition against double jeopardy. Defendant concedes that he failed to object at sentencing on double jeopardy grounds.

"A defendant's failure to object below on constitutional double jeopardy grounds typically waives his or her right to appellate review of the issue. . . . 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." *State v. Harding*, ___ N.C. App. ___, ___, 813 S.E.2d 254, 261 (*purgandum*), *disc. review denied*, ___ N.C. ___, 817 S.E.2d 205 (2018). However, if "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally

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imposed, or is otherwise invalid as a matter of law,” it may be subject to appellate review even though no objection, exception or motion was made at trial. N.C. Gen. Stat. § 15A-1446(d)(18) (2017). We address the merits of defendant’s arguments and arrest judgment for his conviction of possession of stolen goods.

“[T]he Legislature created the statutory offense of possession of stolen goods as a substitute for the common law offense of larceny in those situations in which the State could not provide sufficient evidence that the defendant stole the property at issue.” *State v. Moses*, 205 N.C. App. 629, 640, 698 S.E.2d 688, 696 (2010) (citation omitted). In light of this determination, “the Legislature also did not intend to subject a defendant to multiple punishments for both robbery and the possession of stolen goods that were the proceeds of the same robbery.” *Id.* The “[p]rinciples of legislative intent . . . proscribe punishment for possession during the course of the same conduct, and where the property is the same property.” *State v. Hendricksen*, ___ N.C. App. ___, ___, 809 S.E.2d 391, 395 (citation and quotation marks omitted), *review denied*, ___ N.C. ___, 812 S.E.2d 856 (2018).

In the present case Defendant was convicted of robbery with a dangerous weapon, possession of stolen goods, and possession of marijuana. Defendant’s convictions for possession of stolen goods and possession of marijuana were consolidated and that sentence was to run concurrently with the robbery with a dangerous weapon sentence. However, in light of *Moses* and *Hendricksen*, we are required to arrest judgment on Defendant’s sentence for possession of stolen goods.

[8] Furthermore, Defendant’s conviction of misdemeanor possession of stolen goods was consolidated with his conviction of misdemeanor possession of marijuana, which required him to serve a sentence of 60 days in custody. Possession of less than one-half ounce of marijuana is a Class 3 misdemeanor. N.C. Gen. Stat. § 90-95(d)(4). A defendant with a prior record level III convicted of a Class 3 misdemeanor can only be sentenced to a maximum of 20 days in custody. N.C. Gen. Stat. § 15A-1340.23(c). Because we arrested judgment for possession of stolen goods, we remand for the resentencing of Defendant’s conviction of possession of marijuana.

Conclusion

The trial court properly admitted Ray’s statements because they were nontestimonial. The trial court properly denied Defendant’s motions to dismiss because the State presented substantial evidence of each element to support a conviction for each offense. The trial court

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did not abuse its discretion by not intervening *ex mero motu* during the prosecutor's closing statements because there was nothing improper about the prosecutor's closing arguments. The trial court did not err in instructing the jury on acting in concert because the instruction was supported by the evidence introduced at trial. We arrest judgment on Defendant's conviction for possession of stolen goods, and remand for resentencing on the possession of marijuana conviction.

NO ERROR IN PART; ARREST JUDGMENT IN PART; REMANDED IN PART.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA

v.

EUGENE OLIVER JACKSON, DEFENDANT

No. COA18-417

Filed 6 November 2018

Search and Seizure—probable cause—search incident to arrest—open container—expired license

In a prosecution for possession of cocaine and driving without a license, the trial court properly denied defendant's motion to suppress drugs found on his person during a traffic stop, based upon sufficient evidence and findings of fact that after defendant was stopped for running a red light, the law enforcement officer observed an open container of alcohol in the vehicle and discovered that defendant was driving without a valid driver's license. Although the trial court ruled that the officer had a reasonable suspicion which justified extending the traffic stop, the officer did not need reasonable suspicion where probable cause arose during the stop to search defendant's person and arrest him.

Appeal by defendant from judgment entered 13 June 2017 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 2 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jarrett W. McGowan, for the State.

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David Weiss for defendant.

BERGER, Judge.

Eugene Oliver Jackson (“Defendant”) was indicted for felony possession of cocaine and driving without an operator’s license. Defendant filed a motion to suppress, arguing the arresting officer lacked reasonable suspicion to justify the traffic stop. Defendant’s motion to suppress was denied. On June 13, 2017, Defendant pleaded guilty to felony possession of a schedule II substance and driving without an operator’s license. Defendant appeals arguing that his motion to suppress should have been granted because the arresting officer did not have reasonable suspicion to justify extending the traffic stop. Defendant also contends that the trial court erred in concluding the contraband seized from Defendant’s person would have been ultimately or inevitably discovered through lawful means. We disagree.

Facts and Procedural Background

In the order denying Defendant’s motion to suppress, the trial court found: On February 14, 2015, City of Winston-Salem Police Department Corporal J.B. Keltner (“Corporal Keltner”), who had more than sixteen years of experience in law enforcement, including training in narcotics investigation and highway interdiction, was on the lookout for a gold Kia sedan in connection with an earlier incident that occurred at the Green Valley Inn. As Corporal Keltner was monitoring the intersection of Patterson Avenue and Germanton Road, he observed a Kia sedan drive through the red light on Patterson Avenue approaching Highway 52 North. Corporal Keltner conducted a traffic stop. The Kia, driven by Defendant, stopped on the right hand side of the highway, but with its two left tires on the outside right fog line. Based on Corporal Keltner’s training and experience, persons transporting narcotics sometimes engaged in the practice of “white lining,” or parking on the white fog line to make approaching the vehicle and conducting investigations more difficult.

Corporal Keltner approached the passenger side of the vehicle, and immediately “observed a 24-oz. beer, open, in the center console.” Defendant then rolled down the window and Corporal Keltner explained that he stopped the vehicle for running the red light, to which Defendant made spontaneous comments about a friend running off and not knowing the friend’s location. Corporal Keltner then asked for his license and registration. Defendant responded that he did not have a license, but

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handed Corporal Keltner a Pennsylvania State I.D. card with his right hand, which was “shaky.”

After noticing that Defendant “had red glassy eyes” and “a moderate odor of alcohol coming from the car,” Corporal Keltner asked Defendant to exit the car so that he could search the car and have Defendant perform sobriety tests. Before searching the car, Corporal Keltner frisked Defendant for weapons. Upon searching the vehicle, Corporal Keltner found no further evidence or contraband. As Corporal Keltner returned to his police car to check the status of Defendant’s license and for any outstanding warrants, “[D]efendant spontaneously handed” Corporal Keltner his car keys. Because it was cold outside, Corporal Keltner permitted Defendant to sit in the back of the patrol car un-handcuffed while he ran license and warrant checks. Corporal Keltner determined Defendant’s license was expired, the Kia was not registered to Defendant, and Defendant had no outstanding warrants.

While Corporal Keltner was sitting with Defendant in his patrol car, Defendant voluntarily “made a variety of spontaneous statements to Corp[oral] Keltner about his missing friend, first saying he could not remember the friend’s name, then that his name was “Ty,” then “Ty Payne,” and then that “Ty was in fact his brother-in-law.” Defendant further asked if “he could give him a ride back to the Green Valley Inn after the traffic stop was finished.”

After concluding his license and warrant check, Corporal Keltner conducted standardized field sobriety tests, which were performed to his satisfaction. Corporal Keltner then requested and received consent to search Defendant and found powder cocaine and crack cocaine in Defendant’s pockets. Defendant was arrested for possession of cocaine and driving without an operator’s license.

The trial court further found that Corporal Keltner would not have allowed Defendant to drive away from the traffic stop because he had no driver’s license; and he would have searched Defendant’s person before transporting Defendant in his patrol car to any other location or prior to arresting him. Corporal Keltner testified that it was his practice to search all persons who rode in his patrol car, even if not under arrest, for safety reasons and to avoid unwittingly transporting contraband.

Defendant was indicted for possession of cocaine and driving without an operator’s license, and in February 2016, he filed a motion to suppress. The trial court denied Defendant’s motion to suppress in an order filed on July 24, 2017. On June 13, 2017, Defendant pleaded guilty to felony possession of a schedule II substance and driving without an

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operator's license. Defendant was placed on supervised probation for eighteen months.

Defendant appealed the trial court's denial of his Motion to Suppress, but did not give notice of his appeal from the underlying judgment. As a result, Defendant petitioned this Court on May 23, 2018 for a writ of certiorari in light of the defect in his notice of appeal. Defendant asserts that the trial court erred in denying the Motion to Suppress because the arresting officer's reason for extending the traffic stop failed to distinguish Defendant from other innocent travelers and did not establish reasonable suspicion. We grant Defendant's petition for a writ of certiorari, and address the merits.

Analysis

Defendant argues that Corporal Keltner lacked reasonable suspicion to extend the stop after determining Defendant was not intoxicated. He further argues that the State failed to prove discovery of the cocaine was inevitable. We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The conclusions of law . . . are reviewed *de novo*." *State v. Downey*, ___ N.C. App. ___, ___, 796 S.E.2d 517, 519 (2017), *aff'd*, 370 N.C. 507, 809 S.E.2d 566 (2018).

Here, the trial court's findings of fact were supported by competent evidence. Based upon those findings, the trial court concluded as a matter of law that "the purpose of the traffic stop was concluded after the field sobriety tests were administered, and before Corp[oral] Keltner requested consent to search [D]efendant's person." However, "based on the totality of the circumstances Corpor[al] Keltner had reasonable articulable suspicion to extend the stop for the purpose of asking for consent to search the [D]efendant's person." The factor's supporting Corporal Keltner's reasonable suspicion to extend the stop for the purpose of asking consent to search Defendant's person included:

[D]efendant's nervousness and shakiness, the vehicle being registered to a third party not present, the [D]efendant presenting an out-of-state identification; the [D]efendant giving conflicting information about where he lived; the [D]efendant's repeated offering of unsolicited information

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about a missing friend and conflicting information about the name of the friend while ultimately volunteering that the friend was in fact his brother-in-law; and the [D]efendant's parking the vehicle on the fog line where officers could not approach the driver's side of the vehicle without having to stand in the lane of travel.

The trial court also concluded that Defendant's "consent to the search of his person was voluntarily given," and that Defendant "suffered no constitutional violations as a result of this stop and search." Moreover, the trial court stated that, even if Defendant had not consented to the search of his person,

the drugs located on [D]efendant's person would have been inevitably discovered: if Corp[oral] Keltner had merely written [D]efendant a citation and given [D]efendant the ride he had requested following the completion of the traffic stop, and searched him prior to that ride as was Corp[oral] Keltner's practice, the drugs would have been located at that point; or, they would have been located pursuant to a search incident to arrest for No Operator's License.

I. Reasonable Suspicion

The Fourth Amendment of the United States protects individuals "against unreasonable searches and seizures." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citing U.S. Const. amend. IV. and N.C. Const. art. I, § 20). A traffic stop is constitutional if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Id.* at 246, 658 S.E.2d at 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)). "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Bullock*, 370 N.C. 256, 261, 805 S.E.2d 671, 676 (2017) (citation and quotation marks omitted).

Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (quoting *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576). Reasonable suspicion requires "a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Fields*, 219 N.C. App. 385, 387, 723 S.E.2d 777, 779 (2012) (citation and quotation marks omitted). "[T]he stop [must] . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through

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the eyes of a reasonable, cautious officer, guided by his experience and training.” *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439-40 (2008) (citation omitted). “[T]he overarching inquiry when assessing reasonable suspicion is always based on the *totality* of the circumstances.” *Fields*, 219 N.C. App. at 387, 723 S.E.2d at 779 (citation and quotation marks omitted).

In the present case, Corporal Keltner had reasonable suspicion to conduct a traffic stop because he had witnessed Defendant run a red light. Defendant concedes the initial reason for stopping Defendant was lawful, but contends Corporal Keltner did not have reasonable suspicion to search Defendant’s person once the purpose of the traffic stop was concluded. However, Corporal Keltner did not need reasonable suspicion to extend the stop because probable cause developed to justify Defendant’s arrest.

Even if we were to accept Defendant’s argument that Corporal Keltner lacked reasonable suspicion to extend the stop, the trial court’s ultimate ruling on Defendant’s motion to suppress the admission of cocaine is properly upheld. *See State v. Hester*, ___ N.C. App., ___, ___, 803 S.E.2d 8, 15-16 (2017) (citations and quotation marks omitted) (“A correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned.”).

Based on the trial court’s findings and Corporal Keltner’s testimony at the suppression hearing and at trial, two intervening events, i.e., discovery of the open container and determination that Defendant was driving the vehicle without an operator’s license, provided Corporal Keltner probable cause to search Defendant’s person and arrest him.

II. Probable Cause

An officer may lawfully “arrest without a warrant any person who the officer has probable cause to believe” has committed a criminal offense. N.C. Gen. Stat. § 15A-401(b)(2) (2017).

Probable cause is defined as those facts and circumstances within an officer’s knowledge . . . which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. The Supreme Court has explained that probable cause does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required. A probability of illegal activity, rather than a *prima facie* showing of illegal activity or proof of guilt, is sufficient.

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State v. Robinson, 221 N.C. App. 266, 272-73, 727 S.E.2d 712, 717 (2012) (*purgandum*¹). Additionally, “[p]robable cause is defined as those facts and circumstances within an officer’s knowledge and of which he had reasonably trustworthy information[,] which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.” *State v. Biber*, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (citation and quotation marks omitted).

To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is not a high bar.

District of Columbia v. Wesby, ___ U.S. ___, ___, 199 L. Ed. 2d 453 (2018) (citations and quotation marks omitted).

Here, two intervening events gave Corporal Keltner probable cause to search and arrest Defendant. When Corporal Keltner approached Defendant’s vehicle he “immediately noticed a[n] [open] 24-ounce Bush [sic] beer can that was sitting in the center console of the drink holder.” Defendant then rolled down the window and Corporal Keltner detected an odor of alcohol, observed Defendant’s glassy eyes, and explained that he stopped the car for running the red light, to which Defendant made spontaneous comments about a friend of his having run off and not knowing where the friend was. Corporal Keltner then asked for his license and registration. Defendant responded that he did not have a license and handed Corporal Keltner a Pennsylvania State I.D. card. Corporal Keltner determined that Defendant’s license was expired and Defendant had no outstanding warrants.

In light of these facts, Corporal Keltner could have arrested Defendant for either driving with an open container or driving without

1. Our shortening of the Latin phrase “*Lex purgandum est.*” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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a valid operator's license at that time. N.C. Gen. Stat. § 20-138.7(a)(1) (2017); N.C. Gen. Stat. § 20-35 (2017). The probable cause to arrest justified extension of the encounter between Corporal Keltner and Defendant. Corporal Keltner merely asked for consent to do that which by law he was authorized to do: conduct a search of Defendant's person.

“An officer may conduct a warrantless search incident to a lawful arrest. A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause.” *Robinson*, 221 N.C. App. at 276, 727 S.E.2d at 719 (*purgandum*).

If an officer has probable cause to arrest a suspect and as incident to that arrest would be entitled to make a reasonable search of his person, we see no value in a rule which invalidates the search merely because it precedes actual arrest. The justification for the search incident to arrest is the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime. These considerations are rendered no less important by the postponement of the arrest.

State v. Wooten, 34 N.C. App. 85, 89-90, 237 S.E.2d 301, 305 (1977).

In the present case, because an independent basis for probable cause existed prior to the search of Defendant's person and because the independent basis was separate and apart from discovery of the cocaine, the cocaine found on Defendant's person was unnecessary to establish probable cause for arrest.

Moreover, Corporal Keltner testified that prior to asking Defendant for consent to search his person, he believed that Defendant was engaging in some sort of criminal activity other than just running a red light or impaired driving, or driving without a valid operator's license. Corporal Keltner testified that:

a lot of times individuals that are involved in some sort of criminal activity or have some type of contraband in their car will commonly do what we refer to in high-way interdiction as white line the officer whenever they stopped, because a lot of officers traditionally will make their approach to the vehicle on the driver's side of the vehicle, and by pulling over there on the fog line, would expose the officer to danger, walking up in the travel lane and sometimes force the officer to change the way he does

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the traffic stop, or just go ahead and hurry them on their way just to get out of that danger . . .

[W]hen [Defendant] handed me his Pennsylvania . . . I.D. card, that his left -- or his right hand, rather, was shaking uncontrollably whenever he handed the license to me. I know, based on my training and experience, that individuals that are involved in criminal activity commonly will shake uncontrollably like that whenever they hand me their documentation that I have asked for in a traffic stop. . . .

When he was sitting in the back of my patrol vehicle, just the spontaneous conversation that he initiated with me in regards to an event that had transpired prior to me stopping him and this individual that was involved in the -- the incident just seemed very strange to me that he's providing me with information that I hadn't asked for. And I noticed also that when he was talking to me that he was talking very, very rapidly. And I know both of these things, based on my training and experience, are things that are indications of people who are involved in criminal activities, are excessively nervous. . . .

When I ran the registration, it was a North Carolina license plate that was displayed on this vehicle, I found that the vehicle was registered to a third-party female who was not present in the vehicle. And I know, based on my training and experience that very commonly individuals that are involved in criminal activities will . . . utilize a vehicle that's registered to a third party.

Thus, even though the trial court concluded that the traffic stop ended after the sobriety tests, Corporal Keltner developed probable cause to arrest Defendant and then to search Defendant's person. Because the search of Defendant's person was incident to a lawful arrest, the trial court's ruling on Defendant's motion to suppress was proper.

III. Consent

Defendant also contends his consent to the search was invalid because Corporal Keltner had not yet returned his car keys and I.D. card, and thus Defendant was not free to leave. Defendant relies on *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), which held that a defendant's consent to search is invalid when it is tainted by the illegality of an extended detention.

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Under the search incident to arrest exception, consent to search is not required because “[a]n officer may conduct a warrantless search incident to a lawful arrest.” *State v. Chadwick*, 149 N.C. App. 200, 205, 560 S.E.2d 207, 211 (2002) (citations omitted). “A search incident to lawful arrest is limited in scope to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him. The parameters of search incident to arrest in a given case depend upon the particular facts and circumstances.” *State v. Jones*, 221 N.C. App. 236, 240, 725 S.E.2d 910, 913 (2012) (citation omitted).

Because probable cause existed, Defendant’s consent was unnecessary for Corporal Keltner to conduct the search. No additional justification is needed beyond the probable cause required for the arrest. Additionally, the scope of the search was limited. Corporal Keltner conducted an outer clothing pat-down of Defendant’s person. As a result of the pat-down, Corporal Keltner located powder cocaine and crack cocaine in Defendant’s jeans. Once Corporal Keltner secured the cocaine he placed Defendant under arrest and concluded the search of Defendant’s person. Thus, because Corporal Keltner had probable cause to arrest, Defendant’s consent was not required to conduct a search incident to lawful arrest.

IV. Inevitable Discovery

Defendant further argues the trial court erred in alternatively concluding that discovery of the cocaine was inevitable. Even if we assume the search of Defendant was unlawful, which it was not, discovery of the illegal contraband on Defendant’s person was inevitable.

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). Under the exclusionary rule, evidence obtained by unreasonable search and seizure is generally inadmissible in a criminal prosecution. *State v. Garner*, 331 N.C. 491, 505-06, 417 S.E.2d 502, 510 (1992).

However, “[u]nder the inevitable discovery doctrine, evidence which is illegally obtained can still be admitted into evidence as an exception to the exclusionary rule when the information ultimately or inevitably would have been discovered by lawful means. . . . Under this doctrine, the prosecution has the burden of proving that the evidence, even though obtained through an illegal search, would have been discovered anyway by independent lawful means.” *State v. Harris*, 157 N.C. App. 647, 654, 580 S.E.2d 63, 67 (2003) (*purgandum*). “The State need not prove an ongoing independent investigation; we use a flexible

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case-by-case approach in determining inevitability.” *State v. Larkin*, 237 N.C. App. 335, 343, 764 S.E.2d 681, 687 (2014) (citation omitted). Moreover, “if the State carries its burden and proves inevitable discovery by separate, independent means, thus leaving the State in no better and no worse position, any question of good faith, bad faith, mistake or inadvertence is simply irrelevant.” *Garner*, 331 N.C. at 508, 417 S.E.2d at 511.

In the present case, Corporal Keltner testified that had he merely issued Defendant a citation for driving with no operator’s license, he “would [not] have allowed the [D]efendant to have driven off” from the traffic stop because “he was not licensed to operate a motor vehicle.” Corporal Keltner further testified that he would have searched Defendant before giving him a ride or transporting him to jail because of his practice of searching everyone he transports in his patrol car. Also, Defendant repeatedly asked Corporal Keltner “if [h]e could give him a ride back over to the Green Valley Motel and drop him off.”

Here, the State established by a preponderance of the evidence that the cocaine would have been inevitably discovered because Corporal Keltner would have searched Defendant’s person for weapons or contraband prior to transporting him to another location or jail.

Conclusion

For the reasons stated above, the trial court properly denied Defendant’s motion to suppress.

AFFIRMED.

Judges DIETZ and TYSON concur.

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[262 N.C. App. 340 (2018)]

STATE OF NORTH CAROLINA

v.

TEMAN TAVOI McNEIL, DEFENDANT

No. COA18-175

Filed 6 November 2018

Sentencing—prior record level—possession of drug paraphernalia—pre-2014 conviction

The State failed to carry its burden of proving at defendant's sentencing hearing that his pre-2014 conviction for possession of drug paraphernalia was a Class 1 misdemeanor counting as one point toward defendant's prior record level. Because the General Assembly in 2014 distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor (no points), from possession of paraphernalia related to other drugs, a Class 1 misdemeanor (one point), the State had to prove that the pre-2014 conviction was for non-marijuana paraphernalia in order to assign a point for that conviction. The matter was remanded for resentencing at the appropriate prior record level.

Appeal by Defendant from judgments entered 21 August 2017 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.

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

MURPHY, Judge.

In criminal prosecutions, the State bears the burden of proving a defendant's prior record level. Since 2014, our General Assembly has distinguished possession of *marijuana* paraphernalia, a Class 3 misdemeanor, from possession of paraphernalia related to other drugs, a Class 1 misdemeanor. Where the State fails to prove a pre-2014 possession of paraphernalia conviction was for non-marijuana paraphernalia, a trial court errs in treating the conviction as a Class 1 misdemeanor. Upon careful review, we conclude the State failed to meet its burden to prove Defendant Teman Tavoi McNeil's 2012 "possession of

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drug paraphernalia” conviction was related to a drug other than marijuana, and remand this case for resentencing at the appropriate prior record level.

BACKGROUND

On 21 August 2017, Defendant, Teman Tavoi McNeil, was convicted of Non-Felonious Breaking or Entering, Felonious Larceny, and Felonious Possession of Goods Stolen Pursuant to a Breaking or Entering. During sentencing, the State argued Defendant was a prior record Level V with 14 points for felony sentencing purposes. Defendant did not stipulate to any of the underlying convictions or to his prior record level. The sole evidence the State presented at Defendant’s sentencing hearing was a certified copy of his DCI Computerized Criminal History Report. The DCI Report lists all of Defendant’s prior convictions, including the date, disposition, and docket number for each of Defendant’s previous offenses. One listed offense is a 2012 conviction for Possession of Drug Paraphernalia in violation of N.C.G.S. § 90-113.22.

After hearing from both parties and reviewing Defendant’s DCI Report, the Superior Court determined Defendant had 14 prior record points. This calculus included one point for Defendant’s 2012 paraphernalia conviction, which the court calculated as a Class 1 misdemeanor. Consequently, the trial court assigned Defendant a prior record Level V, and sentenced him to an active sentence at the top of the aggravated range of 19 to 32 months imprisonment for felonious larceny. Had Defendant been sentenced with only 13 points, he would have been assigned a prior record Level IV and his maximum sentence for this class of felony would have been an active sentence of 14 to 26 months. N.C.G.S. § 15A-1340.17(c)-(d) (2017).

ANALYSIS

The specific issue that we address for the first time in a published opinion¹ here is whether Defendant’s 2012 conviction for possession of drug paraphernalia was correctly treated as a Class 1 misdemeanor for prior record level purposes. “The determination of an offender’s prior record level is a conclusion of law that is subject to *de novo* review on appeal.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009), *disc. review denied*, 28 January 2010 Order (not published), 691 S.E.2d 414 (Mem) (2010). Additionally, “it is not necessary that an

1. See *State v. Dent*, No. COA17-857, 811 S.E.2d 247, 2018 WL 1386605, *6-*7 (N.C. Ct. App. Mar. 20, 2018) (unpublished); *State v. McCurry*, No. COA17-169, 806 S.E.2d 703, 2017 WL 5586601, *9-*10 (N.C. Ct. App. Nov. 21, 2017) (unpublished).

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objection be lodged at the sentencing hearing” in order for the claim to be preserved for appeal. *Id.* The paraphernalia charge in question was counted as a Class 1 misdemeanor, but Defendant argues it should have been counted as a Class 3 misdemeanor and therefore excluded from his prior record level calculus. N.C.G.S. § 15A-1340.14(b)(5) (2017). We find Defendant’s argument persuasive and remand for a new sentencing hearing with a prior record Level IV.

Defendant’s prior offenses must be calculated according to their assigned classification as of February 2016, the date of Defendant’s offenses in the immediate case. N.C.G.S. § 15A-1340.14(c) (2017) (“In determining [a defendant’s] prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.”). Defendant was convicted for possession of drug paraphernalia in violation of N.C.G.S. § 90-113.22 on 13 March 2012. As of that date, N.C.G.S. § 90-113.22 was the sole criminal statute regarding all drug paraphernalia possession. However, in 2014 our General Assembly enacted N.C.G.S. § 90-113.22A, Possession of Marijuana Paraphernalia. N.C.G.S. § 90-113.22A (2017). As of the date of Defendant’s offenses in this case, possession of *marijuana* paraphernalia was a Class 3 misdemeanor while possession of other drug paraphernalia remained a Class 1 misdemeanor. *Compare* N.C.G.S. § 90-113.22A *with* § 90-113.22. Thus, our determination of whether the trial court correctly calculated Defendant’s prior record level is dependent upon whether Defendant’s 2012 possession of paraphernalia conviction was related to marijuana or another drug, and whether the State met its burden of proving Defendant’s prior record level.

“The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists” N.C.G.S. § 15A-1340.14(f) (2017). The existence of a prior conviction can be proven by stipulation, production of relevant records, or through “any other method found by the court to be reliable.” *Id.* During the sentencing hearing, Defendant did not stipulate to his prior convictions, there was no specific mention of the paraphernalia charge, and the only evidence proffered by the State was a certified copy of Defendant’s DCI Computerized Criminal History Report. The DCI Report is included in the Addendum to the Record on Appeal but sheds no light on whether Defendant’s paraphernalia charge was related to marijuana or another drug. The DCI Report simply shows that Defendant was arrested and convicted for possession of drug paraphernalia in 2012. In sum, the State proved Defendant’s record included a conviction for possession of drug paraphernalia,

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but failed to prove whether that charge was related to marijuana or another drug, and therefore whether the conviction was for a Class 1 or Class 3 misdemeanor.

Reviewing the determination of Defendant's prior record level *de novo*, it is apparent the State failed to meet its burden of proving at the sentencing hearing that Defendant's prior conviction for possession of drug paraphernalia was a Class 1 misdemeanor. When the trial court fails to properly determine a defendant's prior sentencing level, the matter must be remanded for resentencing at the correct sentencing level. *See State v. Jeffery*, 167 N.C. App. 575, 582, 605 S.E.2d 672, 676 (2004) (remanding for resentencing where the State failed to prove the defendant's prior record level by a preponderance of the evidence). Therefore, this matter must be remanded and Defendant resentenced at the appropriate prior record level, IV.

CONCLUSION

The State failed to prove Defendant's 2012 conviction for possession of drug paraphernalia was a Class 1 misdemeanor, but the trial court assigned one point to Defendant's prior record level for that conviction. That error resulted in Defendant being sentenced more harshly than he would have been under his proven prior record level. Therefore, this case must be remanded and Defendant resentenced as a prior record Level IV.

REMANDED FOR RESENTENCING.

Judges STROUD and ZACHARY concur.

STATE v. MITCHELL

[262 N.C. App. 344 (2018)]

STATE OF NORTH CAROLINA

v.

STANLEY MELVIN MITCHELL

No. COA18-29

Filed 6 November 2018

1. Search and Seizure—domestic violence visit—evidence discovered—warrant obtained

The trial court did not err by denying defendant’s motion to suppress evidence from an armed robbery discovered in a search of his home pursuant to a warrant obtained after officers saw the evidence during a domestic violence visit. Defendant did not object to officers entering his home; there was no merit to defendant’s contention that the officers’ entry into his home to investigate domestic violence was a mere subterfuge; and the officers did not participate in a warrantless search during the domestic violence visit because defendant’s girlfriend merely showed the officers items she had discovered before the officers arrived.

2. Evidence—identification of defendant—not impermissibly suggestive

The trial court did not err by denying defendant’s motion to suppress in- and out-of-court identification evidence under the totality of the circumstances. The evidence supported the trial court’s findings that the authorities substantially followed statutory and police department policies in each photo lineup and that the substance of any deviation from those policies revolved around defendant’s neck tattoos.

Appeal by defendant from judgment entered 6 October 2017 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

Richard Croutharmel for defendant.

ELMORE, Judge.

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Defendant Stanley Melvin Mitchell entered an *Alford* guilty plea to robbery with a dangerous weapon following the trial court's denial of his motions to suppress evidence obtained from a search of his home as well as evidence of his identification by the robbery victim. Pursuant to the terms of his plea agreement with the State, defendant appeals the denial of his two motions. We affirm.

I. Background

On 17 January 2014, Officers Nicole Saine and Marvin Francisco of the Charlotte-Mecklenburg Police Department (CMPD) responded to a report of domestic violence at the home defendant shared with his girlfriend, Kristy Fink. In addition to reporting the domestic violence incident, the 9-1-1 caller had further alleged that Ms. Fink suspected defendant of being involved in the armed robbery of a Game Stop store a few days prior to the incident.

The officers knocked on the front door upon arriving at the home, and defendant and Ms. Fink eventually answered and exited the home together. Pursuant to CMPD policy, the officers then separated defendant and Ms. Fink for questioning. Officer Saine remained outside the home with defendant, while Officer Francisco entered the home with Ms. Fink after being authorized by her to do so.

Inside the home, Ms. Fink confirmed that she had been assaulted by defendant; she also corroborated the 9-1-1 caller's allegation by telling Officer Francisco that the incident began when she confronted defendant about the robbery. Ms. Fink then led Officer Francisco to the shared upstairs bedroom to view potentially incriminating evidence she had found prior to the incident, which included money and clothing that matched the description of the robbery suspect's clothing. When Officer Saine entered the home at defendant's request for warmer clothing while he waited outside, Ms. Fink gave her the same information she had given Officer Francisco. The officers subsequently obtained a search warrant and conducted a search of the home based on the information provided by Ms. Fink.

On 12 May 2014, a grand jury indicted defendant for one count of robbery with a dangerous weapon. The State alleged that on 15 January 2014, defendant robbed a Game Stop store and threatened to use a fire-arm against an employee, Robert Cintron, in the commission of the robbery. Although Mr. Cintron had failed to identify any alleged perpetrator in a photographic lineup shown to him two days after the robbery, he later identified defendant when shown a single still-frame photograph obtained from the store's surveillance video. Mr. Cintron then identified

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defendant as the perpetrator in the same photographic lineup shown to him two days after the robbery and again in four close-up, post-arrest photographs of defendant showing his neck tattoos.

Prior to trial, defendant filed a motion to suppress evidence obtained from the search of his home “because valid consent was not obtained” for the officers’ initial entry into the home, and because the subsequent search warrant “was issued without probable cause and was invalid to authorize the search.” Defendant also filed a motion to suppress both in-court and out-of-court identification by Mr. Cintron “of the defendant . . . as the person that robbed the Game Stop, because the out[-]of[-]court identification was so unnecessarily suggestive as to create a substantial likelihood of irreparable misidentification and any in-court identification would not be independent in origin from the impermissible out-of-court identification.” After a hearing in which Officer Saine, Officer Francisco, defendant, and Mr. Cintron testified, the trial court denied defendant’s two motions in written orders entered 20 April 2017.

On 6 October 2017, defendant pled guilty to robbery with a dangerous weapon pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), as well as a plea agreement that preserved his right to appeal the trial court’s denial of his motions to suppress. This appeal followed.

II. Discussion

Our review of a trial court’s denial of a motion to suppress is “strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). We review the trial court’s conclusions of law *de novo*. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

A. Motion to Suppress Evidence Obtained from Search

[1] Defendant first contends the trial court erred in denying his motion to suppress evidence discovered in the search of his home “because it was obtained in violation of his constitutional rights to be free from unreasonable searches and seizures.” According to defendant, the officers’ initial entry into the home was illegal; thus, the fruits of the subsequent search should have been suppressed. We disagree.

Defendant relies primarily on the United States Supreme Court’s holding in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006), to support his argument that the officers were not justified in their initial

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entry into his home. In *Randolph*, officers asked a married couple for permission to search their marital residence; one spouse refused permission, while the other spouse consented to the search. *Id.* at 107, 126 S. Ct. at 1519. The non-consenting spouse was later charged with possession of cocaine based on evidence the officers obtained during their search. *Id.* at 107-08, 126 S. Ct. at 1519-20. At trial, the non-consenting spouse moved to suppress the evidence as a “product[] of a warrantless search of his house unauthorized by his wife’s consent over his express refusal.” *Id.* The trial court denied the defendant’s motion to suppress, holding that the consenting spouse “had common authority to consent to the search.” *Id.* The Supreme Court disagreed, holding that “one occupant may [not] give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.” *Id.* at 108, 126 S. Ct. at 1520.

In response to defendant’s argument, the State contends that *Randolph* is inapposite here for the reasons set forth in *Fernandez v. California*, 571 U.S. 292, 134 S. Ct. 1126 (2014). The Supreme Court refined *Randolph* in *Fernandez*, emphasizing that *Randolph*’s “holding was limited to situations in which the objecting occupant is physically present” and refusing to extend that holding “to the very different situation in [*Fernandez*], where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.” *Fernandez*, 571 U.S. at 294, 134 S. Ct. at 1130. We likewise conclude that *Randolph*’s holding does not extend to the facts of the instant case.

Here, the trial court made the following findings of fact in its order denying defendant’s motion to suppress evidence obtained from the search of his home:

4. In order to fulfill their policy of separating the parties in domestic calls, Officer Saine stayed on the front steps with the defendant, and Officer Francisco was authorized by Miss Fink to enter the residence, where he conducted his original domestic disturbance interview of Miss Fink.

....

7. During Officer Francisco’s investigation in the home with Miss Fink, the defendant was outside on the front steps with Officer Saine.

8. Although the defendant indicated that he wanted to be in the residence while any officers were in the residence,

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the defendant never expressly refused permission of the officers to enter the residence themselves.

9. Officers did not conduct a warrantless search, but were simply shown evidence items by Miss Fink in support of her suspicion that the defendant committed the robbery, which had been the subject of the domestic altercation.

10. On the basis of the display of these items of possible evidence, the officers subsequently obtained a search warrant and conducted a search of the residence per search warrant duly obtained.

....

14. Neither Officer Saine nor Francisco were sure if the defendant asked other officers who arrived later in the scene not to enter the residence, but the Court finds specifically, based on the totality of the circumstances, that in point of time [sic], had the defendant requested the later arriving officers not to enter the residence, this would have been after Kristy Fink had already told Francisco what she suspected about the robbery and after she had already displayed the potential robbery evidence to them.

....

17. The defendant testified at the hearing and stated that Miss Fink had told him that she and Whitney, a friend [who defendant suspected as the 9-1-1 caller], had discussed Miss Fink's suspicion that the defendant had robbed the store in question.

Based on its findings of fact, the trial court concluded as a matter of law:

4. The police in this matter did not conduct a warrantless search of the residence, but were simply shown certain items of evidence of the robbery of a particular video game store possibly perpetrated by the defendant.

5. The defendant never expressly refused Officers Saine or Francisco to enter into the residence. He only indicated his desire to be present inside if and when the officers were inside the residence.

6. Miss Fink's statements to Officers Francisco and Saine during the initial domestic investigation, which concerned

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possible implication of the defendant in a particular robbery, provided probable cause to them to obtain a search warrant and to arrest the defendant for the robbery.

[7]. These items of evidence displayed by Miss Fink to Officer Saine and Officer Francisco are not fruits of the poisonous tree and, therefore, are admissible.

[8]. Neither the defendant's constitutional nor statutory rights were violated herein.

Defendant specifically challenges finding no. 8 and conclusion no. 5—that defendant never objected to the officers entering his home—as “legally erroneous because [defendant] was tricked into believing the officers were not there to search his residence for evidence of crimes other than domestic violence.” Defendant similarly challenges finding no. 9 and conclusion no. 4—that officers did not conduct a warrantless search of the residence. He asserts that “Officer Francisco’s entry into the residence under the subterfuge of investigating a domestic violence complaint followed by his participation in a private search of [defendant’s] bedroom and nightstand for evidence of a robbery was a warrantless search within the meaning of the Fourth Amendment.” We disagree.

The trial court’s finding and conclusion that defendant never objected to the officers entering his home is supported by Officer Saine’s testimony that although defendant appeared “reluctant to stay outside” and “wanted to go back inside,” defendant “did not state officers could not be in his residence.” Like *Fernandez*, this is a very different situation from the one in *Randolph*, which involved a co-tenant “standing at the door and expressly refusing consent.” *Randolph*, 547 U.S. at 119, 126 S. Ct. at 1526. Moreover, defendant’s contention that the officers’ entry into the home to investigate the allegations of domestic violence was a mere subterfuge to investigate the robbery is meritless. The evidence shows that the officers were dispatched to the home in response to a 9-1-1 call reporting an incident of domestic violence. When they arrived at the home, the officers separated the parties pursuant to CMPD policy, and Ms. Fink corroborated the information provided by the 9-1-1 caller. Finally, the evidence supports the trial court’s finding and conclusion that officers did not participate in a warrantless search, where Ms. Fink simply showed the officers items she had discovered prior to their arrival at the home. *Cf. State v. Kornegay*, 313 N.C. 1, 10, 326 S.E.2d 881, 890 (1985) (“Mere acceptance by the government of materials obtained in a private search is not a seizure so long as the materials are voluntarily relinquished to the government.”). As defendant’s contention that the subsequent search warrant was issued without probable cause and

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was thus invalid to authorize the search assumes that the officers' initial entry into the home and gathering of information was unlawful, this argument is likewise overruled.

Because the trial court's findings of fact are supported by at least some competent evidence, and because those findings in turn support the trial court's conclusions of law, we hold that the trial court properly denied defendant's motion to suppress evidence obtained from the search of his home.

B. Motion to Suppress Identification Evidence

[2] In his second and final argument on appeal, defendant contends the trial court erred in denying his motion to suppress identification evidence "because the State conducted an impermissibly suggestive pretrial identification procedure that created a substantial likelihood of misidentification and violated [defendant's] right to due process." We disagree.

Here, the trial court made the following findings of fact in its order denying defendant's motion to suppress in-court and out-of-court identification evidence:

1. That on January 17, 2014, defendant was arrested for robbery of the GameStop store on January 15th, 2014. The alleged victim was shown six separate photos in a photo lineup on January 17, 2014, which was conducted substantially pursuant to procedures outlined in the statutes and the CMPD policies. However, the alleged victim failed to identify the defendant or any other alleged perpetrator during that photo lineup.
2. On February 18, 2015, in the course of trial preparation, the then assistant district attorney and two officers who had arrived at the scene of the alleged robbery on January 15, 2014, showed the alleged victim a single color photo, which is asserted by the affidavit of the defendant's counsel, upon information believed to be a single photo of one of the frames from the surveillance video, which the witness, that is, the alleged victim, identified as the defendant. This was the first time that the alleged victim identified the defendant. Thereupon, the alleged victim was shown the same or similar group of photos as the original photo lineup of January 17, 2014 and he identified the defendant as the perpetrator who was Number 3 in the course of that photo examination.

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3. On March 21, 2017, again in trial preparation, the then assistant district attorney met with the alleged victim and showed multiple notes, which included four close-up post-arrest photos of the defendant showing his neck tattoos, and the victim again identified the defendant in the four photos as the alleged perpetrator.

....

6. . . . [T]he alleged victim asserted that he could identify the defendant in the photo from the “creases in his forehead and tattoos.”

7. The statutory and CMPD policy rules were primarily followed with some deviation in the photo lineups in this case, with the January 17, 2014, photo lineup almost precisely following the statutory and CMPD policy requirements.

8. The substance of any deviation from the statutory requirements and the CMPD policies revolved around the defendant’s tattoos, and once the victim was shown close-up photos of defendant’s tattoos, he made the identification in the matter.

Based on its findings of fact, the trial court concluded as a matter of law:

1. The authorities substantially followed statutory and CMPD policies in each photo lineup.
2. Any deviation was principally the result of earlier photos not portraying with sufficient clarity the defendant’s tattoos, which the victim had observed at the alleged robbery.
3. This issue is why a less suggestive process could not be used and was not used, which would have comported more precisely with CMPD policy and the statute.
4. The totality of the facts and circumstances surrounding the question of any in-court or out-of-court identification of the defendant by the alleged victim is not unduly or impermissibly suggestive, and no less suggestive procedure could reasonably have been used by the authorities.
5. The procedures used by the authorities herein in regards to the identification question of the defendant did

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not give rise to a substantial likelihood that this defendant was mistakenly identified as the perpetrator allegedly in this case.

Defendant specifically challenges finding nos. 7 and 8 as well as conclusion no. 4—that the authorities substantially followed statutory and CMPD policies in each photo lineup, and that the substance of any deviation from those policies revolved around defendant’s tattoos. He contends that “[t]he problem with that reasoning is that it assumes the police had their man and they merely needed confirmation from the witness.” According to defendant, “[w]hen the assistant district attorney showed Mr. Cintron a single, color photo of Mr. Mitchell, he essentially told Mr. Cintron, ‘This is the guy we think robbed the Game Stop store.’ . . . Such a procedure was inherently suggestive.” Defendant ultimately challenges conclusion no. 5—that the procedures used by the authorities “did not give rise to a substantial likelihood that this defendant was mistakenly identified as the perpetrator.” We disagree with defendant’s argument.

A “show-up” identification is the practice of “showing suspects singly to persons for the purpose of identification, and not as part of a lineup[.]” *State v. Oliver*, 302 N.C. 28, 44, 274 S.E.2d 183, 194 (1981) (quotation marks omitted). As the State emphasizes here, the suggestive nature of show-ups is not fatal to their admissibility at trial. *See State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (“Pretrial show-up identifications . . . , even though suggestive and unnecessary, are not *per se* violative of a defendant’s due process rights.”). Rather, “[a]n unnecessarily suggestive show-up identification does not create a substantial likelihood of misidentification where under the totality of the circumstances surrounding the crime, the identification possesses sufficient aspects of reliability.” *Id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 106, 97 S. Ct. 2243, 2248 (1977)).

Here, trial court’s challenged findings and conclusion—that the authorities substantially followed statutory and CMPD policies in each photo lineup and that the substance of any deviation from those policies revolved around defendant’s neck tattoos—are supported by the evidence. Defendant fit Mr. Cintron’s initial description of the perpetrator, which emphasized “a neck tattoo of an Asian symbol on the left side of his neck” as well as the “lining” or notable creases in the perpetrator’s forehead. Based on this description, Mr. Cintron had the ability to identify defendant both in-court and in photographs reflecting a close-up view of defendant’s tattoos, and he specifically testified to

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his ability to recognize defendant as the perpetrator “independent of any lineup . . . or any photo” he had been shown. Thus, the trial court’s ultimate conclusion—that the procedures used by the authorities did not give rise to a substantial likelihood that defendant was mistakenly identified as the perpetrator—is supported by the totality of the circumstances indicating that the identification was sufficiently reliable.

Because the totality of the circumstances supported the reliability of Mr. Cintron’s in-court and out-of-court identification of defendant, we hold that the trial court properly denied defendant’s motion to suppress identification evidence.

III. Conclusion

Where officers did not conduct a warrantless search of defendant’s home, and where the identification of defendant by the robbery victim was sufficiently reliable, the trial court properly denied defendant’s motions to suppress.

AFFIRMED.

Judges DILLON and DAVIS concur.

STATE OF NORTH CAROLINA

v.

KANDRA DORELL NICKENS, DEFENDANT

No. COA18-45

Filed 6 November 2018

1. Indictment and Information—sufficiency of indictment—resisting a public officer

An indictment for resisting a public officer was sufficiently specific and facially valid where it identified the officer by name and office, the duties to be discharged by the officer, and the general manner in which defendant obstructed the officer. The indictment could have been more specific, but hyper-technicality is not required and this indictment identified the ultimate facts, allowing defendant to mount a defense.

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2. Police Officers—resisting a public officer—sufficiency of the evidence

There was sufficient evidence of resisting a public officer where defendant became upset and began cursing in a driver's license office and a uniformed Division of Motor Vehicles inspector, who had arrest authority, attempted to escort her out of the office. Defendant argued that there was insufficient evidence that the inspector was discharging a duty of his office, but the evidence showed that the inspector discharged a duty falling within the scope of N.C.G.S. § 20-49 and N.C.G.S. § 20-49.1 and that defendant's conduct satisfied each element of resisting arrest.

3. Indictment and Information—fatal variance—second-degree trespass—person in charge

The Court of Appeals declined to invoke Appellate Rule 2 where a defendant who was charged with resisting arrest moved to dismiss because of a fatal variance between the indictment and the evidence at trial. Defendant failed to argue how any deficiency resulted in a manifest injustice and failed to argue how the purported error prevented the proper presentation of a defense.

4. Trespass—implied consent—motion to dismiss

The trial court properly denied defendant's motion to dismiss a charge of second-degree trespass where defendant refused to leave a driver's license office and became belligerent with employees. A Division of Motor Vehicles inspector revoked defendant's implied consent when he told defendant to leave the office.

5. Trespass—second-degree—jury instructions—extra words included

The trial court did not err in a second-degree trespass prosecution where the indictment alleged that a Division of Motor Vehicles inspector was a "person in charge" of the premises but the instruction included the additional words "a lawful occupant, or another authorized person." The list of people who can tell a defendant not to remain on the premises in the applicable statute was merely a disjunctive list of descriptors, not additional theories. Substantial differences in the extra descriptors used in this case could not be determined from the plain words of the statute.

6. Constitutional Law—effective assistance of counsel—underlying issues—no error

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There was no ineffective assistance of counsel in a prosecution for resisting a public officer and second-degree trespass where defense counsel explicitly consented to a jury instruction and did not argue that there was a fatal variance between the indictment and the evidence. It was held elsewhere in the opinion that there was no error in the jury instruction and no fatal variance.

Appeal by defendant from judgment entered 10 August 2017 by Judge C. Winston Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 21 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.

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

HUNTER, JR., ROBERT N., Judge.

Kandra Dorell Nickens (“Defendant”) appeals from a 10 August 2017 judgment after a jury convicted her of resisting a law enforcement officer and of second-degree trespass. The trial court sentenced Defendant to a sentence of forty-five days, suspended with twelve months of special, supervised probation and seven days in the custody of the Harnett County Sheriff’s Office. Defendant argues on appeal: (1) the indictment was insufficient in the charge of resisting a public officer; (2) the trial court erred by denying Defendant’s motion to dismiss the charge of resisting a public officer; (3) the trial court erred by denying Defendant’s motion to dismiss the charge of second-degree trespass, due to a fatal variance between the indictment and evidence offered at trial; (4) the trial court erred by denying Defendant’s motion to dismiss the charge of second-degree trespass based on Defendant’s lack of implied consent to be on the premises; (5) the trial court committed plain error instructing the jury on second-degree trespass; and, (6) Defendant received ineffective assistance of counsel.

We disagree, and hold (1) the indictment alleged sufficient facts for each element of the offenses charged; (2) the trial court did not err in denying Defendant’s motions to dismiss the charges of resisting a public officer and second degree trespass based on a fatal variance and lack of implied consent; (3) the trial court did not err in its jury instructions; and, (4) hold defense counsel’s performance did not constitute ineffective assistance of counsel.

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I. Factual and Procedural Background

On the morning of 12 January 2017, Defendant went to the North Carolina Division of Motor Vehicles (“NCDMV”) Driver’s License Office in Erwin, North Carolina, to update her address. Senior Examiner Melissa Overby (“Ms. Overby”) assisted Defendant, asked for her driver’s license, and told her to take a seat. Defendant, who was wearing a head scarf, complied. Ms. Overby informed Defendant her photo could not be taken if she was wearing the scarf. Ms. Overby then asked Defendant if she had a medical or religious reason for wearing the scarf, and Defendant said she did.

Ms. Overby provided Defendant a “head gear affidavit[,]” on which Defendant could declare a medical or religious exemption, thus allowing her to wear the scarf in her license photo. Defendant told Ms. Overby she would neither sign the form nor remove her scarf. Defendant then “got upset” and told Ms. Overby she wanted someone else to take her picture. Ms. Overby told Defendant to have a seat in a nearby station until another examiner became available to assist her. Defendant grew more upset, and “started using some cuss words[.]”

Ms. Overby “realized it wasn’t going anywhere” and turned to her computer to enter Defendant’s driver’s license number and enter a note in her file concerning the dispute. At that time, Defendant stood nearby “wanting her driver’s license back.” Ms. Overby was “listening to her, but not really listening to what she was saying because . . . at that point she is upset[.]” Defendant “kept getting louder and louder and louder[.]”

During this time, Inspector Brandon Wall of the NCDMV License and Theft Bureau (“Inspector Wall”) was in his office in a separate part of the building when a loud voice drew his attention. A former detective with the Lee County Sheriff’s office, Inspector Wall said the voice he heard, “piqued my law enforcement interest.” Inspector Wall—dressed in his “Class B” uniform that included a badge, sidearm, and handcuff case—walked from his office to the public lobby of the NCDMV, where he saw Defendant “standing up, talking loudly.” He saw Defendant creating a scene that left other customers in the lobby “in disarray” and “looking around, trying to figure out what was going on.” Inspector Wall attempted to get Defendant’s attention, was unable to do so, and subsequently approached her. Inspector Wall saw that Ms. Overby had Defendant’s license in her hand.

Based on Defendant’s loud talking and cursing, Inspector Wall told Defendant she needed to leave. Defendant replied “she was in a public building[, s]he wanted a real law enforcement officer[, and s]he wasn’t

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going to leave.” Inspector Wall repeated that “she had to go.” He reached to take Defendant’s license from Ms. Overby. As Inspector Wall was telling Defendant to leave a second time, he touched Defendant’s elbow to “guide her out.” Angered by Inspector Wall’s action, Defendant yelled at him, “get your f***ing hands off me.” Inspector Wall pulled away and reiterated his request for Defendant to leave. His attempts to guide Defendant out of the building were polite, but firm, and the touching was not forceful in nature.

Inspector Wall again reached toward Defendant in an attempt to “guide her” out of the building. Defendant shoved Inspector Wall, and a “pushing match” ensued for “ten seconds to fifteen, twenty seconds.” Inspector Wall began trying to effect an arrest. Defendant headed towards the front door, but Inspector Wall believed “that’s not an option at this point[.]” As the two struggled, they became “locked up.” Inspector Wall tried to restrain Defendant as she tried to get away, and Defendant “lash[ed] out at” Inspector Wall. Inspector Wall then “took [Defendant] down to the ground” and Defendant commented “get off of me” and “I want a real cop[.]” Inspector Wall replied, “I am a cop[.]” and other employees of the DMV told Defendant that Inspector Wall “was a cop as well.”

Scared by the events, Ms. Overby called the police. An officer with the Erwin Police Department arrived and assisted Inspector Wall. Defendant was taken to a break room in the back of the building, where she was “still cursing, still yelling.” During the struggle, Defendant bit Inspector Wall in the arm, and continued to yell at him and to resist. Inspector Wall also suffered an abrasion to his elbow. Throughout Defendant’s interaction with Inspector Wall, she demanded a “real cop,” and Inspector Wall and Ms. Overby told her Inspector Wall was, in fact, “police” and a “real cop.”

On 20 February 2017, a grand jury in Harnett County indicted Defendant for one count each of assault inflicting physical injury on a law enforcement officer, resisting a public officer, and second-degree trespass. On 7 August 2017, the case came on for trial in Harnett County Superior Court. On 10 August 2017, a jury found Defendant not guilty of assault inflicting physical injury on a law enforcement officer, and guilty of resisting a public officer and of second-degree trespass. The trial court found Defendant to have a prior record level II for misdemeanor sentencing purposes; sentenced Defendant to 45 days in the custody of the Sheriff of Harnett County; and, suspended the sentence for 12 months of special, supervised probation, with an active term of seven days in the Sheriff’s custody. Defendant gave oral notice of appeal.

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II. Jurisdiction

Our jurisdiction over an appeal from a final judgment of a North Carolina Superior Court is appropriate pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444(a) (2017).

III. Standard of Review**A. Sufficiency of the Indictment**

When evaluating the sufficiency of an indictment, North Carolina law has established

[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity. [W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of [subject matter] jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court. This Court review[s] the sufficiency of an indictment *de novo*. An arrest of judgment is proper when the indictment wholly fails to charge some offense cognizable at law or fails to state some essential and necessary element of the offense of which the defendant is found guilty. The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.

State v. Harris, 219 N.C. App. 590, 593, 724 S.E.2d 633, 636 (2012) (citations and internal quotation marks omitted, alterations in *Harris*).

B. Motions to Dismiss

Our Court reviews a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A denial of a motion to dismiss is proper if "there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* at 62, 650 S.E.2d at 33 (citation omitted). On a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-193, 451 S.E.2d 211, 223 (1994) (citation omitted).

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C. Ineffective Assistance of Counsel

“It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required” *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted). “Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.” *Id.* at 123, 604 S.E.2d at 881. “The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citations omitted).

D. Plain Error

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Our 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).

IV. Analysis**A. Sufficiency of the Indictment**

[1] Defendant first argues the trial court lacked jurisdiction over the charge of resisting a public officer because the indictment was invalid on its face. Defendant contends the indictment is facially invalid because it (1) “fails to allege the public office held by Inspector Wall with sufficient specificity to allow [Defendant] to prepare a defense,” and (2) “fails to fully and clearly articulate a duty that Inspector Wall was attempting to discharge.”

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Indictment Requirements

Under Section 15A-924(a)(5), an indictment must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2017). “As a prerequisite to its validity, an indictment must allege every essential element of the criminal offense it purports to charge, although it need only allege the ultimate facts constituting each element of the criminal offense.” *Harris*, 219 N.C. App. at 592, 724 S.E.2d at 636 (citations and internal quotation marks, and brackets omitted). “[W]hile an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form.” *Id.* at 592, 724 S.E.2d at 636 (citation omitted). Generally, “an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.” *Id.* at 593, 724 S.E.2d at 636 (citation omitted). Considering the general sufficiency of allegations, our Supreme Court has determined a warrant or bill of indictment must identify the officer—the person alleged to have been resisted, delayed or obstructed—by name; indicate the official duty he was discharging or attempting to discharge; and should point out, generally, the manner in which the defendant is charged with having resisted, delayed, or obstructed the officer. *State v. Smith*, 262 N.C. 472, 474, 137 S.E.2d 819, 821 (1964); *State v. Fenner*, 263 N.C. 694, 700, 140 S.E.2d 349, 353 (1965); *State v. Wiggs*, 269 N.C. 507, 512, 153 S.E.2d 84, 88 (1967); *State v. White*, 3 N.C. App. 443, 445, 65 S.E.2d 19, 21 (1968).

The indictment by which the Grand Jury charged Defendant alleges violations of: (I) N.C. Gen. Stat. § 14-37(c)(1), “ASSAULT PHYSICAL INJURY LEO”; (II) N.C. Gen. Stat. § 14-223, “RESISTING PUBLIC OFFICER”; and (III) N.C. Gen. Stat. § 14-159.13, “SECOND DEGREE TRESPASS.” The indictment specifies:

I. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did assault Agent B.L. Wall, a state law enforcement officer employed by the North Carolina

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Division of Motor Vehicles who was discharging or attempting to discharge his official duties, by scratching and hitting the officer with her hands and biting the officer on the back of the arm, and inflicted physical injury on the officer.

II. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did resist, delay and obstruct Agent B.L. Wall, a public officer holding the office of North Carolina State Law Enforcement Agent, by refusing commands to leave the premises, assaulting the officer, refusing verbal commands during the course of arrest for trespassing and assault, and continuing to resist arrest.

III. The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did without authorization remain on the premises of the North Carolina Division of Motor Vehicles Driver's License Office located at 125 W. Jackson Blvd., Erwin, N.C. 28339, after having been notified not to remain there by a person in charge of the premises, Agent B.L. Wall.

We first must assess whether the indictment sufficiently names the officer. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. In *State v. Powell*, for example, this Court considered the sufficiency of an indictment's specificity. 10 N.C. App. 443, 179 S.E.2d 153 (1971). We held because the warrant neither named the officer on its face nor named the defendant in the order of arrest, the warrant was insufficient, fatally defective, and void. *Id.* at 450, 179 S.E.2d at 158. In *State v. McKoy*, this Court held indictments "do not need to state the victim's full given name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person." 196 N.C. App. 650, 654, 675 S.E.2d 406, 409 (2009).

Here, in the first count, Inspector Wall is identified as "Agent B.L. Wall, a state law enforcement officer employed by the North Carolina Division of Motor Vehicles." In the second count, he is identified as "Agent B.L. Wall, a public officer holding the office of North Carolina Law Enforcement Agent." Both counts, taken together, provide Defendant with sufficient information to identify and locate Inspector Wall. Defendant relies on *State v. Swift* to support her argument, arguing

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the indictment insufficiently identifies the officer. *See State v. Swift*, 105 N.C. App. 550, 414 S.E.2d 65 (1992). Such reliance is misplaced, however, because in *Swift* the indictment named the wrong officer. *See id.* at 552-53, 414 S.E.2d at 67. Unlike the indictment in *Swift*, the indictment here identifies the correct officer, by name, as the one who has been resisted, delayed, or obstructed. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Unlike *Powell*, where the warrant was insufficient, *see* 10 N.C. App. at 450, 179 S.E.2d at 158, we hold the indictment sufficient because it names the officer on its face, including initials and full last name. We likewise hold the specificity of the office held by Inspector Wall facially sufficient. Inspector Wall's identification in the first charge as "employed by the North Carolina Division of Motor Vehicles[.]" and in the second charge as "holding the office of North Carolina Law Enforcement Agent[.]" provides enough information to identify Inspector Wall by both name and employment.

We also must assess whether the indictment specifies the official duty Inspector Wall was discharging or attempting to discharge. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. In count two, the indictment charges Defendant with "refusing commands to leave the premises," "refusing verbal commands during the course of arrest for trespassing and assault[.]" and "continuing to resist arrest." In count three, the indictment specifies Defendant "did without authorization remain on the premises of the North Carolina Division of Motor Vehicles Driver's License Office located at 125 W. Jackson Blvd., Erwin, N.C. 28339, after having been notified not to remain there by a person in charge of the premises." We hold the charges specifically state the duties Inspector Wall was attempting to discharge, namely: commanding Defendant to leave the premises and arresting or attempting to arrest her when she failed to comply.

Finally, to determine whether the indictment is facially valid, we must assess whether it properly points out, in a general manner, the way Defendant is charged with resisting or attempting to resist or obstruct Inspector Wall. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Under Section 14-223, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2017); *see State v. Kirby*, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972) ("[T]he resisting of the public officer in the performance of some duty is the primary conduct proscribed by this section, and the particular duty the officer is performing while being resisted is of paramount importance and is material to the preparation of the defense[.]").

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Therefore, we must determine whether Inspector Wall was acting within the scope of his duties in his interaction with Defendant.

North Carolina caselaw has not specifically addressed the scope of NCDMV officers' powers to arrest, and neither Defendant nor the State have cited to cases directly on point. N.C. Gen. Stat. § 20-49.1 states, in pertinent part:

(a) In addition to the law enforcement authority granted in G.S. 20-49 or elsewhere, the Commissioner and the officers and inspectors of the Division whom the Commissioner designates have the authority to enforce criminal laws under any of the following circumstances:

(1) When they have probable cause to believe that a person has committed a criminal act in their presence and at the time of the violation they are engaged in the enforcement of laws otherwise within their jurisdiction.

N.C. Gen. Stat. § 20-49.1(a) (2017). Defendant acknowledges in her brief that DMV Inspectors do have authority to enforce criminal laws "under certain limited circumstances."

N.C. Gen. Stat. § 20-49.1(a) contains an expansive grant of power that vests DMV inspectors with "the same powers vested in law enforcement officers by statute or common law." N.C. Gen. Stat. § 20-49.1(a). While we recognize the legislature has narrowed the jurisdiction of DMV inspectors, Inspector Wall was acting under the authority given to him by N.C. Gen. Stat. § 20-49 at the time the disturbance began. *See* N.C. Gen. Stat. § 20-49 (2017). While not unlimited, Inspector Wall's authority exists in the office where he works. *See* N.C. Gen. Stat. § 20-49.1(a). Accordingly, we hold Inspector Wall was acting within the scope of his duties during his interaction with Defendant.

Based on the above, we hold the indictment facially sufficient. It identified Inspector Wall, by name and office; the duties to be discharged by Inspector Wall; and, the general manner in which Defendant obstructed Inspector Wall in the discharge of his duties. *See Smith*, 262 N.C. at 474, 137 S.E.2d at 821. Even though the indictment could have been more specific, we decline to require that it be hyper-technical. *See Harris*, 219 N.C. App. at 592, 724 S.E.2d at 636. It identified charges against Defendant with ultimate facts allowing Defendant to sufficiently mount a defense. Accordingly, we hold the indictment was sufficiently specific and facially valid.

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B. Motions to Dismiss**i. Resisting a Public Officer**

[2] Defendant next asserts the trial court erred by denying Defendant's motion to dismiss the charge of resisting a public officer. Defendant argues the State presented insufficient evidence Inspector Wall was discharging a duty of his office at the time of Defendant's arrest.

The elements of resisting arrest are:

- 1) that the victim was a public officer;
- 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- 3) that the victim was discharging or attempting to discharge a duty of his office;
- 4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Sinclair, 191 N.C. App. 485, 488-89, 663 S.E.2d 866, 870 (2008) (citations omitted); *see also* N.C. Gen. Stat. § 14-223. This statute "presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office." *Id.* at 489, 663 S.E.2d at 870. We must consider Section 14-233 and its elements in conjunction with the scope of authority established in Sections 20-49 and 20-49.1. It is clear Section 20-49.1 is dependent upon Section 20-49, as it defines "Supplemental police authority of Division officers," and is coextensive with the grant of authority delineated in Section 20-49. *See* N.C. Gen. Stat. §§ 14-223, 20-49, 20-49.1.

The State presented evidence at trial showing Inspector Wall discharged a duty falling within the scope of both Sections 20-49 and 20-49.1. The evidence also showed Defendant's conduct satisfied each element of resisting arrest. *See* N.C. Gen. Stat. § 14-223; *Sinclair*, 191 N.C. App. at 488-89, 663 S.E.2d at 870. As explained above, Inspector Wall was discharging his duty by commanding Defendant to leave the premises and arresting her when she failed to comply. Sections 20-49 and 20-49.1 delineate Inspector Wall's scope of authority, and define the limits of his authority as a "inspector[] of the Division [of Motor Vehicles]." N.C. Gen. Stat. § 20-49.1. It is clear from the evidence presented Inspector Wall

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acted within the parameters established under both Section 20-49 and 20-49.1 when taken together.

Additionally, under Section 15A-401, “[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense . . . in the officer’s presence.” N.C. Gen. Stat. § 15A-401(b)(1) (2017). When Defendant refused to leave the premises of the DMV office, Inspector Wall had probable cause to believe Defendant committed a criminal offense. *See Parker v. Hyatt*, 196 N.C. App. 489, 497, 675 S.E.2d 109, 114 (2009) (“[T]he authority of the State to charge an offender would be subverted if an officer imbued with power to arrest was required to ignore the crime occurring in his or her jurisdiction.”). Accordingly, we hold the trial court’s denial of the motion to dismiss the charge of resisting a public officer was proper.

ii. Second-Degree Trespass

[3] Defendant next asserts the trial court erred by denying Defendant’s motion to dismiss the charge of second-degree trespass, because of a fatal variance.

N.C. Gen. Stat. § 14-159.13 provides:

(a) **Offense.** – A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:

(1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person

N.C. Gen. Stat. § 14.159.13 (2017).

Defendant argues there was a fatal variance between the allegation in the indictment and the evidence offered at trial. Specifically, Defendant contends the State did not present sufficient evidence Inspector Wall was “a person in charge of the premises” and therefore, the trial court should have granted Defendant’s motion to dismiss this charge. However, Defendant concedes this issue was not preserved for appellate review at trial, and requests this Court to invoke Rule 2 to reach the merits of this argument.

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it

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upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

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“This Court repeatedly has held a [d]efendant must preserve the right to appeal a fatal variance.” *State v. Hill*, 247 N.C. App. 342, 347, 785 S.E.2d 178, 182 (2016) (citations and quotation marks omitted). “If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue.” *Id.* at 247, 785 S.E.2d at 182 (citation omitted); *see also* N.C.R. App. P. 10 (2018). This Court should only invoke Rule 2 in “exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (citation omitted).

Defendant argues the State did not prove Inspector Wall was a “person in charge” for purposes of the trespass offense. N.C. Gen. Stat. § 14-159.13. Neither the statute itself nor prior caselaw address the definition of a “person in charge.” N.C. Gen. Stat. § 14-159.13. “Charge” is defined as “to entrust with responsibilities or duties.” Black’s Law Dictionary 282 (10th ed. 2014). Defendant has failed to argue how a deficiency in additional evidence as to whether Inspector Wall was “person in charge” resulted in a manifest injustice to herself. Further, Defendant has failed to argue how this purported error prevented the proper preparation of her own defense against the crime charged. Thus, we are unpersuaded to invoke Rule 2 to address this issue.

iii. Lack of Implied Consent

[4] Defendant next asserts the trial court erred by denying Defendant’s motion to dismiss the charge of second degree trespass, based on Defendant’s lack of implied consent to be on the premises.

Under Section 14-159.13, generally, those who enter premises open to the public have the implied consent of the owner to remain. *State v. Marcoplos*, 154 N.C. App. 581, 582, 572 S.E.2d 820, 821 (2002); N.C. Gen. Stat. § 14-159.13 (2017). “If, however, the premises are open to the public, the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void.” *Id.* at 582-583, 572 S.E.2d at 821-822 (citation omitted). “[O]ne who lawfully enters a place may be subject to conviction for trespass if he or she remains after being asked to leave by someone with authority.” *Id.* at 583, 572 S.E.2d at 821-822; *see also* N.C. Gen. Stat. § 14-159.13.

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The evidence at trial shows Defendant raised her voice and began swearing at the DMV employee who possessed her license. When Inspector Wall told Defendant to leave, he picked up Defendant's license and attempted to escort her out of the building. By telling Defendant to leave the office, Inspector Wall revoked Defendant's implied consent to remain. Inspector Wall's possession of Defendant's license did not prevent her from leaving the building. Inspector Wall picked up Defendant's license from Ms. Overby. Inspector Wall attempted to escort Defendant off the property with all of her possessions. Defendant's refusal to leave the premises and becoming belligerent with the DMV employees and Inspector Wall prevented her from retrieving her license. Further, Inspector Wall was established at trial as someone who fit the definition of a lawful occupant and authorized person. Accordingly we affirm the trial court's denial of the motion to dismiss.

C. Plain Error, Jury Instruction

[5] Finally, Defendant asserts the trial court committed plain error in its jury instruction on second-degree trespass. Defendant asserts the trial court committed plain error by instructing the jury on additional theories of second-degree trespass not alleged in the indictment. Defendant argues the evidence showing Inspector Wall was a "person in charge of the premises" is insufficient to support a conviction on that theory alone. Defendant did not object and this argument was not presented at trial. However, because we hold the inclusion of the additional words is not erroneous, we do not need to employ a plain error analysis.

North Carolina Pattern Jury Instruction 214.31A describes four potential persons who can notify a defendant not to enter or remain on the premises: the owner, a person in charge of the premises, a lawful occupant, an authorized person. N.C.P.I. Crim. 214.31A (2015). Defendant was indicted for "remain[ing] on the premises . . . after having been notified not to remain there by a person in charge of the premises." In the case *sub judice*, the indictment specifically alleged Inspector Wall was a "person in charge" of the premises. However, the trial court instructed the jury to find Defendant guilty if she was told not to remain on the premises "by a person in charge of the premises, a lawful occupant or another authorized person."

However, the additional words "a lawful occupant, or another authorized person" do not constitute other disjunctive theories included in the jury instructions. Examining the statute's language, it is apparent the list of persons is merely a disjunctive list of descriptors, not additional theories.

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In the construction of statutes, the *ejusdem generis* rule is that where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.

State v. Lee, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970) (citation omitted); see also *United States v. Aguilar*, 515 U.S. 593, 615-16, 132 L. Ed. 2d 520, 538 (1995). An associative canon of statutory construction, *noscitur a sociis*, teaches “associated words explain and limit each other. When a word used in a statute is ambiguous or vague, its meaning may be made clear and specific by considering the company in which it is found and the meaning of the terms which are associated with it.” *City of Winston v. Beeson*, 135 N.C. 271, 280, 47 S.E. 457, 460 (1904).¹

Here, the notification element of second-degree trespass “by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person” specifies a list appropriate to interpret using *ejusdem generis* and *noscitur a sociis*. See N.C. Gen. Stat. § 14-159.13; *Lee*, 277 N.C. at 244, 176 S.E.2d at 774. The descriptors define persons who could notify Defendant they were no longer authorized to remain on the premises, not additional theories. From the plain language of the statute, we cannot determine any substantive differences between the descriptors included in the jury instructions not alleged in the indictment. Accordingly, the trial court did not err in its jury instructions on second-degree trespass.

For the reasons discussed above, we hold the trial court did not err in its instructions to the jury on the charge of second-degree trespass by including other descriptors from the pattern jury instructions and in Section 14-159.13.

D. Ineffective Assistance of Counsel

[6] Defendant argues she received ineffective assistance of counsel, violating her Sixth Amendment rights and Article 1, Section 23 of the North Carolina Constitution. Specifically, Defendant contends her counsel was ineffective because her counsel (1) explicitly consented to the jury instruction amounting to a misstatement of the law regarding

1. This case was reprinted in 1924, and paginated as 135 N.C. 192, 198 (Spring Term, 1904).

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the specific duty Inspector Wall was discharging when he arrested Defendant; and (2) failed to argue there was a fatal variance between the allegation in the indictment and the evidence presented.

Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment of the United States Constitution guarantee criminal defendants the right to effective assistance of counsel at trial. *See* N.C. Const. art. I § 23; U.S. Const., Amend. VI; *see also State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985). “[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution.” *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248; *see Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

In order to prevail on a claim of ineffective assistance of counsel (“IAC”), a “defendant must first show that his defense counsel’s performance was deficient and, second, that counsel’s deficient performance prejudiced his defense.” *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876 (2004); *see also Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. “Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness.” *Thompson*, 359 N.C. at 115, 604 S.E.2d at 876 (citations and internal quotation marks omitted).

[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Thompson, 359 N.C. at 115, 604 S.E.2d at 876 (citations and internal quotation marks omitted). When our Court reviews an IAC claim, “[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.” *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). “Because of the difficulties inherent in determining if counsel’s conduct was within reasonable standards, a court must indulge a strong presumption that counsel’s conduct falls within the broad range of what is reasonable assistance.” *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986) (citing *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694).

Defendant asserts trial counsel explicitly consented to the jury instruction at the charge conference regarding the specific duty Inspector Wall was discharging when he arrested Defendant, and Defendant was

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prejudiced by trial counsel's consent. Defendant contends the trial court's instruction, "[m]aking an arrest for criminal conduct, which occurs in his presence, is a duty of a Division of Motor Vehicles agent" is an erroneous statement of the law, and thus, there is a reasonable probability the jury would have reached a different result.

During the charge conference, Defendant's trial counsel discussed the correct language at length with the State and the trial court concerning the language used to define the specific duty Inspector Wall was attempting to discharge during Defendant's arrest. Defendant's trial counsel argued the trial court should not define a specific duty or impute a duty to Inspector Wall because whether he had a specific duty was a separate question of fact for the jury to decide. The record indicates trial counsel did object to one portion of the language in question:

THE COURT: All right. I would be inclined to add that language out of abundance of caution, making an arrest for criminal conduct which occurs in his presence or preventing criminal conduct in a Division of Motor Vehicles office are duties of a DMV agent. State want to be heard any further about that?

MR. PAGE: No, your Honor.

THE COURT: Defense want to be heard any further?

MR. KEY: Just note my exception to the second aspect of it.

THE COURT: That's noted and overruled. All right.

At trial, counsel argued several times Inspector Wall did not have the authority to arrest Defendant. Defense counsel specifically questioned Inspector Wall about the power of a DMV inspector to arrest.

Defendant also argues her trial counsel should have argued the existence of a fatal variance between the allegation of second-degree trespass in the indictment and the evidence presented at trial. Because we previously held above the trial court did not err in its jury instructions and there was no fatal variance, both did not constitute a misstatement of the law or errors by counsel. Therefore, we hold Defendant's IAC claims are without merit, and Defendant did not receive ineffective assistance of counsel.

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V. Conclusion

For the reasons set out in our opinion above, we find no error committed at trial and affirm the conviction of Defendant for resisting a public officer and trespass in the second degree.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 NOVEMBER 2018)

BOSWELL v. BOSWELL No. 18-462	New Hanover (16CVD361)	AFFIRMED IN PART AND REMANDED
CABLE v. SINK No. 18-271	Randolph (13CVS2790)	Appeal dismissed.
CORE v. N.C. DIV. OF PARKS & RECREATION No. 17-1402	N.C. Industrial Commission (TA-24656)	Remanded
COUSAR v. MARTIN No. 18-268	Forsyth (16CVS5241)	Dismissed
ECMD, INC. v. GRUBBS No. 18-377	Guilford (17CVS1383)	Dismissed
EVERETT v. DUKE ENERGY CAROLINAS, LLC No. 18-159	Wake (16CVS7353)	Reversed in Part; Affirmed in Part.
FITNESS SOLUTIONS GRP, LLC v. JTG EQUIP. & SUPPLY CO., LLC No. 18-313	Wake (16CVD13102)	Affirmed
HUDSON v. PASQUOTANK CTY. No. 18-115	Pasquotank (16CVS414)	Reversed and remanded in part; affirmed in part
IN RE A.P. No. 18-280	Orange (15JT88)	Affirmed
IN RE D.C., JR. No. 18-482	Swain (16JA18-20)	Affirmed in Part, Reversed and Remanded in Part
IN RE E.W.P. No. 18-183	Avery (13SPC68)	Affirmed
IN RE K.K.L-H. No. 18-598	Avery (18JA12)	Affirmed in part; reversed in part; reversed and remanded in part
IN RE N.J.H. No. 18-381	Johnston (15JT198)	Affirmed

JONES v. BOYD No. 18-198	Catawba (14CVS2977)	Affirmed
JONES v. WELLS FARGO BANK, NA No. 18-245	N.C. Industrial Commission (15-711274)	Affirmed
McCAMMITT v. CHEN No. 18-480	Mecklenburg (17CVD5297)	Dismissed
PEGUES v. MONROE No. 18-162	Sampson (09CVD1585)	Vacated and Remanded
SHEN v. McGOWAN No. 18-263	Durham (16CVD3981)	Affirmed
STATE v. AVERETTE No. 18-227	Pitt (16CRS1393)	Affirmed
STATE v. BAKER No. 18-70	Lincoln (15CRS53563)	No prejudicial error.
STATE v. BRADLEY No. 17-1391	New Hanover (14CRS53046)	No Error
STATE v. COLES No. 18-357	Forsyth (13CRS60689)	New trial.
STATE v. GARRISON No. 18-156	Wake (15CRS219816)	NO ERROR IN PART; DISMISSED IN PART
STATE v. GILL No. 18-191	Durham (15CRS57733)	Vacated and Remanded
STATE v. HAZEL No. 18-266	Forsyth (16CRS2452) (16CRS50882)	No Error
STATE v. HUDSON No. 18-143	Harnett (15CRS51385-86)	No Error
STATE v. KEWISH No. 18-214	Wake (12CRS219520)	No Error in Part, Vacated and Remanded in Part
STATE v. MASH No. 18-68	Wilkes (16CRS51364) (16CRS51647)	Affirmed
STATE v. MATLOCK No. 18-101	Onslow (16CRS52047-48)	Remanded for Re-sentencing.

STATE v. McKOY No. 18-152	Johnston (15CRS53962)	No Error
STATE v. MILLHOUSE No. 17-1142	New Hanover (01CRS18969-78) (01CRS25484-87) (01CRS28577) (02CRS4353)	Affirmed in part and Vacated in part
STATE v. OCEGUEDA No. 18-414	Rockingham (16CRS50085) (16CRS51)	No Error
STATE v. PILKINGTON No. 18-38	Onslow (15CRS57350-52) (16CRS51123) (16CRS51125)	No Error
STATE v. RAWLINSON No. 18-325	Greene (16CRS50132)	Vacated and Remanded
STATE v. SATTERWHITE No. 18-249	Edgecombe (16CRS51837)	No Error
STATE v. SISK No. 18-211	Transylvania (16CRS50807)	No Plain Error
STATE v. SMITH No. 18-529	Mecklenburg (16CRS226550) (16CRS226551) (16CRS226552) (16CRS226554) (16CRS226556) (17CRS5918)	No Error
STATE v. WHITMIRE No. 18-308	Buncombe (15CRS89331) (15CRS89435) (16CRS266)	No Error
STATE v. WILLIAMS No. 16-684-2	Wayne (14CRS55045) (15CRS551)	No Plain Error
STONEWALL CONSTR. SERVS., LLC v. FROSTY PARROTT BURLINGTON No. 18-171	Alamance (15CVS124)	Affirmed
STYLES v. STYLES No. 18-257	New Hanover (17CVD833)	Affirmed

THE GRANDE VILLAS AT THE PRES. CONDO. HOMEOWNERS ASS'N, INC. v. INDIAN BEACH ACQUISITION LLC No. 18-218	Carteret (15CVS1415)	Dismissed
WOODLIEF v. CANAL WOOD, LLC No. 18-447	Franklin (17CVD315)	Reversed
YOUNG v. YOUNG No. 18-335	Halifax (15CVD1141)	Affirmed

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JAMES A. BRADLEY, EMPLOYEE, PLAINTIFF

v.

CUMBERLAND COUNTY, EMPLOYER, SELF-INSURED
(KEY RISK MANAGEMENT SERVICES, INC., SERVICING AGENT), DEFENDANTS

No. COA18-334

Filed 20 November 2018

1. Appeal and Error—notice of appeal—service—by email—non-jurisdictional violation

Where plaintiff improperly served opposing counsel his notice of appeal from the Industrial Commission's Opinion and Award by email, the violation of the Appellate Rules was non-jurisdictional and did not warrant dismissal where all parties had actual notice, as evidenced by defendants' participation in the appeal.

2. Appeal and Error—notice of appeal—service—certificate of service in record—non-jurisdictional violation

Plaintiff's failure to include in the record a certificate of service of his notice of appeal from the Industrial Commission's Opinion and Award was a non-jurisdictional violation of the Appellate Rules and did not necessitate dismissal.

3. Appeal and Error—notice of appeal—designation of court to which appeal is taken—non-jurisdictional violation

Plaintiff's failure to designate the court to which he was appealing the Industrial Commission's Opinion and Award in his notice of appeal was a non-jurisdictional violation of the Appellate Rules and did not warrant dismissal of plaintiff's appeal where plaintiff's only appeal of right was in the Court of Appeals and defendants participated in the appeal.

4. Appeal and Error—notice of appeal—timeliness—jurisdictional violation

Plaintiff's failure to establish in the appellate record that his notice of appeal was timely filed with the Industrial Commission was a jurisdictional violation of the Appellate Rules and required dismissal.

Appeal by plaintiff from Opinion and Award entered 7 November 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2018.

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[262 N.C. App. 376 (2018)]

Musselwhite, Musselwhite, Branch and Grantham, by Stephen C. McIntyre, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Dayle A. Flammia and Lindsay A. Underwood, for defendants-appellees.

ZACHARY, Judge.

Plaintiff James A. Bradley appeals from an Opinion and Award of the North Carolina Industrial Commission. In that Plaintiff failed to establish that his notice of appeal was properly and timely filed, this Court lacks jurisdiction. Accordingly, we dismiss Plaintiff's appeal.

I. Background

On 28 March 2017, Deputy Commissioner Lori A. Gaines issued an Opinion and Award concluding Plaintiff was entitled to workers' compensation benefits and awarding Plaintiff disability benefits. Defendants appealed to the Full Commission, and on 7 November 2017, the Full Commission entered an Opinion and Award reversing in part and affirming in part the Deputy Commissioner's Opinion and Award.

Plaintiff filed his notice of appeal to this Court. Plaintiff's counsel printed the notice of appeal on his firm's letterhead and addressed the notice to Commissioner Phillip A. Baddour, III of the Industrial Commission, confirmation receipt requested. Although the notice indicated that it was filed with the Industrial Commission "via Electronic Filing Portal," it lacked any time stamp indicating if or when the Industrial Commission received Plaintiff's notice of appeal. At the bottom of the notice was a notation of "cc via email: Dayle Flammia, Counsel for Defendants," indicating that opposing counsel was to receive a copy of the notice of appeal via email. Further, Plaintiff failed to include a certificate of service in the record on appeal demonstrating how and when Plaintiff served opposing counsel with a copy of the notice of appeal. Finally, the body of the notice failed to state the court to which appeal was being taken.

II. Appellate Jurisdiction

This Court has the power to inquire into jurisdiction at any time, even *sua sponte*. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010). We must have jurisdiction to hear the cases before us, and our power to hear those cases must be "properly invoked by an interested party." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*,

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362 N.C. 191, 197, 657 S.E.2d 361, 364 (2008). Both statute and our Rules of Appellate Procedure provide the proper method by which interested parties may successfully invoke our jurisdiction. *Id.* at 197, 657 S.E.2d at 364-65 (“The appellant’s compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case.”). When an appealing party fails to follow the steps necessary to vest this Court with jurisdiction, we cannot review the case on the merits, and the appeal must be dismissed. *Id.* at 197, 657 S.E.2d at 364.

Generally, violations of Rule 3 are jurisdictional and warrant dismissal of an appeal. *Id.* at 197, 657 S.E.2d at 365 (citing *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000)). However, certain violations of the appellate rules are non-jurisdictional and do not invariably warrant dismissal of an appeal. *Id.* at 200, 657 S.E.2d at 366-67. Non-jurisdictional rules are those that are “designed primarily to keep the appellate process flowing in an orderly manner.” *Id.* at 198, 657 S.E.2d at 365 (citation and quotation marks omitted). The violation of non-jurisdictional rules warrants dismissal only when the violation or violations amount to a “substantial failure or gross violation” of the Appellate Rules that impairs this Court’s task of review or frustrates the adversarial process. *Id.* at 200, 657 S.E.2d at 366.

A. Appealing Cases from the Industrial Commission

The Workers’ Compensation Act provides a right to appeal Industrial Commission cases to this Court:

[E]ither party to the dispute may, within 30 days from the date of the award or within 30 days after receipt of notice to be sent by any class of U.S. mail that is fully prepaid or electronic mail of the award, but not thereafter, appeal from the decision of the Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

N.C. Gen. Stat. § 97-86 (2017). The Industrial Commission requires that parties submit most documents in workers’ compensation cases electronically via the Commission’s Electronic Document Filing Portal (“EDFP”). 11 NCAC 23A.0108(a). Parties can file a notice of appeal to the Court of Appeals via EDFP or U.S. Mail. 11 NCAC 23A.0108(g).

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Article IV of the Appellate Rules governs appeals from administrative tribunals, including the Industrial Commission. Pursuant to Rule 18, “[a]ppeals of right from administrative [tribunals] shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial division, except as provided in this Article.” N.C.R. App. P. 18(a). A party’s notice of appeal from the Industrial Commission must (1) specify the party or parties taking the appeal; (2) designate the final decision from which appeal is taken and the court to which appeal is taken; and (3) shall be signed by counsel of record for the party or parties taking the appeal. N.C.R. App. P. 18(b)(2). Appellants can demonstrate timely filing of a notice of appeal by including in the appellate record some form of acknowledgement from the Industrial Commission stating when the Commission received the notice of appeal. *See Jones v. Yates Motor Co.*, 121 N.C. App. 84, 85, 464 S.E.2d 479, 480 (1995) (“On 23 March 1994, the Commission advised plaintiff that it received his notice of appeal to the Court of Appeals.”). Such acknowledgement includes, *inter alia*, providing a time-stamped copy of a notice of appeal or a letter from the Industrial Commission acknowledging receipt of a notice of appeal. Article IV of the Appellate Rules does not, however, provide any instruction concerning service of the notice of appeal upon the opposing party.

B. Service of a Notice of Appeal

“Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, *at or before the time of filing*, be served on all other parties to the appeal.” N.C.R. App. P. 26(b) (emphasis added). Rule 26 further prescribes the following manner of service:

Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient’s last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney’s office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon

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deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the [appellate courts'] electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

N.C.R. App. P. 26(c). Rule 4 of the North Carolina Rules of Civil Procedure substantially mirrors the methods of service and process listed in Rule 26(c) of the Appellate Rules, with a few additional methods provided. *See e.g.*, N.C. Gen. Stat. § 1A-1, Rules 4(j)(1), (j1) (2017) (permitting, among other methods, service by leaving copies at a party's dwelling with a person of suitable age, service by delivery to a party's authorized agent, or service by publication).

Generally, service by email is not allowed. *See id.* § 1A-1, Rule 4(j6) ("Nothing in subsection (j) of this section authorizes the use of electronic mailing for service on the party to be served."). However, parties can serve papers by email in one limited instance: for documents filed electronically to the North Carolina Appellate Courts' electronic-filing site. *See* N.C.R. App. P. 26(c) ("When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es) . . ."). A notice of appeal is not filed with this Court, but rather with the court that entered judgment. *See* N.C.R. App. P. 3(a), 26(a). Thus, appellants cannot serve a notice of appeal via email. *See MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 445-47, 735 S.E.2d 364, 366-67 (2012) (holding service of a notice of appeal by email is a technical violation of Rule 26 of the Appellate Rules, but determining that the technical error did not warrant dismissal where all parties clearly received notice and the error did not materially impede review). In addition, both the Rules of Civil Procedure and the Rules of Appellate Procedure require proof of service in the form of a certificate of service. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b1); N.C.R. App. P. 26(d).

III. Discussion

[1] In the instant case, the following errors are apparent: (1) Plaintiff's notice of appeal was improperly served via email; (2) the record on appeal does not include a certificate of service of the notice of appeal; (3) the notice of appeal failed to designate the court to which appeal was being taken; and most significantly, (4) the record on appeal contains no proof that the notice of appeal was timely filed.

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The first three of Plaintiff's errors constitute non-jurisdictional violations of our Appellate Rules. Plaintiff improperly served opposing counsel with his notice of appeal by email, failed to include a certificate of service of his notice of appeal, and failed to designate the court to which appeal was taken. Neither Rule 4 of the Rules of Civil Procedure nor the Appellate Rules permit service of a notice of appeal by email. Thus, Plaintiff's service of the notice of appeal was improper. However, this Court has ruled that such a violation is non-jurisdictional and does not warrant dismissal where all parties had actual notice. *See State v. Williams*, 235 N.C. App. 201, 204, 761 S.E.2d 662, 664 (2014) (holding that service of a notice of appeal is a non-jurisdictional violation and determining that dismissal would be inappropriate because the State was not misled by the error and waived compliance by participating in the appeal), *appeal dismissed and disc. rev. denied*, 368 N.C. 241, 768 S.E.2d 857 (2015). Here, it is clear that Defendants had actual notice of appeal to this Court by their participation in the appeal. Accordingly, this violation does not warrant dismissal of the appeal.

[2] Second, Plaintiff failed to include a certificate of service of the notice of appeal in the record. Appellate Rule 3 provides that service of a notice of appeal shall be as provided in Rule 26. N.C.R. App. P. 3(e). Rule 26 requires that the certificate of service "shall appear on or be affixed to the" notice of appeal. N.C.R. App. P. 26(d). Therefore, Plaintiff's failure to include a certificate of service of his notice of appeal violates Appellate Rule 3. However, while proper filing of a notice of appeal is jurisdictional, the manner of service of a notice of appeal is a non-jurisdictional requirement. *See Lee*, 204 N.C. App. at 102, 693 S.E.2d at 689-90 (holding that "where a notice of appeal is properly and timely filed, but not served upon *all* parties" the "violation of Rule 3 is a non-jurisdictional defect[,] although it is nevertheless a "significant and fundamental violation" warranting dismissal of the appeal). In that this violation does not constitute a "substantial or gross violation of the Appellate Rules," it does not necessitate dismissal.

[3] In addition, Plaintiff neglected to designate in the notice of appeal the court to which the case was being appealed. This Court, however, has deemed that a violation of this sort does not necessarily warrant dismissal of the appeal. *See Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (holding that the appellant's failure to designate the court to which the appeal is taken is not a fatal error, so long as this information may be fairly inferred and the other parties are not misled by the mistake). Plaintiff's only appeal of right lies in this Court, so it can be inferred that Plaintiff intended to appeal to this

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Court despite his failure to designate in his notice of appeal the court to which he was appealing. Based on Defendants' participation in this appeal by settling the record on appeal and filing a brief, it is clear they were not misled by this Rule violation. As a result, this violation, alone, would not warrant dismissal of Plaintiff's appeal.

[4] Finally, there is no indication that Plaintiff's notice of appeal was timely filed, which is a jurisdictional error. *E.g.*, *Strezinski v. City of Greensboro*, 187 N.C. App. 703, 710, 654 S.E.2d 263, 268 (2007) (dismissing the defendant's cross-appeal from a decision of the Industrial Commission because the notice of appeal was not timely filed), *disc. rev. denied*, 362 N.C. 513, 668 S.E.2d 783 (2008). Plaintiff's counsel allegedly filed his notice of appeal—on his firm's letterhead—via the Industrial Commission's Electronic Document Filing Portal. The notice of appeal does not bear a time stamp, file stamp, or any other designation that the Industrial Commission received the notice of appeal. Plaintiff's counsel requested that Commissioner Baddour confirm receipt of the notice; however, Plaintiff failed to include any acknowledgment from the Industrial Commission indicating receipt of Plaintiff's notice of appeal in the record on appeal. The notice of appeal is dated "December 5, 2017," which would have been timely, but that date was affixed by Plaintiff's counsel, and again, not confirmed by proof of service. We will not assume the notice of appeal was timely filed solely based upon Plaintiff's unverified notice of appeal. *See Dogwood*, 362 N.C. at 197, 657 S.E.2d at 365 (citing *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (per curiam) (holding that because of the failure to include the notice of appeal in the record, in violation of Rule 3, the Court of Appeals had no jurisdiction and the appeal must be dismissed); *In re Lynette H.*, 323 N.C. 598, 602, 374 S.E.2d 272, 274 (1988) (holding that the State violated Rule 3 by failing to give timely notice of appeal, resulting in a lack of jurisdiction)).

"[I]t is [the appellant's] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects th[e] appeal to dismissal." *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). Subject matter jurisdiction cannot be waived by this Court or the parties, *Inspection Station No. 31327 v. N.C. Div. of Motor Vehicles*, 244 N.C. App. 416, 428, 781 S.E.2d 79, 88 (2015), and because such violation of Rule 3 is jurisdictional, plaintiff's appeal must be dismissed.

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[262 N.C. App. 383 (2018)]

IV. Conclusion

There is no indication in the record that Plaintiff properly and timely filed his notice of appeal. As a result, this Court does not have jurisdiction to hear Plaintiff's appeal, and the appeal is therefore dismissed.

APPEAL DISMISSED.

Judges STROUD and MURPHY concur.

CUMBERLAND COUNTY, EX REL. LLOYD E. MITCHELL, SR., PLAINTIFF
v.
DANITA L. MANNING, DEFENDANT

No. COA17-662

Filed 20 November 2018

1. Contempt—civil—child support order—order still in force

In a civil contempt proceeding based on a mother's failure to pay child support arrears, the trial court properly found that its child support order remained in force at the time of the show cause hearing, even though the mother's son had turned eighteen years old and was no longer in school, because arrears were still owed to the county.

2. Contempt—civil—child support—failure to pay—ability to pay

In a civil contempt proceeding based on a mother's failure to pay child support arrears, no competent evidence appeared in the record to support the trial court's findings that the mother had the ability to comply with the underlying child support order at the time of the show cause hearing and had the ability to purge the contempt conditions.

Judge BERGER concurring in part and dissenting in part.

Appeal by Defendant from order entered 18 August 2016 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 16 November 2017.

CUMBERLAND CTY. EX REL. MITCHELL v. MANNING

[262 N.C. App. 383 (2018)]

Cumberland County Child Support Department, by Ben Logan Roberts and Roxanne C. Garner, for plaintiff-appellee Cumberland County.

Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for plaintiff-appellee relator.

Michael E. Casterline, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Danita L. Manning (“Defendant”) appeals from an order holding her in civil contempt. On appeal, Defendant argues: (1) the contempt order attempts to enforce a child support order no longer in force; and (2) the findings on willfulness and present ability to pay are not supported by competent evidence and do not support the trial court’s conclusions. We affirm in part and vacate and remand in part.

I. Factual and Procedural Background

On 31 March 2014, the Cumberland County Child Support Enforcement Agency (“the Agency”) filed a complaint on behalf of Lloyd E. Mitchell, Sr. (“Relator”). In the complaint, the Agency alleged the following. Relator and Defendant married on 8 November 1997. The two had one child during the marriage and separated on 1 August 1998. Defendant “has failed or refused to adequately contribute to the support and maintenance of []her minor child(ren)[.]” Defendant “is and has been an able bodied person, capable of providing child support through all times relevant to this action.”

The court held a hearing on 24 July 2014. In an temporary child support order entered 19 August 2014, the court ordered Defendant to do the following: (1) pay \$187 per month to the North Carolina Centralized Collections; (2) provide her child with medical coverage; and (3) reimburse Relator fifty percent of all unreimbursed medical expenses, after the first \$250 per year.

On 2 October 2014, the court held another hearing. On 28 October 2014, the court entered a permanent child support order. The court found Defendant had the ability to pay \$187 child support per month and ordered Defendant to do so. The court found Defendant owed \$374 of past child support and ordered Defendant to pay \$18 per month in arrears.

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On 5 April 2016, Defendant filed a motion to set aside/terminate arrears. On 6 April 2016, the court entered an “Order to Appear and Show Cause for Failure to Comply Support Order and Order to Produce Records.” (All capitalized in original). In the order, the court found “probable cause to believe [Defendant was] in contempt for failure to comply with” the child support order. The order averred Defendant owed \$3,927 in past due support payments. The court ordered Defendant to appear in Cumberland County District Court “to show cause why [she] should not be . . . held in contempt of court for failing to comply with the lawful orders of this Court.” The order informed Defendant if the court found her to be in civil contempt, she “may be committed to jail for as long as the civil contempt continues.” Although child support payments were suspended because Defendant’s son reached his eighteenth birthday and was no longer in school, the Agency sought payment for the amount still in arrears.

On 20 July 2016, court held a show cause hearing, which Defendant attended. Defendant requested a continuance, to set aside prior orders, and to dismiss the show cause order. The court dismissed or denied all of Defendant’s requests. The court then heard the Agency’s motion for contempt. The parties did not call anyone to testify. Defendant did not present any evidence. The court found Defendant in willful contempt.

On 18 August 2016, the court entered an order for contempt. The court found, *inter alia*:

16. That the Court finds all the following facts beyond a reasonable doubt.

....

d. That the Temporary and Permanent Child Support orders entered were proper, that the Permanent Child Support Order is still valid and the purpose of the Order may still be served by compliance with the Order, to wit: payment of child support.

e. That since the entry of the Order, the Defendant has failed to comply with the payment terms of the aforesaid Order and as of June 30, 2016 owes a total outstanding arrears of \$ 3,740.00 and compliance arrears of 3,740.00.

f. That since the entry of the Order, the Defendant has not been under any physical or mental disability that would prevent her from working.

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- g. That the Defendant testified and the Plaintiff confirmed that the Defendant's Federal Tax Return in the amount of \$1,284.00 were seized for the payment of child support and are on hold through the North Carolina Centralized Collections Agency pending a fraud hold.
- h. That the Defendant has not paid the arrears as set forth in the Order to Show Cause prior to this hearing.
- i. That the Defendant had the ability to comply with the previous Order and has the ability to purge herself as ordered.

The court concluded "Defendant is in willful contempt of this Court for her failure to comply with the terms and conditions of the order previously entered in this case." The court decreed Defendant owed arrears of \$3,740. The court ordered Defendant to pay \$205 per month in arrears and set the purge amount at \$2,500. The court ordered Defendant to the custody of the Sheriff of Cumberland County.

On or about 12 September 2016, the court reduced the purge amount to \$1,000, with an additional \$1,500 to be paid by 26 October 2016. On 14 September 2016, Defendant filed notice of appeal from the order for contempt. On 5 October 2016, the court further reduced the purge amount to \$500, with additional amounts to be paid on a schedule set by the trial court. On 15 November 2016, the trial court issued a stay of the judgment from the order for contempt pending appeal and ordered Defendant be released from custody.

II. Standard of Review

The standard of review for contempt is:

limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.

Watson v. Watson, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted).

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III. Analysis

A trial court may hold a party in civil contempt for failure to comply with a court order if:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

A. Current Force of the Child Support Order

[1] Defendant contends the trial court erred in holding her in civil contempt because the underlying child support order was no longer in force at the time of her show cause hearing, and, thus, its purpose could not be served by her compliance with the order. We disagree.

This argument was not made at the show cause hearing, and, on appeal, Defendant cites no law supporting this argument. Although Defendant's child support obligation terminated because her son turned eighteen and was no longer in school, the arrears owed to the county remained.

If an arrearage for child support or fees due exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court.

N.C. Gen. Stat. § 50-13.4(c) (2017).

On 28 October 2014, the court entered the permanent child support order and directed Defendant to pay \$187 per month. The order "remain[ed] in full force and effect." Defendant made no child support payments before her son turned eighteen and finished school. The court

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found the purpose of the order, “payment of child support[,]” would be served by Defendant’s compliance with the order. We conclude competent evidence supports this finding, and the findings and applicable law support the conclusion the child support order remained in force. Accordingly, Defendant’s argument is without merit.

B. Challenged Findings¹

[2] Civil contempt proceedings may be initiated:

(1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. Under the first two methods for initiating a show cause proceeding, the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause.

Moss v. Moss, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-05 (2012) (brackets, quotation marks, and citations omitted); N.C. Gen. Stat. § 5A-23 (2017).

Nonetheless, our Court recognized the burden shift under the first two ways of commencement does not divest the trial court of its responsibility to make findings of fact supported by competent evidence:

despite the fact that the burden to show cause shifts to the defendant, our case law indicates that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the

1. Both appellees argue Defendant waived the issue of present ability to pay the child support order and purge amount by not raising the issue below and not presenting any evidence below. However, our Court reviewed this issue in *Tigani*, where neither defendant nor his counsel attended the show cause hearing, thus not arguing the issue of inability to pay at the hearing. ___ N.C. App. at ___, 805 S.E.2d at 548, 551-52. Additionally, an appellant cannot present argument about findings of fact the trial court has not yet made.

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defendant had the ability to pay, in addition to all other required findings to support contempt.

Cty. of Durham v. Hodges, ___ N.C. App. ___, ___, 809 S.E.2d 317, 324 (2018) (citing *Carter v. Hill*, 186 N.C. App. 464, 466, 650 S.E.2d 843, 844 (2007); *Frank v. Glanville*, 45 N.C. App. 313, 316, 262 S.E.2d 677, 679 (1980)). See also *Cty. of Durham v. Burnette*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip. op. at *8-*9 (N.C. Ct. App. Oct. 16, 2018) (relying on the rule stated in *Hodges*); *Tigani v. Tigani*, ___ N.C. App. ___, ___, 805 S.E.2d 546, 549-52 (2017).

Before holding an obligor in civil contempt, the trial court must find as fact the obligor's failure to comply with the child support order was willful and the obligor has the present ability to pay. *Clark v. Gragg*, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-60 (2005). While our Court has a clear preference for explicit findings on these issues, we will affirm an order when the trial court finds present ability to comply, *but only if* there is competent evidence in the record supporting the finding. *Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 551-52; *Maxwell v. Maxwell*, 212 N.C. App. 614, 619-20, 713 S.E.2d 489, 493 (2011) (citation omitted). *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990) (citation omitted) ("Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of willfulness necessary to support a judgment of civil contempt."). The finding is binding on appeal if supported by competent evidence. *Watson*, 187 N.C. App. at 64, 652 S.E.2d at 317 (citation omitted).

When determining ability to pay, the trial court must look at two periods of time: (1) the period of time the party did not pay child support; and (2) the date of the hearing, *i.e.* the present ability to comply. See *Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 550-52; *Shippen v. Shippen*, 204 N.C. App. 188, 190-91, 693 S.E.2d 240, 243 (2010) (citation omitted); *Clark*, 171 N.C. App. at 122-23, 614 S.E.2d at 358-59 (citations omitted).

For these findings, there are several points of argument for an appealing contemnor—the lack of a finding on these issues, the *wording* of the finding, and *whether the finding is supported by competent evidence*. See *Tigani*, ___ N.C. App. at ___, 805 S.E.2d at 551 (citing *Maxwell*, 212 N.C. App. 614, 713 S.E.2d 489; *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986)). Said another way, wording sufficient to survive appellate review does not determine whether competent evidence supports the findings. See *id.* at ___, 805 S.E.2d at 551-52.

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Additionally, “[t]he order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court’s conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt.” *Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317 (quotation marks and citation omitted). The trial court must also determine the obligor’s present ability to comply with the purge conditions. *Spears v. Spears*, 245 N.C. App. 260, 281-82, 784 S.E.2d 485, 499 (2016) (citation omitted). This finding must also be supported by competent evidence in the record. *Lee v. Lee*, 78 N.C. App. 632, 633-34, 337 S.E.2d 690, 691 (1985).

Here, the trial court entered an order to show cause, which shifted the burden to Defendant. *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 204-05 (citations omitted). The court found “the Defendant *had* the ability to comply with the previous Order and has the ability to purge herself as ordered.”² (Emphasis added).

While it is true Defendant failed to present evidence below, Defendant’s failure to present evidence does not relieve the trial court of its duty to make findings of fact supported by competent evidence. *Hodges*, ___ N.C. App. at ___, 809 S.E.2d at 324 (citations omitted). Turning to whether this finding is supported by competent evidence, we hold it is not.³ The record is devoid of evidence of Defendant’s ability to pay the child support amount or purge amount at the time of the hearing. The record includes Defendant’s affidavit of indigency. However, Defendant completed the affidavit on 12 May 2016, and the court held the hearing on 20 July 2016. Thus, the affidavit cannot be evidence of Defendant’s *present ability* to pay at the time of the hearing.⁴ Neither appellee offered any evidence of Defendant’s present ability to pay at the hearing.

2. We need not determine whether the wording of this finding is sufficient—even minimally—because even if we were to conclude the wording of the finding was sufficient on Defendant’s present ability to comply with the support order, as explained *infra*, the finding is not supported by competent evidence. Thus, our holding to vacate and remand would remain the same.

3. Defendant also argues any “findings” on Defendant’s ability to pay are not findings, but instead, conclusions of law. However, our case law treats these findings *as findings*. See *e.g.*, *Burnette*, ___ N.C. App. ___, ___ S.E.2d ___, ; *Hodges*, ___ N.C. App. at ___, 809 S.E.2d at 323-25 (explaining the difference between evidentiary findings of fact and ultimate findings of fact).

4. Additionally, two things in the record stand out in our review of Defendant’s present ability to pay. First, the trial court repeatedly reduced the purge amount, from \$2,500 to \$1,000, and then to \$500. Second, Defendant required court appointed counsel for the proceedings below.

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Therefore, we hold the trial court's finding on Defendant's ability to pay the child support amount owed and the purge amount is not supported by competent evidence.⁵ Accordingly, we vacate the order and remand for proceedings not inconsistent with this holding.

IV. Conclusion

For the foregoing reasons, we affirm, in part, the trial court's order and vacate and remand, in part, for proceedings not inconsistent with this opinion. The trial court may, in its discretion, receive evidence on remand.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge BERGER concurring in part; dissenting in part.

BERGER, Judge, concurring in part, dissenting in part by separate opinion.

I concur with the majority that the underlying child support order was in full force and effect. However, because there was sufficient evidence that Defendant was in willful contempt of court, I respectfully dissent and would affirm the trial court's determination.

Defendant and Lloyd E. Mitchell, Sr. ("Mitchell") were married November 8, 1997. Three months later, their son was born, and six months after their son's birth the couple separated. Because Defendant had failed or refused to adequately contribute to the support and maintenance of her child, the Cumberland County Child Support Enforcement Agency (the "Agency") filed a complaint against her on March 31, 2014. In its complaint, the Agency alleged that Defendant was the "Responsible Parent" as defined by N.C. Gen. Stat. § 110-129(3), and she therefore had a legal duty to provide support.

A hearing was conducted in July 2014, and a temporary child support order was entered on August 19, 2014. Both the temporary child support order and a permanent child support order entered on October 26, 2014 found Defendant responsible for paying support for her minor

5. As the trial court's determination of willfulness was predicated upon ability to pay, this portion of the order is also vacated and remanded.

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child. The permanent child support order required Defendant to make child support payments of \$187.00 per month and arrears payments of \$18.00 per month.

On April 6, 2016, Defendant owed \$3,927.00 in past due support payments. The trial court entered an Order to Appear and Show Cause for Failure to Comply with the Support Order and Order to Produce Records. In the order, the trial court found “that there is probable cause to believe that [Defendant is] in contempt for failure to comply with the order(s) of this Court and/or [Defendant has] failed to comply with other provisions of the” child support order. The trial court ordered Defendant to appear in Cumberland County District Court “to show cause why [she] should not be . . . held in contempt of court for failing to comply with the lawful orders of this Court.” The order also put Defendant on notice that, if found to be in civil contempt, she “may be committed to jail for as long as the civil contempt continues.” Defendant was served with the trial court’s order on April 21, 2016 by a deputy with the Cumberland County Sheriff’s Department.

Defendant had made no payments since the entry of the permanent child support order on October 2, 2014. Although child support payments had been suspended because the parties’ son had reached his eighteenth birthday and was no longer in school, the Agency sought payment for the amount still in arrears.

On July 20, 2016, the show cause hearing was conducted in Cumberland County District Court. During the hearing, Defendant was given the opportunity to introduce evidence, but she provided none. The trial court found Defendant to be in civil contempt of the support order, ordered her into custody, and set the contempt purge amount at \$2,500.00.

The matter was readdressed by the trial court on July 27, 2016, and Defendant remained in jail at that time. On August 17, 2016, the purge amount required was reduced to \$1,000.00, with an additional \$1,500.00 to be paid by October 26, 2016. Defendant remained in custody when the matter was again addressed on August 24 and August 31, 2016. On September 7, 2016, the purge amount was further reduced to \$500.00, with additional amounts to be paid on a schedule set by the trial court. On September 14, 2016, Defendant filed notice of appeal from the order for contempt. On September 21, 2016, the trial court issued a stay of the judgment from the order for contempt pending appeal and ordered Defendant be released from custody.

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A trial court may hold a party in civil contempt for failure to comply with a court order if:

- (1) [t]he order remains in force;
- (2) [t]he purpose of the order may still be served by compliance with the order;
- (2a)[t]he noncompliance by the person to whom the order is directed is willful; and
- (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2017).

Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply.

Watson v. Watson, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007) (citations and quotation marks omitted).

Where there is "a show cause order with a judicial finding of probable cause[,] . . . the burden was on [contemnor] to show why he should not be held in contempt." *Gordon v. Gordon*, 233 N.C. App. 477, 480, 757 S.E.2d 351, 353 (2014) (citations and quotation marks omitted). "The party alleged to be delinquent has the burden of proving either that he lacked the means to pay or that his failure to pay was not willful." *Shumaker v. Shumaker*, 137 N.C. App. 72, 76, 527 S.E.2d 55, 57 (2000). The burden is only on an aggrieved party when there is a motion for contempt filed pursuant to N.C. Gen. Stat. § 5A-23(a1). "The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." N.C. Gen. Stat. § 5A-23(a1) (2017); *but see Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 303 (2004) (noting the contempt proceeding was initiated by a motion and notice of hearing by an aggrieved party and not by order or notice from the court, "there is no basis to shift the burden of proof to the alleged contemnors in this case.").

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Here, the record plainly reflects that the trial court entered an order directing Defendant to appear at a specified time to show cause why she should not be held in civil contempt. The burden was on Defendant to show that she was not in contempt of the child support order. A “defendant refuses to present such evidence at h[er] own peril.” *Hartsell v. Hartsell*, 99 N.C. App. 380, 387, 393 S.E.2d 570, 575 (1990), *aff’d*, 328 N.C. 729, 403 S.E.2d 307 (1991).

“To show such cause, a party must establish a lack of means to pay support or an absence of willfulness in failing to pay support.” *Belcher v. Averette*, 136 N.C. App. 803, 807, 526 S.E.2d 663, 665 (2000). “It is well established that in civil contempt proceedings to enforce orders for child support, the court is required to find only that the allegedly delinquent obligor has the means to comply with the order and that he or she wilfully refused to do so.” *Plott v. Plott*, 74 N.C. App. 82, 84-85, 327 S.E.2d 273, 275 (1985).

Additionally, “[t]he order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. The court’s conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt.” *Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317 (citations and quotation marks omitted). “Although specific findings as to the contemnor’s present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness necessary to support a judgment of civil contempt.” *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 574.

Here, the record reflects that on October 2, 2014 a child support order was entered directing Defendant to pay \$205.00 per month, and that the order “remain[ed] in full force and effect.” The court found that the purpose of the order, “payment of child support,” would be served by Defendant’s compliance with the order. The trial court’s findings also reflect that Defendant had “the means to comply with the order and that . . . she wilfully refused to do so.” *Plott*, 74 N.C. App. at 84-85, 327 S.E.2d at 275.

Further, the trial court found that Defendant was not prevented from working due to “any physical or mental disability,” and she had an income tax refund that had been intercepted to apply to her child support obligation. In addition, Defendant was late to court on the day of the contempt hearing because she was at work, and she informed the trial court that she was “an insurance agent.” She also claimed she

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was unemployed. When given the opportunity to present evidence at the show cause hearing, Defendant failed to produce any evidence demonstrating that she lacked the means to comply with the order, or that her failure to pay was not willful.

The trial court found Defendant's noncompliance with the child support order to be willful; that she had the present ability to comply; and the conditions by which Defendant could purge the contempt were clear. *See Watson*, 187 N.C. App. at 65, 652 S.E.2d at 317. To purge the contempt, Defendant was required to pay \$2,500.00 of the \$3,740.00 owed.

Based upon the record before us, there was sufficient information available to the trial court to find that Defendant had the means to comply with the order and that she wilfully refused to do so. The trial court's findings are binding on this Court, and are sufficient to warrant entry of civil contempt. Defendant was given an opportunity to prove her inability to comply with a valid court order, but she presented no evidence. Because Defendant was in civil contempt of the child support order, I would affirm.

IN THE MATTER OF WILLIAM THOMAS DUNCAN, JR., PETITIONER-APPELLANT

No. COA18-318

Filed 20 November 2018

1. Appeal and Error—appealability—interlocutory orders—motions to dismiss

The petitioner's motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a child abuse action in which petitioner was placed on the responsible persons list were dismissed on appeal as interlocutory. There is no right to appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(1). The denial of a Rule 12(b)(6) motion is also an interlocutory order from which no immediate appeal may be taken; while defendant argued that this constituted the dismissal of a defense, the effect of the order was that the defense was not proven as a matter of law. Nothing precluded petitioner from making his argument at his hearing on judicial review pursuant to N.C.G.S. § 7B-323.

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2. Appeal and Error—appealability—preservation of issues—interlocutory order—denial of motion for trial—substantial right

The denial of petitioner’s motion for a new trial affected a substantial right that could be lost without immediate review and his arguments were heard on appeal.

3. Constitutional Law—North Carolina—jury trial

Petitioner had no right to a trial by jury where he was placed on a list of responsible individuals (RIL) pursuant to N.C.G.S. § 7B-311(b) after an investigation for child abuse. The right to a jury trial is limited to cases where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. While the right to trial by jury can still be created by statute, it is undisputed that no statutory right exists to a jury trial upon petition for judicial review pursuant to N.C.G.S. § 7B-323. The proceeding in the present case was unknown at common law. Furthermore, petitioner did not raise to the trial court his argument that the matter was akin to a common law defamation action that existed when the Constitution of 1868 was adopted, and the argument was not preserved for appeal. Even if he had done so, placing his name on the RIL list could not be reasonably analogized to defamation.

Appeal by Petitioner from orders entered 15 December 2017 and 12 January 2018 by Judge Robert M. Wilkins in District Court, Randolph County. Heard in the Court of Appeals 1 October 2018.

Chrystal S. Kay for Randolph County Department of Social Services, Respondent-Appellee.

Woodruff Law Firm, PA, by Carolyn J. Woodruff and Jessica Snowberger Bullock, for Petitioner-Appellant.

McGEE, Chief Judge.

I. Factual and Procedural Background

A minor child (“D.M.”) was placed in the care and custody of William Thomas Duncan, Jr. (“Petitioner”) from 8 August 2015 until 17 September 2015, while Petitioner was being considered as an adoptive parent for D.M. Due to allegations of abuse, D.M. was removed from Petitioner’s custody on 17 September 2015. Upon completion of the investigation of the allegations, and pursuant to N.C. Gen. Stat. §§ 7B-311(b) and 7B-320(a) (2017), Randolph County Department of

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Social Services (“DSS”) made the decision to cease consideration of Petitioner as an adoptive parent, and to place Petitioner on the responsible individuals list (“RIL”). N.C.G.S. § 7B-311(b). A person is placed on the RIL after “an investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual[.]” N.C.G.S. § 7B-320(a). Petitioner filed multiple motions pursuant to N.C. Gen. Stat. § 7B-323(a) (2017), requesting judicial review, and requesting that the trial court “dismiss the . . . action, or deny the decision to place him on the RIL (the “motion to dismiss”).¹ Petitioner also filed a 29 December 2017 motion for a jury trial. These matters were heard on 15 November 2017 and 10 January 2018. By order entered 15 December 2017, the trial court denied “Petitioner’s motion to deny/dismiss” DSS’s decision to place him on the RIL. The trial court denied Petitioner’s motion for a jury trial by order entered 12 January 2018. Petitioner appeals.

II. Interlocutory Orders

Petitioner appeals from orders denying his motion to dismiss and his motion for a jury trial. As Petitioner acknowledges, both of these orders are interlocutory, but Petitioner argues that they are immediately appealable. DSS filed a “Motion to Dismiss” on 20 July 2018, contending that both orders were not only interlocutory, but not immediately appealable. We grant DSS’s motion to dismiss in part, and deny it in part.

A. 15 December 2017 Order

[1] In the motion to dismiss, Petitioner argued that he could not be placed on the RIL because he was not a “caretaker” as defined by N.C. Gen. Stat. § 7B-101(3) (2017), and as required on the present facts by N.C.G.S. § 7B-101(18a). In the trial court’s 15 December 2017 order, it denied “Petitioner’s motion to deny/dismiss [] DSS[’s] decision to place Petitioner’s name on the [RIL] because Petitioner was not a ‘caretaker[.]’ ” DSS contends that Petitioner’s argument should be dismissed because Petitioner has no right to appeal from the 15 December 2017 interlocutory order dismissing Petitioner’s motion to dismiss DSS’s determination that Petitioner was a “responsible individual” as defined by N.C.G.S. § 7B-101(18a). We agree with DSS and dismiss this argument.

Petitioner argued that the present action should be dismissed pursuant to Rule 12(b)(1) or Rule 12(b)(6) of our Rules of Civil Procedure. There is no right of immediate appeal from the interlocutory denial

1. A motion was filed on 6 November 2017, two motions were filed on 14 November 2017, and another motion was filed on 27 November 2017.

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of a motion to dismiss pursuant to Rule 12(b)(1). *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209, 753 S.E.2d 822, 826 (2014). Further, “The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken.” *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) (citations omitted).

In addition, contrary to Petitioner’s argument in his “Statement of the Grounds for Appellate Review,” the 15 December 2017 order does not “strike[] an entire defense, so that the order in effect grants a demurrer against that defense[.]” (Emphasis in original). The trial court denied Petitioner’s motion to dismiss the determination placing him on the RIL. However, the 15 December 2017 order included no determination that Petitioner was a “caretaker” as defined by N.C.G.S. § 7B-101(18a). The effect of the trial court’s ruling was simply that Petitioner had not *proven*, as a *matter of law*, that he was not a “caretaker” at any time relevant to DSS’s RIL determination. Nothing in the 15 December 2017 order precludes Petitioner from making his “caretaker” argument at a hearing pursuant to his N.C.G.S. § 7B-323 right to judicial review. Because Petitioner’s appeal of the 15 December 2017 order is an improper interlocutory appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(1) or Rule 12(b)(6), we grant DSS’s motion to dismiss this portion of Petitioner’s appeal.

B. 12 January 2018 Order

[2] Petitioner argues that the trial court’s denial of his 29 December 2017 “Motion for Jury Trial” affects a substantial right of his that could be lost without immediate review. We agree.

As an initial matter, we note that while the order defendant appeals from is interlocutory, since the trial court denied defendant’s request for a jury trial the order affects a substantial right and is, therefore, immediately appealable. *In re McCarroll*, 313 N.C. 315, 327 S.E.2d 880 (1985); *Dick Parker Ford, Inc. v. Bradshaw*, 102 N.C. App. 529, 402 S.E.2d 878 (1991).

Dept. of Transportation v. Wolfe, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994). We therefore address Petitioner’s argument that the trial court erred in denying his motion for a jury trial.

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III. Analysis

[3] Petitioner’s argument on appeal is that the North Carolina Constitution requires that he receive a jury trial in the present case. We disagree.

At trial, Petitioner made the following argument relative to the North Carolina Constitution:

[PETITIONER’S ATTORNEY:] I will be up front with you that the statute says you cannot get a jury trial[.]

. . . .

Right, moving right along. And then number E is the North Carolina Constitution and this is where probably I have and [Petitioner] has the most trouble, page 3 of this section 13, this is the Constitution currently in effect: “Forms of actions: there shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated as a civil action,” which is what this is, “and which there shall be a right to have issues of fact tried before a jury.”

THE COURT: Okay.

[PETITIONER’S ATTORNEY:] And then it says in two, “No rule of procedure or practice shall abridge substantive rights, abrogate or limit the right of trial by jury.” So we need an answer to that.

On appeal, Petitioner first argues: “[U]nder the North Carolina Constitution, ‘[i]n all actions where legal rights are involved, and issues of fact are joined by the pleadings, [a party] is entitled to a trial by jury.’ *Andrews v. Pritchett*, 66 N.C. 387, 388 (1872).” However, there is not a constitutional right to a jury trial in *every* action where legal rights are involved and issues of fact are raised. As Petitioner acknowledges, the right to a jury trial in North Carolina is limited: “The right to trial by jury under article I has long been interpreted by this Court to be found *only* where the prerogative existed by statute or at common law *at the time the Constitution of 1868 was adopted*.” *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989) (citations omitted) (emphasis added). Nonetheless: “Where the cause of action fails to meet these criteria and hence a right to trial by jury is not constitutionally protected, it can still be created by statute.” *Id.* at 508, 385 S.E.2d at 490 (citation omitted). In

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the present case, it is undisputed that no statutory right exists to a jury trial upon petition for judicial review pursuant to N.C.G.S. § 7B-323.

At the hearing, the director shall have the burden of proving by a preponderance of the evidence the abuse or serious neglect and the identification of the individual seeking judicial review as a responsible individual. *The hearing shall be before a judge without a jury.* The rules of evidence applicable in civil cases shall apply.

N.C.G.S. § 7B-323(b) (emphasis added).

This Court has held the statutory requirement that termination of parental rights proceedings are heard by the trial court without a jury is constitutional.

Proceedings to terminate parental rights in children were unknown at the common law. Nor did they exist by statute at the time of the adoption of our constitution. The statute establishing these proceedings was first adopted by the legislature in 1969. The legislature in adopting this procedure established the policy of having the issues decided by the court without a jury. This was properly the prerogative of the legislature.

There was no right to jury trial at common law in proceedings to terminate parental rights, nor by statute at the time our constitution was adopted, and it is not now provided for by the statute. Therefore, we hold appellant's motion for a trial by jury was properly denied.

In re Ferguson, 50 N.C. App. 681, 683–84, 274 S.E.2d 879, 880 (1981) (citation omitted). The proceeding in the present case was also unknown at the common law and, therefore, was not subject to the constitutional right to a jury trial. *Id.*

However, Petitioner, for the first time on appeal, argues that the matter before us is akin to a common law defamation action and, therefore, should be treated as an action that “existed . . . at common law at the time the Constitution of 1868 was adopted.” *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490 (citations omitted). Petitioner has not preserved this argument for appellate review.

N.C. Appellate Procedure Rule 10(a)(1) mandates that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

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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.” This general rule applies to constitutional questions, as constitutional issues not raised before the trial court “will not be considered for the first time on appeal.”

State v. Spence, 237 N.C. App. 367, 369–70, 764 S.E.2d 670, 674 (2014) (citations omitted). Petitioner did not make the argument to the trial court that the conduct of DSS in this matter was substantially similar to a common law defamation action. In fact, Petitioner did not make any argument that “the prerogative [of a jury trial] existed . . . at common law at the time the Constitution of 1868 was adopted.” *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490 (citations omitted). The general constitutional challenge Petitioner made at trial did not “stat[e] the specific grounds for the ruling the party desired the court to make” and “the specific grounds were not apparent from the context” of Petitioner’s argument. N.C. R. App. P. 10(a)(1); *Spence*, 237 N.C. App. at 369-70, 764 S.E.2d at 674. We therefore dismiss this part of Petitioner’s argument.

Assuming, *arguendo*, Petitioner had preserved this argument, it would still fail. As Petitioner notes, if he believed DSS engaged in conduct that would warrant it, he “could bring an action for government defamation.” Petitioner has that right. If such an action were allowed to proceed to trial, Petitioner would have the right to a jury trial – as would DSS. However, it simply does not follow that placing Petitioner’s name on the RIL can be reasonably analogized to initiation of an action for defamation. “‘In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person.’” *Craven v. SEIU Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (citations omitted). DSS did not initiate a defamation action by following the statutory procedures for placing Petitioner on the RIL. Petitioner did not file anything that could be considered a counterclaim to DSS’s “action,” much less a counterclaim for defamation. There has been no allegation in any pleading that DSS defamed Petitioner. The fact that the allegations against Petitioner necessary for his inclusion on the RIL might be harmful to him, or that the filing of the RIL itself might be harmful to him, cannot transform the present proceeding into an action for defamation, or anything remotely akin to one.

In abuse and neglect proceedings pursuant to Chapter 7B, DSS regularly makes allegations of conduct that could seriously “stigmatize” the persons involved, and potentially “penalize” those persons,

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by negatively impacting their abilities to pursue certain jobs or other endeavors. However, as cited above, this Court held that there was no right to a jury trial in termination proceedings. *In re Ferguson*, 50 N.C. App. at 683–84, 274 S.E.2d at 880 (“There was no right to jury trial at common law in proceedings to terminate parental rights, nor by statute at the time our constitution was adopted, and it is not now provided for by the statute. Therefore, we hold appellant’s motion for a trial by jury was properly denied.”). Although Petitioner’s argument concerning the inherent damage to his reputation was not specifically addressed in *In re Ferguson*, we reach the same result with respect to Petitioner’s argument. DSS’s placement of a person on the RIL cannot itself constitute anything akin to an action for defamation, and does not provide the “responsible individual” with any constitutional right to a trial by jury. This does not mean, of course, that there is no recourse – by a motion in the cause or by separate action – if the RIL process is abused. Because Petitioner had no right to a trial by jury, the trial court did not err in denying Petitioner’s motion for a jury trial.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ELMORE and ARROWOOD concur.

 IN THE MATTER OF I.B.

No. COA18-608

Filed 20 November 2018

1. Termination of Parental Rights—no-merit brief—Rule 3.1(d)—independent review—not required

The Court of Appeals reaffirmed its holding that Rule of Appellate Procedure 3.1(d) does not require the appellate court to conduct an independent review of the record in termination of parental rights cases in which the parent’s attorney has filed a no-merit brief and the parent has not filed a separate brief. The clear and unambiguous text of Rule 3.1(d) does not require such review, and the exclusion of such language must be presumed to be purposeful.

2. Termination of Parental Rights—no-merit brief—Rule 3.1(d)—independent review

Where a mother’s parental rights were terminated on the grounds of neglect and dependency, her attorney filed a no-merit

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brief pursuant to Rule of Appellate Procedure 3.1(d), and the mother did not file a separate brief, the Court of Appeals elected to conduct an independent review of the record in its discretion and concluded that any arguments the mother might advance on appeal were frivolous.

Appeal by respondent-mother from order entered 22 March 2018 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 11 October 2018.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Mary McCullers Reece for respondent-appellant mother.

Doughton Blancato, PLLC, by William A. Blancato, for guardian ad litem.

DIETZ, Judge.

Respondent appeals the trial court's order terminating her parental rights. Her court-appointed counsel filed a "no-merit" brief indicating that there are no non-frivolous issues on appeal. We have conducted an independent review of the record and agree that any arguments Respondent might advance on appeal are frivolous. We therefore affirm the trial court's order.

We could end our analysis here. But because this Court has found itself so divided over whether we *must* conduct an independent review in these cases, we take the time to provide a thorough legal analysis.

As explained below, the root of this issue is the language in *Anders v. State of California*, 386 U.S. 738 (1967). In *Anders*, the U.S. Supreme Court created a multi-step process to handle cases in which a criminal defendant has a constitutional right to counsel, but the defendant's appointed lawyer concludes that any arguments on appeal would be frivolous. The final step in that process is the appellate court's independent review of the record to confirm the appeal is "wholly frivolous." *Id.* at 744.

When our state Supreme Court created an *Anders*-like process for juvenile cases (civil cases to which *Anders* does not apply) through Rule 3.1(d) of the Rules of Appellate Procedure, the Court adopted most of the steps in the *Anders* process, often copying the language of the

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Anders opinion verbatim. But the Supreme Court did not include the language concerning counsel's obligation to withdraw and the court's independent review of the record, both of which lie at the heart of the *Anders* process.

This could have been an oversight. But even if we concluded that it was, this Court has no authority to insert language into the text of procedural rules because the Court thinks the authors would have wanted it there. Moreover, as explained below, there are sound reasons why the Supreme Court might have omitted this language to broaden indigent litigants' access to justice, not diminish it. Faced with this reality, until otherwise instructed by our Supreme Court, we will follow the plain language of Rule 3.1(d). That language, in conjunction with our existing precedent, permits but does not require this Court to conduct an independent review of the record in these cases.

Facts and Procedural History

When Respondent's son Ike¹ was born, his blood tested positive for illegal drugs. At a check-up while eighteen months old, healthcare providers discovered that Ike had gained only slightly more than a pound of weight during the last year. They diagnosed Ike with failure to thrive, indicating abnormal growth and development. Respondent later was arrested on drug charges, was diagnosed with several mental illnesses including bipolar disorder and schizophrenia, and was found to be living in a relationship involving domestic violence.

Ultimately, the Orange County Department of Social Services petitioned to terminate Respondent's parental rights based on neglect and dependency. After a hearing, the trial court terminated Respondent's parental rights on both grounds. Respondent timely appealed.

Respondent's court-appointed counsel filed a "no-merit" brief indicating that there were no non-frivolous issues to assert in this appeal. That brief provided an outline of issues that "might arguably support the appeal" and an explanation of why those issues were frivolous, as required by Rule 3.1(d) of the Rules of Appellate Procedure. Counsel provided a copy of the brief to Respondent along with the record on appeal and accompanying transcripts, and a letter advising Respondent of her right to file her own brief and the timeframe for doing so. Respondent did not file a separate brief.

1. We use a pseudonym to protect the identity of the juvenile.

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Analysis

[1] This Court is no one’s lawyer. Our role is to remain impartial, to review the litigants’ issues on appeal, and to render a judgment on those issues. Thus, ordinarily, this Court will not comb through the appellate record searching for possible arguments no one else had thought to raise. Our review is confined to the issues that the litigants *choose* to assert on appeal.

But the Sixth and Fourteenth Amendments alter this rule (slightly) in certain criminal cases. In *Anders v. State of California*, 386 U.S. 738 (1967), the Supreme Court established a special procedure to handle cases in which a criminal defendant has a constitutional right to counsel, but the defendant’s appointed counsel concludes that any arguments on appeal would be “wholly frivolous.” *Id.* at 744. When this occurs, the *Anders* process begins, and it works as follows:

First, counsel must “advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Id.* Second, “[a] copy of counsel’s brief should be furnished the indigent and time allowed him to raise any points that he chooses.” *Id.* Third, “the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel’s request to withdraw and dismiss the appeal.” *Id.* “On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.” *Id.*

Importantly, the *Anders* process is designed around counsel’s request to withdraw. The entire purpose of the *Anders* brief and the court’s “independent review” of the record (the *Anders* opinion doesn’t actually call it that) is to assist the court “in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.” *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988).

For this reason, the court’s *Anders* review does not entail an independent *adjudication* of potentially non-frivolous arguments identified during the court’s review of the record. The independent review under *Anders* is limited to confirming that the appeal is “wholly frivolous.” 386 U.S. at 744. If the court agrees that it is—meaning the court sees no potentially non-frivolous arguments—the court grants counsel’s motion to withdraw and dismisses the appeal as frivolous. *Id.* On the other hand, if the court spots any issues of arguable merit, its independent review

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ends and it either rejects counsel's motion to withdraw or, more typically, grants that motion but appoints new, substitute counsel and orders counsel to file a brief on the merits. *See, e.g., United States v. Estevez Antonio*, 311 F. App'x 679, 681 (4th Cir. 2009). The case then proceeds like any other appeal.

In criminal cases in our State courts, we must follow the *Anders* procedure because it arises from the protections guaranteed by the Sixth and Fourteenth Amendments. But there are other categories of cases in North Carolina where litigants have a *statutory* right to counsel but not a *constitutional* one. A decade ago, this Court examined whether *Anders* applies to a case like this one, concerning the termination of parental rights, where the right to counsel was provided by statute, not by the state or federal constitution. *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). We held that *Anders* did not apply. *Id.* This meant that "counsel for a parent appealing an order terminating parental rights did not have a right to file an *Anders* brief." *Id.* But we "urge[d] our Supreme Court or the General Assembly to reconsider this issue." *Id.*

Our Supreme Court did. The Court amended Rule 3.1 of the North Carolina Rules of Appellate Procedure to add a section titled "No-Merit Briefs." N.C. R. App. P. 3.1(d). That section adopted most of the requirements of *Anders*, often by copying verbatim from the language of Justice Clark's majority opinion in the case. But the Supreme Court's amendment to Rule 3.1 left out two prominent parts of the *Anders* process: (1) the requirement that counsel move to withdraw; and (2) the court's obligation to review the record and confirm the appeal is wholly frivolous before granting the motion to withdraw and dismissing the appeal.

Why? When our Supreme Court drafted Rule 3.1(d), *Anders* had been around for forty years and its multi-step procedure was well-settled. So why leave out these two critical steps of the *Anders* process?

To be sure, it could have been an oversight. But it is also possible that this omission was intended—that our Supreme Court chose an alternative approach different from the withdrawal-focused approach in *Anders*. After all, as the U.S. Supreme Court has acknowledged, "public defenders making withdrawal decisions are viewed by indigent prisoners as hostile state actors." *Polk County v. Dodson*, 454 U.S. 312, 324 (1981). The Supreme Court emphasized that there is "little justification for this view," but it nonetheless exists among many indigent defendants. *Id.* And although it may be inaccurate, this view is not irrational—when your lawyer asks the court for permission to quit, it's not unreasonable to conclude your lawyer isn't on your side anymore.

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What our Supreme Court might have intended with Rule 3.1(d) was to avoid the tension that results when counsel seeks to terminate the attorney-client relationship when submitting an *Anders* brief. Rule 3.1(d) provides the following:

No-Merit Briefs. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d).

The rule does not anticipate that counsel will seek to terminate the attorney-client relationship and, indeed, counsel in these cases do not do so. Instead, Rule 3.1(d) permits the attorney to continue advising the client about the allegations in the case, the standards of review on appeal, the rules of appellate procedure, and other legal complexities of an appeal. The attorney's continued service assures that the client will be able to file a brief raising the arguments she believes the court should address (which, because the client is not bound by ethical rules concerning frivolous arguments, may include issues the lawyer could not assert).

Examining this procedure in light of the *Anders* process, one can see that it anticipates a slightly different set of submissions to the Court: (1) a no-merit brief from counsel, which must "identify any issues in the record on appeal that might arguably support the appeal"; (2) the client's *pro se* principal brief and reply brief, prepared with access to counsel to assist with procedural and substantive legal questions; and (3) the briefs of the other parties in the appeal. N.C. R. App. P. 3.1(d). With this information in hand, this Court can then adjudicate the appeal

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as it would any other—by addressing the issues raised in the briefs and treating issues not raised as abandoned. N.C. R. App. P. 28(b)(6). Through this process, there is no need for the Court to conduct an independent review of the record, as would be necessary under *Anders* where the Court’s focus is whether to permit counsel to withdraw from the case.

Is this what the Supreme Court intended? Or did the Court intend to include the independent review requirement under *Anders* despite not saying so in the text of the rule? We have no way to know, and that’s the point. “This Court is an error-correcting body, not a policy-making or law-making one.” *Davis v. Craven County ABC Board*, __ N.C. App. __, __, 814 S.E.2d 602, 605 (2018). When asked to interpret a procedural rule, we look not to what we would have done as drafters of the rule, but instead to the text and to principles of textual interpretation. These tools lead us to conclude that an independent review by the Court is not a requirement of Rule 3.1(d).

First, there is no ambiguity in the text; the rule simply does not require the Court to conduct an independent review. Because the text itself is clear and unambiguous, “there is no room for judicial construction.” *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018).

Second, canons of interpretation support this plain-language approach. The Supreme Court knew *Anders* required an independent review in criminal cases, copied much of *Anders* into Rule 3.1(d), but left out the independent review language. The decision to exclude that language is presumed to be purposeful. See *Comstock v. Comstock*, 244 N.C. App. 20, 24, 780 S.E.2d 183, 186 (2015). Moreover, by departing from the settled language of *Anders* and instead adopting a different rule, we must presume that the Supreme Court intended something different than what *Anders* requires. See *Wells Fargo Bank, N.A. v. American Nat’l Bank & Tr. Co.*, __ N.C. App. __, __, 791 S.E.2d 906, 910 (2016).

Third, as explained above, there are sound reasons why the Supreme Court might have left out this independent review requirement, in order to avoid the tension created by counsel seeking to withdraw from the case. Thus, our plain-text interpretation is a reasonable one and certainly not the type of “absurd result” that permits us to disregard the text. *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361–62, 250 S.E.2d 250, 253 (1979).

These settled rules of interpretation support a conclusion that we are not required to conduct an independent review of the record under

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the text of Rule 3.1(d) as it is written. And even if we thought otherwise, we are not permitted to depart from this Court's recent holding in *In re L.V.*, __ N.C. App. __, __, 814 S.E.2d 928, 929 n.2 (2018), that "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Of course, holding that an independent review is *not required* does not mean we cannot conduct one. Even before Rule 3.1(d) existed, in juvenile cases where court-appointed counsel believed the appeal was wholly frivolous, this Court acknowledged that it had the discretion to "review the record to determine whether the evidence supports the trial court's findings of fact and conclusions of law." *N.B.*, 183 N.C. App. at 119, 644 S.E.2d at 25 (citing N.C. R. App. P. 2). As our Supreme Court later emphasized, when a litigant has lost the right to argue an issue due to a rules violation unrelated to jurisdiction in the trial court, "[t]he imperative to correct fundamental error, however, may necessitate appellate review of the merits despite the occurrence of default." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Moreover, this Court always has authority under Rule 2 to suspend our procedural rules entirely in extraordinary cases to prevent "manifest injustice." N.C. R. App. P. 2. We can use these forms of discretionary authority to conduct an independent review, where appropriate, to ensure justice is done in these important cases. What we cannot do is rewrite our State's procedural rules to impose requirements that simply aren't there.

[2] With these principles in mind, we have reviewed the submissions of the parties in this case, conducted our own review of the record in our discretion, and determined that the trial court's findings of fact are supported by competent evidence and those findings, in turn, support the court's conclusions of law. We therefore affirm the trial court's order.

AFFIRMED.

Judges BRYANT and INMAN concur.

McKENZIE v. CHARLTON

[262 N.C. App. 410 (2018)]

KEVIN MCKENZIE, ADMINISTRATOR OF THE ESTATE OF YVONNE LEWIS, PLAINTIFF

v.

RICHARD CHARLTON, INDIVIDUALLY, RICHARD CHARLTON, DBA NY HOMES II, APAC-ATLANTIC, INC., D/B/A HARRISON CONSTRUCTION AND REACH FOR INDEPENDENCE, INC., DEFENDANTS

No. COA18-82

Filed 20 November 2018

Agency—vicarious liability—respondeat superior—caregiving services

Defendant disability services company could be held vicariously liable for the torts committed by one of its caregivers while providing services to the company's clients under the contract (between the company and the caregiver), where the contract gave defendant company authority to exercise sufficient control over defendant caregiver in his performance of caregiving services to be deemed an employee for purposes of respondeat superior.

Appeal by Plaintiff from order entered 13 July 2017 by Judge Casey M. Viser in Buncombe County Superior Court. Heard in the Court of Appeals 5 September 2018.

White & Stradley, PLLC, by J. David Stradley and Lakota R. Denton, P.A., for the Plaintiff-Appellant.

Davis and Hamrick, L.L.P., by Ann C. Rowe, for Defendant-Appellee Reach for Independence, Inc.

Ball Barden & Cury P.A., by Ervin L. Ball, Jr., for Defendant-Appellee Richard Charlton, individually, and dba NY Homes II.

DILLON, Judge.

This matter stems from a traffic accident in which Yvonne Lewis was struck and killed by an automobile being driven by Defendant Richard Charlton as Ms. Lewis was walking across a public street.

Plaintiff Kevin McKenzie, in his capacity as the administrator for Ms. Lewis' estate, filed this action against Mr. Charlton and against Defendant Reach for Independence, Inc. ("Defendant RFI"), whom Plaintiff alleges Mr. Charlton was working for at the time of the accident.

McKENZIE v. CHARLTON

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This present appeal is brought by Plaintiff from an interlocutory order in which the trial court granted partial summary judgment to Defendant RFI, concluding that Mr. Charlton was acting as an independent contractor and not as an employee of Defendant RFI at the time of the accident. After careful review of the record, we conclude that there was a genuine issue of material fact as to whether Defendant RFI is liable for Ms. Lewis' death under the doctrine of *respondeat superior*. We, therefore, reverse the order of the trial court and remand for further proceedings.

I. Background

Defendant RFI is a government-regulated provider of Medicaid-funded services to disabled individuals. Defendant RFI contracts with paraprofessional caregivers to provide these services. In late 2014, Defendant RFI entered into a contract with Mr. Charlton to serve as a paraprofessional caregiver for disabled patients.

In January 2015, Mr. Charlton's contractual obligations with Defendant RFI involved spending approximately forty (40) hours per week, providing one-on-one supervision of a certain disabled individual, hereinafter referred to as Mr. Smith¹. At the time of the accident, Mr. Charlton was not providing caregiving services to or for anyone else either on behalf of Defendant RFI or otherwise.

On 8 January 2015, while Mr. Smith was a passenger in Mr. Charlton's car, Mr. Charlton struck Ms. Lewis as she was crossing a public street. Ms. Lewis later died as a result of the accident.

Plaintiff filed a wrongful death action against both Defendant RFI and Mr. Charlton, alleging negligence in the death of Ms. Lewis. Defendant RFI moved for summary judgment. After a hearing on the matter, the trial court granted the motion with respect to Plaintiff's wrongful death claim,² holding that Mr. Charlton was an independent contractor of Defendant RFI and, therefore, Defendant RFI was not liable under *respondeat superior*.

Plaintiff appeals.

1. A pseudonym is used to protect the identity of the client and to comply with any regulations that may apply to services provided by Defendant RFI.

2. Plaintiff also brought claims against Defendant RFI for negligent hiring of and negligent entrustment to Mr. Charlton, but those claims were not included in the partial summary judgment and are not before this Court.

McKENZIE v. CHARLTON

[262 N.C. App. 410 (2018)]

II. Appellate Jurisdiction

Plaintiff is appealing from an interlocutory order which does not contain a Rule 54(b) certification. Therefore, Plaintiff's appeal is premature *unless* the order affects a substantial right. *See Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 291-92, 420 S.E.2d 426, 428 (1992). Following the reasoning of our Supreme Court in *Bernick v. Jurden*, we conclude that the order, indeed, does affect a substantial right: "[W]e hold that because of the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment for fewer than all the defendants in the case before us affects a substantial right." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 409 (1982).

III. Analysis

Plaintiff challenges the trial court's decision granting summary judgment in favor of Defendant RFI, in which the trial court held that Defendant RFI was *not* vicariously liable under *respondeat superior*. We review the trial court's summary judgment decision *de novo*, to determine whether, in the light most favorable to the non-moving party, the full record shows a genuine issue as to any material fact. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). Specifically, we consider (1) whether the agency relationship between Mr. Charlton and Defendant RFI was sufficiently akin to an employer-employee relationship such that *respondeat superior* would apply and (2) if so, whether Mr. Charlton was acting within the scope of that relationship at the time of the accident.

A. Nature of Agency Relationship

Under the doctrine of *respondeat superior*, a principal may be held vicariously liable for the torts of his agent. Our Supreme Court has held as a general rule that *respondeat superior* applies if the agent's relationship with his principal is akin to an employee rather than that of an independent contractor. *See Cooper v. Asheville Citizen-Times Pub. Co.*, 258 N.C. 578, 586-87, 129 S.E.2d 107, 113-14 (1963). Our task, here, is *not* to determine whether Defendant RFI should be treated as Mr. Charlton's employer for payroll tax purposes or in determining the applicability of the Workers Compensation Act. Rather, our task is to determine whether Defendant RFI should be treated as Mr. Charlton's employer for purposes of holding Defendant RFI vicariously liable for the torts committed by Mr. Charlton.

Our Supreme Court instructs that whether an agent is akin to an employee or is akin to an independent contractor "depends on the *degree*

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of control retained by the principal over the details of the work as it is being performed [by the agent].” *Vaughn v. N.C. Dep’t of Human Res.*, 296 N.C. 683, 686, 252 S.E.2d 792, 795 (1979) (emphasis added); *see also Gammons v. N.C. Dep’t of Human Res.*, 344 N.C. 51, 56-7, 472 S.E.2d 722, 725-26 (1996). One acts as an independent contractor where he is not accountable to his employer as to *the manner* in which he performs his work, but is only accountable “as to *the result* of his work.” *Cooper*, 258 N.C. at 588, 129 S.E.2d at 114 (emphasis added).

Our Supreme Court instructs that the “vital test” in classifying whether a worker acts as an employee does not depend on whether his principal actually controls his work but whether his principal “*has retained the right of control or superintendence* over the contractor or employee as to details” of the performance of his work. *Hayes v. Bd. of Trs. Of Elon Coll.*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944) (emphasis added). “[I]t is immaterial whether [the principal] actually exercises [his right of control],” so long as he has retained the right to do so. *Cooper*, 258 N.C. at 587, 129 S.E. at 113; *see also Gammons*, 344 N.C. at 57, 472 S.E.2d at 726 (“The controlling principal is that vicarious liability arises from *the right* of supervision and control.”) (emphasis added)).

And our Supreme Court instructs that an independent contractor may still be deemed an employee, for purposes of *respondent superior*, as to *some of the work* performed by him, if that principal exercises a sufficient degree of control as to *that portion of the work*.³

In conclusion, our Supreme Court’s jurisprudence suggests that we are to determine the extent that Defendant RFI had the right to control Mr. Charlton’s work with respect to Mr. Charlton’s care of Mr. Smith.

Whether vicarious liability applies in a given agency relationship is “a mixed question of fact and law.” *Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941). But where the facts are essentially established, then the issue is purely a question of law. *Id.* As we have held:

3. *See, e.g., State v. Wilson*, 362 N.C. 162, 165, 655 S.E.2d 359, 361 (2008) (recognizing that “an independent contractor can, in certain respects, be an [employee] depending upon the degree of control exercised by the principal”); *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 509-10, 597 S.E.2d 710, 716 (2004) (recognizing that a landlord who hired an independent contractor to manage its residential property may still be vicariously liable for dogs allowed by the contractor where the landlord had authority to actively control the presence of pets); *Gammons*, 344 N.C. at 63, 472 S.E.2d at 729 (holding that “regarding the provision of child protective services, there exists a sufficient agency relationship between [the State] and [the County] such that the doctrine of *respondent superior* is implicated, [and therefore the State] may be liable [for negligent acts of the County] while acting within the scope of their obligation [to provide child protective services]”).

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Where the facts are undisputed or the evidence is susceptible of only a single inference and a single conclusion, it is a question of law for the court whether one is an employee or an independent contractor, but it is only where a single inference can reasonably be drawn from the evidence that the question of whether one is an employee or an independent contractor becomes one of law for the court.

Little v. Poole, 11 N.C. App. 597, 600, 182 S.E.2d 206, 208 (1971).

We have reviewed the contract between Mr. Charlton and Defendant RFI (the “Contract”) and the other evidence in the record. For the reasons stated below, we conclude that Mr. Charlton was an “employee” of Defendant RFI in his care of Mr. Smith for purposes of *respondereat superior*.⁴ In reviewing the evidence that was before the trial court at summary judgment, we are guided by the cases cited above and by the eight factors considered by our Supreme Court in *Hayes v. Board of Trustees of Elon College* in determining whether one acts as an employee or as an independent contractor; namely, whether:

[t]he person employed

- (a) is engaged in an independent business, calling, or occupation;
- (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;
- (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis;
- (d) is not subject to discharge because he adopts one method of doing the work rather than another;
- (e) is not in the regular employ of the other contracting party;
- (f) is free to use such assistants as he may think proper;
- (g) has full control over such assistants; and
- (h) selects his own time.

Hayes, 224 N.C. at 16, 29 S.E.2d at 140.

4. We note that the Contract does state that Mr. Charlton was not an employee of Defendant RFI for purposes of benefits, payroll taxes, or workers compensation. But the names assigned by the parties are not conclusive as to whether Defendant RFI had the right to control the manner in which Mr. Charlton performed his caregiver duties, thereby exposing Defendant RFI to vicarious liability for the negligent acts of Mr. Charlton in the performance of his caregiving duties on Defendant RFI's behalf.

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We are further guided by our Court's opinion in *Rhoney v. Fele*, in which we analyzed whether a registered nurse was an employee of a nurse staffing agency at the time the nurse was involved in a fatal car accident. *Rhoney v. Fele*, 134 N.C. App. 614, 518 S.E.2d 536 (1999). In *Rhoney*, the staffing agency recruited nurses to work at medical facilities short-term. *Rhoney*, 134 N.C. App. at 615, 518 S.E.2d at 538. If a facility needed a nurse for a particular shift, it would call the agency who would provide a nurse from the agency's pool. *Id.* On one occasion, the agency contacted the defendant nurse who agreed to work a shift at a particular hospital. *Id.* While driving to the hospital, the nurse was involved in an automobile accident which killed an individual. *Id.* The deceased's estate brought suit against both the nurse and the agency. *Id.*

Relying on many of the Supreme Court's opinions cited above, our Court held that the nurse was an independent contractor. *Id.* at 618-19, 518 S.E.2d at 540. In the analysis, our Court cited a number of factors which supported a finding that the nurse was an independent contractor: (1) as a registered nurse, he was engaged in an independent profession; (2) he was free to provide nursing services to others outside his arrangement with the agency; (3) he exercised his duties at the assigned hospital, free from supervision from the agency; (4) his work was sporadic, rather than regular; (5) he was free to reject job assignments offered by the agency; and (6) the agency did not provide him with valuable equipment. *Id.*

Our Court also cited factors which supported a finding that the nurse was an employee: (1) he was paid an hourly rate, rather than a lump sum for a particular assignment; (2) he was not free to select his assistants; (3) he was not able to choose unilaterally when he would perform his assigned tasks; (4) the agency was paid directly by the hospital for his services, who in turn would pay him; (5) the agency could terminate its relationship with him at any time; and (6) the agency provided a work packet and directions to the site for each assignment. *Id.*

Our Court weighed the factors, "bearing in mind the admonition of *Gordon* and *Hayes* that the key factor is 'control,' " and concluded that the nurse was an independent contractor:

These factors demonstrate that while [the agency] exercised control over extraneous aspects of [the nurse's] work, such as dates and times when work was offered and collection of his salary, [the agency] exercised no control over [the nurse's] nursing, the function for which hospitals sought him. To the contrary, [the nurse] was a free

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agent who could and did maintain similar arrangements with other suppliers of medical personnel Once [he] accepted work proposed by [the agency], [the nurse] was not under any control by [the agency] while working Thus, [the agency's] role was similar to that of a broker or middleman.

Id.

The facts in the present case are *similar* to the facts of *Rhoney*, but they are not “on all fours.” Bearing in mind that the key factor is “control,” for the reasons stated below, we conclude that Defendant RFI exerted much more control over Mr. Charlton than the agency exerted over the nurse in *Rhoney*. Specifically, the evidence shows that while Mr. Charlton was experienced in providing caregiving services to disabled clients, Defendant RFI was more than just a broker or middleman who placed caregivers with such clients.

According to the Contract, Defendant RFI had the right to monitor and supervise Mr. Charlton in his work and to exercise some control over *the manner* in which Mr. Charlton provided his caregiving services. The Contract suggests that Mr. Charlton was required to provide caregiving services to whichever clients Defendant RFI decided to place with him and that Defendant RFI had the right to control and plan the type of caregiving services which Mr. Charlton provided to Mr. Smith:

[Mr. Charlton shall] provide all services to each placed client described in the contact [sic] in accordance with the approved habilitation plan for each client, as such plan may change from time to time. [Mr. Charlton shall] notify [the qualified professional supervising him] when the schedule of services changes for any reason. [Mr. Charlton shall] participate in the review and changing of the plan as needed to meet the needs of the client. [Mr. Charlton shall] not provide services for payment that [Defendant RFI] is not approved to provide.

Further, Mr. Charlton was required to participate in consultations with Defendant RFI regarding his care of clients. Mr. Charlton was not allowed to use restraints on a client who was acting unruly; he could only use “restrictive interventions” as approved by Defendant RFI, and he was required to notify Defendant RFI if he determined in his judgment that it was necessary to use emergency rights restrictions. Defendant RFI even controlled the manner in which Mr. Charlton drove his vehicle when transporting clients, limiting his speed to five miles per hour below the

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speed limit. We note, though, that there was evidence of an independent contractor relationship; for example, Mr. Charlton was free to hire others to help him carry out his caregiving duties.

According to their Contract, Defendant RFI controlled Mr. Charlton's ability to accept clients on his own; that is, Mr. Charlton was generally required to work with only Defendant RFI clients. Specifically, the Contract provided that Mr. Charlton shall "not accept clients from another agency while housing clients from [Defendant RFI]." The evidence shows that Mr. Charlton did house clients of Defendant RFI and did not work with clients outside of those assigned to him by Defendant RFI.

Also, unlike the nurse in *Rhoney* whose work with the agency "was sporadic rather than regular," *Rhoney*, 134 N.C. App. at 619, 518 S.E.2d at 540, the evidence here shows that Mr. Charlton's work with Mr. Smith was regular. He worked forty (40) hours each week, a typical full work week, providing direct caregiving services to Mr. Smith. It is true that Defendant RFI did not have absolute control over the specific hours Mr. Charlton had to work each week. *See Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 385, 364 S.E.2d 433, 438 (1988) (recognizing that a requirement that a worker perform his work during a set time is indicative of an employer-employee relationship). But there was evidence that Mr. Charlton could not unilaterally choose when to provide his forty (40) hours of service either, but that he needed to do so to fit the needs of Mr. Smith, and that he generally worked with Mr. Smith during regular day-time working hours.

According to their Contract, Mr. Charlton was paid hourly, rather than by the job, a strong indication of an employer-employee relationship. *See Id.* at 384, 364 S.E.2d at 437-38 (stating that "payment by a unit of time, such as an hour, day, or week, is strong evidence that [the worker] is an employee").

Regarding the transportation services Mr. Charlton provided to Mr. Smith, we note that Defendant RFI did not provide Mr. Charlton with a vehicle to transport clients, a factor which suggests an independent contractor relationship. However, there were other factors which suggest an employment relationship, including that (1) Mr. Charlton was required to drive clients to certain events as requested by the client and as otherwise required by the plan of services that Defendant RFI required Mr. Charlton to provide; (2) Defendant RFI had the right to inspect Mr. Charlton's vehicle that he used to transport clients; and (3) Defendant RFI controlled the manner in which Mr. Charlton operated

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his vehicle, for instance, requiring that he not drive faster than five miles per hour below the speed limit.

Our Supreme Court has held that “[t]he right to fire is one of the most effective means of control” and that “[a]n independent contractor is subject to discharge only for cause and not because he adopts one method of work over another[,]” whereas “[a]n employee, on the other hand, may be discharged without cause at any time.” *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438. Here, Defendant RFI did not have the absolute right to terminate the Contract without cause, but the Contract did provide that Defendant RFI had the right to terminate the Contract “immediately without notice” if it “reasonably determines that the life, health, safety or property of the client is threatened or at risk.” Implicit in this provision is the right of Defendant RFI to terminate the Contract if Mr. Charlton provided caregiving services in a manner which violates the Contract but which otherwise complies with law.

Though not controlling, we are persuaded by guidance provided by the U.S. Department of Labor, Wage and Hour Division. Specifically, on 13 July 2018, the Department issued a bulletin to guide whether to treat “caregiver registries” as employers of the caregiver.⁵ For instance, the Bulletin informs that where a registry merely conducts more than just basic background checks, but rather conducts additional subjective screening, an employer-employee relationship is indicated. Here, the Contract suggests that Defendant RFI engages in subjective screening beyond basic background checks in placing caregivers with clients based on their respective “culture, age, gender, sexual orientation, spiritual beliefs, socioeconomic status and language” expecting the caregiver to “hold[] the same values [of inclusivity].”

The Bulletin provides that where the client controls the hiring/firing of the caregiver, an independent contractor relationship is indicated. But where the registry plays a more active role and can fire a caregiver for not meeting certain standards, an employer-employee relationship is indicated. Here, Defendant RFI does have some control to terminate Mr. Charlton.

The Bulletin provides that a registry which exercises “control over the caregiver’s work schedules and assignments may indicate that the

5. Wage and Hour Division, *Field Assistance Bulletin No. 2018-4: Determining whether nurse or caregiver registries are employers of the caregiver*, U.S. Dep’t of Labor (13 July 2018) https://www.dol.gov/whd/FieldBulletins/fab2018_4.htm.

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registry is an employer[.]” Here, Defendant RFI did have the right to exercise control over assignments and the number of hours Mr. Charlton was to work.

The Bulletin states that for the caregiver to be considered an independent contractor, the registry may not “instruct caregivers how to provide caregiving services, monitor or supervise caregivers in clients’ homes, or evaluate caregivers’ performance.” And further, “[c]ontrol over the caregiver services indicates that the registry is an employer of the caregiver.” Here, though, as outlined above, Defendant RFI had control over how Mr. Charlton provided care.

The Bulletin states that a registry, in an independent contractor relationship, “does not determine a caregiver’s rate of pay.” The Bulletin recognizes that the registry is not deemed to set pay where Medicaid or another government program determines the hourly rate. The evidence, here, suggests that Mr. Charlton’s pay was based largely on the rate allowed by the government, and therefore, is indicative of an independent contractor relationship. However, the Bulletin also recognizes that where the registry makes money for each hour worked by the caregiver, rather than simply from an upfront fee for making the placement, the registry acts like an employer, as is the case here. Also, the Bulletin states that where the registry pays the caregiver directly, the registry acts as an employer, as is the case here.

The Bulletin provides that a registry acts as an employer when it tracks and verifies the number of hours worked by the caregiver, which is again the case here.

The Bulletin provides that a registry that provides equipment and supplies to a caregiver acts as an employee. However, here, this factor cuts against an employer-employee relationship.

Finally, the Bulletin states that “[c]alling a caregiver an ‘independent contractor’ or issuing him or her an IRS 1099 form,” as Defendant RFI does here, “does not preclude the caregiver from being an employee [under the Fair Labor Standards Act.]”

In conclusion, there are factors which suggest an employer-employee relationship, for purposes of *respondeat superior*, and there are factors which suggest an independent contractor relationship. However, as stated above, Defendant RFI acted as more than just a passive middleman who placed Mr. Charlton with clients: Defendant RFI retained the right to prescribe the type of services and to regulate the manner in which they were provided; and Defendant RFI retained the right

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to supervise and monitor Mr. Charlton as he provided these services. Therefore, we conclude that Defendant RFI could be held vicariously liable for the torts of Mr. Charlton that he might have committed while providing services to clients of Defendant RFI under their Contract.⁶

B. Course of the Agency Relationship

Our conclusion that Mr. Charlton was, as a matter of law, an employee of Defendant RFI for the purposes of *respondeat superior* does not fully answer whether *respondeat superior* applies in this particular case. Rather, whether, as a matter of law, Mr. Charlton was acting in the scope of his employment with Defendant RFI *at the time of the accident* is not an issue that either party has raised in this appeal. The trial court never reached this issue, having concluded that Mr. Charlton was an independent contractor. And neither party briefed this issue in this appeal. Therefore, we decline to consider the issue in this appeal.

IV. Conclusion

We conclude that Defendant RFI was not entitled to summary judgment on the issue of its vicarious liability for Mr. Charlton's alleged negligence. Defendant RFI, per the terms of the Contract, had the authority to exercise sufficient control over Mr. Charlton in his performance of caregiving services to deem Mr. Charlton an employee for purposes of *respondeat superior*. We cannot say, however, that Mr. Charlton was entitled to summary judgment on the issue of vicarious liability: Whether Mr. Charlton was acting within the scope of his contract with Defendant RFI at the time of the accident is not an issue that is before us. We, therefore, vacate the trial court's grant of summary judgment and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

6. Defendant RFI argues that it would be inappropriate for partial summary judgment to be entered for Plaintiff on the agency issue, as Plaintiff never moved for summary judgment. However, Rule 56 allows for summary judgment to be entered against the moving party where appropriate. N.C. R. Civ. P. 56.

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ROBIN LYNN REA, PLAINTIFF
v.
KATHLEEN OLIVER REA, DEFENDANT

No. COA18-95

Filed 20 November 2018

1. Divorce—alimony—findings of fact—foster children, marital misconduct, retirement income, and reasonable expenses

In an alimony case, the trial court's findings of fact on issues related to foster children, marital misconduct, retirement income, and reasonable expenses were supported by competent evidence.

2. Divorce—alimony—duration—statutory factors—discretion

The trial court did not abuse its discretion in granting 10.5 years of alimony to a wife where it properly considered the required factors of N.C.G.S. § 50-16.3A(b), made findings of fact regarding the relevant factors, and exercised its discretion.

Judge MURPHY concurring in part and dissenting in part.

Appeal by plaintiff from order entered 31 July 2017 by Judge Christopher B. McLendon in District Court, Washington County. Heard in the Court of Appeals 19 September 2018.

Miller & Audino, LLP, by Jay Anthony Audino, for plaintiff-appellant.

Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for defendant-appellee.

STROUD, Judge.

Plaintiff-husband appeals the trial court's order awarding alimony to defendant-wife. Because the trial court's findings of fact are supported by the evidence, the conclusions of law are supported by those findings, and the trial court did not abuse its discretion in setting the alimony term and duration, we affirm.

I. Background

In 1999, plaintiff Husband and defendant Wife were married; they separated on 8 August of 2014. On 21 August 2014, Husband filed a

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verified complaint for equitable distribution and a motion for a temporary restraining order and injunctive relief alleging Wife was removing antiques and other personal property from the former marital home and should be enjoined from such malfeasance. On 3 September 2014, Wife answered Husband's complaint, denying allegations of wrongdoing and counterclaiming for postseparation support, permanent alimony, equitable distribution, and attorney fees. On 2 October 2014, Husband filed a verified reply to Wife's answer and counterclaims and alleged that Wife "committed acts of marital misconduct[;]" Husband characterized the wrongdoing as financial in nature.

On 2 February 2015, the trial court entered an order for postseparation support requiring Husband to pay Wife \$2,000 a month. On 25 July 2016, the trial court entered a judgment and order on equitable distribution; this order was not appealed. On 16 September 2016, the trial court entered a Qualified Domestic Relations Order ("QDRO") which was also not appealed.

The trial court held a hearing on Wife's alimony claim on 9 September 2016 and on 31 July 2017, the trial court entered an order awarding Wife alimony and attorney fees. The trial court determined Husband had committed acts of marital misconduct, including illicit sexual behavior. Husband was ordered to pay wife \$2,780 per month for 10.5 years and attorney fees. Husband timely filed notice of appeal.

II. Alimony Order

Husband challenges findings of fact made by the trial court and the trial court's ultimate determination of the amount and term of alimony.

Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Dechkovskaia v. Dechkovskaia, 232 N.C. App. 350, 356, 754 S.E.2d 831, 836 (2014) (citations omitted).

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A. Findings of Fact

[1] Husband challenges nine findings of fact as unsupported by competent evidence; we first consider each of the nine challenged findings of fact.

1. Foster Children

The trial court found in finding of fact 7 that “[d]uring the marriage the parties[] provided foster care to numerous children, and as of the date of separation, the parties w[ere] the primary caretakers and sole financial provider for two minor children, both of who[m] have remained with the [Wife], who has been solely responsible for their financial care.” Husband argues this finding is not supported by the evidence because the evidence actually showed that the children’s father cares for them on weekends and they receive Medicaid for medical expenses, so Wife is not “*solely* responsible” for the children. (Emphasis added.) Wife responds that the parties had taken in about fifteen foster children at various times during their marriage, including the two children still living with Wife as of the date of separation. Wife testified they had taken full financial responsibility for them, including providing uninsured medical costs if the children’s biological father allowed Medicaid to lapse. Since the parties separated, Wife had been solely responsible for the children; in other words, Husband had not been assisting financially with the foster children as he did while the parties were together.

Husband misconstrues this finding as saying that Wife receives absolutely no assistance from any other source in supporting the children. But the trial court was not addressing all of the financial circumstances of the foster children in this order; it was addressing the financial situation of Husband and Wife. Husband’s argument ignores the first part of the finding, which is that prior to their separation, *he and Wife* were the “sole financial provider” for the children, but after the separation, Wife had been the sole provider. Further, the evidence showed that since Husband and Wife separated, Wife has been caring for the children without Husband’s involvement or financial assistance, so the finding is supported by competent evidence. Even if the wording of finding 7 could have been more exact, the meaning is clear. *See, e.g., In re S.W.*, 175 N.C. App. 719, 723, 625 S.E.2d 594, 597 (2006) (“A review of the record reveals that there is competent evidence to support findings of fact numbers 4, 6 through 17 and 19 as these findings of fact are admitted to in respondent’s answer, if not in exact form, at least in substance.”). This argument is overruled.

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2. Marital Misconduct

Husband next challenges finding of fact 11(a) and (b) which address his marital misconduct:

11. Plaintiff has committed acts of marital misconduct, which include the following:

a. Plaintiff engaged in acts of illicit sexual behavior prior to the parties separation. Plaintiff had the inclination and opportunity and had in fact committed adultery with [Sue Smith].¹

b. Prior to the parties' separation, Plaintiff offered indignities that rendered Defendant's condition intolerable and her life burdensome, due to him acting on his adulterous relationship and Defendant becoming aware of that adultery prior to separation. Specifically, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation.

Husband argues there was not sufficient evidence to support finding 11 because there was not definitive proof he engaged in any type of sexual activity with Ms. Smith. Husband contends that the evidence of his inclination and opportunity to commit illicit sexual behavior with Ms. Smith or offer indignities was not sufficient and evidence of his behavior and statements during the marriage which Wife interpreted as indications of his infidelity, are not sufficient. Husband characterizes the evidence as “[c]ar rides and phone calls” that “can only rise to the level of mere conjecture[.]” Husband specifically argues there is no direct evidence of “sexual intercourse, sexual acts, or sexual contact.”

It is well-established that direct evidence of illicit sexual behavior or indignities as a result of that behavior is not required but can be shown by circumstantial evidence:

Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations.

1. We have used a pseudonym to protect the privacy of the woman.

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Thus, if a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than mere conjecture exists to prove sexual intercourse by the parties.

Coachman v. Gould, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996) (citation and quotation marks omitted).

The evidence at trial included a private investigator (“PI”) who testified that on 6 August, before separation, she witnessed and photographed Husband kissing Ms. Smith. The investigative report, admitted as an exhibit, shows that the investigator parked near Husband’s truck in the parking lot of a shopping mall at 1:09 p.m. and waited until 3:45 p.m., when Husband and Ms. Smith arrived, and Ms. Smith parked her car next to Husband’s truck. Husband and Ms. Smith kissed. Husband then got into his own truck, and both vehicles left at the same time. Thereafter, on 18 and 19 August, two nights in a row only ten days after the parties’ separation, the PI saw Husband’s and Ms. Smith’s vehicles parked overnight at a hotel. Although the overnight stays at the hotel were shortly after the parties separated, “[n]othing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation[.]” N.C. Gen. Stat. § 50-16.3A(b)(1) (2015).

Furthermore, Wife testified that prior to their separation Husband began to repeat specific suspicious behaviors he exhibited in 2011 when he had a prior affair; these actions prompted her to hire the PI. For example, Husband failed to come home one night. Wife also saw Husband and Ms. Smith together, including at Husband’s temporary residence, shortly after the date of separation, and when Wife confronted the Husband about the other woman, he said, “she was a better woman than” Wife. We conclude there was competent evidence to support finding of fact 11(a) and (b). This argument is overruled.

3. Retirement Income

Defendant next challenges finding of fact 16 which states, “The Plaintiff has significant funds upon which he can enjoy upon retirement based on Plaintiff’s employment. The Defendant has little to no independent source of retirement income, but did receive a portion of the Plaintiff’s retirement in the Order for Equitable Distribution.” Husband contends there was no evidence of the value of his retirement account before the trial court “at the time of the trial.” But Husband testified quite extensively about his 401K account, including the large sums he

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had removed from the account. Husband does not dispute that Wife had no retirement savings other than the portion of Husband's retirement she received in their equitable distribution. The trial court did not find an exact amount of Husband's retirement but rather noted the funds were "significant" due to his income and continuing contributions. The trial court found uncontested, and thus binding, that Husband's monthly income was \$10,471.94 while Wife's monthly income was \$2,772.08. *See generally Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). While there was some confusion around how much Husband currently deposits to his 401K, he does make deposits which his employer matches. The trial court need not find a specific value for the parties' retirement accounts for purposes of alimony. Finding 16 is simply a comparison of "[t]he relative assets and liabilities of the spouses" as required under North Carolina General Statute § 50-16.3A(b)(10). N.C. Gen. Stat. § 50-16.3A(b)(10) (2015). There was competent evidence to support finding 16, so this argument is overruled.

4. Reasonable Expenses

Husband next contests two findings of fact determining the parties' reasonable expenses and relative financial needs.

a. Husband's Expenses

Husband specifically contests that his reasonable expenses are \$1,675.00 because his financial affidavit alleged a higher sum. Husband argues that the trial court accepted Wife's expenses as stated on her financial affidavit but did not accept his. But the trial court can accept or reject the alleged expenses on any financial affidavit, based upon its evaluation of the credibility of the evidence and the reasonableness of the expenses alleged. *See Burger v. Burger*, ___ N.C. App. ___, ___ 790 S.E.2d 683, 687 (2016) ("This Court has long recognized that the determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." (citation, quotation marks, and brackets omitted)). There was extensive testimony about the expenses, and during the hearing, Husband's attorney agreed Husband's recurring monthly expenses were \$1,675.00. The trial court has discretion to determine reasonable expenses. *See generally Kelly v. Kelly*, 167 N.C. App. 437, 445, 606 S.E.2d 364, 370 (2004) (noting trial court has discretion to determine reasonable expenses). Findings of fact 18(a)(i) and 19 were supported by competent evidence. This argument is overruled.

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b. Wife's Expenses

Husband next contests the findings that Wife's reasonable expenses are \$5,745.84 a month. Husband makes separate arguments as to the determination of Wife's reasonable expenses. Husband first takes issue with the trial court relying on Wife's financial affidavit for its calculations noting various bits of testimony about various individual expenses and contending that the trial court should have found lower amounts than those stated on Wife's affidavit. During trial, the trial court thoroughly considered Wife's financial affidavit as evidence of her reasonable expenses and needs; the affidavit is competent evidence. *See Parsons v. Parsons*, 231 N.C. App. 397, 399, 752 S.E.2d 530, 533 (2013) ("Plaintiff primarily contends that the trial court's findings of fact on defendant's expenses were erroneous because the financial affidavit presented by defendant, on which the trial court largely based its findings regarding defendant's income and expenses, was unsupported by other evidence. Plaintiff fails to recognize that the affidavit itself is evidence of defendant's expenses.")

Husband next contends that "reasonable expenses" and "relative financial needs" cannot be the same number – here, both were \$5,745.84 – although he cites no authority for this contention. Under North Carolina General Statute § 50-16.3A(b)(13), the trial court must consider "[t]he relative needs of the spouses[.]" N.C. Gen. Stat. § 50-16.3A(b)(13) (2015). The term "relative" is an adjective describing "needs of the spouses[.]" *Id.* In the context of North Carolina General Statute § 50-16.3A(b), the term "relative" is used simply to direct a comparison of the expenses of the husband and the wife.² We see no reason the "relative financial need" of Wife must differ from her "reasonable expenses." Instead, in most cases, the terms "relative financial need" and "reasonable expenses" probably will be the same. The trial court's calculation of Wife's need for alimony is clear, whether the number is called "reasonable expenses" or "relative financial needs":

Wife's expenses (or "relative financial needs")	\$5745.84
Wife's income	-\$2772.08
Deficit (alimony award)	\$2973.76

2. In addition to the "relative needs of the spouses," North Carolina General Statute § 50-16.3A(b) also requires the trial court to consider "[t]he relative earnings and earning capacities of the spouses;" "[t]he relative education of the spouses[.]" and "[t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses[.]" N.C. Gen. Stat. § 50-16.3A(b) (2015).

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The meaning of the trial court's finding is clear, and the evidence supports the amounts stated in the findings of fact. This argument is overruled.

Husband also contends Wife's expenses for foster children, grandchildren, and nieces and nephews are not reasonable expenses because Wife has no legal financial obligation for the foster children or her relatives in the same manner as a parent would have a legal obligation to support her own child. But the question here is not Wife's legal obligation to support the children; it is the parties' accustomed standard of living during the marriage as our Supreme Court has established that the accustomed standard of living is based upon the parties' lifestyle during the marriage and not just economic survival:

We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980).

The evidence showed that "the economic standard established by the marital partnership for the family unit during the years the marital contract was intact" included caring for about fifteen foster children over the years as well as generosity to relatives. *Id.* For some families, the "economic standard[,] *id.*, and lifestyle established during the marriage includes expenses for golf, vacations, boats, hobbies, and entertainment, and these types of expenses can be included as part of the reasonable expenses for purposes of alimony. *See, e.g., Rhew v. Felton*, 178 N.C. App. 475, 484, 631 S.E.2d 859, 865-66 (2006). For example, in *Rhew*, this Court determined the trial court properly considered evidence of the parties' "standard of living" during the marriage, which included frequent travel and "major vacations" to "Canada, New Orleans, Hawaii and Cancun; [a boat they "used regularly;]" contributions to their church; playing golf; "arts, crafts and making jewelry;]"

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going “out every Friday evening[;]” going dancing and to movies; going out to “lunch every Sunday[;]” entertaining friends in their home; and engaging “the services of a housekeeper.” *Id.* Here, instead of pursuing expensive leisure activities, Husband and Wife established a lifestyle of caring for foster children; this economic choice is certainly worth at least the same consideration as golf and vacations. The trial court did not abuse its discretion by including these expenses in Wife’s needs. The arguments as to Wife’s reasonable expenses are overruled.

5. Monthly Surplus

Husband also challenges the determination that he has a monthly surplus of \$8,796.94. Since we have already determined the underlying findings of fact were supported by competent evidence, this number is simply the mathematical result of those findings, so we need not address this argument further. This argument is overruled.

B. Alimony Amount and Duration

[2] Husband next contends that the trial court erred in setting alimony, but his only argument is again challenging the same findings of fact, and thus we need not re-address those issues. Husband then challenges the trial court’s determination that he has the ability to pay alimony and the duration of the alimony. Again, the findings of fact based on competent evidence show that Husband has \$8,796.94 of excess income so he has the ability to pay in alimony. Lastly, Husband contends the trial court did not make adequate findings of fact to support the duration of alimony for 126 months.

North Carolina General Statute § 50-16.3A(b) sets out the factors the trial court should use to determine the “Amount and Duration” of alimony:

The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

- (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;

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- (2) The relative earnings and earning capacities of the spouses;
- (3) The ages and the physical, mental, and emotional conditions of the spouses;
- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
- (5) The duration of the marriage;
- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;
- (14) The federal, State, and local tax ramifications of the alimony award;
- (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
- (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

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Finding of Fact 5 states:

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

But the trial court did not simply recite that it had considered this list of factors; it made findings of fact regarding the relevant factors. *See* N.C. Gen. Stat. § 50A-16.3(b-c) (2015) (noting findings of fact are shall be made for factors for which evidence was presented). Other findings in the order, including findings we have not quoted in this opinion because they were not challenged by Husband, specifically address many of these factors in detail, including marital misconduct; the relative earnings and earning capacities of the parties; the duration of the marriage; the good health and ages of the parties; the standard of living established during the marriage; the relative assets and liabilities of the parties; and the relative needs of the parties. The trial court properly considered the required factors and set the duration of the alimony in its discretion. We discern no abuse of discretion in the trial court granting 10.5 years of alimony. *See Hartsell v. Hartsell*, 189 N.C. App. 65, 75, 657 S.E.2d 724, 730 (2008) (“N.C. Gen. Stat. § 50–16.3A(b) (2007) directs that the court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. Decisions about the amount and duration of alimony are made in the trial court’s discretion, and the court is not required to make findings about the weight and credibility it assigned to evidence before it.” (citations and quotation marks omitted)). This argument is overruled.

III. Conclusion

We conclude competent evidence supports the findings of fact and the trial court did not abuse its discretion in awarding alimony of \$2,780 for a term of 126 months.

AFFIRMED.

Judge ZACHARY concurs.

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Judge MURPHY concurs in part and dissents in part in a separate opinion.

MURPHY, Judge, concurs in part and dissents in part.

I concur in the portions of the Majority's opinion concluding that the trial court's findings of fact in the alimony order relating to (1) the foster children, (2) Husband's retirement income, (3) the parties' reasonable expenses and relative financial needs, and (4) Husband's monthly income surplus were supported by competent evidence. However, I respectfully dissent from the Majority's determination that the trial court's finding of fact of Husband's marital misconduct was supported by competent evidence and that the trial court made adequate findings of fact as to the duration of alimony.

A. Marital Misconduct

Regarding Husband's marital misconduct, the trial court made the following findings of fact:

- A. Plaintiff engaged in acts of illicit sexual behavior prior to the parties' separation. Plaintiff had the inclination and opportunity and had in fact committed adultery with [Sue Smith].
- B. Prior to the parties' separation, Plaintiff offered indignities that rendered Defendant's condition intolerable and her life burdensome, due to him acting on his adulterous relationship and Defendant becoming aware of that adultery prior to separation. Specifically, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation.

Marital misconduct of either spouse is a relevant factor the trial court must consider in determining the amount, duration, and manner of alimony payment. N.C.G.S. § 50-16.3A(b)(1) (2017). There are several enumerated acts which constitute "marital misconduct" within the meaning of N.C.G.S. § 50-16.3A(b)(1), including illicit sexual behavior and "[i]ndignities rendering the condition of the other spouse intolerable and life burdensome." N.C.G.S. § 50-16.1A(3) (2017).

1. Illicit Sexual Behavior

Illicit sexual behavior is defined as "acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in

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G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse.” N.C.G.S. § 50-16.1A(3)(a) (2017). As the Majority notes, direct evidence is not required for a spouse to show illicit sexual behavior. “Where adultery is sought to be proved by circumstantial evidence, resort to the opportunity and inclination doctrine is usually made. Under this doctrine, adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; *and* (2) the opportunity created to satisfy their mutual adulterous inclinations.” *In re Estate of Trogdon*, 330 N.C. 143, 148, 409 S.E.2d 897, 900 (1991) (internal citations omitted) (emphasis added). Inclination and opportunity are to be considered separately, and a showing of inclination will not remedy a failure to show sufficient opportunity. *See Coachman v. Gould*, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563-64 (1996). The Majority does not clearly delineate this distinction, which is crucial to the determination of whether there was competent evidence to support a finding of illicit sexual behavior in this case.

The evidence introduced at trial tended to show that a private investigator (“PI”) hired by Wife observed Husband’s vehicle in the parking lot of a mall on 6 August 2014. While conducting surveillance on Husband’s vehicle, the PI witnessed Husband arrive in another vehicle with Sue Smith and lean over to kiss her. Husband admitted that, prior to the kiss, he and Sue Smith “went to the theater [and] got something to eat[,]” after which he left to work a 12-hour shift. The only other interaction between Husband and Sue Smith introduced as evidence of illicit sexual behavior occurred after separation, when the PI witnessed Husband and Sue Smith’s vehicles in a Holiday Inn parking lot overnight.

I agree with the Majority that, based on the kiss in the parking lot on 6 August, it was not an abuse of discretion for the trial court to find that Husband had the inclination to engage in sexual intercourse or sexual acts with Sue Smith within the meaning of N.C.G.S. § 50-16.1A(3) (a). However, this is not competent evidence to support a finding that Husband had the opportunity to engage in sexual intercourse or acts. Our caselaw has held that car rides and kisses in public do not demonstrate specific opportunities for sexual intercourse or acts. In *Coachman v. Gould*, we held that “telephone calls and a car ride are not the type of ‘opportunities’ for sexual intercourse intended under the *Trogdon* analysis.” 122 N.C. App. at 447, 470 S.E.2d at 563. We specifically noted that the “only evidence of...social contact” between the wife and her alleged lover was the husband finding his wife leaving with the alleged lover in an automobile. *Id.* at 445, 470 S.E.2d at 562. Additionally, in *Oakley v. Oakley*, 54 N.C. App. 161, 282 S.E.2d 589 (1981), we held that “evidence

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hardly establishes a case for adultery” where a spouse and his or her alleged lover “were seen together on occasion” and “once kissed...on the cheek.” *Id.* at 163, 282 S.E.2d at 590. The evidence presented here that Husband rode in a vehicle with Sue Smith and the two shared a kiss in public falls within our caselaw holding similar evidence insufficient to show opportunity.

Wife and the Majority contend additional pre-separation evidence from which opportunity could be inferred was shown through her testimony that Husband did not come home from work “one night” in July 2014. However, when asked about that night, Wife could not remember which night it was. *See generally Coachman*, 122 N.C. App. at 445, 470 S.E.2d at 562 (“Plaintiff was unable to establish the date on which this purported rendezvous occurred . . .”). Husband also later testified that he was working nights at that time in 2014. This “amounts to no more than mere conjecture” of opportunity and not competent evidence of such. *Id.* at 447, 470 S.E.2d at 563.

The evidence that Husband and Sue Smith’s vehicles were in the parking lot of a hotel overnight serves only a corroborative purpose, as they occurred after the date of Husband and Wife’s separation. N.C.G.S. § 50-16.3A(b)(1) (“Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation.”) Thus, this evidence is not to be used independently as evidence that Husband had an opportunity to engage in sexual intercourse or acts with Sue Smith. In order for this evidence to be considered as corroborative, there must be *independent pre-separation evidence* for it to corroborate, which is lacking here. Evidence of a car ride in a public place is insufficient to show opportunity. The Majority fails to show any other pre-separation evidence from which the trial court could find opportunity. Accordingly, there was not competent evidence to support the trial court’s finding of illicit sexual behavior.

2. Indignities

“Our courts have declined to specifically define ‘indignities,’ preferring instead to examine the facts on a case by case basis. Indignities consist of a course of conduct or repeated treatment over a period of time including behavior such as unmerited reproach, studied neglect, abusive language, and other manifestations of settled hate and estrangement.” *Evans v. Evans*, 169 N.C. App. 358, 363-64, 610 S.E.2d 264, 269 (2005). Indeed, the repeated nature of the indignities is the fundamental

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characteristic of indignities, and we have found error where indignities were found based on one occasion or act. *See Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976).

The trial court did not base its finding of indignities on a course of conduct or repeated treatment over a period of time. Rather, it based its finding of indignities on one incident: “*Specifically*, Defendant found Plaintiff kissing [Sue Smith] in a parked vehicle in Greenville prior to separation.” (emphasis added). While unfortunate for the parties involved, this *one act* is insufficient to support a finding of indignities, as it is not a course of conduct or repeated treatment that would render the condition of Wife intolerable and her life burdensome. The trial court therefore abused its discretion in finding that Husband offered indignities.

B. Alimony Duration

While I concur with the Majority’s determination that competent evidence supported the trial court’s finding that Husband had the ability to pay alimony, the trial court did not make adequate findings to support the duration of its alimony award.

The trial court is to “exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term.” N.C.G.S. § 50-16.3A(b) (2017). “Decisions about the amount and duration of alimony are made in the trial court’s discretion, and the court is not required to make findings about the weight and credibility it assigned to evidence before it.” *Hartsell v. Hartsell*, 189 N.C. App. 65, 75, 657 S.E.2d 724, 730 (2008). However, when awarding alimony, trial courts are required to “set forth the reasons for the amount of the alimony award, its duration, and manner of payment.” *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522 (2003). In *Squires v. Squires*, we remanded “for further findings of fact concerning the duration of the alimony award” where the trial court did not make any findings regarding the reason for the duration it imposed. *Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 163 (2006).

While the Majority is correct that the determination of the duration of the payment of alimony is within the discretion of the trial court, this discretion does not free the trial court from its duty to make findings regarding the basis for the duration set. The trial court made no such finding to explain its rationale for the duration of the award. Accordingly, our caselaw “mandate[s] that we remand for further findings of fact regarding the basis for the amount and duration of the alimony award” *Hartsell*, 189 N.C. App. at 76-77, 657 S.E.2d at 731.

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C. Conclusion

Under these facts, there was not competent evidence to support a finding that Husband committed acts of marital misconduct. Because the trial court considered the marital misconduct in its determination of the amount, duration, and manner of alimony payment and was required to order alimony upon its finding of Husband's illicit sexual behavior, I would remand the trial court's order for a new hearing on alimony with the additional instruction, if alimony is still ordered, to make adequate findings regarding the duration of the award. I respectfully dissent.

JOHN TYLER ROUTTEN, PLAINTIFF

v.

KELLY GEORGENE ROUTTEN, DEFENDANT

No. COA17-1360

Filed 20 November 2018

1. Appeal and Error—notice of appeal—order appealed—omission—waiver

In a custody case, defendant mother's arguments that the trial court exceeded its authority under Civil Procedure Rule 35 by ordering her to submit to a psychological examination were waived and dismissed for failure to include in her notice of appeal the relevant order of the trial court.

2. Child Visitation—noncustodial parent—discretion given to custodial parent—improper delegation of authority

In a custody case, the trial court improperly delegated authority to the custodial parent to determine, in his discretion, the amount of visitation the noncustodial parent could exercise with her children.

3. Child Visitation—electronic—telephone calls—supplement to visitation

In a custody case remanded for other reasons, the Court of Appeals instructed the trial court that if it allowed defendant mother to have visitation with her children, electronic visitation in the form of telephone calls or other electronic contact may be ordered only as a supplement, not as a replacement, to defendant's visitation rights.

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4. Constitutional Law—protected status as parent—denial of custody and visitation—necessary findings—unfit or acted inconsistently with protected rights

In a custody case, the trial court failed to make the necessary findings of fact that defendant mother was unfit or had acted inconsistently with her constitutionally protected status as a parent before denying her all custodial and visitation rights to her children.

5. Child Custody and Support—findings of fact—sufficiency of evidence

In a custody case, the trial court's numerous findings of fact were based on competent evidence consisting of testimony from both parties, neighbors, and medical professionals.

6. Appeal and Error—waiver—not raised below—temporary custody review—due process argument

In a custody case, defendant mother's argument that the trial court violated her due process rights by conducting a temporary custody review in the judge's chambers and not in open court were waived and dismissed where defendant's counsel did not object to the review being held in chambers, the trial court did not alter the custody arrangement already in place, and defendant did not raise the procedural due process issue in her Rule 59 and 60 motions to set aside the permanent custody order.

7. Child Custody and Support—evidence—domestic violence—consideration by trial court

The Court of Appeals rejected defendant mother's contention that the trial court failed to consider evidence of domestic violence perpetrated by plaintiff father before making its custody determination, where the trial court made findings regarding altercations between the parties and those findings were supported by competent evidence.

8. Divorce—alimony—amount and duration—statutory factors

In a divorce and custody action, the trial court did not abuse its discretion in awarding defendant mother alimony calculated from the parties' date of separation and not the date of divorce, nor in denying defendant's claim for attorney fees, where its unchallenged findings of fact referenced the required statutory factors contained in N.C.G.S. § 50-16.3A.

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9. Child Custody and Support—pro se motions—amended by counsel—original motions voluntarily dismissed

In a custody case, the Court of Appeals rejected defendant mother’s argument that the trial court should have considered her pro se Rule 59 and 60 motions rather than the amended motions subsequently filed by her attorney, where defendant’s own counsel took voluntary dismissal of the pro se motions and defendant did not voice any disagreement for that action, nor did she advance any authority for her arguments on appeal.

Judge BERGER concurring with separate opinion.

Judge INMAN concurring in part and dissenting in part with separate opinion.

Appeal by defendant from orders entered by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 20 September 2018.

Jill Schnabel Jackson for plaintiff-appellee.

R. Daniel Gibson for defendant-appellant.

TYSON, Judge.

Kelly Georgene Routten (“Defendant”) appeals from orders entered on 4 April 2017 and several other interim and temporary orders. We affirm in part, vacate in part, and remand.

I. Background

John Tyler Routten (“Plaintiff”) and Defendant were married on 23 March 2002 and separated from each other on 26 July 2014. Their union produced two children, a daughter and a son. The daughter, “Hanna,” was born 2 June 2004. The son, “Billy,” was born 17 July 2012.

On 21 July 2014, Plaintiff allegedly assaulted Defendant by pushing her onto the floor of their home. Defendant was granted an *ex parte* domestic violence protective order (“DVPO”) against Plaintiff and was granted temporary custody of the parties’ children on 25 July 2014. On 4 August 2014, Plaintiff filed a complaint (“the Complaint”) against Defendant for child custody, equitable distribution, and a motion for psychiatric evaluation and psychological testing.

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On 13 August 2014, Defendant voluntarily dismissed the DVPO. That same day the parties entered into a memorandum of judgment/order, which established a temporary custody schedule for the children and a temporary child support and post-separation support arrangement. Defendant purportedly did not receive a copy of the Complaint until after she had dismissed the DVPO and signed the memorandum of judgment/order. Defendant filed her answer to the Complaint on 6 October 2014 and asserted several counterclaims, including claims for alimony, child custody, child support, and attorney's fees. The parties participated in mediation and the trial court entered an equitable distribution order by consent of the parties on 29 April 2015.

On 21 September 2015, trial began on the parties' claims for permanent child custody, permanent child support, and Defendant's counterclaims for alimony and attorney's fees. At the conclusion of the trial on 24 September, the trial judge indicated Defendant needed to submit to a neuropsychological evaluation before he could decide permanent child custody.

On 21 December 2015, the trial court entered a custody and child support order, which established a temporary custody arrangement and ordered Defendant to "take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016." The 21 December 2015 order also provided that "[t]his case shall be set for a 3-hour custody review hearing on April 5, 2016" and "for a 6.5-hour subsequent hearing for review of custody and entry of final/permanent orders in July or August of 2016, once those calendars are available for scheduling trial dates." On 5 April 2016, the trial court conducted an in-chambers conference with the parties' counsel to determine the status of Defendant's neuropsychological evaluation.

On 27 April 2016, the trial court entered an order scheduling a three-hour hearing on 4 August 2018 to hear evidence relating to Defendant's neuropsychological evaluation and evidence relating to the best interests of the children. The 27 April 2016 order also decreed:

2. Defendant shall take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016. . . .
3. Defendant shall notify Plaintiff's counsel in writing no later than May 15, 2016, of the name and address of the provider who shall perform the neuropsychological evaluation of Defendant.

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4. Any written report resulting from the neuropsychological evaluation shall be produced to Plaintiff's counsel no later than ten (10) days prior to August 4th, 2016. . . .

On 29 July 2016, Defendant filed a motion for a continuance and protective order in which she alleged that she had complied with the trial court's prior orders to obtain a neuropsychological evaluation. Defendant's 29 July 2016 motion was mailed to Plaintiff's counsel five days prior to the scheduled 4 August 2016 final custody hearing. The motion did not contain the date the neuropsychological evaluation was performed or the name and address of the provider who had performed the evaluation.

The final custody hearing took place on 4 August 2016. At the outset of the hearing, Defendant's trial counsel disclosed for the first time that Duke Clinical Neuropsychology Service had performed a neuropsychological evaluation of Defendant on 21 April 2016. During the hearing, Defendant admitted: (1) she had not disclosed to Plaintiff's counsel the 21 April 2016 evaluation by Duke prior to the 4 August 2016 hearing; (2) she had notified Plaintiff's counsel that Pinehurst Neuropsychology, not Duke, would perform the evaluation; and (3) she had filed motions in June and July 2016 suggesting that a neuropsychological evaluation had not yet been performed.

At the conclusion of the hearing, the trial court transferred sole physical custody of the children to Plaintiff pursuant to a memorandum of order/judgment until a complete permanent custody order could be drafted and entered. The trial court entered a permanent child custody order on 9 December 2016 and an order for alimony and attorney's fees. On 9 and 13 December 2016, Defendant filed *pro se* motions for a new trial and relief from judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure.

Following a series of subpoenas filed by Defendant following the trial court's final custody hearing on 4 August 2016, Plaintiff filed a motion for a temporary restraining order and preliminary injunction on 13 December 2016. Plaintiff's motion asserted, in part:

17. The subpoenas issued by Defendant seek the production of documents related to child custody issues. Child custody has been fully litigated and there are no hearings scheduled (or motions pending) that relate to child custody.

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18. Defendant is representing herself pro se and appears to be using the subpoena process through the clerk's office to (improperly) attempt to continue litigating a claim that has been fully and finally litigated.

The trial court granted Plaintiff a temporary restraining order on 13 December 2016. The trial court conducted a hearing on Plaintiff's preliminary injunction motion on 3 January 2017. At the hearing, the trial court ordered Defendant to calendar her pending Rule 59 and 60 motions within ten days for the next available court dates. Defendant calendared the hearing for the Rule 59 and 60 motions for 1 March 2017. On 25 January 2017, the trial court entered an order granting Plaintiff's preliminary injunction. The trial court's order decreed, in relevant part: "Defendant is hereby restrained and prohibited from requesting issuance of a subpoena in this action by the Wake County Clerk of Superior Court or by any court personnel other than the assigned family court judge."

On 20 February 2017, Defendant filed amended Rule 59 and Rule 60 motions. The trial court concluded Defendant was entitled to the entry of a new order containing additional findings of fact and conclusions of law. On 6 March 2017, the trial court entered an amended permanent child custody order ("the Amended Order"). The Amended Order, in part, granted Plaintiff sole legal custody and physical custody, denied Defendant visitation with the children, but allowed Plaintiff to "permit custodial time between the children and Defendant within his sole discretion" and allowed Defendant two telephone calls per week with the children.

Defendant appeals the trial court's Amended Order and several other "related interim or temporary orders and ancillary orders."

We note Defendant initially chose to prosecute her appeal *pro se*. This Court provided the opportunity for this case to be included in the North Carolina Appellate Pro Bono Program. Following this Court's inquiry, Defendant accepted representation by a *pro bono* attorney under this Program. Upon Defendant's acceptance of *pro bono* representation, this Court ordered the parties to file supplemental briefs by order dated 23 August 2018.

II. Jurisdiction

Jurisdiction lies in this Court over an appeal of a final judgment regarding child custody in a civil district court action pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2017) and 50-19.1 (2017).

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III. Standard of Review

In a child custody case, the standard of review is “whether there was competent evidence to support the trial court’s findings of fact[.]” *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). “[T]he trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. ‘Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ” *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)) (citations omitted). “Whether [the trial court’s] findings of fact support [its] conclusions of law is reviewable *de novo*.” *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (alteration in original) (citation omitted).

“Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.” *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (2001) (citation omitted).

IV. Issues

On appeal, Defendant contends: (1) the trial court abused its discretion by ordering Defendant to submit to a neuropsychological evaluation; (2) the trial court abused its discretion by delegating its authority to determine Defendant’s visitation rights to Plaintiff; (3) the trial court infringed Defendant’s constitutionally protected parental rights by awarding sole custody and visitation rights to Plaintiff; (4) the trial court violated N.C. Gen. Stat. § 50-13.2(e)(3) (2017) by only granting Defendant telephone visitation; (5) the trial court entered numerous findings not supported by competent evidence; (6) the trial court infringed Defendant’s procedural due process rights; (7) the trial court abused its discretion in calculating the amount of alimony; (8) the trial court abused its discretion in denying her claim for attorney’s fees; and (9) the trial court abused its discretion with respect to her originally filed Rule 59 motion and three contempt motions at a hearing on 1 March 2017.

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V. AnalysisA. *Neuropsychological Evaluation*

[1] Defendant argues the trial court exceeded its authority under Rule 35 of the North Carolina Rules of Civil Procedure by ordering her to submit to a neuropsychological evaluation by a non-physician. Rule 35 states that a court “may order [a] party to submit to a physical or mental examination by a physician” when that party’s physical or mental condition is in controversy. N.C. Gen. Stat. § 1A-1, Rule 35 (2017). In Defendant’s *pro se* briefs, she does not refer to a specific order she asserts was erroneously entered. In Defendant’s supplemental *pro bono* brief, she specifically argues the trial court erred, or abused its discretion, by entering an order on 3 October 2014 requiring her to submit to an examination by a neuropsychologist.

The trial court’s 3 October 2014 order required both parties to submit to *psychological*, not *neuropsychological*, evaluations by Dr. Kuzyszyn-Jones. Defendant did not include the 3 October 2014 order in her notice of appeal listing the various orders of the trial court she appealed from. “Proper notice of appeal is a jurisdiction requirement that may not be waived.” *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). “[T]he appellate court obtains jurisdiction only over the ruling specifically designated in the notice of appeal as the ones from which the appeal is being taken.” *Id.* Defendant’s arguments concerning the requirement of the 3 October 2014 order to obtain a psychological evaluation by Dr. Kuzyszyn-Jones are waived and dismissed. *See id.*; N.C. R. App. P. 3(d).

B. *Father’s Discretion over Visitation*

[2] Defendant also argues the trial court violated the statute and abused its discretion by granting Plaintiff the sole authority to “permit custodial time between the children and Defendant” in the Amended Order. Under N.C. Gen. Stat. § 50-13.1(a), “custody” includes “custody or visitation or both.” N.C. Gen. Stat. § 50-13.1(a) (2017).

The trial court’s Amended Order concluded “It is not in the children’s best interests to have visitation with Defendant.” The Amended Order then provides:

2. Physical Custody. The minor children shall reside with Plaintiff. *Plaintiff may permit custodial time between the children and Defendant within his sole discretion, taking into account the recommendations of [Hanna’s]*

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counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for *permitting visitation between [Hanna] and [Defendant]*. (Emphasis supplied).

Defendant cites *In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971), in support of her argument. *Stancil* involved a custody dispute between a child's mother and the paternal grandmother. *Id.* at 546-47, 179 S.E.2d at 845-46. In the trial court's custody award to the grandmother, it granted the grandmother "the right to determine the times, places and conditions under which she could visit with [the child]." *Id.* at 550, 179 S.E.2d at 848. This Court stated:

When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. If the court finds that the parent has by conduct forfeited the right or *if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child*, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; *but the court may not delegate this authority to the custodian.*

Id. at 552, 179 S.E.2d at 849 (emphasis supplied). Here, although the trial court had determined, without finding Defendant had forfeited her parental visitation rights, that it was "not in the children's best interests to have visitation with Defendant." The trial court contradicted its finding and conclusion, the above rule stated in *Stancil*, and delegated its judicial authority to Plaintiff to determine Defendant's visitation. As with the trial court in *Stancil*, the trial court delegated the determination of Defendant's visitation with her children to Plaintiff, at "his sole discretion." The trial court erred and abused its discretion by delegating the determination of Defendant's visitation rights with her children to Plaintiff. *Id.* The trial court cannot delegate its judicial authority to award or deny Defendant's visitation rights to Plaintiff or a third-party. *See id.*; *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) ("[T]he award of visitation rights is a judicial function, which the trial court may not delegate to a third-party" (internal quotation marks and citation omitted)).

The decretal portion of the Amended Order is vacated and the matter remanded for the trial court to determine an appropriate custodial

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and visitation schedule consistent with this Court's opinion in *Stancil*. See *Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

C. Electronic Visitation

[3] Defendant also argues the trial court abused its discretion by allowing her only electronic "visitation," specifically, two telephone calls per week with the children. Defendant raises her electronic visitation arguments for the first time on appeal. Based upon our holding to vacate the custodial and visitation schedule from the Amended Order and remand for additional findings and conclusions, it is unnecessary to address the merits of Defendant's arguments concerning electronic visitation.

However, the trial court is instructed on remand that: "electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication *may not* be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50-13.2(e) (2017) (emphasis supplied).

"Electronic communication" is defined as "contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication." *Id.* If on remand, the trial court does not determine Defendant is unfit or engaged in conduct inconsistent with her parental rights, the trial court may only order electronic visitation as a supplement to Defendant's visitation rights and not as a replacement for Defendant's visitation rights. See *id.*; *In re T.R.T.*, 225 N.C. App. 567, 573-74, 737 S.E.2d 823, 828 (2013).

D. Constitutionally Protected Status as Parent

[4] Defendant contends the trial court violated her constitutionally protected interest as parent by awarding sole legal and physical custody of the children to Plaintiff without making a finding that she was unfit or had acted inconsistently with her constitutionally protected status as parent. We agree.

The Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights.

The Supreme Court of North Carolina held in *Owenby v. Young*, that:

[T]he Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child. [*Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001)]

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(citing *Troxel v. Granville*, 530 U.S. 57, 72-73, 147 L. Ed. 2d 49, 61 (2000)). Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the "best interest of the child" test is simply not implicated. In other words, the trial court may employ the "best interest of the child" test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status.

357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). Our Supreme Court also recognized in *Price v. Howard*, that:

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.

346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). Each parent's constitutional rights are equal and individually protected. *See id.*; *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

Before denying a parent all custodial and visitation rights with his or her children, the trial court: (1) must first make a written finding that the parent was unfit or had engaged in conduct inconsistent with his protected status as a parent, before applying the best interests of the child test; and (2) make these findings based upon clear, cogent, and convincing evidence. *Moore v. Moore*, 160 N.C. App. 569, 573-74, 584 S.E.2d 74, 76 (2003); *see Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994) ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.").

Based upon the trial court's failure to find Defendant is either unfit or has acted inconsistently with her constitutionally protected status as a parent, we vacate the trial court's conclusions of law and custody portions of its order. If on remand, the trial court purports to deny Defendant all custody and visitation or contact with her children, the trial court must make the constitutionally required findings based upon

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clear, cogent, and convincing evidence. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76.

The dissenting opinion claims this holding “diverges from established precedent” and “recognizes a new constitutional right” citing *Respass v. Respass*, 232 N.C. App. 611, 754 S.E.2d 691 (2014). However, the dissenting opinion either overlooks or disregards the precedents set by the Supreme Court of the United States, the Supreme Court of North Carolina, and this Court, including *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

E. *In re Civil Penalty*

The Supreme Court of North Carolina issued a decision in *Lanier, Comr. of Insurance v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968). Subsequently, this Court interpreted the holding of *Lanier* in *N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987). A later decision from this Court found *Gray* had “contradict[ed] the express language, rationale and result of *Lanier*,” and refused to follow that decision. *In re Civil Penalty*, 92 N.C. App. 1, 13-14, 373 S.E.2d 572, 579 (1988). Upon review, the Supreme Court concluded “that the effect of the majority’s decision . . . was to overrule *Gray*,” and rejected this Court’s attempt to do so. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. “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.” *Id.*

This sequence of events in *In re Civil Penalty* is precisely what happened after this Court’s unanimous decision in *Moore*. The Supreme Court issued a decision in *Owenby*, holding that “[u]ntil, and unless, the movant establishes by clear and convincing evidence that a natural parent’s behavior, viewed cumulatively, has been inconsistent with his or her protected status, the ‘best interest of the child’ test is simply not implicated.” *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268. The Court’s unanimous decision in *Moore*, applied that precise result, holding: “[o]nce conduct that is inconsistent with a parent’s protected status is proven, the ‘best interest of the child’ test is applied.” 160 N.C. App. at 573, 587 S.E.2d at 76. No further appellate review of *Moore* occurred.

As occurred *In re Civil Penalty*, “[s]everal pages of the [*Respass*] opinion were devoted to a detailed rejection of the [*Moore*] panel’s interpretation of [*Owenby*].” *In re Civil Penalty*, 324 N.C. at 383-84, 379 S.E.2d at 36. The panel in *Respass* violated our Supreme Court’s holding of *In re Civil Penalty* when it refused to follow the unanimous binding

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ten-year precedent set forth in *Moore*. See *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Respass*, 232 N.C. App. at 624-25, 754 S.E.2d at 700-01.

Further, numerous other precedential cases, also decided prior to *Respass*, have cited to *Moore* for the holding at issue, contrary to the assertion in the dissenting opinion. See, e.g., *Woodring v. Woodring*, 227 N.C. App. 638, 644, 745 S.E.2d 13, 19 (2013) (“In the absence of extraordinary circumstances, a parent should not be denied the right of visitation.” (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Maxwell v. Maxwell*, 212 N.C. App. 614, 622-23, 713 S.E.2d 489, 495 (2011) (“we reverse and remand this matter for further findings of fact as to Plaintiff’s fitness as a parent or the best interest of the minor children” (citing *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77)); *Slawek v. Slawek*, No. COA09-1682, 2010 WL 3220668, at *6 n.4 (N.C. Ct. App. Aug. 17, 2010) (unpublished) (“To declare a parent unfit for visitation, there must be ‘clear, cogent, and convincing evidence.’” (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Mooney v. Mooney*, No. COA08-998, 2009 WL 1383395, at *5 (N.C. Ct. App. May 19, 2009) (unpublished) (“A trial court may only deny visitation under the ‘best interest’ prong of N.C.G.S. § 50-13.5(i) ‘[o]nce conduct that is inconsistent with a parent’s protected status is proven.’” (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *In re E.T.*, No. COA05-752, 2006 WL 389731, at *3 (N.C. Ct. App. Feb. 21, 2006) (unpublished) (“The trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.” (quoting *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 76)); *In re M.C.*, No. COA03-661, 2004 WL 2152188, at *4 (N.C. Ct. App. Sep. 21, 2004) (unpublished) (“The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent.” (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)); *David N. v. Jason N.*, 164 N.C. App. 687, 690, 596 S.E.2d 266, 268 (2004) (“The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent.” (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)), *rev’d on other grounds*, 359 N.C. 303, 608 S.E.2d 751 (2005).

In *Peters v. Pennington*, this Court cited *Moore*, as follows:

In *Moore*, this Court stated that the prohibition of *all* contact with a natural parent’s child was analogous to a termination of parental rights. The Court reasoned that, in order to sustain a ‘total prohibition of visitation or contact’ based on the unfitness prong of N.C. Gen. Stat. § 50-13.5(i), the

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trial court must find unfitness based on the clear, cogent, and convincing evidentiary standard that is applicable in termination of parental rights cases.

210 N.C. App. at 19, 707 S.E.2d at 737 (emphasis in original) (citing *Moore*, 160 N.C. App. at 573-74, 587 S.E.2d at 76-77)).

Our Supreme Court has not overturned any of this Court's published opinions listed above, including *Moore*, which protect the "constitutionally-protected paramount right" of each individual parent over the care, custody, and control of their children. See *Petersen*, 337 N.C. at 403-404, 445 S.E.2d at 905. The dissenting opinion does not address or distinguish any of these binding precedents upon this Court.

Were we to disregard each parent's individually protected constitutional right, the following scenario may arise: an unmarried couple conceives a child. The couple becomes estranged before the child is born, and the father never knows the mother was pregnant. Years later, after the child is born, the father learns of his child's existence and seeks to have a relationship with the child. The father files an action to seek custody or visitation with his child. Under *Respass*, the trial court could then deny the father any custody or visitation solely using the "best interests" test, without any findings of the father's unfitness or actions inconsistent with his parental status. The application of the "best interests" test under this scenario, without findings of unfitness or actions inconsistent, would be wholly incompatible with our precedents, which have recognized: "A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534; see *Quilloin*, 434 U.S. at 255, 54 L. Ed. 2d at 519 ("the relationship between parent and child is constitutionally protected"); *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77.

The dissenting opinion, and *Respass*, assert this Court's holding in *Moore* was in conflict with *Owenby*. Citing the precedents of the Supreme Court of the United States and the Supreme Court of North Carolina, this Court unanimously stated in *Moore*:

It is presumed that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59. A parent's right to a relationship with his child is constitutionally protected. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978). Once conduct that is inconsistent with a parent's protected status is proven, the

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“best interest of the child” test is applied. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

Moore, 160 N.C. App. at 573, 587 S.E.2d at 76.

This Court’s application of the rule regarding each parent’s constitutionally protected individual relationship of custody or visitation with her child in this case and in *Moore* is fully consistent with binding precedents and with our Supreme Court’s holding in *Owenby*. “[T]he trial court may employ the ‘best interest of the child’ test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status.” *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268.

This opinion fully quotes and is consistent with the holding in *Owenby* and does not “conspicuously omit[]” any binding language therein, contrary to the dissenting opinion’s assertion. *See id.*

F. Trial Court’s Findings of Fact

[5] Defendant argues the Amended Order contains numerous findings of fact which are not supported by competent evidence, and the findings of fact do not support the trial court’s conclusions of law.

“Our trial courts are vested with broad discretion in child custody matters.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). Where substantial evidence in the record supports the trial court’s findings of fact, those findings are conclusive on appeal, even if record evidence might sustain findings to the contrary. *Id.* at 475, 586 S.E.2d at 254 (citation omitted).

Here, the trial court made fifty-two findings of fact in its Amended Order. Defendant challenges over twenty of the findings of fact made by the trial court concerning Defendant’s behavior, Defendant’s misleading statements to Plaintiff’s counsel and the trial court regarding her neuropsychological evaluation, Defendant’s health, Defendant’s relationship with Plaintiff, Defendant’s relationship with the children, and the best interests of the children.

After careful review of the whole record, we conclude the trial court’s findings of fact are based upon competent evidence in the record, including the testimony of the Plaintiff; the parties’ former neighbors, Jennifer and Jared Ober; Dr. Kuzyszyn-Jones; Defendant’s neurologist, Dr. Mark Skeen; and Defendant’s own testimony from the September 2015 hearing and the 4 August 2016 hearing. Defendant’s arguments are overruled.

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Defendant also argues the trial court's conclusions of law are not supported by the findings of fact. Based upon our holding to vacate the trial court's conclusions of law for the reasons stated above in sections B and D, it is unnecessary to address these arguments.

G. Denial of Procedural Due Process Rights

[6] Defendant also argues the trial court infringed her constitutional rights to procedural due process by conducting a temporary custody review on 5 April 2016 to determine the status of Defendant's obligation to complete the neuropsychological evaluation. This custody review was conducted in the trial judge's chambers, and not in open court.

Both Plaintiff's counsel and Defendant's counsel were present for this temporary custody review. The trial court did not enter an order based upon this temporary custody review that altered the custody arrangement specified in the 21 December 2015 temporary custody and child support order. Following the 5 April 2016 custody review hearing, the trial court entered an order setting specific guidelines for when Defendant should complete the neuropsychological evaluation ordered by the trial court on 21 December 2015. As a result of the temporary custody review on 5 April 2016, the trial court only ordered that the permanent custody review hearing take place on 4 August 2016 and reiterated Defendant's obligation under the 5 December 2015 order to obtain a neuropsychological evaluation. Defendant's trial counsel offered no objection to the trial court holding the in-chambers custody review meeting. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (citations omitted).

Defendant also did not raise her procedural due process arguments in her amended Rule 59 and Rule 60 motions to set aside the trial court's permanent custody order. *Id.* ("We note that defendant did not raise this issue in his motion to set aside the judgment. The record does not reflect a ruling on this issue by the trial court"); N.C. R. App. P. 10(a)(1). These arguments are waived and dismissed.

H. Domestic Violence

[7] Defendant also contends the trial court failed to consider evidence of domestic violence perpetrated by Plaintiff in making its custody determination in the Amended Order. N.C. Gen. Stat. § 50-13.2(a) (2017) provides, in relevant part:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such

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person . . . as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.

The Amended Order indicates it did consider Defendant's allegations of domestic violence by Plaintiff. Finding of fact 24 states:

There was significant conflict between the parties during their marriage, which culminated in physical altercations between the parties on more than one occasion. Defendant testified at length about these altercations during the September 2015 trial and described herself as a victim of domestic violence, but Plaintiff introduced a recording into evidence at the September 2015 trial in which Defendant can be heard laughing and attempting to goad Plaintiff into a physical altercation. There were two incidents in July of 2014 (shortly before the parties separated) during which Plaintiff attempted to retreat from Defendant during an argument by locking himself in another room but Defendant forced her way into the room. Furthermore, Defendant's medical records (as introduced into evidence by Defendant and/or made available to Plaintiff's counsel for cross-examination purposes at the September 2015 trial) are inconsistent with her testimony about the alleged altercations.

This finding of fact was supported by substantial competent evidence of Plaintiff's testimony and the audio recording referenced therein, which was admitted into evidence. Additionally, finding of fact 24 in the Amended Order is the same as finding of fact 22 in the initial permanent custody order. Defendant did not raise the issue of the trial court's purported failure to consider domestic violence in her amended Rule 59 and 60 motions. Defendant had a full opportunity to assert the trial court failed to consider domestic violence at the 1 March 2017 hearing on her Rule 59 and 60 motions, but failed to do so. *See Creasman* 152 N.C. App. at 123, 566 S.E.2d at 728; N.C. R. App. P. 10(a)(1). Defendant may disagree with the weight and credibility the trial court gave the evidence, but the record clearly establishes the trial court considered the allegations of domestic violence in determining custody pursuant to N.C. Gen. Stat. § 50-13.2(a). Defendant's argument is overruled.

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I. *Alimony and Attorney's Fees*

[8] Defendant next argues the trial court abused its discretion with regard to the Alimony and Attorney Fee Order entered by the trial court on 9 December 2016, the same day the trial court entered its initial permanent custody order. Defendant argues the trial court erred by awarding her alimony for a duration calculated from the parties' date of separation and not from the parties' date of divorce. "Decisions concerning the amount and duration of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion." *Robinson v. Robinson*, 210 N.C. App. 319, 326, 707 S.E.2d 785, 791 (2011).

The trial court is required to consider the sixteen factors enumerated in N.C. Gen. Stat. § 50-16.3A(b) in deciding to award alimony. N.C. Gen. Stat. § 50-16.3A(c) ("[T]he court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor."). "[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony . . . is within the discretion of the trial court." *McKinney v. McKinney*, 228 N.C. App. 300, 307, 745 S.E.2d 356, 361 (2013).

Here, the trial court made several specific and unchallenged findings of fact with reference to attorney's fees and the required statutory factors for determining alimony. Defendant does not challenge any of these findings of fact or argue that these findings are not supported by competent evidence in the record. Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony awarded or by denying Defendant's claim for attorney's fees. Defendant's arguments are overruled.

J. *1 March 2017 Hearing*

[9] Defendant attempts to argue the trial court erred with respect to actions taken by her own attorney at a hearing on 1 March 2017. This hearing was held on several motions filed by Defendant. After the trial court entered its original permanent child custody order and its order on alimony and attorney's fees on 9 December 2016, Defendant subsequently filed a *pro se* Rule 59 motion on 16 December and a *pro se* Rule 60 motion on 19 December.

Defendant obtained new counsel, who then filed amended Rule 59 and Rule 60 motions on 20 February 2017. These motions were heard by the trial court on 1 March 2017, in addition to three *pro se* contempt motions Defendant had previously filed.

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At the outset of the 1 March 2017 hearing, Defendant's counsel stated to the trial court that the contempt motions "are right now being written up in a voluntarily dismissal to be dismissed with prejudice as of today." The trial court then proceeded to hear Defendant's amended Rule 59 and Rule 60 motions. The trial court granted Defendant's Rule 59 motion and later entered the Amended Order on 6 March 2017.

Defendant appears to argue the trial court should have considered her original *pro se* Rule 59 motion instead of the amended motion filed by her attorney. Defendant asserts her contempt motions should not have been dismissed on 1 March 2017. These motions were voluntarily dismissed by Defendant's own counsel and not by the trial court. Defendant was present for the 1 March 2017 hearing and did not voice any disagreement to the trial court over her counsel's voluntary dismissal of the contempt motions. Defendant cites no authority to support these arguments. Defendant fails to establish any error on the trial court's part with respect to the Rule 59 motion and the voluntary dismissal of her contempt motions. These arguments are dismissed.

VI. Conclusion

The trial court erred and abused its discretion by delegating its authority to determine Defendant's visitation rights to Plaintiff and by effectively terminating Defendant's parental rights without first making a finding of unfitness or acts inconsistent with her constitutionally protected status by clear, cogent, and convincing evidence, and violated the statute by limiting her access to her children to telephone calls only. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76; N.C. Gen. Stat. § 50-13.2(e).

Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony, or in denying her claim for attorney's fees. Defendant has failed to preserve her arguments concerning the trial court's ordering of a neuropsychological evaluation and the trial court's purported violations of her procedural due process rights. Defendant's remaining arguments are overruled and dismissed for failures to object and preserve.

The Alimony Order and Attorney Fees Order are affirmed. The trial court's conclusions of law and decretal portions of its Amended Order are vacated and remanded for further proceedings as consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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Judge BERGER concurs with separate opinion.

Judge INMAN concurs in part, dissents in part, with separate opinion.

BERGER, Judge, concurring.

I fully concur in the majority opinion, but write separately to address a trend in this Court's jurisprudence that has troubling implications.

In the last few years, this Court increasingly has overruled precedent on the ground that a case, although published and otherwise controlling, itself failed to follow an even earlier Court of Appeals or Supreme Court case.¹

At first glance, this approach might seem appropriate. After all, *In re Civil Penalty* tells us that one panel cannot overrule another on the same issue. 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). If it appears a second panel did precisely that by refusing to follow the precedent set by the first panel, should the third panel faced with the issue not ignore the second and follow the first? But, what if a fourth panel comes along and concludes that the second panel properly distinguished or limited the first panel? That fourth panel could refuse to follow the third panel on the ground that it improperly overruled the second.

This may sound more like a law school hypothetical than a real-world problem, but it is very real. As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue.

This problem is compounded by the reality that we are an intermediate appellate court that sits in panels. Ordinarily, the doctrine of *stare decisis* will prevent appellate courts from casually tossing away precedent decided just a few years (or even months) earlier.² But that

1. Here are a few examples: *State v. Alonzo*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-1186, 2018 WL 3977546, at *2 (Aug. 21, 2018), *temporary stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (2018); *State v. Jones*, ___ N.C. App. ___, ___, 802 S.E.2d 518, 523 (2017); *State v. Mostafavi*, ___ N.C. App. ___, ___, 802 S.E.2d 508, 513 (2017), *rev'd*, 370 N.C. 681, 811 S.E.2d 138 (2018); *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 693-94 (2017), *disc. review allowed*, ___ N.C. ___, 812 S.E.2d 847 (2018); *In re D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017).

2. "The judicial policy of *stare decisis* is followed by the courts of this state." *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (citation omitted). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable,

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precedential effect is much weaker when a court sits in panels where the judges considering the issue were not necessarily involved in the earlier decision. As the dissent notes in footnote 4, we make mistakes.

One solution to this problem is for this Court to write opinions following our precedent, notwithstanding that panel's view of the weaknesses and errors within the current state of the law. In such an opinion, that panel could explain why the precedent is incorrect and make a direct request for the Supreme Court to use their power of discretionary review to announce the correct rule.

But many judges on this Court view this approach as unrealistic.³ The Supreme Court hears cases on discretionary review primarily because they involve matters of "significant public interest" or "major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31. Though our frequent intramural disputes over *In re Civil Penalty* seem significant to us, the underlying legal issues often are narrow, are of no public interest, and affect only minor or isolated issues within our jurisprudence. At a high court that hears only seventy or eighty cases on discretionary review each year, these simply won't make the cut.

There is another option. This Court now has the power to sit *en banc*. See N.C. Gen. Stat. § 7A-16. When the Supreme Court issued procedural rules for our *en banc* review, it instructed that we may sit *en banc* "to secure or maintain uniformity of the court's decisions." N.C.

and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, ___ U.S. ___, ___, 201 L. Ed. 2d 924, 954-55 (2018) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

"[A]ntiquity has never been a reason for this Court to overrule its own prior case law or that of the North Carolina Supreme Court; indeed, this Court does not have authority to do so." *Strickland v. City of Raleigh*, 204 N.C. App. 176, 181, 693 S.E.2d 214, 217 (2010) (citation omitted). "When this Court is presented with identical facts and issues, we are bound to reach the same conclusions as prior panels of this court." *Smith v. City of Fayetteville*, 220 N.C. App. 249, 253, 725 S.E.2d 405, 409 (2012) (citation omitted).

3. Nevertheless, it is "an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land, – not delegated to pronounce a new law, but to maintain and expound the old one – *jus dicere et non jus dare* [to declare the law, not to make the law]." *McGill v. Town of Lumberton*, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (citation omitted).

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R. App. P. 31.1(a)(1). This suggests that our Supreme Court anticipated we would use our authority to sit *en banc* to address these minor conflicts in our case law and resolve them ourselves. And, of course, if this Court sitting *en banc* gets it wrong, an opinion explaining the conflicting cases and the detailed reasons underlying our interpretation of them would issue from this Court, producing an excellent vehicle by which the Supreme Court can grant review and announce the correct rule.

Unfortunately, we have yet to sit *en banc*. To date, there have been 61 petitions filed requesting this Court to hear cases *en banc*, and we have declined to hear every single one. Perhaps some of my fellow judges on this Court are skeptical of whether the Supreme Court wants us to resolve our own conflicts. Some may be convinced that this resolution is not ours, but the business of our higher court. Others may have different motives. Whatever the reasons we have declined to sit *en banc* may be, legitimate or otherwise, encouragement and accountability from the appellate bar would be beneficial. Of course, if the Supreme Court believes this Court should resolve our conflicts *en banc*, it would be helpful for that Court to say so.

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

I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court's conclusions of law regarding custody and its decree awarding full custody to Plaintiff. The majority's holding in this respect is precluded by established precedent of the North Carolina Supreme Court and this Court and threatens to upend the stability of decisions by our trial courts in child custody disputes between parents.

The trial court's Amended Order denying Defendant custody and visitation complied with Section 50-13.5 of the North Carolina General Statutes, which provides:

In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2018) (emphasis added). "Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive 'or', application of the statute is not

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limited to cases falling within both clauses but applies to cases falling within either one of them.” *Grassy Creek Neighborhood All., Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (internal quotation marks and citations omitted). Ultimately the trial court found that “[i]t is not in the children’s best interests to have visitation with Defendant.” Given this finding, pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court had the authority to suspend Defendant’s visitation with the children without finding that Defendant was a person unfit to visit them.

The trial court’s express finding that visitation with Defendant was not in the children’s best interest followed several other findings by the trial court of Defendant’s harmful interactions with her children, including: (1) Defendant’s behavior necessitated that her daughter have a safety plan while in her custody; (2) Defendant engaged in physical and verbal altercations with her daughter; (3) Defendant was trespassed from her son’s preschool as a result of her behavior there; (4) she had difficulty controlling her son’s behavior; (5) she removed her son from preschool contrary to the school’s recommendation and without Plaintiff’s knowledge or consent; and (6) her daughter’s emotional distress was caused by spending time with Defendant. Each of these findings was supported by competent evidence.

The majority does not hold that the trial court erred in its findings of fact regarding Defendant’s harmful interactions with the children. The majority does not hold that the trial court erred in finding that visitation with Defendant was not in the children’s best interest. Rather, the majority holds that Defendant has a constitutional right to visitation with her children which has been violated by the trial court and remands the matter for “constitutionally required findings based upon clear, cogent, and convincing evidence.” In support of today’s holding, the majority relies on *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), a decision disavowed by this Court—and one directly contrary to controlling North Carolina Supreme Court precedent—which held that when resolving a custody dispute between two parents, a trial court cannot suspend one parent’s visitation rights absent a finding that either the parent is unfit or engaged in conduct that is inconsistent with his or her protected status. *Id.* at 573, 587 S.E.2d at 76.

Moore held that in a custody dispute between a child’s natural or adoptive parents, “absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.” *Id.* at 572, 587 S.E.2d at 76 (internal quotation marks and

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citation omitted). As support for this holding, *Moore* quoted *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994), which established a constitutionally-based presumption favoring a parent in a custody dispute with a non-parent (the “*Petersen* presumption”).¹ But unlike *Moore*, *Petersen* involved a custody conflict between parents and non-parents. 337 N.C. at 399, 445 S.E.2d at 902. *Moore* did not acknowledge that factual distinction or provide any analysis to support extending the *Petersen* holding to a dispute between two parents. Nor did *Moore* acknowledge controlling Supreme Court precedent expressly holding that *Petersen* does not apply to custody disputes between two parents, such as the case we decide today.

Significantly, after *Petersen* was decided and a few months prior to *Moore*, the North Carolina Supreme Court, in a child custody dispute between a father and maternal grandmother, explained the distinction between proceedings involving (1) a parent versus a non-parent, and (2) a parent versus the other parent:

We acknowledged the importance of [a parent’s] liberty interest nearly a decade ago when this Court [in *Petersen*] held: absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail. The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. The justification for the paramount status is eviscerated when a parent’s conduct is inconsistent with the presumption or when a parent fails to shoulder the responsibilities that are attendant to rearing a child. Therefore, unless a natural parent’s conduct has been inconsistent with his or her constitutionally protected status, application of the “best interest of the child” standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. *Furthermore, the protected right is*

1. *Petersen* quoted the holding in *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), that “ [i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” 337 N.C. at 400-01, 445 S.E.2d at 903 (emphasis omitted) (quoting *Stanley*, 405 U.S. at 651, 31 L.Ed.2d at 559). Relying on *Stanley*, the *Petersen* Court noted that a natural parent has a “constitutionally-protected paramount right to custody, care, and control of their child.” *Id.* at 400, 445 S.E.2d at 903.

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irrelevant in a custody proceeding between two natural parents, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the “best interest of the child” test.

Owenby v. Young, 357 N.C. 142, 145, 579 S.E.2d 264, 266-67 (2003) (internal quotation marks and citations omitted) (emphasis added). *Moore* failed to cite *Owenby*, much less attempt to distinguish its holding that a parent’s constitutional right is *irrelevant* in a custody dispute with the other parent. *Moore* was not pursued further on appeal, so its conflict with *Owenby* was not reviewed by the Supreme Court.²

The error of *Moore* was ultimately noted a decade later, in a unanimous decision written by a judge who had concurred in *Moore*. In *Respass v. Respass*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), that judge, writing for a unanimous panel, concluded that “the standard articulated in *Moore* directly conflicts with prior holdings of . . . our Supreme Court and therefore does not control our decision in the instant case.” *Id.* at 624-25, 754 S.E.2d at 700-01. *Respass* explained that prior to *Moore*, precedent consistently held:

(1) the standard in a custody dispute between a child’s parents is the best interest of the child; (2) the applicable burden of proof is the preponderance of the evidence; (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50–13.5(i) if it makes the finding set out in the statute.

Id. at 627, 754 S.E.2d at 702. *Respass* acknowledged our Supreme Court’s holding in *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), that a panel of this Court is bound by a prior decision by another panel of this Court deciding the same issue, but held that rule

2. Although *Moore* was not appealed, our Supreme Court passed on the opportunity to ratify or adopt the holding of *Moore* two years later in *In re T. K., D.K., T. K., & J. K.*, 171 N.C. App. 35, 613 S.E.2d 739, *aff’d* 360 N.C. 163, 622 S.E.2d 494 (2005). That appeal followed a split decision by this Court. The dissent in *In re T.K.* asserted—as the majority holds here—that a trial court’s order awarding visitation to the father was in error because, pursuant to *Moore*, the trial court did not make findings that the mother’s “conduct was inconsistent with her protected status as a parent,” or, by clear and convincing evidence, that the mother was “unfit as a parent.” *Id.* at 44, 613 S.E.2d at 744 (Tyson, J., dissenting). On review, the Supreme Court affirmed the majority opinion *per curiam*. *In re T. K.*, 360 N.C. 163, 622 S.E.2d 494.

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of decision did not apply to bind the panel to follow *Moore*, because “this Court has no authority to reverse existing Supreme Court precedent.” *Respass*, 232 N.C. App. at 625, 754 S.E.2d at 701. *Respass* was never appealed and, until our Supreme Court tells us otherwise, *Respass* remains good law on both points.

Today’s majority opinion quotes a portion of the opinion in *Owenby*, but conspicuously omits the Supreme Court’s key holding directly controlling in this case, that a constitutional analysis “is irrelevant in a custody proceeding between two natural parents” and that “[i]n such instances, the trial court must determine custody using the ‘best interest of the child’ test.” *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267; see also *Respass*, 232 N.C. App. at 626, 754 S.E.2d at 701-02 (“*Moore*’s holding that the *Petersen* presumption applies to a trial court’s decision to deny visitation rights to a non-custodial parent [in a dispute with the custodial parent] contradicts our Supreme Court’s holding [in *Owenby*] that *Petersen* is ‘irrelevant’ to a dispute between parents and that in such instances, the trial court must determine custody using the ‘best interest of the child’ test.” (internal quotation marks, citation, and brackets omitted)).

The majority also fails to distinguish the facts of this case from *Respass*, or to address the effect of *Owenby* on *Moore*’s precedential value. The majority’s holding today deviates from years of consistent precedent and confuses an otherwise settled area of law affecting families across our state.³

The majority asserts that *Respass* violated the North Carolina Supreme Court’s holding in *In re Appeal of Civil Penalty* that one panel of this Court is bound by a previous panel’s decision on the same issue. But the majority fails to acknowledge that *Respass* explicitly held that *In re Civil Penalty* did not require this Court to repeat the holding in *Moore*

3. As noted by the majority, until it was disavowed by *Respass* as violating controlling precedent, *Moore* was cited in subsequent decisions by this Court for its holding directly contrary to *Owenby*. But see *Everette v. Collins*, 176 N.C. App. 168, 173-74, 625 S.E.2d 796, 799-800 (2006) (distinguishing disputes between parents and non-parents, involving the “constitutionally protected status afforded parents,” and disputes between only parents, applying the “best interest of the child” determination without constitutional analysis). But none of the decisions citing *Moore* for that holding acknowledged the conflict. Since *Respass*, *Moore* has been cited by this Court for its holding that a trial court’s findings of fact must resolve factual issues rather than merely reciting witness testimony, but it has not been cited in a majority decision for the proposition disavowed in *Respass*. See *State v. Robinson*, ___ N.C. App. ___, ___, 805 S.E.2d 309, 317 (2017); *Lueallen v. Lueallen*, ___ N.C. App. ___, ___, 790 S.E.2d 690, 698 (2016); *Kelly v. Kelly*, 228 N.C. App. 600, 610, 747 S.E.2d 268, 278 (2013).

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that was contrary to controlling precedent by our Supreme Court. See *Respass*, 232 N.C. App. at 629, 654 S.E.2d at 703.

Earlier this year, in a unanimous opinion, this Court expressly adopted the holding in *Respass* which interpreted and distinguished *In re Civil Penalty* to disavow *Moore*. See *Martinez v. Wake Cty. Bd. of Educ.*, ___ N. C. App. ___, ___, 813 S.E.2d 659, 667 (2018) (discussing *Respass* at length and holding that “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”). Today’s decision cannot be harmonized with *Respass* or *Martinez*.

The jurisprudential history of *In re Civil Penalty*, contrasted with the history of *Moore*, *Respass*, and today’s decision, demonstrates the majority’s error in this case. *In re Civil Penalty* arose from a conflict regarding the precedent established by the North Carolina Supreme Court in *State ex rel. Lanier v. Vines*, 274 N.C. 486, 490, 164 S.E.2d 161, 163 (1968). *Lanier* held that a statute allowing the Commissioner of Insurance to impose a monetary penalty of up to \$25,000 for violations of administrative regulations improperly delegated power vested exclusively in the judiciary by Art. IV, § 3, of the North Carolina Constitution. *Id.* at 497, 164 S.E.2d at 168. Almost twenty years later, in *North Carolina Private Protective Services Board v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987), this Court rejected a constitutional challenge to a statute authorizing the North Carolina Private Protective Services Board to impose monetary penalties of up to \$2,000 for violations of agency regulations. *Id.* at 147, 360 S.E.2d at 138. *Gray* held that “[t]his case is readily distinguishable from the situation in *Lanier*.” *Id.* at 147, 360 S.E.2d at 138.

One year later, in *In re Civil Penalty*, 92 N.C. App. 1, 373 S.E.2d 572 (1989), in a split decision, this Court addressed the constitutionality of a statute authorizing the Department of Natural Resources to assess an administrative penalty against individuals who violated the Sedimentation Pollution Act. *Id.* at 3, 373 S.E.2d at 573. The majority opinion concluded that this Court was bound by the decision in *Lanier*, and not by *Gray*, reasoning that the “rationale [in *Gray*] directly contradicts the rationale and result of *Lanier*.” *Id.* at 16, 373 S.E.2d at 581. The dissent asserted that the majority’s failure to follow *Gray*’s interpretation of *Lanier* “unjustifiably overrule[d]” *Gray*, which “was correctly decided and should have governed the court’s decision in the case before us.” *Id.* at 21, 373 S.E.2d at 583 (Becton, J., dissenting). On review, the North Carolina Supreme Court agreed with the dissent and concluded that “the effect of the majority’s decision here was to overrule *Gray*.”

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This it may not do.” *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The Supreme Court went on to explain, in a holding quoted by this Court in dozens of decisions over the past quarter century, that, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *Id.* at 384, 379 S.E.2d at 37.

Unlike this Court’s decision in *Gray*, which addressed and distinguished the North Carolina Supreme Court’s decision in *Lanier*, this Court’s decision in *Moore* utterly failed to acknowledge the Supreme Court’s decision in *Owenby*.⁴ A citation to *Owenby* is nowhere to be found in *Moore*. The assertion by the majority today that *Moore* applied the holding of *Owenby* misrepresents the reported decision.

Unlike *Moore*, *Respass* cited *Owenby*, discussed it at length, and characterized the Supreme Court’s statement that the *Petersen* presumption is “irrelevant in a custody proceeding between two natural parents” as a “holding” in *Owenby*. *Respass*, 232 N.C. App. at 625-26, 754 S.E.2d at 701-02. As *Respass* has not been overturned by a higher court, we are thus bound by its interpretation of *Owenby*, and must conclude that the language ignored by the majority in today’s decision is a holding by our Supreme Court. See *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. And it is directly controlling here. This Court’s holding in *Moore* must yield to the Supreme Court’s holding in *Owenby*. We do not have the “authority to overrule decisions of the Supreme Court of North Carolina and [have a] responsibility to follow those decisions, until otherwise ordered by the Supreme Court.” *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985).

The rule of decision established by *In re Civil Penalty* applies when two panels of this Court issue conflicting decisions on the same issue without distinguishing the facts or applicable law, passing each other like ships in the night. But *In re Civil Penalty* does not bind a panel of this Court to a decision by a prior panel that conflicts with Supreme

4. I do not suggest that the panel in *Moore* deliberately ignored *Owenby*. The Supreme Court issued its decision in *Owenby* in May 2003; *Moore* was heard in this Court just three months later, in August 2003. Given the typical lapse of months between the submission of briefs and hearing before this Court in most cases, it is likely that *Owenby* was decided by the Supreme Court after briefing in *Moore* was completed, and that neither counsel nor the panel deciding *Moore* realized that binding precedent intervened. Such an error reflects not defiance or judicial recklessness but merely the very human occurrence of overlooking a new precedent when deciding one among a tremendous volume of cases heard by panels of this Court. By contrast, today’s majority violates precedent specifically called to its attention.

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Court precedent. The conflict between a decision by this Court and one by our Supreme Court is more akin to a row boat passing an ocean liner. It is resolved not by *In re Civil Penalty* but by *stare decisis*.

“A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*.” *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 (2001). The doctrine of *stare decisis* “is a maxim to be held forever sacred.” *Commonwealth v. Coxe*, 4 U.S. 170, 1 L. Ed. 786, 4 Dall. 170, 192 (Pa. 1800). Because it is so fundamental to our jurisprudence, the doctrine is generally applied without comment and is described at length only in dissenting opinions. “Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law.” *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 651, 781 S.E.2d 248, 260 (2016) (Newby, J., concurring in part and dissenting in part). “[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea[.]” *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting).

This Court in *Respass* correctly held that it was not bound by *In re Civil Penalty* to follow *Moore*’s holding—which plainly diverged from Supreme Court precedent. And, as *Respass* distinguished *In re Civil Penalty* and explained why it did not apply—*i.e.*, that it did not bind the panel to *Moore*—we are bound by that interpretation, ironically pursuant to *In re Civil Penalty*. Stated differently, the majority charts the same wayward course that previously led this Court to run aground even though our Supreme Court has built us a lighthouse in *In re Civil Penalty*; just as *Gray* constituted a binding interpretation of *Lanier*, *Respass* provided binding interpretations of *Owenby*⁵ and *In re Civil Penalty*. We are bound by *Respass* unless and until it is disavowed by our Supreme Court.

The majority opinion today vacates the conclusions of law and custody portions of the Amended Order based on the trial court’s failure to include findings only deemed necessary in *Moore*. Today’s decision, like the decision in *Moore*, conflicts with binding precedent and the plain language of N.C. Gen. Stat. § 50-13.5(i), the governing statute. Because the dispute is exclusively between the children’s parents, the trial

5. As recounted *supra*, there is nothing in *Moore* to indicate it was interpreting or applying *Owenby*, let alone that it was cognizant of the decision. Thus, *Respass* was not bound by any interpretation of *Owenby* in *Moore*, as none appears therein.

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court properly applied the “best interest of the child” test. *See Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) (“In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the ‘best interest of the child’ test.”).

The majority today also asserts—again citing *Moore*—that the “Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights.” A loss of visitation or custody in a Chapter 50 proceeding between two parents is fundamentally different from the termination of parental rights, which can only be accomplished in a proceeding pursuant to Chapter 7B. “Our jurisprudence has long recognized significant differences between a child custody order, which is subject to modification upon a showing of changed circumstances, and orders for adoption or for termination of parental rights, which are permanent.” *Respass*, 232 N.C. App. at 626, 754 S.E.2d at 702 (citations omitted). Among other things, the standard of proof prescribed by Chapter 50 for custody disputes between parents is a preponderance of the evidence; by contrast, the standard of proof prescribed by Chapter 7B for termination of parental rights is clear and convincing evidence. N.C. Gen. Stat. § 7B-1110(b) (2018); *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001).

For the foregoing reasons, I respectfully dissent from the majority opinion regarding the award of child custody and would affirm the Amended Order’s conclusions of law and decree regarding custody.

Because I dissent from the majority opinion vacating the trial court’s decree suspending Defendant’s right to visitation with her children, I disagree with the majority’s holding that the trial court erred by delegating to Plaintiff the sole discretion to allow, or deny, telephone contact between Defendant and their children. That is, if Defendant has no right to visitation, the trial court’s delegation of discretion to Plaintiff is mere surplusage, albeit admittedly confusing. Assuming *arguendo* that the trial court erred in this portion of its decree, it was surplusage that does not require appellate review.

In sum, I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court’s conclusions of law and its decree awarding full custody to Plaintiff.

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[262 N.C. App. 466 (2018)]

STATE OF NORTH CAROLINA

v.

GREGORY GARRISON COLE

No. COA18-286

Filed 20 November 2018

1. Motor Vehicles—driving while impaired—superior court—jurisdiction—dismissal of district court charge—functional equivalent

The superior court correctly denied defendant's motion to dismiss an indictment for lack of jurisdiction where defendant was initially charged with misdemeanor driving while impaired, the State began a superior court proceeding by presentment and indictment, and the district court action was never formally dismissed. Although the district court has exclusive jurisdiction for the trial of misdemeanors, the superior court may obtain jurisdiction by initiating a presentment. To the extent that concurrent jurisdiction exists, the first court to exercise jurisdiction obtains jurisdiction to the exclusion of the other. Here, there was no evidence that the district court exercised its jurisdiction after concurrent jurisdiction existed, and the State made clear its intent to abandon the district court action. This served as the functional equivalent of a dismissal.

2. Search and Seizure—fruit of the poisonous tree—traffic stop—roadside breath test—subsequent intoxilyzer test

There was no plain error in a prosecution for driving while impaired (DWI) where the trial court admitted evidence discovered after an allegedly unlawfully compelled roadside breath test. The trial court did not address whether subsequent evidence was obtained as a result of the roadside test, but held the initial stop was justified by defendant's license plate not being illuminated. The superior court's findings were sufficient to justify the initial traffic stop and supported a conclusion that the officer had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test.

3. Motor Vehicles—driving while impaired—officer's subjective opinion

In a driving while impaired prosecution, an officer's testimony that he would have given defendant a ride home if he tested low enough did not establish that the officer lacked sufficient information to believe that defendant was appreciably impaired. The

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officer's subjective opinion is not material; the search is valid when the objective facts known to the officer meet the required standard.

4. Motor Vehicles—driving while impaired—multiple tests—implied consent rights

A driving while impaired defendant's right to be re-advised of his implied consent rights was not violated where a first test on an intoxilyzer machine failed to produce a valid result and the test was administered again on a second machine without an additional advisement to defendant of his rights. The request that defendant provide another sample for the same chemical analysis of his breath was not a "subsequent chemical analysis" that would trigger a re-advisement pursuant to N.C.G.S. § 20-139.1(b5) because defendant was not asked to submit to a different chemical analysis for his blood or other bodily fluid or substance in addition to the breath analysis.

5. Motor Vehicles—driving while impaired—sentencing—prior conviction

The trial court did not err by concluding that defendant's prior driving while impaired conviction constituted a "prior conviction," even though the conviction was on appeal, and finding a grossly aggravating factor based on that conviction. There is no statutory language limiting the definition of prior conviction to a "final" conviction or only to those not challenged on appeal. The plain and unambiguous language of N.C.G.S. § 20-179(c)(1)(a) defines a prior conviction merely as a conviction that occurred within seven years of the subsequent offense.

Appeal by defendant from judgment entered 31 August 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 1 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Rick Brown, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant.

ELMORE, Judge.

Defendant Gregory Cole appeals a judgment entered after a jury convicted him of driving while impaired ("DWI"). He argues the superior court erred by (1) denying his motion to dismiss the indictment

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for lack of jurisdiction because the same charge against him remained pending and valid in district court; (2) denying his motion to suppress the results of roadside sobriety tests and a later intoxilyzer test because those tests were administered during an unlawful detention that arose as a direct consequence of an illegal roadside breath test and thus constituted tainted fruit of that poisonous tree; (3) denying his motion to suppress the intoxilyzer results on the additional ground that the superior court improperly concluded the administering officer's request he submit a breath sample on a second intoxilyzer machine after the first one failed to produce a valid result did not constitute a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5) and thus did not trigger that statute's requirement that the officer re-advise him of his implied-consent rights before administering the test on the second machine; and (4) enhancing his sentence because the superior court's finding of the existence of an aggravating factor was based on his prior DWI conviction that was pending on appeal and thus was not "final" so it failed to qualify as a "prior conviction" for enhanced sentencing purposes under N.C. Gen. Stat. § 20-179(c)(1).

We hold the superior court properly (1) denied the motion to dismiss the indictment for lack of jurisdiction because the district court charge was no longer pending or valid; (2) denied the motion to suppress the evidence discovered after the roadside breath test because, before that test, objective reasonable suspicion existed that defendant may be driving while impaired, thereby justifying the officer to prolong the initial traffic stop to investigate defendant's potential impairment; (3) denied the motion to suppress the intoxilyzer results because the officer's request that defendant submit another breath sample to administer the same chemical analysis of the breath on a second intoxilyzer machine did not trigger N.C. Gen. Stat. § 20-139.1(b5)'s re-advise requirement; and (4) enhanced defendant's sentence because his prior DWI conviction, despite its status being pending on appeal, supporting a finding of the existence of the grossly aggravating factor of a "prior conviction" under N.C. Gen. Stat. § 20-179(c). Accordingly, we hold defendant received a fair trial and sentence, free of error.

I. Background

The State's evidence tended to show the following facts. Around 12:30 a.m. on 8 March 2015, Officer Jonathan Ray of the Weaverville Police Department was conducting a business security check at Twisted Laurel, a bar and grill in Weaverville, when he observed defendant exit through the back door of the business and walk toward the parking lot. After completing the business check a few minutes later, Officer

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Ray started working traffic control and observed a burgundy van leave Twisted Laurel's parking lot with no rear lamps illuminating its license plate in violation of N.C. Gen. Stat. § 20-129(d). Officer Ray followed the van for about two miles, observing it "weaving slightly within its lane" and "travel[] over onto the white fog line on the right-hand side of the road" a few times, before activating his blue lights and stopping the van.

When Officer Ray approached, he discovered defendant, whom he recognized as the person he had just seen leaving Twisted Laurel, was driving the van. When Officer Ray requested his driver's license, defendant initially presented his debit card. Officer Ray returned the debit card and defendant correctly furnished his license. Officer Ray "smell[ed] an odor of alcohol on [defendant]" and "noticed that he had red glassy eyes as well." When Officer Ray asked if he had been drinking, defendant replied that he had not, but had been "working at the bar" and "may have spilled some alcohol on himself." Defendant "denied drinking about three times before he finally admitted . . . that he had been drinking."

Officer Ray asked defendant to submit to a roadside breath test using an Alco Sensor SFST. Defendant replied "[t]he preliminary breath test on the roadside was illegal to use in the State of North Carolina." After Officer Ray informed defendant that if he did not submit to the test, he would be taken into custody and transported to the station for a breath sample, defendant agreed to submit to the roadside breath test, which produced a positive result. Officer Ray then directed defendant out of his vehicle and administered roadside sobriety tests. According to Officer Ray, defendant exhibited "six out of the six clues" on the horizontal gaze nystagmus ("HGN") test; "[f]ive out of eight" clues on the walk-and-turn test; "two" out of "four" clues on the one-leg stand test; and exhibited clues of impairment, including swaying back and forth and inaccurately counting seconds, on the Romberg balance test. After a second breath test also produced a positive result, Officer Ray arrested defendant for DWI and transported him to the Buncombe County Detention Facility.

About ten minutes after arriving at the jail, Officer Ray brought defendant to a room containing three Intox ECIR-II machines, read him his implied-consent rights and furnished him a written copy of those rights pursuant to N.C. Gen. Stat. § 20-16.2. Defendant acknowledged his rights and agreed to submit to a chemical analysis of his breath. After waiting the required 15-minute observation period, Officer Ray attempted to administer the test on one of the three intoxilyzer machines. But after defendant's breath sample produced a "mouth alcohol" reading, Officer Ray transferred defendant to one of the

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adjacent machines for another test. After waiting another 15-minute observation period and without re-advising defendant of his implied-consent rights, Officer Ray administered the breath test on that second machine, which produced a valid result.

That same night, on 8 March 2015, Officer Ray cited defendant for misdemeanor DWI and for unlawful failure to burn rear vehicle lamps. *See* N.C. Gen. Stat. §§ 20-138.1, -129(d) (2017). On 6 June 2016, a grand jury issued a presentment requesting the district attorney investigate both offenses. On 11 July 2016, a grand jury indicted defendant of both charges.

Before trial in superior court, defendant moved to quash or dismiss the indictment for lack of jurisdiction. He argued that because the State never dismissed the citation in district court, that charge remained valid and pending, and thus the superior court lacked authority to exercise its jurisdiction over the same offense and must dismiss the indictment. *See* N.C. Gen. Stat. § 15A-954(a)(6) (2017) (requiring a court to “dismiss the charges stated in a criminal pleading if it determines that[] . . . [t]he defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still pending and valid”). The State argued it need not have dismissed the citation in the district court because the indictment superseded that charge and, further, that its records indicate there was no longer any charge against defendant pending in district court. The superior court denied the motion.

Defendant also filed three pretrial motions to suppress evidence. First, he moved to suppress all evidence on the grounds that Officer Ray lacked reasonable suspicion for the traffic stop. The superior court concluded in relevant part that reasonable suspicion existed based on Officer Ray observing the van without rear lamps illuminating the license plate in violation of N.C. Gen. Stat. § 20-129 and denied the motion. Defendant does not challenge this ruling.

Second, defendant moved to suppress all evidence based on the illegality of the roadside breath test. He argued Officer Ray (1) unlawfully compelled defendant to submit to the roadside breath test and thus the subsequent field sobriety tests results and later intoxilyzer test results constituted tainted fruit of the poisonous tree of that illegal roadside breath test search; (2) unlawfully prolonged the traffic stop because his “demand [for] a preliminary breath test constitute[d] a seizure beyond the scop[e] of the initial stop and without reasonable suspicion of criminal activity”; and (3) improperly relied upon the numerical results of

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the roadside breath test in forming probable cause to arrest defendant for DWI and, therefore, that “the State [was] unable to meet its burden to demonstrate [Officer Ray] possessed objectively reasonable probable cause to arrest the defendant.” The superior court concluded the roadside breath tests were unlawfully compelled and thus suppressed the positive-results evidence from those tests. However, it further concluded, even without that illegally obtained evidence, Officer Ray had probable cause to arrest defendant for DWI and thus declined to suppress any other evidence.

Third, defendant moved to suppress the intoxilyzer results on the grounds that Officer Ray failed to re-advise him of his implied-consent rights in violation of N.C. Gen. Stat. § 20-139.1(b5). Defendant acknowledged that Officer Ray duly advised him of his implied-consent rights under N.C. Gen. Stat. § 20-16.2 and that he agreed to submit to a chemical analysis of his breath prior to Officer Ray administering that test on the first intoxilyzer machine. He argued that because the first machine failed to produce a valid result, the administration of that test was a “nullity.” Thus, defendant asserted, Officer Ray’s subsequent request that he provide another sample to administer the test on a second machine was a request for a “subsequent chemical analysis” under N.C. Gen. Stat. § 20-139.1(b5), triggering his right under that statute to be re-advise of his implied-consent rights. Therefore, defendant continued, the results of the intoxilyzer test should be suppressed because Officer Ray failed to re-advise him of his implied-consent rights before administering the breath test on the second machine. The superior court concluded Officer Ray’s request did not trigger N.C. Gen. Stat. § 20-139.1(b5)’s re-advise requirement because it was merely a request to submit to the same chemical analysis and therefore refused to suppress the intoxilyzer results on that basis.

At trial, defendant failed to object to the introduction of the field-sobriety-tests-results evidence or the intoxilyzer-results evidence, the superior court dismissed the failure to burn rear lamps infraction due to insufficiency of the indictment, and the jury found defendant guilty of DWI.

At sentencing, defendant objected to the use of a prior DWI conviction obtained against him in superior court on 15 September 2016 to support a finding of the existence of a grossly aggravating factor for the purpose of enhancing his sentence. He argued that because the prior conviction was currently pending on appeal, it was not “final” and thus did not qualify as a “prior conviction” under N.C. Gen. Stat. § 20-179(c). The superior court concluded the prior DWI conviction, despite it being

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pending on appeal, supported a finding of the existence of a grossly aggravating factor but noted its willingness to resentence defendant if that conviction was later reversed. Accordingly, the superior court entered a judgment finding the grossly aggravating factor of a prior DWI conviction and sentencing defendant as a Level Two offender to twelve months' incarceration, suspended for eighteen months of supervised probation with special conditions that he surrender his driver's license to the Division of Motor Vehicles and serve an active term of thirty days. Defendant appeals.

II. Issues Presented

On appeal, defendant presents four issues. First, he argues the superior court erred by denying his motion to dismiss the indictment for lack of jurisdiction because the same charge against him was still valid and pending in district court. Second, that the superior court erred by denying his motion to suppress all evidence arising from the traffic stop because it was obtained during an unlawful detention that occurred as a direct consequence of an illegal roadside breath test and thus was tainted fruit of that poisonous tree. Third, that the superior court erred by denying his motion to suppress the intoxilyzer results because it improperly concluded Officer Ray's request he provide another breath sample on a different intoxilyzer machine was not a request for a "subsequent chemical analysis" under N.C. Gen. Stat. § 20-139.1(b5). And fourth, that the superior court erred by enhancing his sentence on the grounds that his prior DWI conviction, since it was currently pending on appeal, did not qualify as a "prior conviction" under N.C. Gen. Stat. § 20-179(c) and thus could not be used to support a finding of the existence of a grossly aggravating factor.

III. Motion to Dismiss Indictment for Lack of Jurisdiction

[1] Defendant first asserts the superior court erred by denying his motion to dismiss the DWI indictment for lack of jurisdiction. He argues that because the State failed to dismiss the citation charging the same offense in district court, that charge remained valid and pending in district court, and thus the superior court was required to dismiss the indictment under N.C. Gen. Stat. § 15A-954(a)(6). We disagree.

A. Review Standard

We review subject-matter jurisdiction challenges *de novo*. *State v. Rogers*, ___ N.C. App. ___, ___, 808 S.E.2d 156, 162 (2017) (citing *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007)). We

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also review issues of statutory interpretation *de novo*. *State v. Davis*, 368 N.C. 794, 797, 785 S.E.2d 312, 315 (2016).

B. Discussion

N.C. Gen. Stat. § 7A-272(a) provides that “[e]xcept as provided in . . . Article [22], the district court has exclusive, original jurisdiction for the trial of . . . misdemeanors.” N.C. Gen. Stat. § 7A-272(a) (2017); *see also State v. Felmet*, 302 N.C. 173, 174, 273 S.E.2d 708, 710 (1981) (“Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina.” (citing N.C. Gen. Stat. § 7A-272)). Section 7A-271 of Article 22 provides in relevant part that “the superior court has jurisdiction to try a misdemeanor[] . . . [w]hen the charge is initiated by presentment[.]” N.C. Gen. Stat. § 7A-271(a)(2) (2017). “‘[I]nitiating’ refers to how the criminal process in superior court began, not to what the first criminal process of any kind in any court was.” *State v. Gunter*, 111 N.C. App. 621, 625, 433 S.E.2d 191, 193 (1993) (interpreting these statutes and rejecting the defendant’s argument that the superior court lacked jurisdiction over a charge initiated by presentment because the district court first acquired jurisdiction over the same charge by citation).

Here, the 8 March 2015 misdemeanor DWI citation granted the district court authority to exercise its original jurisdiction over the charge. *See* N.C. Gen. Stat. § 7A-272(a). However, after the 6 June 2016 presentment and later indictment, the superior court had authority to exercise its jurisdiction over the charge. *See* N.C. Gen. Stat. § 7A-271(a)(2); *see also Gunter*, 111 N.C. App. at 625, 433 S.E.2d at 193–94 (holding that although a citation invoked the district court’s jurisdiction, a later presentment and indictment charging the same offense vested the superior court with jurisdiction). Because the charge in superior court was initiated by presentment, the superior court acquired jurisdiction over the offense when the indictment issued, and it thus properly denied the motion to dismiss the indictment for lack of jurisdiction.

Nonetheless, defendant argues that because the State never dismissed the citation in district court, that charge remained pending and active, and thus the superior court was required to dismiss the indictment. *See* N.C. Gen. Stat. § 15A-954(a)(6) (requiring a superior court to “dismiss the charges stated in a criminal pleading if it determines that[] . . . the defendant has previously been charged with the same offense in another North Carolina court of competent jurisdiction, and the criminal pleading charging the offense is still *pending and valid*.” (emphasis added)). We disagree.

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Here, in response to defendant's motion to dismiss the indictment in superior court, the State replied as follows:

[STATE]: . . . [T]he matter that was left in District Court is simply superseded by this indictment. A simple search of our coding and our records indicates that the only pending matters in Buncombe County against [defendant] are the Superior Court matters. The District Court case – the matter that originated in District Court is simply no longer pending. This particular indictment super[s]eded that. . . .

As a result of the fact that there's still no pending matter in District Court . . . this sort of eliminates any idea of a competing claim, that the State is attempting to find him guilty or prosecute him in two separate courtrooms. The matter in District Court just simply isn't there any more. It's here now based on that indictment.

As reflected, although the State never filed a formal dismissal of the citation in district court, it made clear that it had abandoned its prosecution in district court to the exclusion of its superior court prosecution, which effectively served as the functional equivalent of a dismissal of the district court charge, rendering it no longer valid and pending. *See State v. Cole*, No. 17-732, slip op. at 5–9 (N.C. App. Aug. 21, 2018) (unpublished) (rejecting this same argument, reasoning in relevant part that it was “evident from the transcript that defendant was only prosecuted through the Superior Court action and that the District Court action was effectively dismissed—even if no formal dismissal occurred”). Further, as a result of the State's announced election to only prosecute the charge in superior court, once jeopardy attached to the indictment, the State would be barred under double jeopardy principles from later prosecuting that charge in district court. *Cf. State v. Courtney*, ___ N.C. App. ___, ___, 817 S.E.2d 412, 420 (explaining the binding effect of the “State's election” rule in the context of a district attorney's announced election to dismiss and not to exercise the State's right to retry a hung charge after jeopardy had already attached to the indictment), *disc. rev. allowed*, ___ N.C. ___, 818 S.E.2d 109 (2018). Accordingly, we overrule this argument.

Defendant also relies on *State v. Karbas*, 28 N.C. App. 372, 221 S.E.2d 98 (1976), to support his argument that the State's failure to dismiss the citation in district court precluded the superior court from exercising its jurisdiction over the same offense. In *Karbas*, we stated that “[w]here two courts have concurrent jurisdiction of certain offenses, the court

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first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other. But when it enters a *nolle prosequi* it loses jurisdiction and the other court may proceed.” *Id.* at 374, 221 S.E.2d at 100 (citation omitted). Defendant’s reliance on *Karbas* is misguided.

To the extent that the district and superior courts here shared concurrent jurisdiction over the misdemeanor DWI charge, that concurrent jurisdiction did not exist until the superior court indictment issued on 11 July 2016. Defendant points to no evidence suggesting that, after that time, the district court exercised jurisdiction over the offense. Indeed, in his 8 September 2016 motion to dismiss the indictment for lack of jurisdiction, defendant stated “[t]he citation issued in this mat[t]er remains active, *although the case is not currently calendared in district court.*” (Emphasis added.) As there is no record evidence suggesting the district court exercised its jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court, *Karbas*’s language that the first court exercising jurisdiction over a shared offense is exclusive of the other court absent a dismissal terminating the first court’s jurisdiction provides no support here. Accordingly, we overrule this argument.

In sum, because the charge was initiated by presentment, the superior court acquired jurisdiction over the offense after the indictment issued. Despite the State’s failure to dismiss the citation in district court, it made clear it had abandoned its prosecution in district court, which served as the functional equivalent of a dismissal, rendering it no longer valid and pending, and once jeopardy attached to the indictment, the State would be precluded from later prosecuting the charge in district court under double jeopardy principles. Further, no evidence suggests the district court exercised its jurisdiction over the offense once concurrent jurisdiction with the superior court existed. Therefore, we affirm the superior court’s denial of defendant’s motion to dismiss the indictment for lack of jurisdiction.

IV. Motions to Suppress Evidence

[2] Defendant next argues the superior court erred by denying his motions to suppress the evidence discovered as a result of the traffic stop. First, he argues the results of the roadside sobriety tests and later intoxilyzer test should have been suppressed as tainted fruit of the poisonous tree of the illegal search and seizure arising from the unlawfully compelled roadside breath test. Second, he argues the intoxilyzer results should have been suppressed on the additional basis that the test was administered in violation of his implied-consent rights under N.C. Gen. Stat. §§ 20-16.2 and 20-139.1(b5). We disagree.

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A. Preservation

Defendant acknowledges that, although he filed pretrial motions to suppress this evidence on these grounds, he failed to object to the admission of that evidence at trial. Therefore, he argues that the superior court's admission of this evidence constituted plain error. N.C. R. App. P. 10(a)(4). Accordingly, we review these issues only for plain error. *See, e.g., State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 632 (2010) (“[T]o the extent defendant failed to preserve issues relating to the motion to suppress, we review for plain error.”).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). “The first step under plain error review is[] . . . to determine whether any error occurred at all.” *State v. Lenoir*, ___ N.C. App. ___, ___, 816 S.E.2d 880, 883 (2018) (quoting *State v. Oxendine*, 246 N.C. App. 502, 510, 783 S.E.2d 286, 292, *disc. rev. denied*, ___ N.C. ___, 787 S.E.2d 24 (2016)).

B. Review Standard

Our review of a suppression ruling is “strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Legal conclusions “are fully reviewable on appeal.” *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

C. Tainted Fruit

Defendant asserts the results of the roadside sobriety tests and intoxilyzer test should have been suppressed as tainted fruit of the poisonous tree of the illegal search and seizure caused by the unlawfully compelled roadside breath test. We disagree.

Initially, we note that although defendant in his written suppression motion and at the suppression hearing argued that, *inter alia*, all evidence discovered after the illegal roadside breath test should have been

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suppressed as tainted fruit of that poisonous tree, the superior court here did not directly address whether that evidence may have been acquired as a direct consequence of the illegal breath test, or whether Officer Ray was justified in prolonging the initial traffic stop to investigate defendant's potential impairment. Rather, the superior court concluded that reasonable suspicion existed to justify the initial traffic stop based primarily on defendant's license plate not being illuminated in violation of N.C. Gen. Stat. § 20-129 and that, notwithstanding the results of the illegal roadside breath test, the facts known to Officer Ray, including the later acquired results of the roadside sobriety tests, established probable cause to arrest defendant for DWI. Nonetheless, "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given . . . is sound or tenable. The crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (quoting *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987)).

"The 'fruit of the poisonous tree doctrine,' a specific application of the exclusionary rule, provides that '[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed.' " *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (quoting *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)). But "[o]nly evidence discovered as a result of unconstitutional conduct constitutes 'fruit of the poisonous tree.'" *McKinney*, 361 N.C. at 58, 637 S.E.2d at 872 (emphasis added) (citing *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)). "Once the original purpose of the stop has been addressed, in order to justify further delay, there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion . . ." *State v. Jackson*, 199 N.C. App. 236, 241-42, 681 S.E.2d 492, 496 (2009) (citation omitted). It follows that if facts independent of those acquired from unlawful police conduct established legal justification for a seizure, evidence discovered during that lawful detention would not be tainted as a direct consequence of unconstitutional conduct. *Cf. McKinney*, 361 N.C. at 59, 637 S.E.2d at 873 (applying this principle in the context of assessing tainted evidence in a search warrant affidavit); see also *id.* at 62, 637 S.E.2d at 874 ("[T]he admissibility of the evidence defendant sought to suppress turns on whether the *untainted* evidence in the supporting affidavit established probable cause to search his residence.").

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“To determine whether reasonable suspicion exists, courts must look at ‘the totality of the circumstances’ as ‘viewed from the standpoint of an objectively reasonable police officer.’ ” *State v. Johnson*, 370 N.C. 32, 34–35, 803 S.E.2d 137, 139 (2017) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 66 L. Ed. 2d 621(1981), and then *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). As defendant has not challenged the evidentiary sufficiency of the superior court’s findings, they are binding on appeal. *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (citations omitted).

Here, the superior court rendered the following unchallenged findings to support its conclusion that Officer Ray had reasonable suspicion to justify the initial traffic stop: “[(1)] Defendant was coming out of a bar [(2)] after midnight and [(3)] . . . weave[d] within his lane. He did not cross over the fog line but did several times . . . swerve onto the fog line[.]” Additionally, the superior court rendered the following unchallenged findings to support its conclusion that, notwithstanding the roadside breath test results, Officer Ray had probable cause to arrest defendant for DWI:

[(4)] the driving of the Defendant, [(5)] the strong odor of alcohol, [(6)] the fact that the Defendant presented his debit card rather than his [driver’s license], . . . [(7)] [defendant] did admit to drinking alcohol, and [defendant’s] performance on [(8)] the walk and turn test, [(9)] the HGN test, and [(10)] the Romberg balance test.

We conclude the superior court’s findings that Officer Ray observed defendant (1) exit a bar (2) after midnight (3) and swerve several times within his driving lane, combined with its findings that after the initial traffic stop, the legality of which defendant does not challenge on appeal, (4) Officer Ray smelled a “strong odor of alcohol,” (5) defendant present his debit card when asked for his driver’s license, and (6) defendant initially denied but later admitted to drinking alcohol, were sufficient to establish reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant’s potential impairment, including administering the roadside sobriety tests. Those findings in conjunction with the findings on defendant’s performance on the roadside sobriety tests in turn supported a conclusion that Officer Ray had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test. Therefore, the superior court properly refused to suppress the results of the roadside sobriety tests and the intoxilyzer test. Accordingly, we hold the superior court did not commit plain error by admitting this evidence at trial.

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[3] Defendant also argues that Officer Ray’s testimony that “[i]f [defendant] tested low enough, [he] would [have] give[n defendant] a ride home” and “for the sake of the .08 standard, [he] was going to give [defendant] a ride home if he fell below that[,]” establishes that Officer Ray “lacked sufficient information to believe that . . . defendant was appreciably impaired at the point where the alco-sensor test was administered.” This argument fails because Officer Ray’s

subjective opinion is not material. Nor are the courts bound by an officer’s mistaken legal conclusion as to the existence or non-existence of probable cause or reasonable grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required.

Bone, 354 N.C. at 10, 550 S.E.2d at 488 (emphasis omitted) (quoting *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641–42 (1982); other citation omitted); *see also id.* (holding an officer’s suppression hearing testimony that he did not believe he had probable cause to arrest was irrelevant in determining whether, objectively, the facts known to that officer created probable cause to justify a search-incident-to-arrest seizure of evidence). Having concluded above that the objective facts known to Officer Ray before the administration of the roadside breath test established reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant’s potential impairment, we overrule this argument.

D. Statutory Implied-Consent Rights

[4] Defendant next asserts the superior court erred by denying his motion to suppress the intoxilyzer results because it improperly concluded that Officer Ray was not required under N.C. Gen. Stat. § 20-139.1(b5) to re-advise him of his implied-consent rights before administering the breath test on a second machine. Defendant does not dispute that Officer Ray duly advised him of his implied-consent rights before he agreed to submit to a chemical analysis of his breath; rather, he argues that because the test administered on the first intoxilyzer machine failed to produce a valid result, it was a “nullity,” and thus Officer Ray’s subsequent request that defendant provide another sample to administer the test on a different intoxilyzer machine constituted a request for a “subsequent chemical analysis” under N.C. Gen. Stat. § 20-139.1(b5). Therefore, defendant argues, Officer Ray violated his right under that statute to be re-adviced of his implied-consent rights before administering the test on the second machine. We disagree.

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We review the superior court's legal conclusions *de novo*. *Hughes*, 353 N.C. at 208, 539 S.E.2d at 631. We also review issues of statutory interpretation *de novo*. *Davis*, 368 N.C. at 797, 785 S.E.2d at 315.

An officer must advise a person charged with DWI of his or her implied-consent rights before requesting that person to submit to a chemical analysis of the breath. N.C. Gen. Stat. § 20-16.2(a) (2017). An officer may then request that person “submit to a chemical analysis of [his or her] blood or other bodily fluid or substance *in addition to or in lieu of a chemical analysis of the breath*” and, “[i]f a subsequent chemical analysis is requested pursuant to this subsection, the person shall again be advised of the implied consent rights in accordance with G.S. 20-16.2(a).” N.C. Gen. Stat. § 20-139.1(b5) (2017) (emphasis added).

The plain and unambiguous language of N.C. Gen. Stat. § 20-139.1(b5) provides that the re-advisement right triggers only when an officer requests a person to submit to a chemical analysis of “the person’s blood or other bodily fluid or substance *in addition to or in lieu of a chemical analysis of the breath*[.]” *Id.* (emphasis added). Officer Ray’s request that defendant provide another sample for the same chemical analysis of the breath on a second intoxilyzer machine was not one for a “subsequent chemical analysis” under the statute. Accordingly, N.C. Gen. Stat. § 20-139.1(b5)’s re-advisement requirement never triggered, and the superior court properly refused to suppress the intoxilyzer results on this basis.

Nonetheless, defendant relies on *State v. Williams*, 234 N.C. App 445, 450, 759 S.E.2d 350, 353 (2014), to support his position. He argues that “*Williams* stands for the unqualified proposition that when a subsequent test is requested, the defendant must be re-advised of the implied consent rights.” We disagree. In *Williams*, we held that when a person refuses to submit to a breath test, an officer must re-advise that person of his implied-consent rights before requesting he or she submit to a blood test instead of a breath test pursuant to N.C. Gen. Stat. § 20-139.1(b5). *Id.* at 452, 759 S.E.2d at 354. Defendant’s reliance on *Williams* is misguided because the officer there requested the defendant to submit to a *different* chemical analysis—a blood test—*in lieu of* the breath test. Here, Officer Ray only requested that defendant submit to one chemical analysis—the breath test—which was not in addition to or in lieu of the original breath test. Accordingly, we overrule this argument.

V. “Prior Conviction” for Enhanced Sentence

[5] Last, defendant asserts the superior court erred by sentencing him as a Level Two offender after finding the existence of a grossly aggravating

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factor based on upon his prior DWI conviction. Defendant was convicted in superior court of DWI on 15 September 2016. He appealed that conviction on 26 September 2016, which remained pending before this Court at the time of the instant 31 August 2017 sentencing hearing. Before the superior court and now on appeal, defendant argues his prior DWI conviction could not be used to enhance his sentence because the prior conviction, since it was pending on appeal, was not “final” and therefore could not be used as a “prior conviction” to find the existence of a grossly aggravating factor under N.C. Gen. Stat. § 20-179(c). We disagree.

We review issues of statutory interpretation *de novo*. *Davis*, 368 N.C. at 797, 785 S.E.2d at 315. “When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (quoting *In re Banks*, 295 N.C. 236, 239–40, 244 S.E.2d 386, 388–89 (1978)).

N.C. Gen. Stat. § 20-179(c) defines a “prior [DWI] conviction” as a “grossly aggravating factor[]” for enhanced sentencing purposes if “[t]he conviction occurred within seven years before the date of the offense for which the defendant is being sentenced[.]” N.C. Gen. Stat. § 20-179(c)(1)(a) (2017). N.C. Gen. Stat. § 20-4.01 provides in relevant part that “[u]nless the context requires otherwise, the following definitions apply throughout . . . Chapter [20] . . .” Subdivision (4a)(a)(1) of that section defines “[c]onviction” in relevant part as “[a] *final* conviction of a criminal offense[.]” N.C. Gen. Stat. § 20-4.01(4a)(a)(1) (2017) (emphasis added). Defendant argues that because his prior DWI conviction was pending on appeal at the time of the sentencing hearing, the prior conviction was not “final” under Chapter 20’s definition of a “conviction” and it thus did not constitute a “prior conviction” under N.C. Gen. Stat. § 20-179(c)(1)(a). We disagree.

Despite N.C. Gen. Stat. § 20-4.01(4a)(a)(1) defining a conviction as a “final” conviction, we believe the “context [of finding the existence of a grossly aggravating factor based upon a prior DWI conviction in superior court] requires,” *id.* § 20-4.01, an interpretation that a “prior conviction” not be limited to only those not pending on direct appeal to the appellate courts. The plain and unambiguous language of the more specific statute of N.C. Gen. Stat. § 20-179(c)(1)(a) defines a “prior conviction” merely as a “conviction [that] occurred within seven years before” the later offense. Because there is no language limiting

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that definition to a “final” conviction or only those not challenged on appeal, we have no authority to interpret the statute as imposing such a limitation.

Further, even if we found this statutory language ambiguous, we find support for our interpretation on the grounds that interpreting it otherwise would undermine the purpose behind enhancing a repeat DWI offender’s sentence, as a person with a qualifying prior conviction appealed from superior court could be sentenced for a later conviction as though he or she had no prior conviction. Additionally, we note that if a person’s sentence is enhanced based upon a prior DWI conviction that is later reversed on direct appeal, he or she is entitled to be resentenced at the proper offender level without that prior conviction. *See State v. Bidgood*, 144 N.C. App. 267, 276, 550 S.E.2d 198, 204 (2001) (remanding for resentencing on the proper prior record level when the defendant’s sentence was enhanced based on a prior conviction that was subsequently reversed on appeal).

Therefore, the superior court properly concluded that defendant’s prior DWI conviction, despite it being pending on appeal, constituted a “prior conviction” under N.C. Gen. Stat. § 20-179(c)(1). Accordingly, we hold the superior court properly found the existence of a grossly aggravating factor based on the prior DWI conviction and affirm its sentence.

As a secondary matter, we note that this Court has since filed an opinion adjudicating defendant’s appeal from his prior DWI conviction. *See State v. Cole*, No. 17-732 (N.C. App. Aug. 21, 2018) (unpublished). While we found no error in part, we also remanded in part for resentencing and for the entry of a suppression order, *id.* slip op. at 19, with instructions for the superior court to resolve a conflict in the testimony presented at the suppression hearing, *id.* slip op. at 10–12. We reiterate that if this DWI conviction is later overturned, defendant is entitled to be resentenced at the appropriate offender level and the entry of a properly reflective judgment.

VI. Conclusion

The superior court properly denied defendant’s motion to dismiss the indictment for lack of jurisdiction because that charge was no longer pending or valid in district court. The superior court properly refused to suppress the evidence obtained after the roadside breath test because its findings support a conclusion that, before that test, Officer Ray had objective reasonable suspicion to justify prolonging the initial traffic stop to investigate defendant’s potential impairment. The superior court also properly refused to suppress the intoxilyzer results because

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[262 N.C. App. 483 (2018)]

it properly concluded that Officer Ray's request that defendant provide another sample for the same breath test on a different machine was not a request for a "subsequent chemical analysis" triggering N.C. Gen. Stat. § 20-139.1(b5)'s re-advisement requirement. Absent error in these suppression rulings, the trial court did not commit plain error by admitting that evidence at trial. Finally, the superior court properly concluded that defendant's prior DWI conviction, despite it being pending on appeal, constituted a "prior conviction" under N.C. Gen. Stat. § 20-179(c)(1), and thus supported its finding of the existence of a grossly aggravating factor for enhanced sentencing purposes. Accordingly, we hold that defendant received a fair trial and sentence, free of error.

NO ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DONALD LEON GORHAM, II

No. COA18-235

Filed 20 November 2018

Motor Vehicles—speeding to elude arrest—property damage exceeding \$1,000—sufficiency of evidence

In a prosecution for speeding to elude arrest, there was sufficient evidence to support the essential element of property damage exceeding \$1,000 where defendant drove through a house as he wrecked the car. N.C.G.S. § 20-141.5 does not specifically define how to determine the value of the "property damage"; it could be either the cost to repair the damage or the decrease in the value of the damaged property as a whole. Although a police officer did not testify as an expert, the jury could bring to the question their common sense and their knowledge gained from their experiences of everyday life.

Appeal by defendant from judgment entered 7 November 2017 by Judge Casey M. Viser in Superior Court, Rockingham County. Heard in the Court of Appeals 3 October 2018.

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[262 N.C. App. 483 (2018)]

Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State.

Winifred H. Dillon, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his conviction of felony speeding to elude arrest and contends the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence he caused over \$1,000.00 worth of property damage. Even though the police officer was not testifying as an expert in estimating property damage, his lay opinion testimony, as well as the other evidence, is substantial evidence to survive defendant's motion to dismiss. In addition, both parties agree that defendant was sentenced at the wrong prior record level. We find no error in part and vacate and remand for resentencing at the correct record level.

I. Background

On the night of 9 June 2017, defendant drove to a friend's house and drank alcohol on the front porch with several people. Around 10:00 p.m. that night, Officer Revis of the Reidsville Police Department was investigating a stolen Chevrolet Tahoe that matched the description of the vehicle defendant was driving. When Officer Revis spotted the parked vehicle, he stopped nearby and called for backup. When defendant got into his vehicle, Officer Revis immediately activated his blue lights, but defendant failed to stop. A prolonged chase ensued and defendant sped up to 80 miles per hour within the city limits of Reidsville. Defendant's vehicle struck a guardrail, but defendant continued to flee. The chase continued out of Rockingham County and into two other counties. Defendant drove his car into a residential neighborhood near Burlington and drove up a driveway and through a house. Defendant's vehicle went through the bedroom while a woman was lying in her bed with her head less than a foot away from where the vehicle passed through the house. Defendant continued driving and damaged a shed behind the house and continued to flee. At this point, officers ended the chase to assist the occupants of the house that defendant hit.

The following day, police went to the house where defendant had been drinking the night before and questioned defendant's friend and the friend's mother. While the police were present, defendant called this friend, who put the call on speakerphone. Defendant stated while on

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speakerphone, “Yeah, I got away from them motherf*****s[.]” Defendant was indicted for felony fleeing to elude arrest, reckless driving, and as a habitual felon. At trial, the State dismissed the reckless driving charge. The jury found defendant guilty of felony fleeing to elude arrest and defendant pled guilty to being a habitual felon. The trial court sentenced defendant, and defendant gave notice of appeal in open court.

II. Motion to Dismiss

Defendant argues that the State failed to present sufficient evidence that defendant caused property damage in excess of \$1,000.00, one of the aggravating factors for the speeding to elude arrest charge to be a felony under N.C. Gen. Stat. § 20-141.5.

[A] motion [to dismiss] presents a question of law and is reviewed *de novo* on appeal. The question for this Court is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

State v. Norton, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (citations and quotation marks omitted).

Defendant was convicted of felony speeding to elude arrest which requires two or more aggravating factors:

(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

(b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.

(1) *Speeding in excess of 15 miles per hour over the legal speed limit.*

....

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- (4) *Negligent driving leading to an accident causing:*
- a. *Property damage in excess of one thousand dollars (\$1,000); or*
 - b. *Personal injury.*

N.C. Gen. Stat. § 20-141.5 (2017) (emphasis added).

The State relied on N.C. Gen. Stat. § 20-141.5(b)(1) (“Speeding in excess of 15 miles per hour over the legal speed limit.”) and (4)(a) (“Negligent driving leading to an accident causing: a. Property damage in excess of one thousand dollars (\$1,000)[.]”) as the aggravating factors to elevate defendant’s charge to a felony. The only element challenged by defendant is whether the evidence is sufficient to show that the value of the property damage exceeds \$1,000.00. Defendant does not allege insufficiency of the evidence regarding any other element of the crime.

Defendant frames his issue on appeal as sufficiency of the evidence, but his argument focuses mostly on Officer Revis’s qualification to give opinion testimony on the value of the property damages. He argues that “the only evidence presented by the State as to the value of the property damage resulting from the chase and collisions was Officer Revis’s uncorroborated opinion testimony that the damage to the guardrail, the Tahoe, and the house and shed in Burlington exceeded \$1,000.”

First, Officer Revis’s testimony was not the “only evidence presented” of the property damage; the State also presented pictures and video showing the damaged property. But Officer Revis’s testimony was the only evidence assigning any value to the damages. Defendant’s argument fails to address that he did not object to Officer Revis’s testimony, so he did not preserve the issue of Officer Revis’s *qualification* to render an opinion on the value of the property damage, either as an expert or lay witness. Therefore, we consider only the sufficiency of the evidence showing damages in excess of \$1,000.00.

Defendant notes that “[t]he question of what and how much evidence is required to prove the value of damages to satisfy N.C. Gen. Stat. § 20-141.5(b)(4)(a) has not been addressed by our appellate courts.” Defendant is correct. Most cases which address the evidence required to prove value of property, where the elements of the crime include a specific value, have been addressed under N.C. Gen. Stat. § 14-72(a), which elevates misdemeanor larceny of goods to a felony charge when the value of the property stolen exceeds \$1,000.00. N.C. Gen. Stat. § 14-72(a). In that context, this Court has stated:

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Value as used in N.C. Gen. Stat. § 14-72 means fair market value. Stolen property's fair market value is the item's reasonable selling price at the time and place of the theft, and in the condition in which it was when stolen. It is not necessary that a witness be an expert in order to give his opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services.

State v. Redman, 224 N.C. App. 363, 366, 736 S.E.2d 545, 549 (2012) (quotation marks, citations, and brackets omitted).

Although cases addressing larceny of property with a fair market value over \$1,000.00 are helpful, they are not directly analogous on the evidence required to show the value of "property damage." The issue of "Property damage in excess of one thousand dollars (\$1,000)" is distinct from the fair market value of an item of property. See N.C. Gen. Stat. § 20-141.5(b)(4)(a). In cases under N.C. Gen. Stat. § 14-72(a), the value is based upon the fair market value of the property stolen since it has been entirely lost. In cases under N.C. Gen. Stat. § 20-141.5(b)(4)(a), the property has not been removed from its lawful owner; it has just been damaged, even if the damage is so severe as to destroy it. N.C. Gen. Stat. § 20-141.5(b)(4)(a) does not specify whether the \$1,000.00 valuation of "property damage" is based upon the fair market value of the property in its damaged condition compared to its original condition or upon the cost to repair the damaged property. These values may differ. For example, N.C. Gen. Stat. § 14-72.8 makes larceny of a motor vehicle part a Class I felony "if the *cost of repairing* the motor vehicle is one thousand dollars (\$1,000) or more." N.C. Gen. Stat. § 14-72.8 (2017) (emphasis added). Under this statute, it would appear that if a defendant removed a part worth \$500.00 from a vehicle, but the cost to repair the vehicle by replacing the missing part would be over \$1,000.00 because of the labor to install the new part, the larceny would be elevated to a Class I felony.¹ N.C. Gen. Stat. § 14-72.8 expressly does not depend upon the fair market value of the car itself in its damaged condition as compared to its original condition or even just the value of the stolen part. The change in the fair market value of the car with the missing part from the value of the car in its original condition may be far less than \$1,000.00, depending upon the original condition of the car and the part stolen.

1. No cases have addressed N.C. Gen. Stat. § 14-72.8.

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Another crime which includes an element of value of property damage is defined in N.C. Gen. Stat. § 14-160, regarding “willful and wanton injury to personal property.” It elevates the crime to a Class 1 misdemeanor if the injury to the property causes “damage in an amount in excess of two hundred dollars (\$200.00).” N.C. Gen. Stat. § 14-160(b). While other cases have addressed this issue tangentially, *State v. Edmondson*, 70 N.C. App. 426, 320 S.E.2d 315 (1984), *aff’d*, 316 N.C. 187, 340 S.E.2d 110 (1986), directly addressed the evidence needed to show the valuation of the damage to personal property in excess of \$200 under this statute.² In *Edmondson*, the State presented testimony and photographs showing the damage to a lumber company’s premises when

a truck . . . crashed into the back wall of the company sales offices. The door had been forced open and the offices ransacked. In the adjoining warehouse, a forklift had been used to break open the double doors leading to the sales offices. A five gallon can of roofing compound had been run over by the forklift, spilling the compound on the floor.

Id. at 426, 320 S.E.2d at 316. The defendant contended “there was no evidence presented as to the amount of damage done to the personal property[,]” but this Court determined the evidence to be sufficient to support property damages in excess of \$200.00:

After hearing all the evidence, and viewing photographs that showed extensive damage in the ransacked offices, the jury found that the damage done to the personal property exceeded \$200. While there may not have been any precise evidence as to the amount of these damages the jury was free to exercise their own reason, common sense and knowledge acquired by their observation and experiences of everyday life.

Id. at 430, 320 S.E.2d at 318 (citation omitted).

Since N.C. Gen. Stat. § 20-141.5 does not specifically define how to determine the value of the “property damage,” the value could be either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending upon the circumstances of the case. *See* N.C. Gen. Stat. § 20-141.5. Where the property is completely destroyed and has no value after the damage, the value of the property

2. *State v. Edmondson* does not specifically state that the defendant was charged under N.C. Gen. Stat. § 14-160, but this is evident from the description of the crime in the opinion.

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damage would likely be its fair market value in its original condition, since it is a total loss. But, in this case, we need not decide that issue, since defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of “property damage” caused by defendant.

Defendant relies on *State v. Rahaman*, 202 N.C. App. 36, 688 S.E.2d 58 (2010), to support his claim that “[t]here is no evidence in the record that Officer Revis had this specialized knowledge, or that Officer Revis was otherwise qualified to render an opinion as to the amount of the damage to the house, shed, and Tahoe.” But defendant’s reliance on *Rahaman* is misplaced. In *Rahaman*, the defendant objected to the police officer’s lay opinion testimony regarding the value of stolen truck. *Id.* at 48, 688 S.E.2d at 67. Here, defendant did not object to Officer Revis’s testimony and has not argued plain error on appeal. On the sufficiency of the evidence, in *Rahaman* this Court noted that “[t]he State is not required to produce direct evidence of value to support the conclusion that the stolen property was worth over \$1,000.00, provided that the jury is not left to speculate as to the value of the item.” *Id.* at 47, 688 S.E.2d at 66 (citation, quotation marks, and ellipsis omitted). The Court held that the officer’s testimony was properly admitted and noted that “the basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility.” *Id.* at 49, 688 S.E.2d at 67 (citation and brackets omitted). The officer’s testimony, along with the other evidence in *Rahaman*, was “sufficient to establish that the vehicle stolen was valued in excess of \$1,000.00 at the time of the theft, and, therefore, the trial court did not err in denying defendant’s motion to dismiss.” *Id.* at 48, 688 S.E.2d at 67.

Here, Officer Revis testified without objection:

We got towards N.C.-14 and North Scales Street, where the Defendant wrecked the vehicle into the guardrail causing damage to the guardrail; over a thousand dollars’ worth of property damage, damaged the Tahoe, but decided to continue to keep fleeing from me while I was still behind him with siren and lights on trying to stop the vehicle.

When asked directly “did [defendant] drive negligently in a manner that led to an accident causing property damage in the excess of \$1,000?” Officer Revis responded, “Yes, sir.” The State also introduced pictures of the damaged house and a video of the chase and published these to the jury. The testimony of Officer Revis and the photos and video are substantial evidence that a reasonable mind might accept as adequate

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to support the conclusion that defendant caused property damage in excess of \$1,000.00, whether as a repair cost or as a reduction in fair market value of the damaged properties. Besides hitting the guardrail, defendant drove *through* a house and damaged a nearby shed. The jury could use common sense and knowledge from their “experiences of everyday life” to determine the damages from driving through a house alone would be in excess of \$1,000.00. *See Edmondson*, 70 N.C. App at 430, 320 S.E.2d at 318.

III. Prior Record Level

Defendant argues and the State concedes that the trial court erred in sentencing defendant at a prior record level of 4 when his correct prior record level is level 3. This error was prejudicial, so defendant is entitled to a new sentencing hearing.

IV. Conclusion

The trial court did not err in denying defendant’s motion to dismiss, but we vacate and remand for a new sentencing hearing for defendant at prior record level 3.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges DILLON and BERGER concur.

STATE OF NORTH CAROLINA

v.

KELVIN OYAKHILOME IRABOR

No. COA18-243

Filed 20 November 2018

Criminal Law—self-defense—jury instructions—stand-your-ground provision

Failure to include the relevant stand-your-ground provision in the jury instructions in a homicide prosecution constituted prejudicial error and warranted a new trial. The trial court had agreed to give a pattern jury instruction which included duty to retreat and stand-your-ground provisions but failed to do so. If the defendant’s evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State’s evidence is contradictory.

STATE v. IRABOR

[262 N.C. App. 490 (2018)]

Appeal by defendant from judgments entered 2 February 2017 by Judge Robert T. Sumner in Buncombe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Kelvin Oyakhilome Irabor (“defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling. After careful review, we conclude that the trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions from its jury instructions on self-defense. Therefore, we reverse the trial court’s judgment and remand for a new trial.

I. Factual and Procedural Background

In October 2015, defendant lived in apartment 14E in the Oak Knoll apartment complex in Asheville, along with his child, London, London’s mother, Denise Williams (“Williams”), and Williams’s sister, Shamica Robinson (“Robinson”). Sometimes Dondre Nelson (“Nelson”), who was a friend of one of Robinson’s other sisters, stayed with them in apartment 14E.

Defendant testified that he had known Nelson for some time and had befriended Nelson to avoid becoming a “target.” According to defendant, Nelson was a high-ranking member of the Blood gang, which was highly active in the Oak Knoll area, and had frequently robbed individuals around the Oak Knoll apartments. Nelson had gained this status by killing a rival gang member in Atlanta, Georgia. Defendant also testified that he knew Nelson always carried a gun on his person, and Nelson had informed defendant that he had shot an individual for allegedly discharging a weapon into the Oak Knoll apartments. Since defendant knew Nelson’s reputation, he had hoped his friendship with Nelson would ensure that he did not become a target of gang activity.

On 9 October 2015, defendant rode with Nelson to an ABC store, where they met Jenna Ray (“Ray”), with whom Nelson apparently

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had a relationship. After defendant and Nelson returned to Oak Knoll, Ray also arrived. Williams was angry when she saw Ray and was prepared to attack her. When defendant stopped her from attacking Ray, Williams became angry with defendant. Williams's niece, Gelisa Madden ("Madden"), attempted to intervene, striking defendant, who struck her back.

While defending himself from Madden, defendant released Williams, who went into apartment 14E and returned with a broomstick, with which she struck defendant. Defendant responded by drawing a firearm and chasing Williams. While chasing her, he fired three shots. Williams fled into apartment 14E, and a neighbor called Nelson. One of defendant's shots allegedly struck the door of apartment 14E, where Nelson's daughter was staying at the time.

After chasing Williams, defendant left Oak Knoll for several hours. He called multiple people asking for a ride and eventually reached Nelson. Nelson was furious and refused to give him a ride. Defendant decided to walk back to Oak Knoll instead. When defendant returned to Oak Knoll, he saw Nelson and two others standing outside apartment 14E. Fearing what Nelson might do to him, defendant went to another apartment first, where he talked with Jerome Smith ("Smith"). Smith told defendant that Nelson was upset with defendant for firing a shot into apartment 14E, where Nelson's daughter was staying, and warned defendant to be careful. Defendant borrowed Smith's gun for protection.

After defendant left Smith's apartment, he walked along the sidewalk, heading back to apartment 14E. As defendant approached the apartment, Nelson called out to defendant and accused him of shooting at Nelson's daughter, which defendant denied. Nelson responded by telling defendant "this is war, empty your pocket," while advancing towards defendant. Fearing Nelson would attack and rob him, defendant pulled the gun out of his pocket, "racked it," and told Nelson to back up. Nelson continued to advance, and defendant fired two warning shots into the ground; however, Nelson remained undeterred. Nelson then lunged at defendant, and defendant fatally shot Nelson. Defendant then fled, dropping Smith's gun into the bushes.

Defendant was indicted for the first-degree murder of Nelson, assault on a female of Madden, assault with a deadly weapon with intent to kill of Williams, and discharging a firearm into an occupied dwelling. Trial commenced during the 23 January 2017 session of Buncombe County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

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At the charge conference, the trial court agreed to deliver N.C.P.I.–Crim. 206.10, the pattern jury instruction on first-degree murder and lesser-included offenses. This instruction includes instructions on self-defense and a “no duty to retreat” provision as part of the explanation of self-defense. *See* N.C.P.I.–Crim. 206.10 (June 2014) (providing that a “defendant has no duty to retreat in a place where the defendant has a lawful right to be”). N.C.P.I.–Crim. 206.10 also incorporates by reference a “stand-your-ground” provision found in N.C.P.I.–Crim. 308.10. *See id.* 308.10 (June 2017) (providing that “[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant’s ground and repel force with force”) (second set of brackets in original).

Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the “no duty to retreat” language from its actual instructions without prior notice to the parties and failed to give any part of the “stand-your-ground” instruction. Defense counsel failed to object to the instructions as given.

The jury returned verdicts finding defendant guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, and not guilty of assault on a female. The trial court sentenced defendant to a minimum of 200 and a maximum of 252 months for second-degree murder, and a minimum of 55 and a maximum of 78 months for discharging a firearm and assault, to be served consecutively in the custody of the North Carolina Division of Adult Correction.

Defendant appeals.

II. Self-Defense Instruction

Defendant contends the trial court erroneously omitted the relevant no duty to retreat and stand-your-ground provisions from the jury instructions on self-defense, which constituted reversible error. We agree.

A. Standard of Review

“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 is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense.” *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). “In determining whether an instruction on . . . self-defense must be given, the evidence is to be viewed in the light most favorable to the defendant.” *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449

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(2010) (citation omitted). Whether the trial court erred in instructing the jury is a question of law, reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

Self-defense is an affirmative defense, whereby “the defendant says, ‘I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *.’” *State v. Caddell*, 287 N.C. 266, 289, 215 S.E.2d 348, 363 (1975). Our amended “statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability.” *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 566 (2018). N.C. Gen. Stat. § 14-51.3(a) states, in relevant part:

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be* if . . . the following applies:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a) (2017) (emphasis added).

On appeal, the State contends that defendant was not entitled to an instruction on self-defense for several reasons. First, the State asserts defendant failed to present sufficient evidence to support defendant’s actual and reasonable belief that shooting Nelson was necessary to protect himself from imminent death or great bodily harm. Second, the State argues since defendant was the initial aggressor, he lost the protections of the self-defense statute. Therefore, according to the State, the trial court was not required to instruct the jury on self-defense and any error in the self-defense instruction was harmless. We disagree.

Viewed in the light most favorable to defendant, the evidence supports a jury instruction on self-defense, and the trial court agreed to give it. Defendant was fully aware of Nelson’s violent and dangerous propensities on the night of the shooting. According to defendant’s testimony, Nelson had achieved his high-ranking membership in the Blood gang by killing a rival gang member. In addition, Nelson stated that he shot an individual who he believed had shot into the Oak Knoll apartments.

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Furthermore, defendant observed Nelson robbing individuals in the apartments on multiple occasions and testified that, to his knowledge, Nelson always carried a gun with him.

Defendant's knowledge of Nelson's violent propensities, being armed, and prior acts supports the trial court's finding that defendant reasonably believed it was necessary to use deadly force to save himself from death or great bodily harm. *See State v. Strickland*, 346 N.C. 443, 459, 448 S.E.2d 194, 203 (1997) ("[E]vidence of prior violent acts by the victim or of the victim's reputation for violence may . . . prove that a defendant had a reasonable apprehension of fear of the victim." (citation omitted)); *see also* N.C. Gen. Stat. § 14-51.3(a).

Prior to the shooting, defendant offered evidence that Nelson stood outside Apartment 14E, where defendant lived, with two other individuals and was waiting to confront defendant about allegedly shooting a gun towards Nelson's daughter. Defendant also testified he borrowed a gun from Smith for protection. When Nelson noticed defendant walking towards his apartment, Nelson told defendant "this is war, empty your pocket"; continued to advance upon defendant after defendant fired two warning shots; and eventually lunged at defendant while reaching behind his back towards his waistband.

By viewing the evidence in the light most favorable to defendant, a jury could conclude that defendant actually and reasonably believed that Nelson was about to shoot him and that it was necessary for defendant to use deadly force to protect himself. The fact that defendant armed himself and did not affirmatively avoid the altercation does not make defendant the initial aggressor. *See State v. Vaughn*, 227 N.C. App. 198, 204, 742 S.E.2d 276, 279-80 (2013). Further, defendant's earlier conduct towards Williams does not make him an aggressor against Nelson.

When law enforcement officers searched Nelson's body, they did not find a gun. However, evidence presented at trial, when viewed in the light most favorable to defendant, suggested that Nelson may have been armed. Law enforcement officers testified that neither Nelson's wallet or cell phone were found on his person. Yet, Nelson had used his cell phone earlier that evening, and a receipt from Walmart was found in Nelson's pocket. Witnesses also reported seeing an unidentified female fleeing the area that night with a gun.

From this evidence, a jury could reasonably infer that defendant reasonably believed Nelson was armed at the time of the altercation. Therefore, defendant was still entitled to protect himself if he reasonably believed Nelson was armed and intended to inflict death or serious

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bodily injury on defendant. *See State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979) (noting that “an action by the victim as if to reach for a weapon was sufficient to justify an instruction on self-defense” (citation omitted)).

The State further contends that defendant’s testimony was inconsistent and, thus, insufficient. However, “if the defendant’s evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given *even though the State’s evidence is contradictory*.” *Moore*, 363 N.C. at 796, 688 S.E.2d at 449 (emphasis added) (citation omitted); *see also State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (“Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or [there are] discrepancies in defendant’s evidence.” (citations omitted)). Because the evidence, when viewed in the light most favorable to defendant, supports an instruction on self-defense, the trial court correctly gave the self-defense instruction under N.C.P.I.–Crim. 206.10. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

However, the trial court erred by failing to include the relevant no duty to retreat and stand-your-ground provisions after agreeing to provide the instructions. We initially note that this issue is preserved for appellate review. *See Lee*, 370 N.C. at 676, 811 S.E.2d at 567 (“When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.”). Here, the trial court agreed to give the pattern jury instruction under N.C.P.I.–Crim. 206.10, which includes the relevant no duty to retreat and stand-your-ground provisions; however, the trial court failed to include these provisions in its charge to the jury. Therefore, pursuant to *Lee*, this issue is preserved. *See id.*

Our Supreme Court recently affirmed that “a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.” *State v. Bass*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Oct. 26, 2018) (No. 208A17) (emphasis in original). Failure to include the relevant stand-your-ground provision constitutes prejudicial error and warrants a new trial. *Lee*, 370 N.C. at 671-72, 811 S.E.2d at 564 (holding the omission of the stand-your-ground provision amounted to an “inaccurate and misleading statement of the law[,]” requiring a new trial). Defendant is entitled to a new trial with proper jury instructions.

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III. Conclusion

The trial court committed prejudicial error by failing to include the relevant no duty to retreat and stand-your-ground provisions in the agreed-upon jury instructions on self-defense. Therefore, we reverse the judgment of the trial court and remand for a new trial. *See id.* Because we have reversed and remanded for a new trial, we need not address defendant's remaining arguments on appeal.

NEW TRIAL.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BARBARA JEAN MYERS McNEIL

No. COA17-1404

Filed 20 November 2018

1. Appeal and Error—record on appeal—district court judgment—notice of appeal to superior court—petition for writ of certiorari

The Court of Appeals treated defendant's appeal from the superior court's judgment of driving while impaired (DWI) as a petition for writ of certiorari—and granted said petition—where the record did not contain the district court's DWI judgment or the notice of appeal to the superior court and thus failed to establish that the superior court had jurisdiction.

2. Search and Seizure—traffic stop—extension—ordinary inquiries incident to stop

A traffic stop of defendant was not unlawfully extended where an officer was investigating whether defendant's vehicle was being operated without a valid license, made ordinary inquiries incident to the traffic stop, and acquired reasonable suspicion that defendant was operating the vehicle while impaired.

Judge MURPHY dissenting.

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Appeal by defendant from judgment entered 17 August 2017 by Judge Elaine M. O’Neal in Wake County Superior Court. Heard in the Court of Appeals 5 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for defendant-appellant.

ZACHARY, Judge.

Defendant Barbara Jean Myers McNeil argues that the superior court erred in denying her Motion to Suppress the evidence of her Driving While Impaired offense because it was obtained as a result of an officer’s unlawful extension of the initial traffic stop, in violation of the Fourth Amendment. Because the record is devoid of the initial Driving While Impaired judgment in the district court and the notice of appeal to the superior court, the record fails to establish that the superior court had jurisdiction in the instant case. Nevertheless, we elect to treat Defendant’s appeal as a petition for writ of certiorari, and affirm.

Background

On 18 May 2016, Officer Shaun Henry and Officer Lane of the Raleigh Police Department were on duty “in a stationary position in a marked patrol vehicle” running license tags of vehicles that passed. At one point, a vehicle drove past the officers and when they ran the vehicle’s tag information through the DCI program, they learned that the registered owner of the vehicle was a male with a suspended license. The officers then stopped the vehicle based on their suspicion that it was being driven without a valid license. Officer Henry stated that he only intended to “[i]dentify the driver of the vehicle to see first if the owner was in the car, if they were driving, who the driver of the vehicle was.”

As Officer Henry approached the vehicle, he “immediately” saw that Defendant, a female, was in the driver’s seat and that there was a female passenger next to her. When Officer Henry reached the driver’s window, Defendant did “not acknowledge [his] presence” or roll the window down, but was instead “fumbling through what appeared to be a wallet or a small clutch.” Officer Henry testified that “[i]ndicators of impaired driving are inability to locate information pertinent to a traffic stop, looking through a wallet, passing over her driver’s license or using—producing a debit card or credit card in place of a driver’s license.” Officer

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Henry “tapped on the window and asked if [Defendant] could roll the window down.”

Defendant eventually rolled her window down, but only about two inches. Officer Henry testified that “it’s kind of a red flag if a window is rolled down very minimally to the point where either words cannot be exchanged, you can barely hear what anyone is saying, or that someone is attempting to mask an odor coming from the vehicle.” Officer Henry testified that he

asked [Defendant] if she could roll [the window] down all the way. She stated she could hear me just fine. I introduced myself[.] I explained to her that the registered owner of the vehicle did have a suspended driver’s license. And she admitted that the car was not hers and made reference to it being . . . her husband’s and [that] she gets pulled over all the time for that same reason.

Officer Henry then asked Defendant “if she had her driver’s license on her[,]” to which Defendant replied that she did. However, Officer Henry noticed that Defendant “kept fumbling through the same amount of cards over and over again inside that small wallet, mumbling that she did have a license and it was active.”

In addition, Officer Henry “had to get inside th[e] [two inch window] crack in order to hear [Defendant] talking because she was looking down and mumbling down into, I guess, her lap where she was—so I could barely hear what she was saying.” In doing so, he “began to observe the odor of alcohol coming from the vehicle” as well as “[a] slight slur to her speech.” At that point, Officer Henry testified that his investigation changed “from a Chapter 20, or driving, to an impaired driving investigation based on that odor of alcohol and the slurred speech.”

When Officer Henry confronted Defendant about the smell of alcohol, “her passenger interjected stating that she was drinking the alcohol and that was what I smelled.” He asked Defendant to roll the window all the way down so that he could hear her. Defendant “muttered something else under her breath” and Officer Henry asked her to step out of the vehicle. Officer Henry instructed Defendant to exit the vehicle in order “to separate her from the odor of alcohol her passenger had admitted to consuming. I wanted to see if having her step out would separate her from that odor that I was detecting.” Defendant was then subjected to sobriety tests and subsequently charged with Driving While Impaired. Dash-cam video shows that roughly two minutes and forty-six seconds had passed between the time Officer Henry initially approached the vehicle and the time that he asked Defendant to exit the vehicle.

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Defendant filed a Motion to Suppress the evidence of the Driving While Impaired offense on the grounds that Officer Henry had unlawfully extended her roadside detention in violation of the Fourth Amendment. At the hearing, Defendant argued that Officer Henry was required to cease his investigation once he saw that the driver of the vehicle was Defendant—a woman—in that the sole “purpose for the stop [was] to address a male driver with a revoked license.” The State countered that Officer Henry developed “reasonable articulable suspicion” to believe that Defendant was intoxicated during the initial stop, and that he was therefore permitted to extend the stop in order to investigate that suspicion.

The trial court orally denied Defendant’s Motion to Suppress from the bench without making specific findings on the matter, or entering a written order. Defendant properly renewed her Fourth Amendment objection at the time the evidence was presented at trial, which the trial court again overruled. The jury thereafter found Defendant guilty of Driving While Impaired. Defendant timely appealed.

On appeal, Defendant argues that the trial court erred in denying her Motion to Suppress because “[o]nce the underlying reason for the stop of [Defendant] had been satisfied, the stop should not have been prolonged and became unlawful at that point.” Accordingly, Defendant maintains that “all evidence obtained after that point should have been suppressed.” We disagree.

Jurisdiction

[1] We initially address whether this Court has jurisdiction over Defendant’s appeal from the superior court’s judgment of misdemeanor Driving While Impaired.

“The superior court has no jurisdiction to try a defendant on a warrant for a misdemeanor charge unless [she] is first tried, convicted and sentenced in district court and then appeals that judgment for a trial *de novo* in superior court.” *State v. Felmet*, 302 N.C. 173, 175, 273 S.E.2d 708, 710 (1981) (citing *State v. Hall*, 240 N.C. 109, 81 S.E.2d 189 (1954)). In the event that “the record is silent and the appellate court is unable to determine whether the [superior court] had jurisdiction, the appeal should be dismissed.” *Id.* at 176, 273 S.E.2d at 711 (citing *State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957); *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955); and *State v. Patterson*, 222 N.C. 179, 22 S.E.2d 267 (1942)).

In the instant case, the district court’s Driving While Impaired judgment, if there was one, is not included in the record on appeal. Nor

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is there any record of notice of appeal from the district court to the superior court. Therefore, the record is silent as to whether Defendant was indeed first convicted in district court and thereafter properly appealed that judgment to superior court. We are thus unable to determine whether the superior court had jurisdiction when it entered judgment against Defendant. *See Felmet*, 302 N.C. at 176, 273 S.E.2d at 711; *State v. Phillips*, 149 N.C. App. 310, 313-14, 560 S.E.2d 852, 855, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).

Nevertheless, this Court has the option “to exercise our discretion to treat [D]efendant’s appeal as a petition for certiorari” in order to reach the merits of her arguments. *Phillips*, 149 N.C. App. at 314, 560 S.E.2d at 855 (citing N.C. Gen. Stat. § 7A-32(c) (additional citations omitted)). In the instant case, while the district court’s judgment and the notice of appeal to the superior court therefrom are not included in the record on appeal, we note that a district court proceeding is in fact alluded to in the record. The district court’s order indicates that Defendant was found guilty of Driving While Impaired, but references an unattached “DWI judgment,” which is not included in the record. Moreover, the State has not disputed that the superior court had jurisdiction in the instant case. Under these circumstances, we elect to treat Defendant’s appeal as a petition for certiorari, and grant the same. *See id.*

Merits of Defendant’s Appeal**I. Standard of Review**

Our review of a trial court’s order denying a defendant’s motion to suppress “is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Whether those facts are sufficient to support the conclusion that an “officer had reasonable suspicion to detain a defendant is reviewable *de novo*.” *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297 (2001) (citing *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001)). However, where the trial court has not made findings of fact, “[i]f there is no conflict in the evidence on a fact, failure to find that fact is not error.” *State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999). “A finding may be implied by the trial court’s denial of [a] defendant’s motion to suppress where the evidence is uncontradicted.” *Id.* (citing *State v. Cobb*, 295 N.C. 1, 18-19, 243 S.E.2d 759, 769 (1978)).

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II. Discussion

[2] The Fourth Amendment to the United States Constitution requires that an officer’s “investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.’ ” *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). The reasonable suspicion standard requires that “an officer simply must ‘reasonably conclude in light of his experience that criminal activity may be afoot.’ The officer ‘must be able to point to specific and articulable facts,’ and to ‘rational inferences from those facts,’ that justify the . . . seizure.” *State v. Bullock*, ___ N.C. ___, ___, 805 S.E.2d 671, 674 (2017) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 21, 20 L. Ed. 2d 889, 911, 906 (1968)) (ellipses omitted). We have held that “when a police officer becomes aware that a vehicle being operated is registered to an owner with a suspended or revoked driver’s license, and there is no evidence appearing to the officer that the owner is not the individual driving the automobile, reasonable suspicion exists to warrant an investigatory stop.” *State v. Hess*, 185 N.C. App. 530, 534, 648 S.E.2d 913, 917 (2007).

That a traffic stop is justified at its inception, however, does not afford the officer an unrestrained encounter with the individual. It is well established that “the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop[.]” *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citing *Rodriguez v. United States*, 575 U.S. ___, ___, 191 L. Ed. 2d 492, 499 (2015)). “Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose.” *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 498 (citations, quotation marks, and alteration omitted). “Authority for [a] seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.” *Id.* at ___, 191 L. Ed. 2d at 498 (citation omitted).

Nevertheless, it is entirely permissible for an officer to “conduct certain unrelated checks during an otherwise lawful traffic stop” so long as the “unrelated investigations” do not prolong “the time reasonably required to complete the mission” of the stop. *Id.* at ___, 191 L. Ed. 2d at 499 (brackets omitted). Otherwise, the only event in which an officer will be permitted to prolong his detention of an individual is where “reasonable suspicion of another crime arose before that mission was completed[.]” *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citing *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499).

In the instant case, Defendant argues that “[w]hile the officers might have had reasonable suspicion when they stopped the vehicle

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[D]efendant was driving, the traffic stop became unlawful when it was verified that the male owner was not driving the vehicle.” We disagree.

We first note that Defendant’s argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical “male” hairstyles nor do they all wear “male” clothing. The driver’s license includes a physical description of the driver, including “sex.” Until Officer Henry had seen Defendant’s driver’s license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

In any event, the time needed to complete an officer’s mission will always include time for the “ ‘ordinary inquiries incident to the traffic stop.’ ” *Id.* at ___, 805 S.E.2d at 673 (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499 (brackets, citation, and internal quotation marks omitted)). Such ordinary “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.* at ___, 805 S.E.2d at 673 (quoting *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499). Regardless of an officer’s precise *reason* for initially stopping a vehicle, “database searches of driver’s licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop.” *State v. Campola*, ___ N.C. App. ___, ___, 812 S.E.2d 681, 688 (2018) (citation omitted).

Defendant cites no authority for her proposition that Officer Henry’s “mission” in the instant case must have been limited solely to verifying “that the male owner was not driving the vehicle.” Rather, Officer Henry’s “mission” upon stopping Defendant’s vehicle appropriately encompassed the two minutes and forty-six seconds’ worth of “ordinary inquiries” incident to any traffic stop, including conversing with Defendant in order to inform her of the basis for the stop, asking Defendant for her driver’s license, and checking that the vehicle’s registration and insurance had not expired. *Rodriguez*, 575 U.S. at ___, 191 L. Ed. 2d at 499; *cf. State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) (“[A]n initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee’s driver’s license and registration.”). Thus, Officer Henry was not, as Defendant suggests, required to return to his vehicle at the moment he saw that a female, rather than a male, was driving the vehicle, nor upon approaching Defendant and learning that her husband was the owner of the car whose license was suspended.

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The routine information that Officer Henry sought to obtain from Defendant “was simply time spent pursuing the mission of the stop.” *Bullock*, ___ N.C. at ___, 805 S.E.2d at 676. During the course of that mission, Defendant avoided rolling her window all the way down, and Officer Henry also noticed that Defendant “kept fumbling through the same amount of cards over and over again” in an attempt to find her license. Meanwhile, Officer Henry could barely hear what Defendant was saying because she was “mumbling” and had “[a] slight slur to her speech.” This prompted Officer Henry to lean in very closely to the window, at which point he smelled “the odor of alcohol coming from the vehicle.” Despite Defendant’s passenger providing an excuse for the smell, such circumstances, along with his training and experience, provided Officer Henry with reasonable suspicion to believe that Defendant was intoxicated, warranting further investigation. *See, e.g., Farrell v. Thomas*, 247 N.C. App. 64, 68, 784 S.E.2d 657, 660, *appeal dismissed*, 794 S.E.2d 318 (2016) (“[Defendant’s] glassy, bloodshot eyes and slurred speech alone created a strong suspicion that [defendant] might be impaired.”); *State v. Veal*, 234 N.C. App. 570, 579, 760 S.E.2d 43, 49 (2014) (“Officer Cloer’s observations during the . . . encounter (the odor of alcohol and an unopened container) established reasonable suspicion to further detain and investigate the defendant.”).

Because Officer Henry developed reasonable suspicion of a new offense while he was in the process of completing his original mission in stopping Defendant’s vehicle, the Fourth Amendment clock was in essence “re-set” so as to permit him to extend the detention in order to inquire about that new violation. *See Campola*, ___ N.C. App. at ___, 812 S.E.2d at 691. Accordingly, the trial court properly denied Defendant’s Motion to Suppress.

Conclusion

We elect to treat Defendant’s appeal as a petition for writ of certiorari. Officer Henry lawfully stopped Defendant’s vehicle based on his reasonable suspicion that the vehicle was being operated by a driver without a valid license. Before Officer Henry completed the mission of the stop, he acquired reasonable suspicion that Defendant was operating the vehicle while impaired. Officer Henry was therefore permitted to extend his stop of Defendant in order to investigate the potential driving while impaired offense. The trial court did not err when it denied Defendant’s Motion to Suppress the evidence obtained from that subsequent lawful detention. Accordingly, the trial court’s denial of Defendant’s Motion to Suppress is

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AFFIRMED.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority's opinion, specifically its decision to treat Defendant's appeal as a petition for writ of certiorari and allowing of the same. I agree with the Majority's analysis as to the lack of jurisdiction and its recognition that the district court clearly alludes to the existence of a "DWI judgment" in the judgment portion of the AOC-CR-500 Form, Rev. 12/13. However, based on the record before us it is impossible to determine if the superior court had jurisdiction to conduct a trial de novo.

In order for the superior court to have acquired jurisdiction over this matter, Defendant was required to give oral notice of appeal or written notice of appeal within 10 days of entry of the judgment:

Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. *Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment.* Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket.

N.C.G.S. § 7A-290 (2017) (emphasis added). The otherwise completed and signed AOC-CR-500 Form containing the phrase "see DWI judgment[.]" contains a box for the district court judge to check in the event that Defendant has given oral notice of appeal. The district court judge left that box unchecked, indicating Defendant has not given oral notice of appeal in open court. Therefore, there is no showing that the superior court obtained jurisdiction over this matter by Defendant giving oral notice of appeal. As there was no oral notice of appeal, N.C.G.S. § 7A-290 requires a written notice, but the record lacks any evidence of written notice of appeal to the superior court. In sum, there is no showing in the record that Defendant filed a notice of appeal within 10 days of the "DWI judgment."

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Not only is the record lacking the actual district court judgment, which I would entertain treating as a petition for writ of certiorari in this particular and individualized circumstance, it lacks a showing that Defendant gave timely notice of appeal to the superior court. If Defendant's appeal was not timely, then the superior court was without jurisdiction. As a result, I do not join the Majority in allowing a *sua sponte* petition for writ of certiorari. Defendant's case should be dismissed without a discussion of the merits of his appeal. I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 NOVEMBER 2018)

BOURQUE v. ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC No. 17-1054	Mecklenburg (17CVS2059)	Affirmed
BRYANT v. NATIONSTAR MORTG., LLC No. 17-592	Catawba (16CVS1395)	Affirmed
CARTER v. ST. AUGUSTINE'S UNIV. No. 17-1008	Wake (14CVS14273)	No error in part; vacated and remanded in part
EAST HARDWOOD CO., INC. v. TRADER No. 18-498	Carteret (17CVS1052)	Dismissed
GIESEKING v. TOWN OF GROVER No. 18-441	Cleveland (17CVS1137)	Reversed and Remanded
IN RE A.B.C. No. 18-492	Columbus (15JT29)	Vacated and Remanded
IN RE CB BLADEN SOLAR LLC No. 18-390	Property Tax Commission (17PTC0016)	Affirmed
IN RE COATS SOLAR LLC No. 18-392	Property Tax Commission (16PTC0745)	Affirmed
IN RE D.E. No. 18-321	Edgecombe (16JA91)	Vacated and Remanded
IN RE E.J.R. No. 18-270	Johnston (15JT142) (15JT143) (15JT208)	Affirmed
IN RE H.H. No. 18-628	Orange (16JT48)	Affirmed
IN RE HIGHWATER SOLAR 1, LLC No. 18-396	Property Tax Commission (16PTC0746)	Affirmed

IN RE INNOVATIVE SOLAR 63, LLC No. 18-391	Property Tax Commission (16PTC0744)	Affirmed
IN RE J.D.L.B. No. 18-579	Yadkin (16JT27)	Affirmed
IN RE J.N.M. No. 18-470	Wake (16JT42-43)	Affirmed
IN RE JACOB SOLAR, LLC No. 18-394	Property Tax Commission (16PTC0764)	Affirmed
IN RE K.B. No. 17-1395	Buncombe (17SPC1076)	Affirmed
IN RE KELFORD OWNER, LLC No. 18-389	Property Tax Commission (16PTC0743)	Affirmed
IN RE M.M.S.W. No. 18-522	Gaston (15JT81)	Vacated
IN RE MAXTON SOLAR 1, LLC No. 18-393	Property Tax Commission (16PTC0766)	Affirmed
IN RE SNOW CAMP LLC No. 18-388	Property Tax Commission (16PTC0765)	Affirmed
IN RE VANCE SOLAR 1, LLC No. 18-395	Property Tax Commission (17PTC0076)	Affirmed
INT'L PROP. DEV., LLC v. K CONSTR. & ROOFING, LLC No. 17-509	Cabarrus (15CVS500)	Dismissed in part; Affirmed in part.
KYLE BUSCH MOTORSPORTS, INC. v. BOSTON No. 18-426	Iredell (15CVS1932)	Affirmed
LAMPKINS v. N.C. DEPT OF PUB. SAFETY No. 18-483	N.C. Industrial Commission (16-002598)	Affirmed
STATE v. APPLEWHITE No. 18-340	Wayne (01CRS57628) (01CRS57629)	VACATED AND REMANDED WITH INSTRUCTIONS.

STATE v. ARRINGTON No. 17-1364	Orange (14CRS51971)	No Error
STATE v. BETHEA No. 17-1419	Lee (15CRS52722)	Affirmed
STATE v. BROWN No. 18-467	Pitt (07CRS59512)	Reversed and Remanded.
STATE v. DAROSA No. 17-1267	Mecklenburg (16CRS201405) (16CRS201408-09)	No Error
STATE v. DUKES No. 18-274	Onslow (15CRS53596-97)	No Plain Error.
STATE v. FLORES No. 18-326	Cleveland (16CRS55447)	No error in part; Vacated in part
STATE v. FRAZIER No. 18-90	Onslow (16CRS27) (16CRS52122) (16CRS689) (17CRS537)	No Error
STATE v. GAME No. 18-306	Randolph (14CRS56200) (14CRS710389) (15CRS116)	Remanded for correction of clerical error.
STATE v. HAUSER No. 17-717	Forsyth (15CRS54968-69) (15CRS54973) (15CRS54975)	No Error
STATE v. JOHNSON No. 18-241	Cabarrus (16CRS55394)	No error in part, reversed in part.
STATE v. JOINER No. 18-186	McDowell (16CRS51395) (16CRS51400) (17CRS362)	No Error
STATE v. LITTLE No. 18-199	Forsyth (15CRS61566-67) (15CRS61598-600) (17CRS52552) (17CRS52554)	Affirmed
STATE v. PARRISH No. 18-77	Rowan (16CRS1296) (16CRS51618-19)	No Error

STATE v. PIERCE No. 18-358	Columbus (14CRS10) (14CRS11) (14CRS50009)	No Error
STATE v. PINNIX No. 17-1199	Forsyth (15CRS54961-62)	No Prejudicial Error
STATE v. ROBINSON No. 17-1262	Guilford (14CRS74998-99)	No Error
STATE v. WARREN No. 18-223	Pitt (16CRS50211) (16CRS50212)	No Prejudicial Error.
STATE v. WILLIAMS No. 18-402	Davie (15CRS51326)	No Error
STATE v. YOUNG No. 13-586-2	Wake (09CRS19207)	No Error in Part; Affirmed in Part.
WADHWANIA v. WAKE FOREST UNIV. BAPTIST MED. CTR. No. 18-252	Forsyth (16CVS3939)	Affirmed
WILDER v. LITTERAL No. 17-1410	Yadkin (16CVS531)	Reversed in part; vacated and remanded in part

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PAULA K. BULLOCK AND FYNMASTER, LLC, PLAINTIFFS

v.

TRENTON GLEN TUCKER, ALLISON C. TUCKER, HOLLIE TUCKER WINTERS, BRIAN KEITH WINTERS, SHARLETTE TUCKER, GLENWOOD TUCKER, TIM RICHARDSON, TUCKER LAKE RECREATIONS, INC., JOHN BEMIS, JEFF ROBERTS, AND JAKUB PILECKY, DEFENDANTS

No. COA17-1429

Filed 4 December 2018

1. Civil Procedure—Rule 53—compulsory referee—judicial review of report

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court conducted a proper review, pursuant to N.C.G.S. § 1A-1, Rule 53(g)(2), of a report issued by an appointed referee. The record reflects the trial court gave more than a perfunctory examination of the report before adopting it, and defendants' written exception to the report "in its entirety" without reference to specific findings relieved the trial court of the requirement to review the evidentiary sufficiency supporting the report's findings.

2. Civil Procedure—Rule 53—compulsory referee—adoption of report by trial court—findings and conclusions

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not err by adopting the appointed referee's report where the report's findings were sufficiently supported by the evidence and in turn supported the report's conclusions.

3. Civil Procedure—Rule 60(b) relief—striking of specific performance requirement—doctrine of impossibility

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not abuse its discretion by awarding Rule 60(b) relief in the form of striking the requirement from a prior order that plaintiffs be required to remove equipment from the lake upon termination of the parties' lease, since extraordinary circumstances existed which prevented plaintiffs from fulfilling that specific performance.

4. Civil Procedure—Rule 60(b) relief—modification of prior order—propriety

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the Court of Appeals rejected defendants'

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argument that the trial court erroneously modified a consent order upon the appointed referee's suggested remedy of Rule 60(b) relief, because the order from which the trial court struck a provision requiring plaintiffs to remove equipment from the lake upon termination of the lease was not entered by consent but upon the court's decision.

5. Civil Procedure—Rule 53—compulsory referee—judicial adoption of report—entry of proper judgment

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court's review and adoption of a report from the appointed referee pursuant to N.C.G.S. § 1A-1, Rule 53, while proper, was incomplete without entry of a proper judgment, and the trial court was directed to do so upon remand.

Appeal by defendants from order entered 3 August 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 5 September 2018.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., for plaintiff-appellees.

Daughtry, Woodard, Lawrence & Starling, LLP, by Luther D. Starling, Jr. and W. Joel Starling, Jr., for defendant-appellants.

ELMORE, Judge.

This action arose from the commercial lease of lakefront property at Tucker Lake in Johnston County that began 1 January 2012 and ended 31 December 2016. Lessors Trenton Glen Tucker, Allison C. Tucker, Hollie Tucker Winters, Brian Keith Winters, and Tucker Lake Recreations, Inc., as well as Sharlette Tucker, Glenwood Tucker, and Tim Richardson (collectively, "defendants"), appeal a trial court order that adopted a compulsory referee's report. In its report, the referee recommended that the lessees, Paula K. Bullock and Fynnmaster, LLC (collectively, "plaintiffs"), be awarded Rule 60(b) relief in the form of striking a provision in a 30 April 2014 order that amended the initial lease. That provision provided that "[u]pon termination of the lease, . . . [p]laintiffs shall remove . . . grain bin anchors" they had previously installed in Tucker Lake to support the cable system required to operate their commercial waterskiing enterprise. In its report, the referee found that defendants have thwarted plaintiffs' earnest efforts to remove the anchors since at least October 2016, and concluded that, at the time its report issued one day

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before the lease expired, it was now impossible for plaintiffs to comply with this provision of the 30 April 2014 order. After a hearing on defendants' exception to the referee's report, the trial court adopted the report in its entirety. Defendants appeal.

On appeal, defendants contend the trial court's order adopting the referee's report should be reversed because (1) the trial court perfunctorily adopted the report without adequately reviewing the evidentiary sufficiency of the referee's findings; (2) certain findings were unsupported by the evidence and the findings did not support the conclusions; and (3) the Rule 60(b) relief recommended was improper because it (a) was premised on an erroneous conclusion that it was impossible for plaintiffs to perform the anchor-removal requirement of the 30 April 2014 order, and (b) inappropriately modified a material provision of a consent order. Defendants also contend that, even if the trial court did not reversibly err in these respects, (4) the case must be remanded for entry of a proper judgment because the trial court's order merely adopted the referee's report.

We hold that the trial court adequately reviewed defendants' exceptions to the referee's findings and did not err in adopting the report in its entirety. The challenged findings were supported by the evidence, the challenged conclusions were supported by the findings, the 30 April 2014 order amending the initial lease was not a valid consent order, and the Rule 60(b) relief recommended did not amount to an abuse of discretion. Accordingly, we affirm the trial court's order. However, we remand to the trial court with instructions to enter a judgment concordant with that adopted report.

I. Background

On 1 January 2012, plaintiffs entered into a five-year *pro se* commercial lease with defendants Trenton Glen Tucker, Allison C. Tucker, Hollie Tucker Winters, Brian Keith Winters, and Tucker Lake Recreations, Inc., to use a 48-acre parcel of lakefront property at Tucker Lake for plaintiffs' "operations of a water recreation operation including . . . the construction and maintenance of underwater and above water cabling, docks buildings, and related facilities." Soon after, disputes concerning the parties' performances under the lease arose. Although the parties have been actively litigating since April 2012, we limit our discussion of the extensive procedural history to only that relevant to provide context and adjudicate the appeal.

On 3 April 2012, plaintiffs filed a verified complaint against defendants. Plaintiffs asserted claims of breach of contract, civil conspiracy,

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tortious interference with contract, and unfair and deceptive trade practices (“UDTP”); sought declaratory judgments as to interpreting certain lease provisions; and sought a temporary restraining order (“TRO”) and a preliminary injunction on the grounds that defendants have “frustrate[d their] efforts . . . to construct a cable water skiing facility[.]” On 12 April 2012, defendants cross-moved for a TRO and preliminary injunction, seeking to enjoin plaintiffs from continuing construction. On 26 April 2012, the trial court entered a TRO that, *inter alia*, enjoined defendants from unreasonably interfering with plaintiffs’ business plans. Plaintiffs then proceeded with their plan of installing three large grain bin anchors in Tucker Lake to support the cable system required for their waterskiing enterprise.

On 4 June 2012, defendants filed their answer to the complaint, moved under Rule 12(b)(6) to dismiss plaintiffs’ claims, and asserted eight affirmative defenses. Defendants also filed a third-party complaint against plaintiffs, and John Bemis, Jeff Roberts, and Jakub Pilecky (collectively, “third-party defendants”). Defendants, as third-party plaintiffs, asserted claims of breach of contract, fraud, trespass to real property, trespass to personal property, civil conspiracy, UDTP, summary ejectment, and assault. After further litigation, likely due to the number of claims and the parties’ contentiousness, the trial court on 21 May 2013 entered an order appointing a compulsory referee to, *inter alia*, “resolve any disagreement among the parties relating to the performance of the lease agreement” and “serve until the trial of this action or until further order of the Court.” Disputes about the lease and litigation continued.

In mid-January 2014, plaintiffs voluntarily dismissed six of their claims, moved for summary judgment on their three remaining claims seeking declaratory judgments on interpreting certain lease provisions, and moved for summary judgment on all of defendants’ claims in their third-party complaint. After a bench trial scheduled for 21 January, the trial court permitted the parties to negotiate outside its presence to reach a resolution of their claims. After a full day of negotiation on 22 January, the parties announced in open court they had reached an agreement, which they requested the trial court adopt as a consent order. The trial court instructed the parties to draft a consent order and reconvene the next day for its entry. But after exchanging several drafts, the parties could not mutually agree to the language of the consent order.

In mid-February 2014, the parties filed cross-motions to enforce the settlement agreement they previously announced to the trial court on 22 January. After a hearing, at which both parties presented their proposed settlement agreements, the trial court entered an order on 30 April

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2014 resolving the parties' claims and amending some provisions of the initial lease. In its order, the trial court noted the parties' "ultimate[] ineffective work toward" "attempt[ing] to finalize a Consent Order"; elected to "adopt[] Plaintiff's Motion and Order, with the addition of [two] paragraphs"; and added the following relevant provision to the lease agreement: "Upon termination of the lease [on 31 December 2016], Plaintiffs shall remove the cable system and grain bin anchors." The parties operated under the modified lease but further disputes arose and litigation continued.

Around 7 October 2016, plaintiffs began removing the cable system attached to the anchors from the premises. On 12 October, defendants moved for a TRO, seeking to enjoin plaintiffs from removing the cable system "while leaving the concrete grain bin anchors for Defendants to deal with later[.]" That same day, the trial court granted the TRO. At a review hearing two days later, evidence was presented that plaintiffs had hired an engineer to develop a plan for removing the anchors; that the engineer had proposed two plans that required lowering the water level of the lake, which plaintiffs had presented to defendants; and that defendants had rejected both proposals on the grounds that they refused to lower the water level due to ecological concerns with the lake.¹ After the hearing, the trial court entered an order on 20 October 2016 dissolving the prior TRO and denying defendants' preliminary injunction motion.

On 26 October 2016, plaintiffs filed a "Motion to Modify Permanent Injunction" in the trial court, requesting that "the requirement to remove the 'grain bin anchors' be stricken from the permanent injunction" of the 30 April 2014 order. Plaintiffs argued that the lease required defendants to "assist [Plaintiffs] in lowering water level for general maintenance of water quality in October of each year" but that defendants "have refused to lower the water level of the lake," which "needs to be lowered at least 15 feet to remove the 'grain bin anchors.'" Therefore, plaintiffs requested, "[d]ue to [defendants'] refusal to lower the water level," the trial court "modify the requirement to remove the 'grain bin anchors.'"

At a 3 November 2016 hearing on plaintiffs' motion, the trial court refused to consider the matter and referred it to the referee. On 15 November, defendants filed their response to plaintiffs' motion to modify the 30 April 2014 order and a request that the referee report on additional lease issues.

1. Because defendants have only provided 122 of 219 pages of transcript from this hearing, our discussion is limited. *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form." (citation omitted)).

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On 30 December 2016, one day before the lease expired, the referee electronically submitted its report to the parties. In its report, the referee found that plaintiffs were ready, willing, and able to comply with the anchor-removal provision, having retained an engineer and having submitted two proposals to remove the anchors to defendants in October 2016. However, defendants rejected both proposals on the grounds that they refused to lower the water level but failed to provide an alternative plan or present evidence to support their rationale that lowering the water level would cause ecological damage to the lake, refused to lower the water level as they had done annually in Octobers past, and moved for a TRO that halted plaintiffs' progress, all of which served to effectively frustrate plaintiffs from complying with the anchor-removal provision of the amended lease. As the lease was set to expire one day after its report issued, the referee concluded it was now impossible for plaintiffs to remove the anchors "[u]pon termination of the lease." The referee determined:

The plaintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order at this time. The Plaintiffs made a good faith effort to develop and implement a plan to remove the anchors while attempting to balance the environment of the lake with the need to remove the anchors. These efforts have been thwarted by the Defendants who do not want the lake level lowered but who have not offered any alternative plans for consideration nor evidence of potential damages to the lake at the level they believe is likely to occur. With the end of the lease term now upon the parties and the resistance to the Plaintiffs' plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.

Therefore, the referee recommended that the trial court award plaintiffs relief under Rule 60(b)(6) in the form of striking the provision of the 30 April 2014 order amending the lease that required them to remove the anchors.

On 13 January 2017, defendants filed with the trial court an exception to the referee's report "in its entirety" but did not specifically except to any finding or conclusion. On 28 June, after several continuances, the trial court heard defendants' exception to the referee's report. On 3 August 2017, the trial court entered an order adopting "all findings of fact and conclusions of law" contained in the referee's report. Defendants appeal.

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II. Issues Presented

On appeal, defendants assert the trial court erred by (1) “fail[ing] to make a sufficient review of the referee’s findings as required by N.C. Gen. Stat. § 1A-1, Rule 53(g)(2)”¹; and (2) adopting the referee’s report because “the referee’s findings of fact were not supported by the evidence, and the conclusions of law were not supported by the findings.” Additionally, defendants contend, even if the trial court adequately reviewed and properly adopted the report, (3) “the case should still be remanded for entry of a proper judgment.”

III. Sufficiency of Review

[1] Defendants first assert the trial court erred by “fail[ing] to make a sufficient review of the referee’s findings as required by N.C. Gen. Stat. § 1A-1, Rule 53(g)(2)” on the grounds that the trial court “ ‘perfunctorily placed the stamp of . . . approval upon the labor of the referee’ because the referee’s findings were unsupported and contradictory.” We disagree.

N.C. Gen. Stat. § 1A-1, Rule 53(g)(2) (2017) governs judicial review of a referee’s report and provides in pertinent part: “All or any part of the report may be excepted to by any party The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions.” Ordinarily, where

exceptions are taken to a referee’s findings of fact and law, it is the duty of the [trial] judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee’s findings in any other way.

Quate v. Caudle, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989) (quoting *Thompson v. Smith*, 156 N.C. 345, 346, 72 S.E. 379, 379 (1911)). However, where a party perfunctorily excepts to a referee’s report “in its entirety” and fails to specifically except to any finding, a trial court need not review the evidentiary sufficiency of the referee’s findings. *See, e.g., Anderson v. McRae*, 211 N.C. 197, 198, 189 S.E. 639, 640 (1937) (“[I]n the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be

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determined upon the facts as found by the referee.” (citations omitted)); *Chard v. Warren*, 122 N.C. 75, 79, 29 S.E. 373, 374 (1898) (“There was no exception by any of the parties to that finding of the referee, at any time, and it ought to have been confirmed by the court, because there had been no exception filed to the finding of the referee on that point.” (citation omitted)).

Here, in their written exception to the referee’s report, defendants failed to except to any particular factual finding or legal conclusion made by the referee; rather, they excepted to the referee’s report “in its entirety.” A careful review of the seventy-two-page transcript of the hearing before the trial court reveals that the only relevant exception defendants took to the referee’s findings that they now challenge on appeal concerned its finding about the absence of evidence that the anchors could be removed without lowering the water level of the lake. As no other relevant exceptions were made to the referee’s findings, they were binding and the trial court was not required to review them. *Anderson*, 211 N.C. at 198, 189 S.E. at 640 (citations omitted).

We are satisfied by the two-hour hearing on defendant’s exception to the referee’s report, and by the language in the trial court’s order—that it “reviewed in detail the Referee’s Report of December 30, 2016, Defendants’ exceptions to the same, the case file, briefs and affidavits submitted by counsel, the materials submitted to the referee, [and] prior Orders of this Court”—that the trial court thoughtfully considered defendants’ exceptions and did not perfunctorily place a stamp of approval on the referee’s labor. Accordingly, we overrule defendants’ argument that the trial court inadequately reviewed the referee’s findings under Rule 52(g)(2).

IV. Adopting the Referee’s Report

[2] Defendants next contend the trial court erred by adopting the referee’s report on the grounds that “the referee’s findings of fact were not supported by the evidence, and the conclusions of law were not supported by the findings.” We disagree.

A. Review Standard

Appellate review of factual findings made by a referee and adopted by the trial court is limited to whether the challenged findings were supported by “any competent evidence.” See *Lawson v. Lawson*, 236 N.C. App. 576, 578, 763 S.E.2d 570, 572 (2014) (“In reviewing the trial court’s judgment entered on the referee’s report, the findings of fact by a referee, approved by the trial [court], are conclusive on appeal if supported

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by any competent evidence.” (quoting *Cleveland Constr., Inc. v. Ellis-Don Constr., Inc.*, 210 N.C. App. 522, 531–32, 709 S.E.2d 512, 520 (2011)). Challenged legal conclusions are reviewed *de novo*. *Id.* (“Any conclusions of law made by the referee, however, are reviewed *de novo* by the trial court, and the trial court’s conclusions are reviewed *de novo* by the appellate court.” (quoting *Cleveland Constr.*, 210 N.C. App. at 531–32, 709 S.E.2d at 520)).

B. Findings and Conclusions

Defendants challenge the evidentiary sufficiency of the following purported findings made by the referee and adopted by the trial court: (1) “[t]he testimony of an engineer was that in order to remove the anchors the water level of the lake would need to be lowered”; (2) “[t]here was no showing by the Defendants to the court of any alternative plan for removing the anchors that would not necessitate the lowering of the lake level”; (3) “[p]laintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order at this time”; and (4) “[w]ith the end of the lease term now upon the parties and the resistance to the Plaintiffs’ plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.”

As to the first statement, because the recitation of testimony is not a valid finding, *see, e.g., In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) (“Recitations of the testimony of each witness *do not* constitute *findings of fact*[.]” (quoting *Moore v. Moore*, 160 N.C. App. 569, 571–72, 587 S.E.2d 74, 75 (2003))), its evidentiary sufficiency is irrelevant. Nonetheless, we note that despite plaintiffs’ engineer during cross-examination at the October 2016 hearing conjuring up a proposal to remove the anchors without lowering the water level of the lake, the two plans he formally proposed required lowering the water level. As to the second, defendants have not lodged a legitimate evidentiary challenge by pointing to evidence that they, indeed, presented a plan for removing the anchors not requiring lowering the water level; rather, they rely solely on plaintiffs’ engineer’s testimonial proposal that it might be possible the anchors could be so removed. Accordingly, we uphold the finding that *defendants* failed to present evidence of an alternative plan.

As the third and fourth statements are legal conclusions, *see Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) (“Generally, ‘any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law.” (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997))), our review on appeal is whether the referee’s findings adopted

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by the trial court supported these conclusions, *id.* (“A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal.” (citing *M.R.D.C.*, 166 N.C. App. at 697, 603 S.E.2d at 893)). To support these conclusions, the trial court adopted the referee’s following relevant findings:

[A]s early as October 2016 the Plaintiffs were working towards removing the anchors in an effort to comply with Paragraph 9 of the April 30, 2014 order that “[U]pon termination of the lease, the Plaintiffs shall remove the cable system and grain bin anchors.” . . .

. . . . The Plaintiffs have employed an engineer to develop a plan for removing the anchors. The engineer has present[ed] two plans to the Plaintiffs . . . each involving the lowering of the lake levels Before the Plaintiffs [could] proceed with the plan to remove the anchors the Defendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the Defendants. The Defendants have offered no alternative plan for removing the anchors nor have they offered any independent testimony regarding the harm they believe will occur to the lake with the lowering of the lake level.

The lease now terminates on December 31, 2016. This motion to modify the April 30, 2014 order was filed several days after the Defendants filed for a [TRO]. These filing[s] have delayed the process of removing the anchors prior to the termination of the lease

These findings, combined with the fact that the referee’s report was issued one day before the lease expired, support the challenged conclusions that “Plaintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order *at this time*” and “[*w*]ith the end of the lease term now upon the parties and the resistance to the Plaintiffs’ plan of removal by the Defendants, *it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.*” (Emphasis added.) Accordingly, we hold the trial court did not err in adopting the challenged findings and conclusions.

C. Rule 60(b) Relief

[3] Defendants also challenge the recommendation that plaintiffs be awarded Rule 60(b)(6) relief in the form of striking the requirement of the 30 April 2014 order that “[u]pon termination of the lease, the

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Plaintiffs shall remove the . . . grain bin anchors.” Defendants argue (1) the underlying conclusion that it was impossible for plaintiffs to comply with this requirement was erroneous because “[p]laintiffs’ own expert testified it was possible to remove the . . . anchors without draining the lake[,]” and (2) the recommended relief was improper because the 30 April 2014 order was a consent order, and neither the referee nor the trial court had authority to modify a material term of such a consent order. We disagree.

1. Review Standard

We review a trial court’s ruling on whether to grant Rule 60(b) relief for abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (“[T]he standard of review of a trial court’s denial of a Rule 60(b) motion is abuse of discretion.” (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975))).

2. Grounds for Rule 60(b) Relief

Rule 60(b)(6) authorizes relief from a judgment or order for “[a]ny . . . reason justifying relief from the operation of the judgment.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2017). “The test for whether a judgment [or] order . . . should be modified . . . under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted.” *Curran v. Barefoot*, 183 N.C. App. 331, 343, 645 S.E.2d 187, 195 (2007) (quoting *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). “Exercise of this equitable power is within the full discretion of the trial judge.” *N.C. Dep’t of Transp. v. Laxmi Hotels of Spring Lake, Inc.*, ___ N.C. App. ___, ___, 817 S.E.2d 62, 71 (2018) (citing *Thacker v. Thacker*, 107 N.C. App. 479, 482, 420 S.E.2d 479, 480 (1992)).

An “extraordinary circumstance . . . exist[s]” and “justice demands” Rule 60(b)(6) relief in the form of modifying a judgment by striking an award of specific performance pursuant to a contract when the movant shows the performance ordered is impossible. *See, e.g., Curran*, 183 N.C. App. at 343, 645 S.E.2d at 195 (holding the trial court erred by denying Rule 60(b)(6) relief in the form of amending a judgment to strike an order of specific performance requiring one party to convey to an adverse party three watercraft the party proved it did not own).

Here, the trial court adopted the following relevant findings and conclusions made by the referee to support awarding Rule 60(b)(6) relief:

[A]s early as October 2016 the Plaintiffs were working towards removing the anchors in an effort to comply

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with Paragraph 9 of the April 30, 2014 order that “[U]pon termination of the lease, the Plaintiffs shall remove the cable system and grain bin anchors.” . . .

. . . . The Plaintiffs have employed an engineer to develop a plan for removing the anchors Before the Plaintiffs [could] proceed with the plan to remove the anchors the Defendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the Defendants. The Defendants have offered no alternative plan for removing the anchors nor have they offered any independent testimony regarding the harm they believe will occur to the lake with the lowering of the lake level.

The Plaintiffs made a good faith effort to develop and implement a plan to remove the anchors while attempting to balance the environment of the lake with the need to remove the anchors. These efforts have been thwarted by the Defendants who do not want the lake level lowered but who have not offered any alternative plans for consideration nor evidence of potential damage to the lake at the level they believe is likely to occur. With the end of the lease term now upon the parties and the resistance to the Plaintiffs’ plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.

. . . . The Defendants object to lowering the lake levels and have sought to restrain the Plaintiffs from so doing. Given that the lease will end in one day, the Plaintiffs have been stopped from proceeding with the plan to remove the anchors prior to the termination of the lease and the Defendants have made no offer or an alternative plan for removing the anchors. It is now impossible for the portion of Paragraph 9 of the April 30, 201[4] order to be enforced.

Defendants challenge the conclusion that the plaintiffs’ performance of the anchor-removal requirement of the 30 April 2014 order was impossible on the grounds that “[p]laintiffs’ own expert testified it was possible to remove the . . . anchors without draining the lake.” Contrary to defendants’ interpretation, we construe this impossibility-of-performance conclusion not as one grounded in an underlying determination that it was impossible for plaintiffs to “remove the . . . grain

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bin anchors” without lowering the water level. Rather, we construe the conclusion as one grounded in an underlying determination that it was now impossible for plaintiffs to remove the anchors “[u]pon termination of the lease” because the lease expired the next day. As the referee and trial court correctly concluded, the doctrine of impossibility operated to excuse plaintiffs’ from further performing this provision of the modified lease. By the time the referee issued its 30 December 2016 report, it had become impossible for plaintiffs to remove the anchors “[u]pon [the 31 December 2016] termination of the lease.”

Further, the lease provided that “[defendants] agree[] to assist [plaintiffs] in lowering water level for general maintenance of water quality in October of each year,” and the referee made the following relevant unchallenged findings: (1) “Defendants . . . knew that anchors would need to be removed as this was made a part of the [30 April 2014] order”; (2) “the water levels of the lake are annually lowered during the months of September to December”; (3) “[a]t the time the [30 April 2014] order was entered . . . [it] did not place any restrictions on or address the lowering of the lake level as it was regular practice to lower the lake”; (4) “[p]laintiffs now come to the point in time that the lake level is usually lowered” and “have employed an engineer to develop a plan for removing the anchors,” who “present[ed] two plans . . . involving . . . lowering . . . the lake levels”; (5) “[d]efendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the [d]efendants”; (6) this “filing [has] delayed the process of removing the anchors prior to the termination of the lease”; (7) “[p]laintiffs made a good faith effort to develop and implement a plan to remove the anchors” but their “efforts have been thwarted by the [d]efendants who do not want the lake level lowered but who have not offered any alternative plans”; (8) “[t]here is nothing in the record to indicate that at the time the [30 April 2014 order] was entered the [d]efendants would later raise an objection to the lowering of the water level to remove the anchors at the termination of the lease as the water level of the lake was known to be lowered annually by all parties”; and (9) “[d]efendants object to lowering the lake levels and have sought to restrain the [p]laintiffs from so doing.”

These unchallenged findings adopted by the trial court establish, alternatively, that plaintiffs made a sufficient showing that defendants effectively prevented them from removing the anchors “[u]pon termination of the lease.” See *Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906) (“It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.”);

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see also Goldston Bros. v. Newkirk, 233 N.C. 428, 432, 64 S.E.2d 424, 427 (1951) (“As a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the adversary party, and ordinarily the party whose performance is thus prevented is discharged from further performance[.]”).

Accordingly, we conclude that the findings established “extraordinary circumstances . . . exist[ed]” based on defendants’ refusing to annually lower the water level and rejecting plaintiffs’ proposals to remove the anchors, and that plaintiffs showed “justice demands that relief be granted” from enforcing the modified lease requirement that they remove the anchors “[u]pon termination of the lease” based upon the doctrines of impossibility and/or prevention. Accordingly, we hold the trial court did not abuse its discretion in determining plaintiffs are entitled to relief under Rule 60(b)(6) of striking this requirement from the 30 April 2014 order.

3. Application of Rule 60(b) Relief to Settlement Agreement

[4] Defendants also assert the challenged Rule 60(b) relief recommended was improper because the 30 April 2014 order represented the parties’ settlement agreement, and Rule 60(b) provides no authority to modify material terms of such a consent order or judgment. Because we conclude the 30 April 2014 order was not entered by consent, we overrule this argument.

In the 30 April 2014 order, the trial court made the following unchallenged findings:

3. The parties, after a full day of settlement negotiations [on 22 January 2014] outside the presence of the Court, informed the Court in chambers of a settlement.

4. All parties . . . with their attorneys appeared before the Court in open session and recited for the record the terms of a settlement agreeable to all parties hereto

. . . .

6. The parties . . . consented to and agreed upon the terms as being entered pursuant to this Order [.] . . .

7. *After further hearings or appearances before this Court, significant discussion and correspondence among the parties’ counsel, attempts to finalize a Consent Order, and ultimately ineffective work toward that end,*

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Plaintiffs and Defendants filed separate motions to Enforce the Settlement Agreement.

8. *The Court adopts Plaintiffs Motion and Order, with the addition of the paragraph 8, and 17, herein.*

(Emphasis added.) As reflected, although the parties after negotiating on 22 January 2014 announced in open court they had reached a settlement agreement, they were unable to agree to the terms of a consent order. Rather, both parties later moved to enforce the settlement agreement and, at the hearing on the motions, both parties presented their proposed settlement agreements to the trial court. The trial court's 30 April 2014 order adopted plaintiffs' proposed agreement but added two other paragraphs. This establishes that the order was contested at least by defendants and was therefore not entered by consent. Further, contrary to the styling of plaintiffs' proposed settlement agreement as "Consent Order," the 30 April 2014 order was styled merely as "Order"; and only the trial judge, not the parties, signed the order. As the 30 April 2014 order was not a consent order, we overrule this argument.

V. Entry of Proper Judgment

[5] Last, defendants contend that even if the trial court's review and adoption of the referee's report did not amount to reversible error, the case must be remanded for entry of a proper judgment. We agree.

Under North Carolina Civil Procedure Rule 53(g)(2), "[n]o judgment may be rendered on any reference except by the judge." N.C. Gen. Stat. § 1A-1, Rule 53(g)(2). Where, as here, a trial court adopts a referee's report without entering a judgment, the appropriate disposition is to remand the case for entry of a judgment in accordance with the approved referee's report. *See Morpul, Inc. v. Mayo Knitting Mill, Inc.*, 265 N.C. 257, 268, 143 S.E.2d 707, 716 (1965) ("We note, however, that [the trial judge], with the exception of the one item of cost, merely affirmed, *ipsis verbis*, the referee's report, without entering any judgment upon it. But the parties have treated his order as a judgment, and, to dispose of the appeal, so do we. The case is remanded to the Superior Court for judgment in accordance with the report as amended by [the trial judge]."); *see also Rouse v. Wheeler*, 17 N.C. App. 422, 427, 194 S.E.2d 555, 558 (1973) ("We find no error in the order of approval and confirmation [of the referee's report] by [the trial judge]. However, in view of the fact that [the trial judge] did not enter a [j]udgment based on the approved findings of fact and conclusions of law other than to make an allowance for the referee's fee, this cause is remanded to the superior court with directions that a proper judgment be entered herein."). Accordingly, we

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remand this matter to the trial court with instructions to enter a proper judgment in accordance with the adopted referee's report.

VI. Conclusion

The trial court adequately reviewed defendants' exceptions to the referee's findings. The challenged findings were supported by competent evidence, the challenged conclusions were supported by the findings, and the trial court did not abuse its discretion in ultimately determining that plaintiffs should be awarded relief under Rule 60(b)(6) in the form of striking the requirement of the 30 April 2014 order that "[u]pon termination of the lease, Plaintiffs shall . . . remove the grain bin anchors." Accordingly, we affirm the trial court's order adopting the referee's report. However, we remand this matter to the trial court with instructions to enter a proper judgment concordant with that report.

AFFIRMED AND REMANDED.

Judges DILLON and DAVIS concur.

THE ESTATE OF ANTHONY LAWRENCE SAVINO, PLAINTIFF

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, A NORTH CAROLINA
HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM
AND CMC-NORTHEAST, DEFENDANT

No. COA17-1335

Filed 4 December 2018

1. Medical Malpractice—administrative negligence—pleadings

The trial court erred by allowing plaintiff to proceed on an administrative negligence theory in a medical malpractice case where the issue was the sufficiency of the pleading. The definition of "medical malpractice action" has been expanded to include the breach of administrative or corporate duties by hospitals and there are two kinds of corporate negligence claim: negligence in clinical or medical care and negligence in the administration or management of the hospital. The negligence allegations in this case were not sufficient to put defendant on notice of a claim of administrative negligence.

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2. Statutes of Limitation and Repose—medical malpractice—refiled complaint—relation back

A negligence claim against a hospital arising from the emergency room treatment of a decedent was barred by the statute of limitations, regardless of whether plaintiff pleaded wrongful death in addition to medical malpractice, where both limitations periods expired prior to plaintiff refiled a voluntarily dismissed claim. Relation-back applies only to those claims in the second complaint that were included in the voluntarily dismissed complaint. Medical or clinical negligence and administrative negligence are distinct claims and any administrative negligence claim in the second complaint did not relate back because there were no allegations of breaches of administrative duties in the first complaint.

3. Medical Malpractice—expert witness—community standard of care—sufficiency of evidence

The trial court did not abuse its discretion in a medical malpractice action by determining that plaintiff's expert qualified as an expert on the community standard of care. North Carolina law does not prescribe a particular method by which a medical doctor must become familiar with the standard of care in a particular community. The expert's testimony here was based on review of a lengthy demographics package, internet research, and the expert's comparison of this community to the Albany Medical Center, where he had practiced and where he taught. Although defendant contended that the evidence was not sufficient to show familiarity with community standards because the expert had never been in the area, had never practiced in North Carolina, held a license in North Carolina, or previously testified in North Carolina, there was precedent holding sufficient similar basis for determining familiarity with the community standard of care.

4. Medical Malpractice—administrative and medical negligence—instructions—JNOV on administrative negligence improperly denied

In a medical malpractice action involving both administrative and medical or clinical negligence in which a JNOV was improperly denied on administrative negligence, defendant did not show that the error impacted the jury instructions to its detriment. The instructions used "implement" and "follow" in regard to protocols, but the two terms were not synonymous in this case. However, considered in their entirety, the instructions were not likely to mislead the jury because there was ample evidence that defendant failed to

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follow its policies and that the attending emergency room nurse did not collect or communicate pertinent medical information.

5. Evidence—medical malpractice—administrative and clinical—hospital accreditation documents—mixed claims—not prejudicial

There was no prejudicial error in a medical malpractice action against a hospital in the admission of some of the hospital's accreditation documents. Although the claim was for both administrative and clinical negligence, and the administrative negligence claim proceeded erroneously, evidence of the defendant's policies and protocols was relevant to establish a standard of care for clinical negligence and defendant did not show that the evidence impacted the verdict on clinical negligence.

6. Damages and Remedies—pain and suffering—medical malpractice

An award for pain and suffering in a medical malpractice action against a hospital was remanded for a new trial where a doctor testified that a decedent who had suffered chest pain earlier in the day more likely than not suffered pain at home before dying. Where the only evidence was that it was likely that decedent experienced pain because he had previously experienced chest pain, the evidence was insufficient to establish damages for pain and suffering to a reasonable degree of certainty. However, the jury only separated the damages into economic and non-economic categories and it was impossible to determine which portion of the award was for pain and suffering. The matter was remanded for a new trial on the issue of non-economic damages.

7. Medical Malpractice—contributory negligence—not reporting EMT treatment to emergency room personnel

The trial court did not err in a medical malpractice action against a hospital by granting plaintiff's motion for a directed verdict on contributory negligence where decedent did not report to emergency room personnel that EMTs gave him medication on his way to the hospital. There was no evidence that defendant failed to report his symptoms.

Judge MURPHY concurs in the result only.

Appeal by defendant from judgment entered 8 December 2016 and orders entered 19 January 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 5 June 2018.

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Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and Matthew W. Krueger-Andes, and Horack, Talley, Pharr & Lowndes, P.A., by Kimberly Sullivan, for defendant-appellant.

Bradley Arant Boult Cummings LLP, by Robert R. Marcus, for defendant-appellant.

ARROWOOD, Judge.

The Charlotte-Mecklenburg Hospital Authority (“defendant”), d/b/a Carolinas Healthcare System and CMC-Northeast, appeals from judgment in favor of the Estate of Anthony Lawrence Savino (“plaintiff”) and orders denying motions for a judgment notwithstanding the verdict (“JNOV”) or for a new trial. For the following reasons, we reverse in part, vacate in part, and grant a new trial on non-economic damages.

I. Background

Anthony Lawrence Savino (“decendent”) died on the evening of 30 April 2012 after receiving medical treatment at CMC-Northeast earlier that afternoon in response to complaints of chest pain, a headache, dizziness, and numbness and tingling in his arms and hands.

Specifically, Cabarrus County EMS responded to an emergency call regarding decendent’s report of chest pain at approximately 1:32 p.m. on 30 April 2012. While transporting decendent to CMC-Northeast, EMS treated decendent with aspirin and a nitroglycerin tablet to relieve his chest pain. Decendent arrived at CMC-Northeast at approximately 2:22 p.m. The admitting nurse at CMC-Northeast was told verbally by the EMT of EMS’s treatment and the admitting nurse signed an “EMS Snapshot” that detailed EMS’s treatment. The admitting nurse recorded decendent’s complaints into his medical chart. Decendent was then examined by an emergency department physician who reviewed decendent’s medical chart. The admitting nurse did not relay to the emergency department physician the information provided by the EMT or included in the “EMS Snapshot.” The emergency room physician documented decendent’s complaints and ordered diagnostic tests. Results of decendent’s lab work were not unusual, leading the physician to report a “negative cardiac work-up.” Decendent was discharged at approximately 5:31 p.m. with

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instructions to follow-up with his primary care physician. Hours later, at approximately 10:58 p.m., decedent's widow found him unresponsive and immediately called EMS. Resuscitation efforts were unsuccessful and decedent was pronounced dead at the scene.

Almost two years after decedent's death, plaintiff and decedent's widow filed an initial "Complaint for Medical Negligence" on 23 April 2014 against defendant, the attending emergency room physician, and the attending emergency room physician's practice (the "2014 Complaint"). Defendant filed an answer with affirmative defenses and a declaration not to arbitrate on 3 July 2014.

On 6 January 2016, plaintiff filed a motion for leave to amend the 2014 Complaint "to conform to the evidence presented to date" "out of an abundance of caution[.]" Plaintiff then filed a withdrawal of the motion for leave to amend the complaint on 15 January 2016, followed by a notice of voluntary dismissal as to all parties without prejudice to refile against defendant only on 19 January 2016. Plaintiff and decedent's widow refiled a "Complaint for Medical Negligence" against defendant on 1 February 2016 (the "2016 Complaint"); the attending emergency room physician and the physician's practice were no longer named as defendants.¹ Defendant filed an answer with affirmative defenses and a declaration not to arbitrate on 5 April 2016.

The case was tried before a jury in Cabarrus County Superior Court, the Honorable Julia Lynn Gullett presiding, between 24 October 2016 and 15 November 2016.

A disagreement between the parties arose during the trial court's consideration of pretrial motions when plaintiff asserted that "obviously this is a medical negligence case" and explained that "there's basically two contentions of negligence in this case[.]" Plaintiff then asserted that it was proceeding on both theories—negligence in the provision of medical care and negligence in the performance of administrative duties. Defendant disagreed that there were two theories of negligence in this case, asserting "[t]he complaint only alleges one theory of negligence."

The parties continued to argue over this issue throughout the hearing of pretrial motions and the trial. Defendant consistently maintained that plaintiff did not plead a claim for administrative negligence. Plaintiff argued its general negligence allegations pleaded in the 2016 Complaint were sufficient to assert both theories of negligence and

1. It appears that, at some point prior to the case being tried, decedent's widow was dismissed from the action as her name does not appear on the judgment or orders.

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that defendant was on notice of the administrative negligence claim from plaintiff's designation of experts. The trial court allowed plaintiff to proceed on both negligence theories.

At the close of plaintiff's evidence, defendant moved for a directed verdict. Among the grounds argued, defendant claimed plaintiff did not plead an administrative negligence claim and that, to the extent the paragraphs added to the 2016 Complaint alleged administrative negligence, those portions were barred by the statute of limitations. The trial court denied defendant's motion for a directed verdict without hearing argument from the plaintiff. Defendant later filed a renewed motion for a directed verdict at the close of all the evidence on 10 November 2016. In the motion, defendant asserted there was insufficient evidence and that any claim for administrative negligence should be dismissed because it is barred by the statute of limitations. The trial court again denied defendant's motion.

On 15 November 2016, the jury returned verdicts finding decedent's death was caused by defendant's negligent provision of medical care and defendant's negligent performance of administrative duties. The jury found that plaintiff was entitled to \$680,000.00 in economic damages and \$5,500,000.00 in non-economic damages. The jury also found that defendant's provision of medical care and defendant's performance of administrative duties were both in reckless disregard to the rights and safety of others.

On 8 December 2016, the trial court entered judgment on the jury verdicts awarding plaintiff \$6,130,000.00 in total damages, plus pre- and post-judgment interest as allowed by law. On 12 December 2016, the trial court entered an additional order for costs awarding plaintiff \$417,847.15 in pre-judgment interest and \$15,571.35 in costs.

Following the entry of judgment, on 16 December 2016, defendant filed a motion for a "JNOV" or for a new trial pursuant to Rule 50(b)(1) and Rule 59 of the North Carolina Rules of Civil Procedure. Defendant moved the court to

set aside the Verdict of the Jury and the Judgment entered thereon and to enter Judgment in accordance with the Defendant's Motion for Directed Verdict submitted and argued by the Defendant at the close of the evidence offered by the Plaintiff and renewed at the close of all the evidence, or in the alternative, for a new trial on all issues, or in the alternative, for remittitur.

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The motions were heard before Judge Gullett in Cabarrus County Superior Court on 19 January 2017 and the trial court entered separate orders denying defendant's motions for a JNOV and a new trial that same day.

On 7 February 2017, defendant filed notice of appeal to this Court from the 8 December 2016 judgment and the 19 January 2017 orders.

II. Discussion

Defendant's primary arguments on appeal concern the trial court's denial of its motion for a JNOV on the administrative negligence and medical negligence claims. Alternatively, defendant argues the trial court erred in allowing the jury to award damages for pain and suffering and in granting plaintiff's motion for a directed verdict on defendant's contributory negligence defense.

1. JNOV

Defendant contends the trial court erred in denying its motion for a JNOV because (1) plaintiff failed to plead a claim for administrative negligence, (2) any claim pleaded in the 2016 Complaint for administrative negligence was barred by the applicable statute of limitations, and (3) plaintiff did not present sufficient evidence of either administrative negligence or medical negligence.

Generally, a motion for a directed verdict or for a JNOV raises the issue of the legal sufficiency of the evidence. Thus, our appellate courts have explained that, "[o]n appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). Because of this high standard, "[our Supreme Court] has . . . held that a motion for judgment notwithstanding the verdict is cautiously and

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sparingly granted.” *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985).

“[Q]uestions concerning the sufficiency of [the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law[.] On appeal, this Court thus reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*.” *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 341-42, 658 S.E.2d 1, 4 (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 469, 665 S.E.2d 737 (2008). “Therefore, we consider the matter anew and . . . freely substitute our judgment for that of the trial court regardless of whether the trial court made findings of fact and conclusions of law.” *Hodgson Const., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007) (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 28 (2008).

A directed verdict or a JNOV is also appropriate if an affirmative defense is established as a matter of law and there are no issues to be decided by the jury. *See Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 341, 427 S.E.2d 149, 152 (1993) (addressing a statute of limitations argument in a breach of contract case). We review those questions of law which establish bases for a directed verdict or a JNOV *de novo*.

A. Administrative Negligence

[1] Defendant’s first argument on appeal is that the trial court erred in denying its motion for a JNOV on the administrative negligence claim because the claim was not pleaded in plaintiff’s complaint. Consequently, defendant contends the trial court should not have allowed plaintiff to proceed on the administrative negligence claim at trial. Plaintiff contends “corporate negligence” was pleaded all along.

Rule 8 of the North Carolina Rules of Civil Procedure outlines the general rules of pleadings. It provides as follows:

A pleading which sets forth a claim for relief . . . shall contain

- (1) 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, and
- (2) A demand for judgment for the relief to which he deems himself entitled. . . .

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N.C. Gen. Stat. § 1A-1, Rule 8(a) (2017). Rule 8 further provides that “[n]o technical forms of pleading . . . are required” and that “[e]ach averment of a pleading shall be simple, concise, and direct.” N.C. Gen. Stat. § 1A-1, Rule 8(e)(1). Lastly, “[a]ll pleadings shall be so construed as to do substantial justice.” N.C. Gen. Stat. § 1A-1, Rule 8(f).

This Court has described the general standard for civil pleadings under Rule 8 as “notice pleading.” That is, “[p]leadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.” *Haynie v. Cobb*, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010) (internal quotation marks and citation omitted). “As we have consistently held, the policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleading.” *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895, *disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). “While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim” *Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 44, 742 S.E.2d 287, 293 (2013) (internal quotation marks and citation omitted).

The question raised by defendant’s first argument on appeal is whether plaintiff sufficiently pleaded a medical malpractice claim for administrative negligence to put defendant on notice of the claim. We hold plaintiff did not sufficiently plead administrative negligence.

As detailed above, two complaints were filed in this case. For purposes of addressing the sufficiency of the pleadings, it is plaintiff’s 2016 Complaint that is relevant to our analysis. The parties, however, also refer to both the 2014 Complaint and plaintiff’s motion to amend the 2014 Complaint in support of their respective arguments regarding whether the 2016 Complaint sufficiently pleaded administrative negligence. Specifically, defendant contends that all of the allegations of negligence pleaded in the 2016 Complaint and the 2014 Complaint focused exclusively on the clinical care provided by defendant to decedent. Consequently, defendant contends plaintiff asserted a medical negligence claim but not an administrative negligence claim.

Instead of responding to defendant’s distinction between medical negligence claims and administrative negligence claims, plaintiff spends the majority of its response asserting that both the 2016 Complaint and 2014 Complaint sufficiently allege “corporate negligence.” Citing *Estate of Ray v. Forgy*, 227 N.C. App. 24, 744 S.E.2d 468, *disc. review denied*,

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367 N.C. 271, 752 S.E.2d 475 (2013), plaintiff acknowledges that “[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital.” 227 N.C. App. at 29, 744 S.E.2d at 471 (quoting *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 213 (2001)). Nevertheless, plaintiff’s argument does not focus on whether it has pleaded a claim for administrative negligence. Plaintiff instead argues that, “under North Carolina law, to state a valid claim for corporate negligence, a plaintiff need only allege the hospital breached the applicable standard of care based on any one of the many clinical *or* administrative duties owed by the hospital.” (Emphasis in plaintiff’s argument). During oral argument before this Court, plaintiff consistently repeated its argument that it sufficiently pleaded “corporate negligence.”

It is not clear from plaintiff’s argument on appeal whether plaintiff fully comprehends defendant’s argument or the distinction between types of medical malpractice actions in N.C. Gen. Stat. § 90-21.11.

Prior to 2011, “medical malpractice action” was defined in our General Statutes as a “civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental or other health care by a health care provider.” N.C. Gen. Stat. § 90-21.11 (2009). The term “health care provider” was defined to include a hospital. *Id.* Applying these definitions, this Court recognized that a hospital could be held liable for medical malpractice where claims of corporate negligence arose out of clinical care provided by the hospital to a patient. *Estate of Waters*, 144 N.C. App. at 101, 547 S.E.2d at 144-45.

In 2011, the General Assembly expanded the definition of “medical malpractice action” in N.C. Gen. Stat. § 90-21.11 to include civil actions against a hospital for damages for personal injury or death arising out of the hospital’s breach of administrative or corporate duties to patients. *See* 2011 N.C. Sess. Laws ch. 400, § 5 (retaining the previous definition outlining medical negligence claims as subdivision (a) and adding subdivision (b) to incorporate administrative negligence claims). In full, the definition of “medical malpractice action” in N.C. Gen. Stat. § 90-21.11 now includes either of the following:

- a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

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- b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2) (2017). The term “health care provider” continues to include a hospital following the amendments. *See* N.C. Gen. Stat. § 90-21.11(1)(b).

This appears to be the first case deciding the pleading requirements for administrative negligence as a malpractice action following the 2011 amendments to the statute. However, we do not perceive that the legislature intended to create a new cause of action by the 2011 amendment, but rather intended to re-classify administrative negligence claims against a hospital as a medical malpractice action so that they must meet the pleading requirements of a medical malpractice action rather than under a general negligence theory.

Upon review of the amended N.C. Gen. Stat. § 90-21.11, we now reiterate what plaintiff has acknowledged this Court explained in *Estate of Ray*, “[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital.” 227 N.C. App. at 29, 744 S.E.2d at 471 (internal quotation marks and citations omitted). Following the 2011 amendments to N.C. Gen. Stat. § 90-21.11, both types of corporate negligence claims are considered medical malpractice actions.

In this case, defendant’s argument is not that plaintiff failed to allege corporate negligence, as plaintiff frames the issue in its response. Defendant contends only that plaintiff failed to allege breaches of administrative duties necessary to plead an administrative negligence claim under N.C. Gen. Stat. § 90-21.11(2)(b).

This Court has explained that

[a] plaintiff in a medical malpractice action may proceed against a hospital . . . under two separate and distinct theories—*respondeat superior* (charging it with vicarious

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liability for the negligence of its employees, servants or agents), or *corporate negligence* (charging the hospital with liability for its employees' violations of duties owed directly from the hospital to the patient)."

Clark v. Perry, 114 N.C. App. 297, 311-12, 442 S.E.2d 57, 65 (1994) (internal citations omitted) (emphasis in original). In the 2016 Complaint, plaintiff makes clear in paragraph 3 that

[a]ll allegations contained herein against said corporation also refer to and include the principals, agents, employees and/or servants of said corporation, either directly or vicariously, under the principles of corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior and that all acts, practices and omissions of [d]efendant's employees are imputed to their employer, [defendant].

Plaintiff then summarizes the "medical events occasioning [the] Complaint" in paragraph 6 and specifically identifies the following alleged negligent acts of defendant in paragraph 7:

Defendant, including by and through its agents, servants and assigns, including its nursing staff, was negligent in its care of [decedent] in that it, among other things:

- a. Failed to timely and adequately assess, diagnose, monitor and treat the conditions of [decedent] so as to render appropriate medical diagnosis and treatment of his symptoms;
- b. Failed to properly advise [decedent] of additional medical and pharmaceutical courses that were appropriate and should have been considered, utilized, and employed to treat [decedent's] medical condition prior to discharge;
- c. Failed to timely obtain, utilize and employ proper, complete and thorough diagnostic procedures in the delivery of appropriate medical care to [decedent];
- d. Failed to exercise due care, caution and circumspection in the diagnosis of the problems presented by [decedent];

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- e. Failed to exercise due care, caution and circumspection in the delivery of medical and nursing care to [decedent];
- f. Failed to adequately evaluate [decedent's] response/lack of response to treatment and report findings;
- g. Failed to follow accepted standards of medical care in the delivery of care to [decedent];
- h. Failed to use their best judgment in the care and treatment of [decedent];
- i. Failed to exercise reasonable care and diligence in the application of his/her/their knowledge and skill to [decedent's] care;
- j. Failed to recognize, appreciate and/or react to the medical status of [decedent] and to initiate timely and appropriate intervention, including but not limited to medical testing, physical examination and/or appropriate medical consultation;
- k. Failed to use their best judgment in the care and treatment of [decedent];
- l. Failed to provide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to [decedent.]

These allegations of negligent acts mirror the allegations in the 2014 Complaint.

It is evident from a review of these allegations that the allegations identify failures in the clinical care, either diagnosis or treatment, provided to decedent by defendant by and thru its employees. The allegations do not implicate defendant's administrative duties.

In addition to arguing that the above allegations put defendant on notice of "corporate negligence" claims, plaintiff contends the 2016 Complaint "went further" than the 2014 Complaint "by alleging [d]efendant had Chest Pain Center protocols reflecting the standard of care that were not followed[.]" The three factual allegations included in paragraph 6 of the 2016 Complaint that were absent from the corresponding section of the 2014 Complaint are as follows:

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- l. Prior to the above events, [defendant] had submitted an application to the Society of Chest Pain Centers (a/k/a the Society for Cardiovascular Patient Care) for CMC-Northeast to gain for [sic] accreditation as a Chest Pain Center and was approved for such accreditation at the time of the events complained of.
- m. As part of the Society of Chest Pain Centers accreditation process [defendant] had submitted an application to the Society of Chest Pain Centers that it employed certain protocols, clinical practice guidelines and procedures in the care of patients presenting with chest pain complaints.
- n. The protocols, clinical practice guidelines and procedures contained in the CMC-North[e]ast accreditation application replicated the existing standards of practice for medical providers and hospitals in the same care profession with similar training and experience situated in the same or similar communities with similar resources at the time of the alleged events giving rise to this cause of action.

Although the development, implementation, and review of protocols, practice guidelines, and procedures for purposes of accreditation implicate defendant's administrative duties, plaintiff did not include any allegations of negligence associated with those duties in the 2016 Complaint. As stated above, the negligent acts alleged in the 2016 Complaint are the same as those included in the 2014 Complaint, which did not include the factual allegations regarding defendant's administrative duties related to accreditation as a Chest Pain Center.

Plaintiff asserts that the negligence allegation in paragraph 7(1) of the 2016 Complaint, when read in conjunction with the factual allegations about the Chest Pain Center application and accreditation, is sufficient to put defendant on notice of any corporate negligence claims. Again, we disagree. Something more specific is necessary to put defendant on notice of an administrative negligence claim.

Paragraph 7(1) is a general allegation that defendant failed to provide health care in accordance with the standards of practice. The failure to follow protocols in this instance goes to the clinical care provided to decedent. The standards of health care for medical negligence and administrative negligence claims are set forth in N.C. Gen. Stat. § 90-21.12(a). Although the standards outlined in N.C. Gen. Stat.

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§ 90-21.12(a) for medical negligence claims under N.C. Gen. Stat. § 90-21.11(2)(a) (“the *care* of such health care provider was not in accordance with the standards of practice among *members of the same health care profession with similar training and experience* situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action”) and administrative negligence claims under N.C. Gen. Stat. § 90-21.11(2)(b) (“the *action or inaction* of such health care provider was not in accordance with the standards of practice among *similar health care providers* situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action”) are similar, there are differences. (Emphasis on differences added). Paragraph 7(l) refers to care provided by defendant falling below “the standards of practice among members of the same health care professions with similar training and experience[.]” in keeping with the standard of health care for medical negligence provided in N.C. Gen. Stat. § 90-21.12(a).

We further note that this is not a case where it appears plaintiff did not understand how to plead an administrative negligence claim. It is clear from plaintiff’s motion for leave to amend the 2014 Complaint and the attached proposed amended complaint filed on 6 January 2016 that plaintiff knew how to plead an administrative negligence claim. In those filings, plaintiff sought to add the following allegations to the negligent acts already listed in the 2014 Complaint:

- m. Failed to provide and/or require adequate training, instruction, monitoring, compliance, coordination among providers, and supervision of its employees and contracted medical staff members concerning utilization, implementation, and compliance with its written protocols, standing orders, guidelines, procedures, and/or policies.
- n. Failed to enforce and/or follow its written protocols, standing orders, guidelines, procedures and/or policies.
- o. Failed to establish, design, and implement clear, explicit and effective protocols, standing orders, guidelines, procedures and/or policies relating to communication among employees, contracted medical staff members, and EMS personnel.
- p. Failed to properly train, supervise, restrict, and monitor emergency department personnel with

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known impairments critical to job performance and patient care.

- q. Failed to establish, design, and implement clear, explicit, and effective written protocols, standing orders, guidelines, procedures and/or policies to ensure immediate collection, transfer to treating medical providers, availability, and retention of verbal and written information provided by EMS personnel.
- r. Misled the consuming public and EMS personnel thus causing injury to . . . decedent by holding itself out to be a chest pain center and failing to follow its stated ACS protocol for patients in the emergency department.

These proposed amendments to plaintiff's 2014 Complaint clearly allege administrative negligence by defendant and are the type of allegations necessary to plead an administrative negligence claim. However, plaintiff withdrew the motion for leave to amend the 2014 Complaint, took a voluntary dismissal on the 2014 Complaint, and did not plead any of these allegations of administrative negligence in the 2016 Complaint.

Plaintiff also asserts that, apart from the 2016 Complaint, discovery requests served after the 2014 Complaint and a supplemental designation of experts put defendant on notice of the administrative negligence claim. While those documents do indicate there may be evidence pertinent to administrative negligence, they do not take the place of a pleading. The discovery requests and the supplemental designation of experts were filed prior to the 2016 Complaint. Thus, if plaintiff was aware of evidence of administrative negligence and wanted to proceed on that theory, it could have included specific allegations in the 2016 Complaint. On appeal, our Courts have refused to allow plaintiffs to assert negligence claims not pleaded in the complaint, holding that "pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002); see also *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 630, 652 S.E.2d 302, 306-307 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). The same holds true at the trial court level under Rule 8.

While labels of legal theories do not control, see *Haynie*, 207 N.C. App. at 149, 698 S.E.2d at 198, the 2016 Complaint, labeled "Complaint for Medical Negligence," included only allegations of medical negligence. Those negligence allegations were not sufficient to put defendant on notice of a claim of administrative negligence. Thus, we hold the trial court erred in allowing plaintiff to proceed on an administrative negligence theory in the medical malpractice action.

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B. Statute of Limitations

[2] Defendant also argues that the trial court erred in denying its motion for JNOV on the administrative negligence claim because it was barred by the statute of limitations. Assuming arguendo plaintiff sufficiently pleaded an administrative negligence claim in the 2016 Complaint, we agree the claim was time barred.

Generally, there is a three-year statute of limitations period for any medical malpractice action. N.C. Gen. Stat. § 1-15(c) (2017). Defendant, however, argues the applicable statute of limitations in this case is the two-year limitations period for bringing a wrongful death claim based on negligence. *See* N.C. Gen. Stat. § 1-53(4) (2017). This Court has held that a wrongful death action based on medical malpractice must be brought within two years of a decedent's death. *See King v. Cape Fear Mem'l Hosp., Inc.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989) (holding discovery exception for latent injuries contained in N.C. Gen. Stat. § 1-15(c) did not apply to a wrongful death action based upon medical malpractice), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990). Regardless of whether defendant pleaded a wrongful death claim in addition to a medical malpractice claim in this case, *see Udzenski v. Lovin*, 159 N.C. App. 272, 275, 583 S.E.2d 648, 650-51 (2003) (explaining that although not perfectly worded, the plaintiff had sufficiently alleged a wrongful death claim in addition to and based on the underlying medical malpractice claim), both limitations periods expired prior to plaintiff's filing of the 2016 Complaint on 1 February 2016, almost four years after decedent's death on 30 April 2012. That, however, does not end our inquiry.

Rule 41(a) of the North Carolina Rules of Civil Procedure provides that “[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice . . . a new action based on the same claim may be commenced within one year after such dismissal . . .” N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2017). This Court has explained that “the relation-back provision in Rule 41(a)(1) only applies to those claims in the second complaint that were included in the voluntarily-dismissed first complaint.” *Williams v. Lynch*, 225 N.C. App. 522, 526, 741 S.E.2d 373, 376 (2013).

Plaintiff filed the 2014 Complaint on 23 April 2014, less than two years after decedent's death and within any applicable statute of limitations. Plaintiff then took a voluntary dismissal of the 2014 Complaint on 19 January 2016, just weeks before filing the 2016 Complaint. The timing of plaintiff's filing of the 2014 Complaint and plaintiff's subsequent

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voluntary dismissal and filing of the 2016 Complaint allows for the possibility that an administrative negligence claim in the 2016 Complaint is timely if it relates back to the 2014 Complaint.

However, assuming *arguendo* the 2016 Complaint pleads an administrative negligence claim, that claim does not relate back to the 2014 Complaint. As detailed above, this Court made clear in *Estate of Ray* that medical negligence and administrative negligence are distinct claims. 227 N.C. App. at 29, 744 S.E.2d at 471 (“[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital.”). All of the factual and negligence allegations pleaded in the 2014 Complaint relate to the medical care provided by defendant to decedent. There are no allegations of breaches of defendant’s administrative duties.

Apart from the 2014 Complaint, plaintiff’s own statements show that it could not have pleaded administrative negligence in the 2014 Complaint. As noted above, plaintiff’s motion for leave to amend the complaint and the attached proposed amended complaint filed on 6 January 2016 include the necessary allegations to plead a claim of administrative negligence. In the motion, plaintiff admits that it

had no way of knowing about the manner in which [CMC-Northeast’s] emergency department operated, [CMC-Northeast’s] failure to provide and/or require adequate training, instruction, monitoring, compliance, coordination among providers, and supervision of its employees and contracted medical staff members concerning utilization, implementation, and compliance with its written protocols, standing orders, guidelines, procedures, and/or policies, and the issues concerning [the nurse who received defendant at the hospital].

Plaintiff further states in the motion that it sought to continue the case in November 2015 “to explore ‘. . . new areas of negligence not previously known to [p]laintiff . . .’ and to perhaps seek ‘amendment to [p]laintiff’s [c]omplaint.’ ”

These statements by plaintiff in the motion for leave to amend the 2014 Complaint are noteworthy because they indicate plaintiff did not have enough information to plead an administrative negligence claim at the time plaintiff filed the 2014 Complaint. Since plaintiff did not plead an administrative negligence claim in the 2014 Complaint, any

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administrative negligence claim in the 2016 Complaint did not relate back to the 2014 Complaint and, therefore, is time barred.

Plaintiff argues this case is similar to *Haynie*, in which this Court rejected the defendant's argument that a negligent entrustment claim, which was pleaded in a second complaint filed after a voluntary dismissal of the original complaint, should be dismissed because it was not based on the claims in the original complaint. 207 N.C. App. at 149, 698 S.E.2d at 199. Plaintiff contends that defendant has asked this Court to do what it refused to do in *Haynie*—to ignore the original complaint and to instead focus on proposed amendments to the complaint. *Id.* at 150, 698 S.E.2d at 199. The present case is distinguishable. In *Haynie*, this Court held “[the] plaintiff did allege the necessary elements to put [the] defendant . . . on notice of the claim of negligent entrustment, even if plaintiff mislabeled or failed to label the claim.” *Id.* at 149-50, 698 S.E.2d at 199. A review of plaintiff's motion to amend and the attached proposed amended complaint in this case only highlights what is evident from a review of the 2014 Complaint—there are no allegations of breaches of defendant's administrative duties in the 2014 Complaint to put defendant on notice of an administrative negligence claim.

C. Sufficiency of the Evidence

[3] Defendant next argues that even if an administrative negligence claim was properly pleaded and timely, the trial court erred in denying its motion for a JNOV on both the administrative negligence claim and the medical negligence claim because plaintiff failed to present sufficient evidence to submit the claims to the jury. Having determined the administrative negligence claim was not properly pleaded, we only address defendant's argument as it relates to medical negligence.

As stated above, “[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical . . . care by a health care provider” is defined as a medical malpractice action in N.C. Gen. Stat. § 90-21.11(2)(a). “In [such] a medical malpractice action, a plaintiff has the burden of showing ‘(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.’ ” *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). Here, defendant only challenges the sufficiency of the evidence to establish the standard of care for medical negligence.

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N.C. Gen. Stat. § 90-21.12 sets forth the appropriate standards of care in medical malpractice actions. Pertinent to claims of medical negligence, the statute provides:

in any medical malpractice action as defined in [N.C. Gen. Stat. §] 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence *that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action*[.]

N.C. Gen. Stat. § 90-21.12(a) (emphasis added). “Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony.” *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003).

In this case, plaintiff presented Dr. Dan Michael Mayer as an expert to testify regarding the standard of care for medical negligence. Defendant contends that “Dr. Mayer’s demonstrated lack of familiarity with the community standard of care rendered him unqualified to testify regarding the standard of care for the medical negligence claim.” We disagree with defendant’s characterization of Dr. Mayer’s familiarity with the community standard of care.

This Court has applied a highly deferential standard of review to evidentiary rulings on expert testimony, explaining that

[t]rial courts are afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony. The trial court’s ruling on the qualifications of an expert or the admissibility of an expert’s opinion will not be reversed on appeal absent a showing of abuse of discretion. A trial court’s evidentiary ruling is not an abuse of discretion unless it was so arbitrary that it could not have been the result of a reasoned decision.

Kearney v. Bolling, 242 N.C. App. 67, 76, 774 S.E.2d 841, 848 (2015) (internal quotation marks and citations omitted), *disc. review denied*, 368 N.C. 771, 783 S.E.2d 497 (2016).

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This Court has explained that

[a]n expert witness “testifying as to the standard of care” is not required “to have actually practiced in the same community as the defendant,” but “the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities.”

Id. (quoting *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672). “[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community.” *Robinson v. Duke Univ. Health Sys., Inc.*, 229 N.C. App. 215, 236, 747 S.E.2d 321, 336 (2013) (quoting *Grantham v. Crawford*, 204 N.C. App. 115, 119, 693 S.E.2d 245, 248-49 (2010)), *disc. review denied*, 367 N.C. 328, 755 S.E.2d 618 (2014).

The “critical inquiry” in determining whether a medical expert’s testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is “whether the doctor’s testimony, taken as a whole” establishes that he “is familiar with a community that is similar to a defendant’s community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community.”

Kearney, 242 N.C. App. at 76, 774 S.E.2d at 848 (quoting *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff’d per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005)). “According to our Supreme Court, ‘[a]ssuming expert testimony is properly qualified and placed before the trier of fact, [N.C. Gen. Stat. §] 90-21.12 reserves a role for the jury in determining whether an expert is sufficiently familiar with the prevailing standard of medical care in the community.’” *Grantham*, 204 N.C. App. at 119, 693 S.E.2d at 248 (quoting *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 633 (2009) (Martin, J., concurring) (citing N.C. Gen. Stat. § 90-21.12 (2007))).

As stated above, plaintiff presented Dr. Mayer to testify as an expert about the community standard of care for purposes of medical negligence. Dr. Mayer was accepted by the trial court as an expert in emergency medicine in a hospital setting, emergency nursing services, and chest pain protocols. While giving his background in emergency medicine, Dr. Mayer testified that he most recently practiced emergency

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medicine at Albany Medical Center and taught at Albany Medical College, an accredited medical school, until he retired in 2014. Dr. Mayer further explained that he continues to be involved in the field of emergency medicine by regularly teaching in the emergency medicine residency program at Albany Medical College and by teaching medical students at Albany Medical College.

Regarding the standard of care, Dr. Mayer testified that he was familiar with the standard of care at CMC-Northeast. Dr. Mayer explained that he “found . . . [CMC-Northeast] was in many ways very similar to Albany Medical Center” because they have “pretty much the same types of specialists for general specialty medical problems[.]” Dr. Mayer opined that the community standard of care in Albany was the same or very similar to the community standard of care expected in Concord and explained “[t]here would only be a small minority of patients, none of whom would fit the characteristics of [decedent], that would be treated differently at [CMC-Northeast] than would be treated at Albany Medical Center.” Dr. Mayer added that he was familiar with the standard of care that applies to nurses in the emergency department at CMC-Northeast because “[t]he types of duties that nurses have at CMC[-]Northeast is exactly the same as the role of nurses at Albany Medical Center.”

To establish a basis for Dr. Mayer’s familiarity with the standard of care and to support his conclusions in this case, plaintiff questioned Dr. Mayer about the materials he reviewed in preparation for the case. Dr. Mayer testified that he first reviewed the record in this case which included decedent’s medical records from 30 April 2012 and the depositions of the attending emergency department physician, the emergency department nurse who attended to decedent, the paramedic who responded to the emergency calls, and other hospital employees and administrators. Dr. Mayer also reviewed CMC-Northeast’s policies and procedures, including the hospital’s application to become certified as a Chest Pain Center. Dr. Mayer explained that he reviews these types of materials before he discusses the case with the attorneys so that he “can give as objective a review of the care that was provided as possible.” Dr. Mayer then advises whether there is a case or not based on the standard of care, which Dr. Mayer further explained is “not perfect care,” but “what a reasonably prudent physician under the same circumstances would do.”

Pertaining to the community standard of care in this case, Dr. Mayer testified that he reviewed a lengthy demographics package, which he explained contained information about “the characteristics of Cabarrus County and of Concord and of the – both the general demographics and

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also the medical issues, you know, what types of physicians practice here, what are the different hospitals, how big are the hospitals, how many patients do they see.” Dr. Mayer stated that it was important for him to review this information because “I want to make sure that in fact what I’m testifying to about the standard of practice in Cabarrus County, and specifically at [CMC-Northeast], is something that I’m familiar with and that I can then testify truthfully would be appropriate care and reasonable care.” Dr. Mayer acknowledged that there are community standards of care and explained that the purpose of reading the demographics package was to determine whether there were extenuating circumstances that were relevant to the standard of care in Concord. Dr. Mayer also indicated that he reviewed websites for Carolinas Healthcare System.

Based on the information reviewed by Dr. Mayer about Concord and CMC-Northeast, Dr. Mayer testified the community standard of care in this case was similar to Albany Medical Center, where he worked and with which he was familiar.

Citing this Court’s decision in *Smith*, 159 N.C. App. 192, 582 S.E.2d 669 (2003), defendant contends Dr. Mayer’s testimony was insufficient to establish that he was familiar with the relevant community standard of care because Dr. Mayer had never been to the area prior to offering testimony in this case; Dr. Mayer had never practiced medicine in North Carolina, held a medical license in North Carolina, or previously testified in North Carolina; Dr. Mayer’s familiarity was based on the demographics package received for purposes of testifying; and because Dr. Mayer noted differences between CMC-Northeast and Albany Medical Center and unjustifiably compared the two. Defendant asserts the above argument in reference to the community standard of care for administrative negligence, but subsequently asserts that “[t]he same holds true with respect to [plaintiff’s] medical negligence claim: Dr. Mayer’s demonstrated lack of familiarity with the community standard of care rendered him unqualified to testify regarding the standard of care for the medical negligence claim.” We are not convinced.

In *Smith*, this Court held the trial court properly excluded testimony of the plaintiff’s expert witness because the witness’ testimony was devoid of support for his assertion that he was sufficiently familiar with the applicable standard of care. 159 N.C. App. at 196-97, 582 S.E.2d at 672-73. This Court explained that the witness

stated that the sole information he received or reviewed concerning the relevant standard of care . . . was verbal

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information from [the] plaintiff's attorney regarding "the approximate size of the community and what goes on there." [The witness] could offer no further details . . . concerning the medical community, nor could he actually remember what plaintiff's counsel had purportedly told him.

Id. at 196-97, 582 S.E.2d at 672. Furthermore, the witness stated there was a national standard of care and "that he could 'comment on the standard of care as far as a reasonably prudent orthopedic surgeon anywhere in the country regardless of what [this particular] medical community . . . might do.'" *Id.* at 197, 582 S.E.2d at 672.²

Unlike in *Smith*, Dr. Mayer's testimony in this case was based on his review of a lengthy demographics package, internet research conducted by Dr. Mayer on CMC-Northeast, and Dr. Mayer's comparison of the community to Albany Medical Center. Plaintiff has cited many cases in which this Court has determined similar bases were sufficient to demonstrate familiarity with the community standard of care. *See i.e. Kearney*, 242 N.C. App. at 76-78, 774 S.E.2d at 848-49; *Robinson*, 229 N.C. App. at 235-36, 747 S.E.2d at 335-36; *Day v. Brant*, 218 N.C. App. 1, 6-7, 721 S.E.2d 238, 243-44, *disc. review denied*, 366 N.C. 219, 726 S.E.2d 179 (2012).

We agree the present case is governed by those cases cited by plaintiff and hold the trial court did not abuse its discretion in determining Dr. Mayer was qualified to testify as an expert to the community standard of care for medical negligence.

2. New Trial

[4] In the event the trial court erred in denying its motion for a JNOV on administrative negligence, but the trial court did not err in denying its motion for a JNOV on medical negligence, defendant asserts a new trial is required on medical negligence. Defendant argues that the evidence and the jury instructions for administrative negligence and medical negligence were so "intermingled" that "the jury's determination on the medical negligence claim . . . was tainted by the trial court's error in

2. Defendant also cites this Court's unpublished decision in *Barbee v. WHAP, P.A.*, 255 N.C. App. 214, 803 S.E.2d 701, COA16-1154 (2017) (unpub.), available at 2017 WL 3481038, *7-11 (holding that the plaintiff's expert witness failed to demonstrate familiarity with the relevant community standard of care after the witness testified during a deposition that he had never been to the area, knew nothing about the hospital, knew nothing about the training and experience of the doctors at the hospital, and did not know any doctors in the State).

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allowing the administrative negligence claim to proceed at trial at all.” We are not convinced a new trial is required.

Defendant first takes issue with the inclusion of “implement” in the jury instructions for medical negligence by arguing its inclusion “suggested to the jury that it could find [defendant] liable for medical negligence based on administrative negligence-related principles.” This is defendant’s only challenge to the jury instructions.

“[T]he trial court has wide discretion in presenting the issues to the jury” *Murrow v. Daniels*, 321 N.C. 494, 499, 364 S.E.2d 392, 396 (1988). On appeal,

this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

A review of the jury instructions shows that the trial court used “implement” three times in the instructions for medical negligence, each time in a similar fashion. The relevant portions of the trial court’s instructions are as follows:

With respect to the first issue in this case, the plaintiff contends and the defendant denies that the defendant was negligent in one or more of the following ways. The first contention is that the hospital did not use its best judgment in the treatment and care of its patient in that the defendant did not adequately *implement and/or follow* protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room on April 30th of 2012, in accordance with the standard of care. The second contention is that the hospital did not use its best judgment in the treatment and care of its patient, in that its employee,

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[the attending nurse], did not adequately collect and/or communicate to other health care providers pertinent medical information necessary for the care and treatment of [decedent] on April 30th of 2012.

The third contention is that the hospital did not use reasonable care and diligence in the application of its knowledge and skill to its patient's care in that Carolinas Healthcare System did not adequately *implement and/or follow* the protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room or emergency department on April 30th of 2012. The fourth contention is that the hospital did not use reasonable care and diligence and the application of its knowledge and skill to its patient's care in that its employee, [the attending nurse], did not adequately collect and/or communicate to other health care providers pertinent medical information necessary for the treatment and care of [decedent] on April 30th of 2012.

The fifth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that the defendant did not adequately *implement and/or follow* the protocols, processes, procedures and/or policies in place in the emergency department on April 30th of 2012.

The sixth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that its employee, [the attending nurse], did not adequately collect and/or communicate to other medical providers pertinent medical information necessary for the treatment and care of [decedent] on April 30th of 2012. (Emphasis added).

The trial court then went on to instruct as follows:

With respect to the plaintiff's first contention, a hospital has a duty to use its best judgment in the treatment and

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care of its patient. A violation of this duty is negligence. With respect to the plaintiff's second contention, a nurse has a duty to use her best judgment in the treatment and care of her patient. A violation of this duty is negligence. With respect to the plaintiff's third contention, a hospital has a duty to use reasonable care and diligence in the application of its knowledge and skill to its patient's care. A violation of this duty is negligence.

With respect to the plaintiff's fourth contention, a nurse has a duty to use reasonable care and diligence and the application of her knowledge and skill to her patient's care. A violation of this duty is negligence. With respect to the plaintiff's fifth contention, a hospital has a duty to provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. In order for you to find that the hospital did not meet this duty, the plaintiff must satisfy you by the greater weight of the evidence, first, what the standards of practice were among hospitals with similar resources and personnel in the same or similar communities at the time the defendant cared for [decedent], and, second, that the defendant did not act in accordance with those standards of practice. . . . A violation of this duty is negligence.

With respect to the defendant's sixth contention, a nurse has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered. In order for you to find that the defendant's employee, [the attending nurse], did not meet this duty, the plaintiff must satisfy you by the greater weight of the evidence, first, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities at the time [the attending nurse] cared for [decedent]. And, second, that [the attending nurse] did not act in accordance with those standards of practice. . . . A violation of this duty is negligence.

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In response to defendant's argument that the inclusion of "implement" intermingled the administrative negligence and medical negligence claims, plaintiff cites Merriam-Webster in support of its contention that "implement" and "follow" are nearly synonymous in meaning. Therefore, plaintiff asserts the trial court did not err in using both terms in the jury instructions. Plaintiff also claims that *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987), directly supports inclusion of "implement" in the instructions. We are not convinced the inclusion of "implement" in the instructions for medical negligence was not error. First, "implement" is never mentioned in *Blanton*. Second, while "implement" and "follow" may be used similarly in some circumstances, they may also be used differently. It is evident from the use of both "implement" and "follow" in the instructions above in the alternative that the terms are not synonymous in this instance.

Nevertheless, when these instructions are considered in their entirety, it is clear that the medical negligence instructions directed the jury to consider the treatment and care provided by defendant to decedent. Although defendant is correct that implementation of protocols, processes, procedures and/or policies is usually an administrative duty, the use of "implement" three times in the above instructions in the alternative to "follow" was not likely to mislead the jury when the instructions are considered in their entirety. Defendant has failed to show that the trial court's error in allowing the administrative negligence claim to proceed impacted the jury instructions to its detriment where ample evidence was presented that defendant failed to follow its policies and that the attending emergency department nurse did not collect or communicate pertinent medical information for decedent's care.

[5] In regards to the evidence at trial, defendant contends the admission of documents related to defendant's application for accreditation as a Chest Pain Center and other evidence of policies and protocols was only relevant to the administrative negligence claim, if at all, and would not have been admitted if plaintiff's action was only for medical negligence. Defendant asserts that this improper evidence "inflamed and prejudiced the jury against the hospital, ultimately impacting the jury's determination on both negligence claims."

While evidence of policies and protocols may not necessarily establish the standard of care, see *O'Mara v. Wake Forest Univ. Health Sciences*, 184 N.C. App. 428, 439, 646 S.E.2d 400, 406 (2007) (explaining that "violation of a hospital's policy is not necessarily a violation of the applicable standard of care, because the hospital's rules and policies

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may reflect a standard that is above or below what is generally considered by experts to be the relevant standard”), evidence of the defendant’s policies and protocols, or its purported policies and protocols, is certainly relevant and properly considered alongside expert testimony to establish the standard of care for medical negligence. As defendant points out, expert testimony in this case clarified which policies and protocols were in place at CMC-Northeast.

Although not all evidence of policies and protocols related to the defendant’s application for accreditation as a Chest Pain Center may have been admitted into evidence absent the trial court allowing the administrative negligence claim to proceed, defendant has not shown that the evidence impacted the jury’s verdict on medical negligence. This Court has long recognized that “[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Defendant’s assertion that “the inflammatory nature of the evidence relating to the Chest Pain Center application was palpable and highly prejudicial” is not sufficient proof.

Defendant summarily claims that “absent this evidence . . . no rational jury would have returned a \$6.13 million verdict against the hospital based solely on [the nurses] alleged negligence in communicating the decedent’s information to [the attending physician].” We are not convinced.

3. Pain and Suffering

[6] In the event we did not reverse outright or grant a new trial, defendant alternatively asserts the trial court erred in allowing the jury to award damages for pain and suffering because there was insufficient evidence of pain and suffering.

The issue of pain and suffering was argued numerous times during trial before the trial court allowed the issue to go to the jury. Defendant first moved for a directed verdict on damages for “conscious pain and suffering” after it reviewed plaintiff’s proposed jury instruction. Defendant argued “there was no evidence put on as to any conscious pain and suffering of [decedent].” The trial court asked if either party would like to be heard and both responded in the negative. The trial court then stated that it “would grant [a] directed verdict on that issue because there has been no evidence as to pain and suffering of [decedent]”

Immediately thereafter, plaintiff indicated that it would like to be heard on the issue of pain and suffering, and the trial court obliged.

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Plaintiff admitted that no one was around decedent to observe pain and suffering, but argued that does not mean it didn't happen. Plaintiff pointed out that one doctor testified decedent could have experienced pain for an hour prior to his death, a second doctor testified decedent could have experienced pain for 20 minutes prior to his death, and a third doctor testified he didn't know one way or the other. Plaintiff then concluded its argument stating:

So there is evidence of conscious pain and suffering. Well, there's evidence that it could have existed, but I don't think that the jury should be precluded from considering that because there was evidence that – nobody really knows because nobody observed it, but there certainly is evidence that it could have occurred from defendant's witnesses and also for plaintiff's witnesses.

In response, defendant argued “possibly or could have . . . does not meet the burden of proof in terms of more likely than not [decedent] had conscious pain and suffering[,]” adding that evidence of “more likely than not” is “what they would need to submit to support any jury award for that element. A mere possibility or that it could have happened would not meet the burden of proof.” Upon consideration of the arguments, the trial court “once again [found] that there has not been sufficient evidence of conscious pain and suffering to meet the legal standard” and granted defendant's motion for a directed verdict on damages for pain and suffering.

Plaintiff then changed its argument and sought for a third time to address the issue of pain and suffering, arguing that decedent experienced pain and suffering from the time he was first admitted to the emergency department and as a result of anxiety from being discharged without answers. For a third time, the trial court granted defendant's motion for a directed verdict on damages for pain and suffering.

Following the weekend recess, plaintiff again raised the issue by objecting to the trial court's prior rulings when the proceedings reconvened. At that point, plaintiff had revisited the testimony of Dr. Andrew Selwyn and was able to direct the court to the doctor's testimony that it was more likely than not that decedent would have experienced chest pain. Defendant simply responded that there was no evidence of actual chest pain. Based on the plaintiff's argument, the trial court changed its ruling, explaining that “there is some evidence so . . . it is a factual issue. . . . [W]e'll need to put the pain and suffering back in the instructions . . . for the jury to make that determination.”

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Now on appeal, defendant contends the only relevant evidence, Dr. Selwyn's testimony, amounts to speculation. Defendant therefore claims the evidence failed to meet plaintiff's burden to support an award of damages for pain and suffering.

"The law disfavors-and in fact prohibits-recovery for damages based on sheer speculation." *DiDonato v. Wortman*, 320 N.C. 423, 430, 358 S.E.2d 489, 493 (1987) (internal citations omitted). Both plaintiff and defendant acknowledge that "[d]amages must be proved to a reasonable level of certainty, and may not be based on pure conjecture." *Id.* at 431, 358 S.E.2d at 493. In *DiDonato*, the Court relied on its much earlier decision in *Norwood v. Carter*, 242 N.C. 152, 87 S.E.2d 2 (1955), in which the Court held, "[n]o substantial recovery may be based on mere guesswork or inference . . . without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered." *Id.* at 156, 87 S.E.2d at 5. Based on this reasoning, the Court held in *DiDonato* that "damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established." 320 N.C. at 432, 358 S.E.2d at 494.

In this case, the only testimony identified by plaintiff as supporting the award damages for pain and suffering was as follows:

- Q. Is there any relevance to the fact that [decedent] had presented with chest pain earlier that day as to whether that same chest pain would have arisen before he really got in trouble with this event?
- A. Yes, it's relevant.
- Q. And tell us why that's relevant.
- A. Well, he presented with a fairly typical picture of chest pain radiating to the stomach, up into the neck, to the hands, which went away with nitroglycerin. So that's the way this man presents. So somewhere around 8, 9 or 9, 10, 11 o'clock that night, more likely than not he would have got chest pain again and manifested ischemia, which would have been treated. Unfortunately, he was at home, it wasn't treated, and it just progressed and he died.
- Q. So because he had previously presented with chest pains from ischemia, more likely than not that would have occurred again giving warning to the staff, if he was at the hospital, if that situation arose?

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A. Yes.

Defendant contends this testimony was insufficient because it is speculative. Defendant also points to conflicting testimony. Plaintiff contends this testimony was sufficient proof to a reasonable degree of certainty because Dr. Selwyn testified that it was “more likely than not.”

Although we agree with plaintiff that testimony that something “is more likely than not” is generally sufficient proof that something occurred, Dr. Selwyn’s testimony, standing alone, is insufficient to support proof of damages for pain and suffering to a reasonable degree of certainty where there was no further evidence for the jury to consider. And while it is not this Court’s job to reweigh the evidence, we do note that ample other evidence was presented to show that plaintiff may not have experienced any further chest pain. Dr. Selwyn even testified that there was “no direct evidence” of chest pain following decedent’s discharge from the emergency department. Where the only evidence is that it was likely decedent experienced chest pain because he had previously experienced chest pain, we hold the evidence was insufficient to establish damages for pain and suffering to a reasonable degree of certainty.

The trial court instructed the jury that “[n]oneconomic damages are damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience and any other non-pecuniary compensatory damage.” The trial court then instructed the jury that it may consider the following categories of non-economic damages in this case: “[p]ain and suffering and the present monetary value of [decedent] to his next of kin from his society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance from the services that he provided for which you do not find a market value.” Defendant has only challenged the sufficiency of the evidence for pain and suffering.

Because the jury verdict in this case only separated the damages into economic damages and non-economic damages and did not further break down the non-economic damages by categories, it is impossible to determine what portion of the jury’s award of non-economic damages was for pain and suffering. As a result, this Court cannot just vacate the award of damages for pain and suffering, but instead must remand for a new trial on the issue of non-economic damages.

4. Contributory Negligence

[7] Lastly, defendant argues in the alternative that if it is not entitled to an outright reversal or a new trial, the trial court erred in granting

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plaintiff's motion for a directed verdict on defendant's contributory negligence defense. Plaintiff moved for a directed verdict on contributory negligence at the close of all the evidence and the trial granted plaintiff's motion, finding that no evidence of contributory negligence by the decedent had been presented.

"[C]ontributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Watson v. Storie*, 60 N.C. App. 736, 738, 300 S.E.2d 55, 57 (1983) (internal quotation marks and citations omitted). Our Supreme Court has explained that

[i]n this state, a plaintiff's right to recover . . . is barred upon a finding of contributory negligence. The trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury. If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court.

Cobo v. Raba, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (internal citations omitted).

In this case, defendant contends there was substantial evidence from which the jury could reasonably find that decedent was contributorily negligent. Defendant then identifies decedent's failure to report to the attending nurse and the attending physician that he was given aspirin and nitroglycerin for his chest pain by EMS prior to this arrival at the emergency department. Defendant compares this case to cases in which patients failed to report their symptoms, or the worsening of symptoms, to their healthcare providers. *See Cobo*, 347 N.C. at 546, 495 S.E.2d at 366; *McGill v. French*, 333 N.C. 209, 220-21, 424 S.E.2d 108, 114-15 (1993); *Katy v. Capriola*, 226 N.C. App. 470, 478, 742 S.E.2d 247, 253-54 (2013). Under these precedents, defendant contends decedent had an affirmative duty to report that EMS gave him medication in the ambulance.

We are not convinced that this case is similar to those cases cited by defendant. There is no indication that decedent in this case failed to report his symptoms to medical personnel. In fact, the evidence shows that decedent was involved in his treatment and sought answers for his continuing discomfort. Moreover, we are not convinced that the failure

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to report symptoms is analogous to decedent not reporting that EMS gave him medication to relieve his chest pain in route to the hospital. We agree with the trial court that there was no evidence of contributory negligence on the part of decedent in this case. Thus, the trial court did not err in granting plaintiff's motion for a directed verdict on the issue.

III. Conclusion

For the reasons stated, we hold the trial court erred in allowing plaintiff to proceed at trial on a theory of administrative negligence. That error, however, did not prejudice the jury verdict on plaintiff's medical negligence claim. The trial court also erred in allowing the jury to award damages for pain and suffering and, therefore, a new trial is required on non-economic damages only. The trial court did not err in granting plaintiff's motion for a directed verdict on the issue of contributory negligence.

REVERSE IN PART, VACATE IN PART, NEW TRIAL IN PART.

Judge INMAN concurs.

Judge MURPHY concurs in result only.

IN THE MATTER OF D.A.

No. COA18-287

Filed 4 December 2018

Child Abuse, Dependency, and Neglect—permanency planning hearing—permanent plan—statutory mandate

The trial court erred by granting custody of a neglected child to his maternal grandparents without first adopting a permanent plan as required by statute (N.C.G.S. § 7B-906.2).

Appeal by respondent-father from order entered 21 November 2017 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 8 November 2018.

Wake County Attorney's Office, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

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David A. Perez, for respondent-appellant father.

Poymer Spruill LLP, by Hannah M.L. Munn, for Guardian ad Litem.

CALABRIA, Judge.

Respondent, the father of D.A. (“Dustin”)¹, appeals from the trial court’s permanency planning order granting custody of Dustin to the child’s maternal grandparents. Because we hold the trial court failed to adopt a permanent plan for Dustin as mandated by N.C. Gen. Stat. § 7B-906.2, we reverse the trial court’s order and remand for further proceedings.

I. Factual and Procedural Background

Respondent and the child’s mother are no longer involved in a relationship. The mother lives in Hawaii, while respondent lives in Oregon with his girlfriend. The mother has three other children besides Dustin and is involved with the Honolulu Department of Human Services regarding two of those children. Dustin was living with his mother until March 2016 when he left to live with respondent in Chicago, Illinois.

On 26 October 2016, Wake County Human Services (“WCHS”) filed a juvenile petition alleging Dustin to be a neglected and dependent juvenile. WCHS alleged that it received a report on 18 October 2016 that Dustin was sent by respondent from Chicago in July of 2016 to stay with his maternal grandparents, Mr. and Mrs. J., in Wendell, North Carolina for a few weeks while he established himself in a new job. A few weeks later, respondent asked if Dustin could stay a couple more weeks as he was still seeking employment. Mr. and Mrs. J. attempted to enroll Dustin in school but needed signed documents from respondent and the mother in order to do so. The petition alleged that respondent had refused to comply with getting the appropriate forms notarized and failed to contact the social worker in order for Dustin to be enrolled in school. WCHS obtained nonsecure custody of Dustin and continued his placement with Mr. and Mrs. J.

The trial court held a hearing on the petition on 22 February and 21 March 2017. On 1 May 2017, the trial court entered an order adjudicating Dustin as neglected. The court ordered respondent to comply with his Out of Home Family Services Agreement, which required

1. A pseudonym is used to protect the juvenile’s identity and for ease of reading.

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him to enter into and comply with a visitation agreement; complete a drug treatment program and follow all recommendations; refrain from using illegal or impairing substances and submit to random drug screens; complete a psychological assessment and follow all recommendations; complete parenting classes and demonstrate learned skills; and obtain and maintain sufficient housing and income. The trial court found that respondent was a fit and proper person to have unsupervised overnight visitation a minimum of one weekend per month. The trial court did not establish a permanent plan but ordered WCHS to continue to make reasonable efforts to eliminate Dustin's need for placement outside of the home.

The trial court held a placement review and permanency planning hearing on 15 June 2017. In an order entered 9 August 2017, the trial court found that respondent had made substantial progress on his Family Services Agreement goals in that he completed a parenting course, secured sufficient housing, and was participating in therapy. The trial court also found that respondent's home was safe and appropriate for Dustin and that respondent could provide proper care and supervision of Dustin on a trial home placement basis. Therefore, the trial court continued Dustin's custody with WCHS but ordered a trial placement with respondent in Oregon. The court ordered respondent to comply with the conditions of the trial home placement, which included the following: demonstrate learned skills from parenting class; provide at least five days advance notice prior to taking Dustin on an out of state trip; maintain Dustin's enrollment in public school without interruption from trips; maintain sufficient housing; seek out safe and appropriate extracurricular activities for Dustin; maintain sufficient lawful income; complete a psychological or mental health assessment and follow all recommendations; and maintain regular contact with WCHS and the social worker, notifying WCHS of any change in circumstances within five business days.

On 15 June 2017, Dustin began his trial home placement with respondent. Upon leaving North Carolina, respondent traveled with Dustin to Georgia to visit with respondent's sister through the end of the month. A Georgia social worker checked on the family during this time and verified Dustin's well-being and safety. On 7 July 2017, respondent reported to WCHS that he and Dustin had traveled to Illinois and were visiting with respondent's mother for a few weeks. A wellness check was done while respondent was in Illinois. On 2 August 2017, respondent informed WCHS that they had arrived home in Portland, Oregon.

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Respondent contacted the Oregon Interstate Compact on the Placement of Children (“ICPC”) social worker, Sonya Sullivan, in order to obtain health insurance for Dustin so that he could take Dustin to the dentist in Oregon and enroll him in therapy. Ms. Sullivan conducted a home visit on 10 August 2017 and the visit “went well.” However, Ms. Sullivan learned that respondent and his girlfriend had purchased airline tickets for themselves and Dustin to go to France to attend a wedding and for respondent and his girlfriend to get married. Respondent had not informed WCHS of the trip or that he planned to marry. Respondent had purchased the tickets in April 2017 hoping to have custody of Dustin and planned to fly out of New York on 1 August 2017. However, as a result of the scheduled home visit in Oregon, neither respondent nor Dustin went to France.

On 23 August 2017, Ms. Sullivan reported to WCHS that an FBI background check revealed an outstanding warrant for respondent from Georgia. Ms. Sullivan initially believed the order for arrest was due to a federal probation violation. However, it was later discovered respondent had failed to appear for a scheduled hearing in Georgia in 2014 for a misdemeanor driving without a license charge. Social services contacted respondent on 23 August 2017 regarding the existence of the warrant. Because respondent was not able to provide a feasible plan of care for Dustin if respondent was arrested on the outstanding warrant, WCHS decided to remove Dustin from respondent’s care. Dustin was removed from respondent’s home on 24 August 2017 and placed back in the home of Mr. and Mrs. J. Respondent contacted the state of Georgia and his warrant was cancelled by 26 or 27 August 2017.

A subsequent placement and permanency planning hearing was held on 13 October 2017. In an order entered 21 November 2017, the court found that respondent had signed Dustin up for soccer and parkour, but did not enroll Dustin in public school or obtain dental treatment for Dustin prior to his removal from the home on 24 August 2017. The court also found that respondent did not provide proof of his income and that respondent acknowledged he drove with Dustin in the car many times without having a valid driver’s license. Therefore, the court found that respondent “continued to act in a manner inconsistent with [his] constitutionally protected status as a parent” and that it was not possible for Dustin to return to respondent’s home in the next six months. Accordingly, the trial court awarded legal custody of Dustin to the maternal grandparents. The court also waived further review hearings and relieved WCHS, the guardian ad litem, and respondent’s attorney “of further obligations in this matter.” Respondent filed timely written notice of appeal on 19 December 2017.

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Respondent appeals from the trial court's permanency planning order changing legal custody of Dustin pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2017).

II. Permanent Plan

Respondent's sole argument on appeal is that the trial court erred in ceasing reunification efforts because the trial court's findings of fact do not support such a conclusion. Because the trial court failed to comply with statutory mandate and adopt a permanent plan for Dustin, however, we decline to address this argument, and reverse and remand.

A. Standard of Review

"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 J.A.K.*, ___ N.C. App. ___, ___, 812 S.E.2d 716, 719 (2018). The trial court's conclusions of law are reviewed *de novo*. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

B. Analysis

Section 7B-906.2 of our General Statutes provides that

[a]t any permanency planning hearing pursuant to G.S. 7B-906.1, the court shall adopt 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.
- (3) Guardianship pursuant to G.S. 7B-600(b).
- (4) Custody to a relative or other suitable person.
- (5) Another Planned Permanent Living Arrangement (APPLA) pursuant to G.S. 7B-912.
- (6) Reinstatement of parental rights pursuant to G.S. 7B-1114.

N.C. Gen. Stat. § 7B-906.2(a) (2017). The statute further provides that "[a]t any permanency planning hearing, the court shall adopt concurrent

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permanent plans and shall identify the primary plan and secondary plan.” N.C. Gen. Stat. § 7B-906.2(b). “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.” *Id.* “Concurrent planning shall continue until a permanent plan has been achieved.” N.C. Gen. Stat. § 7B-906.2(a1). “This Court has held that use of the language ‘shall’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.” *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 631 (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 749 (2010).

Here, although the trial court indicated it held “[a] placement review and permanency planning hearing” on 13 October 2017, the trial court did not adopt a permanent plan as required by N.C. Gen. Stat. § 7B-906.2. Despite purporting to hold two permanency planning hearings in this case after the initial disposition, the trial court never established a permanent plan for the child. In the 9 August 2017 order entered after the first permanency planning hearing, the trial court ordered WCHS to continue to make reasonable efforts aimed at returning Dustin “promptly to a safe home . . . in accordance with the plan approved by this Court within this Order.” However, the court did not adopt a permanent plan for Dustin in the order. Further, the 21 November 2017 order also did not establish a permanent plan for Dustin. Although this order placed custody of Dustin with Mr. and Mrs. J., the order failed to include a primary or secondary plan in accordance with N.C. Gen. Stat. § 7B-906.2(b).

Because the trial court failed to comply with the mandate set forth in N.C. Gen. Stat. § 7B-906.2, we reverse the trial court’s permanency planning order awarding custody of Dustin to the maternal grandparents and waiving further review hearings. We remand the case to the trial court for entry of an order in which the court shall adopt one or more permanent plans in accordance with N.C. Gen. Stat. § 7B-906.2 and make the appropriate necessary findings. Because we are reversing the trial court’s order, we need not address respondent’s arguments regarding whether the trial court made sufficient findings of fact and whether particular findings were supported by the evidence.

REVERSED AND REMANDED.

Judges TYSON and ZACHARY concur.

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IN THE MATTER OF L.S., I.S.

No. COA18-486

Filed 4 December 2018

1. Termination of Parental Rights—grounds—failure to legitimate—sufficiency of evidence

The trial court erred by terminating a father's parental rights on the ground of failure to legitimate (N.C.G.S. § 7B-1111(a)(5)) where no evidence in the record supported a finding that the children were born out of wedlock or that the father had failed to legitimize the children.

2. Termination of Parental Rights—grounds—adequacy of notice

The trial court erred by terminating a father's parental rights on the ground of failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(5)) where the termination petition failed to provide adequate notice to the father that this ground would be at issue in the termination hearing.

Appeal by respondent from order entered 14 February 2018 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 8 November 2018.

Jennifer A. Clay for petitioner-appellee Robeson County Department of Social Services.

Patrick S. Lineberry for respondent-appellant.

TYSON, Judge.

Respondent-Father appeals from an order terminating his parental rights to his minor children "Liam" and "Imogen" ("the children"). See N.C. R. App. P. 3.1(b) (pseudonyms used to protect the identity of the children). The ground or grounds for termination found or asserted by the trial court are either unsupported by the evidence or were not alleged in the petition filed by the Robeson County Department of Social Services ("DSS"). We reverse.

I. Background

The parties stipulated and the trial court found DSS had obtained non-secure custody of the children on 31 October 2014 upon the filing of

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a juvenile petition alleging they were neglected. The children were living with their mother and maternal grandmother at the time the petition was filed. Their mother suffers from dementia induced by head trauma and was subsequently admitted into a secure facility at the Greenbrier Nursing Home.

After a hearing on 2 September 2015, the trial court adjudicated the children as dependent juveniles. In its initial dispositional order, the court maintained the children in DSS' custody and granted the agency authority over their foster placements. The court relieved DSS of reunification efforts and changed the placement plan for the children from reunification with the mother to guardianship with a relative.

The court declined to enter a visitation plan for Respondent-Father, after finding the children "have stated they do not want to see their father because they are afraid of him." The court found that Respondent-Father had entered into an Out-of-Home Services Agreement ("OHSA") with DSS on 31 March 2015, to address issues of substance abuse, mental health, and domestic violence, and had requested that his children be returned home to their grandmother.

In March 2016, following a successful home study, the trial court approved a relative placement for the children in Florida with the maternal grandmother's ex-husband and his current wife ("Mr. and Mrs. R."). Mr. and Mrs. R. subsequently asked to adopt the children. After a hearing on 1 February 2017, the court changed the primary permanent plan to adoption with a concurrent plan of guardianship with a relative.

On 16 March 2017, DSS filed a petition to terminate Respondent-Father's and the mother's parental rights in the children ("TPR petition"). The trial court held an evidentiary hearing on 11 January 2018. After receiving testimony from Mr. Locklear, the children's foster care social worker, the trial court found grounds existed to terminate both parents' rights. The court received additional evidence at disposition and determined that termination of parental rights was in the best interests of the children.

In its written order, the trial court made the following ultimate findings with regard to the grounds for termination of Respondent-Father's parental rights:

85. The alleged father, [Respondent-Father], and any unknown father, have willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under

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the circumstances has been made in correcting the conditions that led to the children's removal; has failed to file an affidavit of paternity in a center [sic] registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile[s] pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juveniles by marriage to the mother of the juveniles; has not provided substantial financial support or consistent care with respect to the juveniles and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Based upon these adjudicatory findings, the court reached the following conclusion of law:

3. That grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of [Respondent-Father] . . . pursuant to North Carolina General Statute's [sic] 7B-1111 in that:

a. That the alleged father, [Respondent-Father], of the children, [Imogen] and [Liam], born out of wedlock has not prior to filing the petition to terminate his parental rights: (a) married the mother of the children or (b) legitimated the children or (c) provided substantial financial support or consistent care with respect of the children and mother or (d) filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services or (e) established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Respondent-Father filed timely notice of appeal from the court's order. Although the order also terminated the mother's parental rights, she is not a party to this appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

III. Issue

Respondent-Father argues the trial court erred in adjudicating grounds exist to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a) (2017).

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IV. Standard of Review

We review an adjudication under N.C. Gen. Stat. § 7B-1111(a) “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 J.M.K.*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4200535, *2 (2018) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996)).

V. Failure to Legitimate

[1] Respondent-Father contends the evidence presented at the adjudicatory stage of the hearing and the trial court’s evidentiary findings do not establish his failure to legitimate the children. Under N.C. Gen. Stat. § 7B-1111(a)(5), the trial court may terminate a father’s parental rights to a child born out-of-wedlock if, prior to the filing of the petition, the father has not done any of the following:

- a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department’s certified reply shall be submitted to and considered by the court.
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
- c. Legitimated the juvenile by marriage to the mother of the juvenile.
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
- e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Id. “The petitioner bears the burden of proving a father has failed to take any of the four actions enumerated under N.C. Gen. Stat. § 7B-1111(a)(5).” *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005). The trial court “must make specific findings of fact as to [each] subsection[.]” *Id.*

We agree with Respondent-Father that DSS adduced no evidence to support a finding that the children were born out-of-wedlock or that,

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at the time its petition was filed on 16 March 2017, Respondent-Father had not filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; legitimated or filed a petition to legitimate the children pursuant to N.C. Gen. Stat. §§ 49-10, -12.1; legitimated the children by marriage to the mother; or established paternity through a judicial proceeding.

While Mr. Locklear testified Respondent-Father had paid no child support or provided gifts or clothes for the children since their arrival in foster care, this minimal proffer does not suffice to meet DSS' burden of proof to support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(5). *See J.M.K.*, 2018 WL 4200535 at *3.

No evidence in the record supports the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(5). We need not address Respondent-Father's exceptions to the trial court's fact-finding in support of this ground. The adjudication is reversed. *See id.*

VI. Willful Lack of Progress

[2] Respondent-Father also challenges the trial court's statement in Finding 85 that he "willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the children's removal[,] insofar as this statement constitutes a conclusion of law of the existence of a ground for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). *Cf. generally Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review.").

Respondent-Father contends the court's Conclusion of Law 3 demonstrates that it adjudicated just a single ground for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(5) and "did not actually rely on the grounds in N.C. Gen. Stat. § 7B-1111(a)(2)[.]" He further asserts that any adjudication under N.C. Gen. Stat. § 7B-1111(a)(2) would be "improper . . . , because [DSS'] TPR petition did not allege this as a ground for terminating his rights."

DSS argues Finding 85 "recite[s] the language of" N.C. Gen. Stat. § 7B-1111(a)(2), and that the court's failure to repeat this language in Conclusion of Law 3 amounts to "a non-prejudicial clerical error." We need not resolve whether the court adjudicated the existence of § 7B-1111(a)(2) as a ground for termination. The record shows and we

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conclude DSS' TPR petition failed to allege that Respondent-Father did not make reasonable progress as a ground for terminating his parental rights.

Under N.C. Gen. Stat. § 7B-1104(6) (2017), a petition to terminate parental rights must state “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.” *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003) (quoting statute). This Court previously stated: “[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to *what acts, omissions or conditions are at issue.*” *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) (emphasis supplied).

In the case of *In re B.L.H.*, this Court further explained that,

[w]here the factual allegations in a petition to terminate parental rights *do not refer to a specific statutory ground for termination*, the trial court may find any ground for termination under N.C.G.S. § 7B-1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground. However, *where a respondent lacks notice* of a possible ground for termination, it is error for the trial court to conclude such a ground exists.

190 N.C. App. 142, 147, 660 S.E.2d 255, 257-58, *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008) (emphasis supplied). In relevant part, N.C. Gen. Stat. § 7B-1111(a)(2) authorizes the termination of parental rights upon a finding that

[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2).

DSS' TPR petition alleges thirteen numbered paragraphs, setting forth the procedural history of the case, demonstrating the basis for DSS' standing to seek termination under N.C. Gen. Stat. § 7B-1103(a)(3) and satisfying the other formal requirements for a petition in N.C. Gen. Stat. § 7B-1104(1)-(7) (2017). Paragraph 3 alleges that “a Juvenile Petition and Non-Secure Custody Order were filed on October 30, 2014, alleging that [Imogen and Liam] are neglected juveniles” Paragraph

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4 alleges that the children were adjudicated dependent on 2 September 2015. Paragraph 5(a) alleges that DSS “has been awarded custody of the minor children . . . by a court of competent jurisdiction” as shown by an order purportedly attached as an exhibit to the petition, but which is not included in the record on appeal.

Paragraph 12 of the TPR petition identifies the specific factual bases alleged by DSS for terminating the parents’ rights, as follows:

12. Facts sufficient to warrant a determination that one or more grounds for terminating parental rights exist under N.C.G.S. 7B-1111 are as follows:

- a) That the alleged father . . . of the children born out of wedlock has not, prior to the filing of a petition or motion to terminate his parental rights, done any of the following:
 - (a) filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services
 - (b) Legitimated the juvenile[s] pursuant to provisions of N.C.G. S. 49-10, N.C. G. S. 49-12.1, or filed a petition for this specific purpose
 - (c) Legitimated the juvenile[s] by marriage to the mother of the juveniles’ [sic]
 - (d) Provided substantial financial support or consistent care with respect to the juveniles’ [sic] and mother
 - (e) Established paternity through N.C.G.S. 49-14, 110-132, 130A-101, 130A-118, OR other judicial proceeding.
- b) The mother . . . is incapable of providing for the proper care and supervision of the children, such that the children are dependent children, and there is a reasonable probability that such incapability will continue for the foreseeable future.

(Emphasis supplied). *See* N.C. Gen. Stat. § 7B-1111(a)(5), (6) (2017).

Paragraph 12, and the body of the TPR petition more generally, make no reference to Respondent-Father’s willful failure to make reasonable progress in correcting the conditions that led to the children’s removal from the mother’s care. This petition cannot be said to provide “sufficient notice” to Respondent-Father of violation of failure to comply with N.C. Gen. Stat. § 7B-1111(a)(2) as a potential ground to terminate of his parental rights. *In re B.L.H.*, 190 N.C. App. at 147, 660 S.E.2d at 257.

DSS directs this Court to the petition’s Exhibit D, a fifteen-page affidavit signed by Mr. Locklear. Exhibit D is incorporated by reference into the body of the petition as follows:

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10. That the last known address of the mother . . . is as stated above, the efforts of the Petitioner to unite the juveniles' [sic] with their mother are as set out in Affidavit of Darryl Locklear, Social Worker III, a copy of which is attached to this original Petition marked Exhibit "D", to be taken as part of this paragraph as if fully set out herein.

11. That the last known address of the alleged father, [Respondent-Father], is as stated above, the efforts of the Petitioner to unite the juveniles' [sic] with their alleged father are as set out in Affidavit of Darryl Locklear, Social Worker III, a copy of which is attached to this original Petition marked Exhibit "D", to be taken as part of this paragraph as if fully set out herein.

N.C. Gen. Stat. § 7B-1104(3) provides that, if the names or addresses of a juvenile's parents are unknown, a petition for termination of parental rights "shall set forth with particularity the petitioner's . . . efforts to ascertain the . . . whereabouts of the parent or parents." *Id.* N.C. Gen. Stat. § 7B-1104(3) further provides that "[t]he information may be contained in an affidavit attached to the petition . . . and incorporated by reference." *Id.*

Mr. Locklear's affidavit details his activities related to the family's case between November 2014 and January 2017. Although dozens of the affidavit's 152 numbered paragraphs make some reference to Respondent-Father, the great majority do not. The affidavit recounts (1) Mr. Locklear's efforts in developing Respondent-Father's OHSA and contacting or attempting to contact Respondent-Father by mail and by phone; (2) Respondent-Father's statements to Mr. Locklear; (3) Respondent-Father's absence from, or attendance of, a particular meeting or hearing; and (4) statements about Respondent-Father made by the maternal grandmother, Respondent-Father's therapist, and the children's therapist. The affidavit concludes with the following averments about Respondent-Father:

150. The father . . . refuses to make regular contact with the agency. The social worker is unable to assess all his needs but is aware of domestic violence issues, substance abuse concerns and issues with parenting.

151. The father did meet with worker and agreed to complete substance abuse assessment/counseling, domestic violence assessment/counseling and mental health assessment/counseling.

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In the case of *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), this Court addressed the sufficiency of the allegations in DSS' petition in a juvenile abuse, neglect, or dependency proceeding. In *D.C.*, DSS filed a petition alleging that D.C. was a neglected juvenile based upon, *inter alia*, the respondent leaving the sixteen-month-old child "unsupervised in a motel room where she was later found by a motel employee." *D.C.*, 183 N.C. App. at 347, 644 S.E.2d at 641. Before the petition was heard, the respondent gave birth to C.C. *Id.* at 348, 644 S.E.2d at 642. When C.C. was two days old, DSS filed a petition alleging she was a dependent juvenile. *Id.*

As is common in abuse, neglect, and dependency proceedings, DSS used a form petition and checked the box indicating an allegation of dependency. *Id.* at 350, 644 S.E.2d at 643. In an attachment to the petition,

DSS incorporated verbatim all the allegations made with respect to respondent's care of D.C. and also alleged that respondent (1) received sporadic prenatal care for C.C., (2) refused to divulge the identity of C.C.'s father, (3) does not possess a crib, diapers, clothes, or formula for C.C., and (4) is incapable of providing care for a newborn.

Id. at 348, 644 S.E.2d at 642. The trial court subsequently adjudicated D.C. and C.C. to be neglected juveniles. *Id.*

On appeal, this Court affirmed D.C.'s adjudication as neglected, based upon the respondent having left the child unattended in a hotel room. *Id.* at 353, 644 S.E.2d at 645. However, this Court reversed C.C.'s adjudication as neglected, and concluded the allegations in the petition were insufficient under the precedent of *Hardesty* to give the respondent notice of an allegation of neglect in addition to the explicit allegation of dependency made in the petition. *Id.* at 350, 644 S.E.2d at 643 (citing *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82).

The Juvenile Code defines a neglected juvenile, *inter alia*, as one who "does not receive proper care" from her parent and expressly makes "relevant" to the neglect inquiry the fact that the "juvenile lives in a home . . . where another juvenile has been subjected to . . . neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2017). Nevertheless, this Court in *D.C.* deemed the allegations in the petition's attachment, which included the respondent's neglect of D.C., C.C.'s lack of regular prenatal care, and the respondent's lack of basic items necessary for newborn C.C.'s care, as "insufficient to put respondent on notice that both dependency *and neglect* of C.C. would be at

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issue during the adjudication hearing.” *D.C.*, 183 N.C. App. at 350, 644 S.E.2d at 643. This Court further

emphasize[d] that this holding is not based on DSS’s mere failure to “check the box” for “neglect” on the form petition. While it is certainly the better practice for the petitioner to “check” the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate. In this case, the box for “neglect” was not checked, *and* the factual allegations, while supporting the claim of dependency, did not *clearly allege* the separate claim of neglect.

Id. (emphasis original).

This Court’s holding in *D.C.* supports our conclusion that DSS’ TPR petition failed to provide adequate notice to Respondent-Father that his failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2) was at issue at the termination hearing. The body of the petition designates specific “[f]acts sufficient to warrant a determination that one or more grounds for terminating parental rights exist under N.C. Gen. Stat. 7B-1111” and then lists allegations comprising the grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(5).

While the petition incorporates Mr. Locklear’s affidavit by reference, it characterizes this attachment as an account of “the efforts of the Petitioner to unite the juveniles’ [sic] with their mother” and Respondent-Father. The affidavit makes no mention of Respondent-Father’s “progress,” much less his lack of “reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile[s]” from the mother’s home. N.C. Gen. Stat. § 7B-1111(a)(2). A fair review of the TPR petition suggests the affidavit was intended to satisfy the requirements of N.C. Gen. Stat. § 7B-1104(3), rather than to state the facts supporting grounds for termination under N.C. Gen. Stat. § 7B-1104(6).

VII. Conclusion

Respondent-Father was not provided prior notice that N.C. Gen. Stat. § 7B-1111(a)(2) was a potential ground for terminating his parental rights. The trial court erred to the extent it relied upon this ground. *See J.M.K.*, 2018 WL 4200535 at *2; *B.L.H.*, 190 N.C. App. at 148, 660 S.E.2d at 258. In the absence of findings of facts supporting any valid adjudication

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of Respondent that grounds exist to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a), the trial court's order is reversed. *It is so ordered.*

REVERSED.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF YI., J.I.

No. COA18-654

Filed 4 December 2018

1. Child Custody and Support—best interests—custody to one parent—parents' respective progress

The trial court did not abuse its discretion by determining it was in the children's best interest to award custody to their father where the children had been adjudicated neglected and dependent based on physical abuse by the mother's boyfriend. At the time of the permanency planning hearing, the mother was not actively participating in her case plan and was not working with the department of social services (DSS), while the father had contacted DSS as soon as he heard of the children's removal and had done everything DSS had asked of him to ensure a safe home for the children.

2. Appeal and Error—waiver—argument—failure to provide support

Respondent mother did not present a meritorious challenge to the trial court's retention of jurisdiction in a juvenile proceeding where she argued that the trial court did not analyze whether the case should have been transferred to a Chapter 50 proceeding but she did not provide support for her assertion.

3. Child Visitation—conditions—supervised—burden of cost

The trial court erred by ordering that visitation between a mother and her children occur at a supervised visitation center without addressing the costs, who must pay, and whether the mother had the ability to do so.

Appeal by respondent-mother from order entered 10 April 2018 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 8 November 2018.

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[262 N.C. App. 575 (2018)]

Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride and Dale Ann Plyler, for petitioner-appellee Union County Division of Social Services.

Parent Defender Wendy Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant mother.

No brief filed for guardian ad litem.

ZACHARY, Judge.

Respondent-mother appeals from an order awarding custody of her minor children, Y.I. (“Yvan”) and J.I. (“John”), to their father, “Jasper.”¹ We affirm in part, vacate in part and remand.

John was born in April 2008, and Yvan was born in September 2009. On 3 November 2016, the Union County Division of Social Services (“DSS”) received a report that the children had witnessed Respondent-mother’s boyfriend, “Alex,” punching, kicking, and dragging Respondent-mother. Both children also reported having been physically abused by Alex. On 27 March 2017, DSS received another report that Respondent-mother had injuries to her right eye and right arm that resulted from being assaulted by Alex. A social worker helped Respondent-mother and the children get admitted to a domestic violence shelter, but Respondent-mother left the shelter with the children within hours after their admission and returned to Alex’s residence.

On 28 March 2017, DSS filed juvenile petitions alleging that the children were neglected and dependent. DSS received nonsecure custody of the children. Following a 24 May 2017 adjudicatory and dispositional hearing, the trial court entered its 26 June 2017 order adjudicating the children to be neglected and dependent and ordering Respondent-mother, *inter alia*, to comply with her case plan, complete a psychological evaluation and comply with any resulting recommendations, complete domestic violence counseling, and engage in parenting classes.

The trial court held a permanency planning hearing on 7 March 2018, after which the court entered an order on 10 April 2018 awarding custody of the children to Jasper, as well as relieving DSS and the attorneys of record of any further responsibility in the case. Respondent-mother filed written notice of appeal on 19 April 2018.

1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

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Standard of Review

“[Appellate] review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court’s findings of fact are supported by any competent evidence, they are conclusive on appeal.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted).

Award of Custody

[1] Respondent-mother first contends that the trial court erred in failing to return custody of the children to her. We disagree.

At any permanency planning hearing, the Juvenile Code permits the trial court to “place the child in the custody of either parent . . . found by the court to be suitable and found by the court to be in the best interests of the juvenile.” N.C. Gen. Stat. § 7B-906.1(i) (2017). “We review a trial court’s determination as to the best interest of the child for an abuse of discretion.” *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015) (citation and quotation marks omitted).

In the present case, the trial court made the following findings relevant to its determination that custody with Jasper was in the children’s best interests:

8. Some of the issues that led to the removal of the children from the home of [Respondent-mother] . . . included Domestic Violence and Mental Health Concerns. The court has consistently ordered [Respondent-mother] to participate in Domestic Violence Counseling, Address the Mental Health concerns and participate in parenting classes.
9. [Respondent-Mother] has made it clear to DSS that she does not intend to participate in parenting classes.
10. [Respondent-mother] participated in a psychological assessment with Dr. Popper which was completed in October of 2017. [Respondent-mother] has been identified as having PTSD which she attributes to the Domestic Violence between herself and [Jasper].
11. Dr. Popper is of the opinion that [Respondent-mother] is reluctant to examine herself as to what steps she can take, because she is a victim of Domestic Violence.

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12. [Respondent-mother] is reluctant to engage in Domestic Violence Counseling and Parenting Classes because Dr. Popper did not specifically recommend those services. [Respondent-mother] has not made substantial progress to address the issues that caused the juveniles to be removed from her home.

. . . .

15. The juveniles were placed with [their paternal aunt] from September 8, 2017 until February 14, 2018 at which time they were moved to the home of [Jasper].

16. Since being [with Jasper] in Catawba County the juveniles have made significant progress with their educational needs. [John] is no longer in need of an Individual Education Plan.

17. [Jasper] did not originally participate in this matter because he was not aware that the juveniles were in Foster Care. He resided in Mexico.

18. When [Jasper] learned that the juveniles were in Foster Care in or around August of 2017, he returned to North Carolina and immediately began working with DSS on an Out of Home Services Agreement.

19. [Jasper] has completed the Triple P Parenting program and has completed counseling to address prior domestic violence with [Respondent-mother].

. . . .

23. [Respondent-mother] is not making adequate progress within a reasonable period of time under the plan.

24. [Jasper] is making adequate progress within a reasonable period of time under the plan.

25. [Respondent-mother] is not actively participating in or cooperating with the plan, DSS, and the guardian ad litem for the juveniles.

26. [Jasper] is actively participating in or cooperating with the plan, DSS, and the guardian ad litem for the juveniles.

27. (A) The juveniles' return [to] the home of [Respondent-mother] would be contrary to the juveniles' best interest.

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. . . .

28. The following progress has been made toward alleviating or mitigating the problems that necessitated placement: [Jasper] has completed parenting classes, followed all activities outlined in his Out of Home Services Agreement and secured safe and stable housing. [Respondent-mother] has completed a comprehensive psychological [sic] exam.

. . . .

33. The court has been presented sufficient evidence and thus finds that the juveniles will receive proper care and supervision in a safe home if they are allowed [to] return to the legal and physical custody of [Jasper].

34. It is in the juveniles' best interest for their custody to be granted to [Jasper].

Respondent-mother first appears to challenge the statement in finding 8 that domestic violence was one of the issues that led to the removal of the children from her home. Setting aside the fact that Respondent-mother fails to specifically challenge this statement as unsupported by the evidence, we nonetheless find support in the trial court's 26 June 2017 adjudicatory order, wherein the court stated that it was adjudicating the children to be neglected juveniles, based in part on the fact that Respondent-mother "has been the victim of Domestic Violence perpetrated by the father of the juveniles, [Jasper]." The order further stated that Respondent-mother was "in need of domestic violence counseling as [a] caretaker[] of the juveniles." At the permanency planning hearing, a DSS social worker confirmed that "part of the concern when these children came into DSS custody was domestic violence altercations between [Respondent-mother] and [her domestic partner.]" Thus, the challenged statement is supported by the trial court's 26 June 2017 order and testimony from the permanency planning hearing.

Respondent-mother further contends that findings 12, 23, and 26 "are contrary to the evidence presented[,] but wholly fails to support her contention with explanation or citation to the record. To the extent Respondent-mother purports to challenge these findings, she has abandoned her challenge. *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."). Respondent-mother does not purport to challenge any of the trial court's other findings, and those findings are therefore binding on appeal. *In re C.B.*, 180 N.C. App. 221,

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223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007).

The trial court's findings demonstrate that once Jasper learned of the children's removal from the home, he immediately began working with DSS and had completed all that was asked of him by the time of the 10 April 2018 permanency planning hearing. The children were placed with Jasper in February 2018 and thereafter "made significant progress with their educational needs." While Respondent-mother participated in a psychological exam, she had not completed domestic violence or parenting classes. At the time of the hearing, Respondent-mother was not actively participating in her case plan and was not working with DSS or the children's guardian *ad litem*. In light of these findings, we cannot say that the trial court abused its discretion in determining that it was in the children's best interest to award custody to Jasper.

Retention of Juvenile Jurisdiction

[2] Respondent-mother next contends that the trial court erred in failing to transfer the case to a Chapter 50 action. While Respondent-mother frames her argument in this way, the substance of her argument appears to be that the trial court erred in failing to make a specific finding as to whether jurisdiction should be retained. Again, we disagree.

N.C. Gen. Stat. § 7B-911(a) provides that, "[u]pon placing custody with a parent or other appropriate person, the 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 pursuant to [Chapter 50]." N.C. Gen. Stat. § 7B-911(a) (2017). The statute does not expressly require that the court make a finding as to whether jurisdiction in the juvenile proceeding should be terminated and the matter transferred to a Chapter 50 action. However, in the event the trial court chooses to do so, N.C. Gen. Stat. § 7B-911(b) and (c) specify the findings the court must make and procedures it must follow in order to terminate jurisdiction in the juvenile proceeding and transfer the matter to a Chapter 50 civil case. N.C. Gen. Stat. § 7B-911(b), (c) (2017).

In this case, the trial court did not terminate its jurisdiction in the order and specifically informed the parties of their right to file a motion requesting that the court review the visitation plan, as is required when the trial court retains jurisdiction. *See* N.C. Gen. Stat. § 7B-905.1(d) (2017) ("If the court retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan[.]"). Respondent-mother does not contend that the trial court erroneously retained jurisdiction, or that the court failed to follow statutory requirements in doing

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so. Respondent-mother claims that “[t]he court did not analyze whether or not the case should be transferred to a Chapter 50 proceeding[,]” but provides no support for the assertion. Accordingly, Respondent-mother does not present a meritorious challenge to the trial court’s retention of jurisdiction.

Award of Visitation

[3] Lastly, Respondent-mother contends that the trial court erred in ordering that visitation occur at a supervised visitation center without addressing the cost, who would bear the responsibility for payment of that cost, and whether Respondent-mother had the means to do so. We agree.

N.C. Gen. Stat. § 7B-905.1 provides, in pertinent part:

(a) 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. The court may specify in the order conditions under which visitation may be suspended.

....

(c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a), (c) (2017).

In the present case, the trial court ordered that:

Visitation shall take place as follows: [Respondent-mother] shall have visitation with the juveniles 2 times per month for a minimum of one hour each time, supervised by either Gaston County Visitation Center or Carolina Solutions. If arrangements for the visitations do not take place within the next 30 days, then the parties shall motion the case back on for the court to address a visitation plan for [Respondent-mother].

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While the trial court adhered to the statutory requirements by setting forth “the minimum length and frequency of the visits and whether the visits shall be supervised[,]” the trial court’s order is not specific enough to allow this Court to determine whether the trial court abused its discretion in setting the conditions of visitation. In *In re J.C.*, 368 N.C. 89, 772 S.E.2d 465 (2015) (per curiam), our Supreme Court remanded for additional findings of fact where “[t]he district court made no findings whether [the] respondent mother was able to pay for supervised visitation once ordered[,]” reasoning that “[w]ithout such findings, our appellate courts are unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at [the] respondent mother’s expense.” *Id.*

In this case, the trial court did not determine what costs, if any, would be associated with conducting supervised visitation at Gaston County Visitation Center or Carolina Solutions. Given that the trial court relieved DSS of any further responsibility in the case, it appears likely that Respondent-mother would be required to pay for visitation, although the court failed to specify who was to bear any such expense. In the event the trial court intended for Respondent-mother to bear the cost of visitation, the court failed to determine whether Respondent-mother had the ability to pay. As a result, we vacate the portion of the permanency planning order regarding visitation and remand for additional findings of fact, addressing whether Respondent-mother is to bear any costs associated with conducting visits at the supervised visitation centers, and if so, whether Respondent-mother has the ability to pay those costs.

Conclusion

In sum, we vacate the portion of the order establishing a visitation plan and remand for further findings of fact. The trial court may, in its discretion, hold additional hearings in this matter to address these issues. The remainder of the trial court’s order is affirmed.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges CALABRIA and TYSON concur.

LAMBERT v. MORRIS

[262 N.C. App. 583 (2018)]

SAM LAMBERT AND ANDRIA LAMBERT, PLAINTIFFS

v.

SALLY MORRIS AND STEVE HAIR, DEFENDANTS

No. COA18-189

Filed 4 December 2018

Animals—lost—dog—adoption—statutory procedure

The trial court's dismissal of plaintiffs' tort claims against defendant for not returning their lost dog was affirmed, where Animal Control satisfied its statutory duty (N.C.G.S. § 19A-32.1) to hold plaintiffs' lost dog for a minimum of 72 hours, after which time plaintiffs lost any ownership rights in the dog and defendant became the dog's lawful owner through a formal adoption.

Appeal by plaintiffs from order entered 16 August 2017 by Judge Michael L. Robinson in Stanly County Superior Court. Heard in the Court of Appeals 2 October 2018.

Carruthers & Roth, P.A., by Brandon K. Jones and Richard L. Vanore, for plaintiffs-appellants.

Bolster Rogers, PC, by Melissa R. Monroe and Jeffrey S. Bolster, for defendants-appellees.

BRYANT, Judge.

Where plaintiffs did not demonstrate genuine issues of material fact, the trial court did not err in granting summary judgment.

Plaintiffs Sam Lambert and Andria Lambert filed an action against defendants Sally Morris and Steve Hair alleging conversion, civil conspiracy, unfair and deceptive trade practices, and intentional or reckless infliction of emotional distress. Plaintiffs also sought injunctive relief and damages related to the disappearance of their dog, Biscuit.

On 16 August 2015, Biscuit went missing from plaintiffs' residence in Stanly County. Plaintiffs attempted to locate Biscuit for several days before initiating contact with Jimmy Medlin of the Montgomery County Animal Control ("Animal Control") on or about 19 August 2015. Plaintiffs informed Medlin that a photograph of Biscuit was posted on Animal Control's unofficial Facebook page and asked if Biscuit was there. Medlin checked their records and told plaintiffs they did not have

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a record of Biscuit. Plaintiffs continued to follow up with the unofficial Facebook page periodically for news of Biscuit.

Over a month later, on 2 October 2015, a citizen brought Biscuit to Animal Control where she was placed in one of Animal Control's holding cells located on the Montgomery County Humane Society's ("Humane Society") property. Biscuit did not have a microchip or a collar to identify the owners. Biscuit was held for 72 hours under the possession of Animal Control. After the 72-hour period, on 5 October 2015, Animal Control transferred possession of Biscuit to the Humane Society.¹ The Humane Society often takes possession of animals after the 72-hour period and finds available homes for them.

The next day, on 6 October 2015, a volunteer with the Humane Society took Biscuit to a veterinarian for examination and spaying. On 7 October 2015, a picture of Biscuit was posted by the Humane Society on its website where it remained until Biscuit was adopted. Meanwhile, it was discovered that Biscuit had tumors in her mammary glands and on 20 October 2015, she was taken to the Asheboro Animal Hospital to have them surgically removed. Then, on 30 October 2015, defendant Hair formally adopted Biscuit by completing an adoption application with the Humane Society. Defendant Hair reimbursed the Humane Society for some of Biscuit's veterinary bills while in the care of the Humane Society.

Approximately four weeks after Biscuit was adopted, defendant Hair decided to let defendant Morris foster Biscuit because of problems Biscuit was having interacting with defendant Hair's other rescue dogs. Defendant Morris brought Biscuit to the Humane Society about "two to three times a week."

Almost a year later, in June 2016, plaintiffs found an old Facebook posting of Biscuit at the Humane Society and attempted to claim Biscuit. Defendant Hair requested that plaintiffs needed to reimburse him for Biscuit's vet bills while in the care of the Humane Society if he gave Biscuit to them, which plaintiffs agreed.

Defendant Hair requested to speak with plaintiffs' veterinarian, but plaintiffs were unable to reach him. Defendant Hair did not feel comfortable giving Biscuit back to plaintiffs when plaintiffs indicated that they had over fourteen dogs. Defendant Hair stated he would not return Biscuit to plaintiffs before conducting a home visit. The exchange

1. Defendant Morris was the Vice President/Secretary and Treasurer for the Humane Society and Defendant Hair was the President.

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between plaintiffs and defendant Hair became heated. Defendant Hair eventually ended the meeting and told plaintiffs to leave. Defendant Hair refused to return Biscuit and did not proceed any further with the home inspection.

On 22 July 2016, plaintiffs filed their action against defendants. During negotiations, defendant Hair agreed to return Biscuit to plaintiffs to resolve the lawsuit, however he later declined and the parties proceeded with the action. On 14 August 2017, the action was heard before the Honorable Michael L. Robinson on defendants' motion for summary judgment. Judge Robinson issued a written order granting judgment in favor of defendants and dismissed plaintiffs' claims. Plaintiffs appeal.

On appeal, plaintiffs argue the trial court erred in granting summary judgment in favor of defendants and dismissing plaintiffs' claims for: 1) conversion and permanent injunction; 2) civil conspiracy; 3) unfair and deceptive trade practices; 4) intentional or reckless infliction of emotional distress; and 5) punitive damages. We disagree.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Rule 56 of the North Carolina Rules of Civil Procedure provides that any party is entitled to judgment as a matter of law “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). “In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party.” *Hart v. Brienza*, 246 N.C. App. 426, 430, 784 S.E.2d 211, 215 (2016) (citations and quotations omitted).

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim If the moving party meets this burden, the non-moving party must in turn either show that a genuine

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issue of material fact exists for trial or must provide an excuse for not doing so.

Id.

North Carolina General Statutes, section 19A-32.1 provides for procedures an animal shelter must follow upon receiving a lost or abandoned animal. N.C. Gen. Stat. § 19A-32.1 (2017). The statute, in pertinent part, states “all animals received by an animal shelter or by an agent of an animal shelter shall be held for a minimum holding period of 72 hours.” *Id.* § 19A-32.1(a). “[A] person who comes to an animal shelter [within the minimum holding period] attempting to locate a lost pet is entitled to view every animal held at the shelter, subject to rules providing for such viewing during at least four hours a day, three days a week.” *Id.* § 19A-32.1(c).

After the expiration of the minimum holding period, the shelter may (i) direct the agent possessing the animal to return it to the shelter, (ii) allow the agent to adopt the animal consistent with the shelter’s adoption policies, or (iii) extend the period of time that the agent holds the animal on behalf of the shelter.

Id. § 19A-32.1(e).

Plaintiffs allege many causes of action, all of which are based on whether defendant Hair’s adoption of Biscuit was properly conducted. In its extensive order granting summary judgment to defendants, the trial court viewed the issue before it as follows: “whether [] defendants’ evidence that the adoption of [p]laintiffs’ lost dog ‘Biscuit’ was properly conducted pursuant to applicable law has been sufficiently rebutted by [p]laintiffs’ evidence to create an issue for jury determination, thus mandating denial of the Motion.” The trial court determined that plaintiffs’ evidence, challenging defendant Hair’s adoption of Biscuit, did not create genuine issues of material fact. As the trial court determined and we agree, Animal Control satisfied its legal duty as Biscuit remained in its custody for the required statutory holding period and was acquired by the Humane Society *only after* the expiration of 72 hours.

By law, it is permissible for Animal Control to euthanize animals after the 72-hour period. *See id.* § 19A-32.1(a). However, as defendants established, it is also customary for Animal Control to transfer animals to the Humane Society for the purpose of finding new available homes. After the minimum holding period, Animal Control has the legal authority to *either* euthanize *or* transfer possession to initiate adoption. It is

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made clear by the statute that after the 72-hour holding period, prior ownership can be legally severed and a formal adoption can begin before euthanasia is considered.

Plaintiffs lost any ownership rights to Biscuit after the first 72 hours Biscuit was in the possession of Animal Control.² Once the Humane Society received Biscuit and initiated a formal adoption to a third party—in this case, defendant Hair—almost a month had passed since Biscuit was in the possession of Animal Control.

It is undisputed that defendant Hair was the rightful owner of Biscuit, and we agree with the statement of the trial court that “[d]efendant Hair, as the [rightful] owner of [Biscuit], was entitled to negotiate with [p]laintiffs in whatever fashion he desired” in deciding whether to return Biscuit to plaintiffs or keep her and “this conduct was solely as an individual . . . not on behalf of the Humane Society.” Therefore, defendants have successfully rebutted plaintiffs’ allegations of tortious conduct and demonstrated that there exist no genuine issues of material fact.

Accordingly, the trial court did not err in granting summary judgment to defendants and dismissing plaintiffs’ claims.

AFFIRMED.

Judges DIETZ and INMAN concur.

2. We again note that Biscuit had no identifying chip or collar when she arrived at Animal Control.

LOCKLEAR v. CUMMINGS

[262 N.C. App. 588 (2018)]

MARJORIE C. LOCKLEAR, PLAINTIFF

v.

MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER,
DUKE UNIVERSITY HEALTH SYSTEM AND DUKE UNIVERSITY
AFFILIATED PHYSICIANS, INC., DEFENDANTS

No. COA16-1015-2

Filed 4 December 2018

1. Pleadings—Rule 9(j) certification—motion to amend—motions to dismiss

In a medical malpractice case, the trial court erred by denying plaintiff's motion to amend her complaint to include the proper Rule 9(j) certification and by dismissing plaintiff's claims. Plaintiff inadvertently used certification language from a prior version of Rule 9(j), and her motion to amend was accompanied by affidavits averring that her experts' review occurred prior to the filing of the original complaint.

2. Civil Procedure—Rule 4—service of process—private process server

In a medical malpractice case, the trial court properly dismissed plaintiff's claims against defendant medical center where she used a private process server instead of the sheriff to serve defendant with the complaint. Private process service is authorized by statute only when the sheriff is unable to fulfill the duties of a process server, a showing not met here. Although plaintiff's process server filed an affidavit pursuant to Rule 4, a self-serving affidavit does not itself create authority for an affiant.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 2 February 2016 and 4 February 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 March 2017. By opinion issued 16 May 2017, a divided panel of this Court reversed in part and affirmed in part the trial court's grant of Defendants' motions to dismiss. In an opinion filed 17 August 2018, the Supreme Court of North Carolina reversed and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision *Vaughan v. Mashburn*, ___ N.C. ___, 817 S.E.2d 370 (2018).

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[262 N.C. App. 588 (2018)]

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, David D. Ward, and Katherine Hilkey-Boyatt, for Defendant-Appellees Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius Worley Berry, for Defendant-Appellee Southeastern Regional Medical Center.

HUNTER, JR., Robert N., Judge.

Marjorie C. Locklear (“Plaintiff”) appeals from an order dismissing her complaint against Defendants Dr. Matthew Cummings, Duke University Health System, and Duke University Affiliated Physicians (collectively “Duke Defendants”) under Rule 9(j), as well as the denial of her motion to amend under Rule 15(a). Plaintiff also appeals from an order dismissing her complaint against Defendant Southeastern Regional Medical Center (“Southeastern”) under Rules 9(j) and 12(b)(5), as well as the denial of her motion to amend under Rule 15(a). After review, we vacate and remand in part and affirm in part.

I. Factual and Procedural Background

On 30 July 2015, one day before the statute of limitations expired, Plaintiff filed a complaint against Defendants, seeking monetary damages for medical negligence. The complaint alleges the following narrative.

On 31 July 2012, Dr. Cummings performed cardiovascular surgery on Plaintiff. During surgery, Dr. Cummings failed to monitor and control Plaintiff’s body and was distracted. Additionally, he did not position himself in close proximity to Plaintiff’s body. While Plaintiff “was opened up and had surgical tools in her[,]” Plaintiff fell off of the surgical table. Plaintiff’s head and the front of her body hit the floor. As a result of the fall, Plaintiff suffered a concussion, developed double vision, injured her jaw, displayed bruises, and was “battered” down the left side of her body. Plaintiff also had “repeated” nightmares about falling off the surgical table. Duke Defendants and Defendant Southeastern acted negligently by retaining physicians, nurses, and other healthcare providers who allowed Plaintiff’s accident to occur.

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In her complaint, Plaintiff included the following, in attempt to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure:

24. That the medical care and treatment rendered to Plaintiff by Defendant Cummings on July 31, 2012 has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.

25. That the medical care and treatment of Defendant Cummings has been reviewed by a person that Plaintiff will seek to have qualified [as] an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.

....

34. That the medical care and treatment of Defendant Southeastern Regional Medical Center has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to the decedent fell below the applicable standard of care.

35. That the medical care and treatment of Defendant Southeastern Regional Medical Center has been reviewed by a person that the Plaintiff will seek to have qualified as an expert witness by Motion under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to the decedent fell below the applicable standard of care.

On 9 September 2015, private process server, Richard Layton, served Duke Defendants by delivering Plaintiff's civil cover sheet, summons, and complaint to Margaret Hoover, a registered agent for Duke Defendants. On 19 September 2015, Gary Smith, Jr. served Plaintiff's summons and complaint on Dr. Cummings. Lastly, on 24 September 2015, Smith served Plaintiff's summons and complaint on Southeastern by delivering the papers to C. Thomas Johnson, IV, Southeastern's Chief Financial Officer.¹

1. In Smith's affidavit, he listed Johnson as Southeastern's registered agent.

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On 10 November 2015, Dr. Cummings and Duke Defendants filed a joint answer and motion to dismiss. Dr. Cummings and Duke Defendants denied the allegations in Plaintiff's complaint and asserted defenses under Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure.

On 23 November 2015, Southeastern filed an answer and denied Plaintiff's allegations. Southeastern moved to dismiss Plaintiff's complaint under Rules 12(b)(4), 12(b)(5), 12(b)(6), and 9(j) of the North Carolina Rules of Civil Procedure. On 29 December 2015, Johnson filed an affidavit. In the affidavit, Johnson swore he was the Chief Financial Officer of Southeastern, but not the corporation's registered agent.

On 8 January 2016, Plaintiff filed notice of submission of affidavits in opposition of Defendants' motions to dismiss. Plaintiff attached nurse Melissa Hannah's affidavit, which stated, *inter alia*:

4. I have been retained by counsel for the Plaintiff Marjorie C. Locklear.
5. I expect to be qualified as a nursing expert for the Plaintiff Marjorie Locklear.
6. I have reviewed Marjorie Locklear's relevant medical records from Southeastern regional Medical Center for the time period of July 31, 2012 through August 5, 2012.
6. [sic] From my review of these medical records, I determined that the nursing staff attending Ms. Locklear and assisting Dr. Matthew S. Cummings on July 31, 2012 deviated from the applicable standard of care for nursing personnel in letting Ms. Locklear fall off the catherization table on which she had been placed.
7. I am ready willing and able to testify as to all relevant issues including those specified above.
8. I first expressed by opinions in writing on July 28, 2015, by answering and relaying a questionnaire.

Plaintiff also attached Dr. Richard Spellberg's affidavit, which stated, *inter alia*:

3. I was retained by the Plaintiff in this action. Marjorie c. Locklear.

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4. I reviewed Ms. Locklear’s medical records from Southeastern Regional Medical Center for the time period of July 31, 2012 through August 5, 2012.

5. After my review, I orally expressed my opinion to counsel for the Plaintiff on July 21, 2015.

....

7. I expect to be qualified as a physician expert for the Plaintiff Marjorie Locklear.

8. From my review of the medical records specified above, I determined that Matthew S. Cummings, M.D. deviated from the standard of care applicable to Marjorie Locklear and her condition by letting her fall off the catheterization table on which she had been placed.

9. From my review of the medical records specified above, I determined that Dr. Cummings’ deviation from the applicable standard of care resulted in injury to Ms. Locklear

....

11. I am ready willing and able to testify as to all relevant issues including those discussed above.

On 11 January 2016, the trial court held a hearing on all Defendants’ pending motions. During argument, Plaintiff requested “leave of the Court to amend [the] complaint so that there’s no controversy hereafter.” Plaintiff asserted she “wishe[d] to allege not just that the medical care and all medical records were reviewed but that the review was conducted prior to the complaint being filed and that a proper review was done.” Then, Plaintiff requested leave “pursuant to Rules 15(a) and 60.”

On 2 February 2016, the trial court granted Dr. Cummings’s and Duke Defendants’ motion to dismiss pursuant to Rule 9(j) and denied Plaintiff’s motion to amend under Rule 15(a). On 4 February 2016, the trial court granted Southeastern’s motion to dismiss pursuant to Rules 9(j) and 12(b)(5) and denied Plaintiff’s motion to amend under Rule 15(a). Plaintiff filed timely notice of appeal.

II. Standard of Review

The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580

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S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009) (citation omitted).

"A motion to amend is addressed to the discretion of the trial court." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). "When the trial court's ruling is based on a misapprehension of law, the order will be vacated and the case remanded to the trial court for further proceedings." *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, ___ (2018) ("*Vaughan II*") (citing *Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991)).

We review the trial court's dismissal under Rule 12(b)(5) *de novo*. *New Hanover Cty. Child Support Enforcement ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

III. Analysis**A. Motions to Dismiss under Rule 9(j) and Motion to Amend under Rule 15**

[1] Plaintiff argues the trial court erred in dismissing her complaint against Defendants under Rule 9(j) and denying her motion to amend under Rule 15. We agree.

Rule 9 of the Rules of Civil Procedure governs special pleadings and states:

(j) Medical malpractice.—Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

- (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
- (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged

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negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; . . .

N.C. R. Civ. P. 9(j) (2017).

In her brief, Plaintiff concedes “her counsel inadvertently failed to expressly state this pre-filing evaluation included a review of ‘all medical records pertaining to the alleged negligence.’” However, Plaintiff argues she “actually complied with the substantive pre-suit review requirements of Rule 9(j).”

Our Supreme Court recently addressed the interplay between Rule 15 and Rule 9(j) of the North Carolina Rules of Civil Procedure in *Vaughan v. Mashburn. Vaughan II*, ___ N.C. ___, 817 S.E.2d 370. In that case, plaintiff filed a complaint for medical malpractice but “inadvertently used the certification language of a prior version of Rule 9(j)[.]” *Id.* at ___, 817 S.E.2d at ___. Specifically, plaintiff’s complaint failed to include the following language “all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry[.]” as required by the current Rule 9(j). *Id.* at ___, 817 S.E.2d at ___. Consequently, defendants filed a motion to dismiss plaintiff’s complaint, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* at ___, 817 S.E.2d at ___. In response to defendants’ motion, plaintiff filed a motion for leave to file an amended complaint. *Id.* at ___, 817 S.E.2d at ___. Plaintiff wanted to amend her complaint to add the one missing sentence required by Rule 9(j), so as to be in compliance with Rule 9(j). *Id.* at ___, 817 S.E.2d at ___. In support of her motion, plaintiff submitted affidavits, indicating an expert “reviewed plaintiff’s medical care and related medical records before the filing of plaintiff’s original complaint.” *Id.* at ___, 817 S.E.2d at ___. The trial court granted defendants’ motion to dismiss, denied plaintiff’s motion to amend, and dismissed plaintiff’s complaint, with prejudice. *Id.* at ___, 817 S.E.2d at ___. Plaintiff appealed.

Our Court affirmed the trial court’s order. *Vaughan v. Mashburn*, ___ N.C. App. ___, 795 S.E.2d 781 (2016) (“*Vaughan I*”). Concluding precedent bound the decision, we held “where a medical malpractice ‘plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot

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have been deemed to have commenced within the statute.’ ” *Id.* at ___, 795 S.E.2d at 788 (citation and emphasis omitted). Thus, the trial court did not err in denying plaintiff’s motion to amend. *Id.* at ___, 795 S.E.2d at 788. Plaintiff filed a petition for discretionary review with the North Carolina Supreme Court. *Vaughan II*, ___ N.C. at ___, 817 S.E.2d at ___. The Supreme Court allowed plaintiff’s petition for discretionary review. *Id.* at ___, 817 S.E.2d at ___.

Our Supreme Court reversed this Court’s decision. After reviewing the purposes behind Rule 15 and Rule 9(j), the Supreme Court held “a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c).” *Id.* at ___, 817 S.E.2d at ___. The Supreme Court further stated:

[w]e again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of weed[ing] out law suits which are not meritorious before they are filed. But when a plaintiff prior to filing has procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle that decisions be had on the merits and not avoided on the basis of mere technicalities.

Id. at ___, 817 S.E.2d at ___ (citations and quotation marks omitted) (alteration and emphasis in original).

In the case *sub judice*, Plaintiff inadvertently used Rule 9(j) certification language from a prior version of the rule, similar to plaintiff in *Vaughan*. After Defendants filed motions to dismiss, Plaintiff filed two affidavits, one by Dr. Spellberg and one by nurse Hannah. At the hearing, Plaintiff requested leave to amend her complaint, because she “wishe[d] to allege not just that the medical care and all medical records were reviewed but that the review was conducted prior to the complaint being filed and that a proper review was done.” Following the Supreme Court’s holding in *Vaughan II*, we hold the trial court erred in dismissing

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Plaintiff's complaint under Rule 9(j) and denying her motion to amend.² While Defendants present several arguments in support of affirming the trial court's orders—which would have been persuasive under prior case law—these arguments are based on technicalities. Agreeing with Defendants would violate the holding and spirit of *Vaughan II*. Accordingly, we vacate the trial court's orders dismissing Plaintiff's complaint against Defendants and denying Plaintiff's motion to amend and remand for proceedings not inconsistent with this opinion.³

B. Motion to Dismiss under Rule 12(b)(5)

[2] Plaintiff next contends the trial court erred in dismissing her claims against Southeastern under Rule 12(b)(5). We disagree.

Rule 4 of the North Carolina Rules of Civil Procedure governs service of process in North Carolina. Rule 4 states, *inter alia*:

(a) Summons — Issuance; who may serve.—Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.

....

(h) Summons—When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person

2. Our holding does not conflict with this Court's recent decision, *Fairfield v. WakeMed*, ___ N.C. App. ___, ___ S.E.2d ___ (N.C. Ct. App. Oct. 2, 2018). In *Fairfield*, plaintiff did not file or appeal from a motion to amend. Thus, the holding of *Vaughan II* did not apply, because there was no interplay between Rule 9(j) and Rule 15. Instead, our Court based its decision only on Rule 9(j).

3. The trial court dismissed Plaintiff's complaint against Dr. Cummings and Duke Defendants only under Rule 9(j); thus, we vacate that order. However, the trial court dismissed Plaintiff's complaint against Southeastern under Rule 9(j) *and* Rule 12(b)(5). We vacate the portion of the order decided under Rule 9(j) and affirm the portion of the order decided under Rule 12(b)(5).

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who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) Summons—When process returned unexecuted. –If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

N.C. Gen. Stat. § 1A-1, Rule 4 (2016).

Plaintiff argues service by a private process server is permissible under the North Carolina Rules of Civil Procedure if the private process server files an affidavit under N.C. Gen. Stat. § 1-75.10.⁴

Southeastern contends holding Plaintiff’s service was proper conflates Rule 4(a) with Rule 4(h) and Rule 4(h1). We agree.

Here, Plaintiff hired a private process server, Smith, to serve Southeastern. On 24 September 2015, Smith served Johnson, the Chief Financial Officer of Southeastern. On 14 October 2015, Smith signed an “Affidavit of Process Server” asserting he was over the age of 18 years, not a party to the action, and “authorized by law to perform said service.”

In North Carolina, private process service is not always “authorized under law”. The proper person for service in North Carolina is the sheriff of the county where service is to be attempted or some other person duly authorized by law to serve summons. N.C. Gen. Stat. § 1A-1, Rule 4(a). Although Plaintiff’s process server filed the statutorily required affidavit, a self-serving affidavit alone does not confer “duly authorized by law” status on the affiant. Legal ability to serve process by private process server is limited by statute in North Carolina to scenarios where the sheriff is unable to fulfill the duties of a process server. N.C. Gen. Stat. § 1A-1, Rule 4(h), (h1). For example, if the office of the sheriff

4. In support of her argument, Plaintiff also cites *Garrett v. Burris*, No. COA14-1257, 2015 WL 4081832 (unpublished) (N.C. Ct. App. July 7, 2015). However, *Garrett* is an unpublished opinion and is not binding authority.

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is vacant, the county's coroner may execute service. N.C. Gen. Stat. § 162-5. Additionally, if service is unexecuted by the sheriff under Rule 4(a), the clerk of the issuing court can appoint "some suitable person" to execute service under Rule 4(h). Here, the record does not disclose the sheriff was unable to deliver service so that the services of a process server would be needed. This is commonly accepted statutory practice in North Carolina and discussed in treatises dealing with civil procedure. See William A. Shuford, *North Carolina Civil Practice and Procedure* § 4.2 (6th ed.); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-4, at 4-16 (2016). Accordingly, we affirm the trial court's order dismissing Plaintiff's claims against Southeastern under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure.

IV. Conclusion

For the foregoing reasons, we vacate the portions of the trial court's orders dismissing Plaintiff's complaint under Rule 9(j) and denying Plaintiff's motion to amend. We affirm the portion of the trial court's order dismissing Plaintiff's complaint against Southeastern under Rule 12(b)(5).

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judge CALABRIA concurs.

Judge BERGER dissenting in part in separate opinion, concurring in part.

BERGER, Judge, dissenting in part in separate opinion, concurring in part.

I respectfully dissent from the portion of the majority opinion vacating and remanding the trial court's order that had dismissed Plaintiff's complaint and denied her motion to amend. Otherwise, I concur with the majority.

First and foremost, it must be stressed that "[a] motion to amend the pleadings is addressed to the sound discretion of the trial court[.]" and "[t]he exercise of the court's discretion is not reviewable absent a clear showing of abuse." *Carter v. Rockingham Cnty. Bd. Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations and quotation marks omitted). Furthermore, in our review of the denial of a motion to amend, a trial court's "ruling is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have

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been the result of reasoned decision.” *Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc.*, 111 N.C. App. 725, 729, 433 S.E.2d 759, 762 (1993) (citations and quotation marks omitted).

Here, Plaintiff sought to amend her complaint alleging medical malpractice so that it would comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, which states that:

Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

- (1) The pleading specifically asserts that the medical care and *all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness* under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
- (2) The pleading specifically asserts that the medical care and *all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness* by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
- (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period

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not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C. Gen. Stat. § 1A-1, Rule 9 (emphasis added).

“Rule 9(j) of the North Carolina Rules of Civil Procedure dictates the pleading requirements for bringing a medical malpractice action [and] serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action.” *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012) (citation and quotation marks omitted). This Rule also “unambiguously requires a trial court to dismiss a complaint if the complaint’s allegations do not facially comply with the rule’s heightened pleading requirements.” *Norton v. Scotland Mem’l Hosp., Inc.*, ___ N.C. App. ___, ___, 793 S.E.2d 703, 707 (2016) (citation omitted). Our Supreme Court has clarified that the review contemplated by Rule 9(j)(1) and (2) must occur prior to the filing of a medical malpractice complaint to avoid dismissal. *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, 377 (2018).

Additionally, “[b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a).” *Alston v. Hueske*, 244 N.C. App. 546, 553, 781 S.E.2d 305, 310 (2016) (citation omitted); *Keith v. Northern Hosp. Dist. of Surry Cnty.*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998). In the drafting of Rule 9(j)(1) and (2), which both require review of “*all* medical records,” “[w]e presume that the legislature carefully chose each word used.” *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (*purgandum*¹).

1. Our shortening of the Latin phrase “*Lex purgandum est.*” This phrase, which roughly translates “that which is superfluous must be removed from the law,” was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

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The United States Court of Federal Claims gave the best explanation of ‘all,’ when it wrote:

‘All’ is often used in writing intended to have legal effect as a preface to flexible or imprecise words, as in ‘all other property,’ ‘all the rest and residue,’ ‘all and every,’ ‘all speed,’ ‘all respect.’ Its purpose is to underscore that intended breadth is not to be narrowed. ‘All’ means the whole of that which it defines—not less than the entirety. ‘All’ means all and not substantially all.

Nat’l Steel & Shipbuilding Co. v. United States, 190 Ct. Cl. 247, ___, 419 F.2d 863, 875 (1969). We therefore must presume that when the legislature wrote ‘all medical records,’ it meant “all and not substantially all” records. *Id.*

The issue in *Vaughan v. Mashburn*, as here, concerned relation back of Rule 9(j) certification through an amended complaint *after* expiration of the statute of limitations. *Vaughan*, ___ N.C. at ___, 817 S.E.2d at 379. However, the plaintiff in *Vaughan* filed a motion to amend her complaint to assert that “*all* medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry had been reviewed before the filing of the original complaint.” *Id.* (quotation marks omitted) (emphasis added).

Plaintiff here did not allege in her oral motion to amend or in affidavits filed in opposition to defendant’s motion to dismiss that her expert witnesses had reviewed “*all* medical records pertaining to the alleged negligence that are available to Plaintiff.” The record contains an unsworn, undated affidavit of Dr. Richard D. Spellberg, who stated that he had “reviewed Ms. Locklear’s medical records from Southeastern Regional Medical Center for the time period of July 31, 2012 through August 5, 2012” on July 27, 2017. His answers to a written questionnaire attached to the unsworn, undated affidavit indicate that he “reviewed Marjorie Locklear’s medical records” for the same location and time period.

Similarly, Plaintiff provided the affidavit of nurse Melissa L. Hannah. Ms. Hannah swore that she had reviewed Plaintiff’s “*relevant* medical records from Southeastern regional [*sic*] Medical Center for the time period of July 31, 2012 through August 5, 2012.” Ms. Hannah also completed a questionnaire in which she confirmed that she had reviewed Plaintiff’s “*relevant* medical records.”

Neither potential expert certified by affidavit or otherwise stated that they had reviewed *all* of Plaintiff’s medical records relating to the

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alleged medical malpractice. Dr. Spellberg simply alleged that he had reviewed Plaintiff's medical records, but does not state he reviewed *all* of Plaintiff's medical records concerning the alleged negligence. Ms. Hannah stated that she had reviewed only medical records she deemed to be *relevant* for that same time period. Neither meet the certification requirements of Rule 9(j). Because Plaintiff did not assert that a potential expert witness had reviewed "*all* medical records pertaining to the alleged negligence" prior to the filing of the original complaint, she has not satisfied the requirements of Rule 9(j) as clarified by *Vaughan*. Any complaint that fails to comply with the certification requirements "shall be dismissed." N.C. Gen. Stat. § 1A-1, Rule 9(j).

Plaintiff alleged that her care and treatment occurred July 31, 2012, and she filed her action July 30, 2015, one day before the statute of limitations would expire. Plaintiff's medical malpractice complaint failed to include a required Rule 9(j) certification regarding review of medical records.

Plaintiff failed to seek amendment of her complaint until January 11, 2016, nearly six months after the statute of limitations had expired, and 44 days beyond [t]he 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) . . . for the purpose of complying with Rule 9(j). Allowing an amendment would have been futile, so it cannot be said that the trial court abused its discretion in denying that motion. Plaintiff failed to plead proper Rule 9(j) certification in her complaint before the statute of limitations expiration. If any complaint alleging medical malpractice shall be dismissed for failure to comply with the certification mandate of Rule 9(j), it cannot be said that the trial court erred in granting Defendants' motion to dismiss.

Locklear v. Cummings, ___ N.C. App. ___, ___, 801 S.E.2d 346, 355-56 (2017) (Berger, J., concurring in part and dissenting in part) (citation and quotation marks omitted), *reversed*, ___ N.C. ___, 817 S.E.2d 571 (2018).

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W. HOMEOWNERS ASS'N, INC.**

[262 N.C. App. 603 (2018)]

OCEAN POINT UNIT OWNERS ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF

v.

OCEAN ISLE WEST HOMEOWNERS ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA17-1289

Filed 4 December 2018

1. Pleadings—notice—identity of subject matter—sufficiency of allegations

In an action to determine the rights and duties bestowed by an easement, plaintiff condo association's allegations were sufficient to put defendant neighboring homeowners association on notice regarding the identity of the card gate facility plaintiff alleged was wrongfully installed by defendant.

2. Parties—standing—real party in interest—condo association—suing on behalf of constituent members

In an action to determine the rights and duties bestowed by an easement, plaintiff condo association qualified as a real party in interest to assert a claim that defendant neighboring homeowners association wrongfully installed a gate card facility on a lot owned by the condo association members in common. The condo association had standing to sue in its own name on behalf of its members where the condo owners were equally affected by the placement of the keypad on their commonly owned lot.

3. Damages and Remedies—punitive damages—summary judgment stage—basis

In an action to determine the rights and duties bestowed by an easement, the trial court erred by awarding punitive damages after granting summary judgment for plaintiff condo association, a stage not generally appropriate for this type of damages. Moreover, the trial court did not provide the underlying basis for awarding punitive damages.

4. Attorney Fees—statutory basis—supporting findings

In an action to determine the rights and duties bestowed by an easement, the trial court erred in awarding attorney fees to plaintiff condo association after granting summary judgment without

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specifying the statutory basis for its award or making appropriate supporting findings of fact.

Appeal by Defendant from judgment entered 15 June 2017 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 8 August 2018.

Watts Law Group PLLC, by Susan A. Fine and S. Denise Watts, for the Plaintiff-Appellee.

McCoy Wiggins PLLC, by Richard M. Wiggins, for the Defendant-Appellant.

DILLON, Judge.

Defendant Ocean Isle West Homeowners Association, Inc. (the “Homeowners HOA”), appeals from the trial court’s judgment granting Plaintiff Ocean Point Unit Owners Association, Inc. (the “Condo UOA”), summary judgment. After careful review, we affirm in part and vacate and remand in part.

I. Background

This matter involves a property dispute on the western end of Ocean Isle. Ocean Isle is a narrow island running west to east. At the western (left) end lies twenty (20) single-family lots which are part of the Homeowners HOA. These lots are numbered Lots 1-20 from west (left) to east (right). Lot 20 is the eastern-most (rightmost) lot in the Homeowners HOA. Just to the east (to the right) of Lot 20 is Lot 21, which is not part of the Homeowners HOA. Rather, Lot 21 is a vacant lot owned by the Condo UOA. To the east (to the right) of Lot 21 is Lot 22. Lot 22 is a larger lot where the condominium units served by the Condo UOA are located. Lot 22 is not owned by the Condo UOA itself, but rather it is owned *in common* by the condominium unit owners.

The northern boundaries of the aforementioned lots are the northern shore of Ocean Isle. There is one road, Ocean Isle West Boulevard, which provides ingress and egress to all the lots on the western end of Ocean Isle. This road runs across the northern portion of each lot.

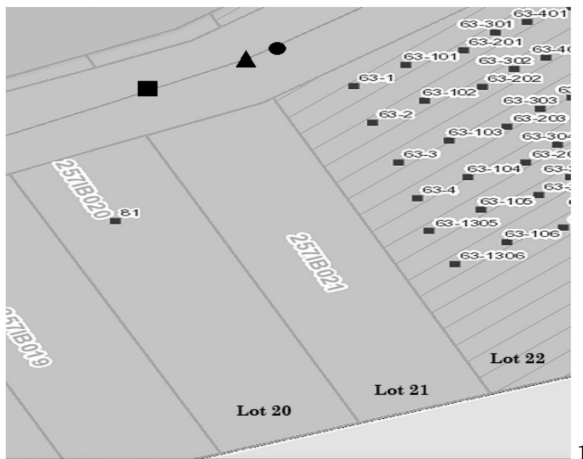
In 1999, the then-owner of Lot 21, the vacant lot currently owned by the Condo UOA, granted the Homeowners HOA a non-exclusive easement (the “Easement”) on the western portion of Lot 21 along the road for the purpose of the installation and maintenance of a card gate facility.

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The Homeowners HOA desired to install the card gate facility to limit access to the western portion of Ocean Isle to only the Homeowners HOA residents and invited guests. The Homeowners HOA constructed its card gate facility on the road approximately twenty-five (25) feet from the western border of Lot 21. The owners of Lot 21 subsequently conveyed their interest in Lot 21 to the Condo UOA.

In June 2014, the Homeowners HOA moved its card gate facility about thirty (30) feet to the east along the road. The keypad itself, though, was actually placed by the Homeowners HOA even further east on the road portion of Lot 22, where the condominiums themselves are located.



■ Original card gate facility ▲ Second card gate facility ● Gate access keypad for second card gate facility

Three months later, in September 2014, the Condo UOA filed this action seeking (1) a declaratory judgment regarding the rights and duties bestowed by the Easement, (2) an order directing the Homeowners HOA to move its new card gate facility off of land that the Homeowners HOA had no right to use, and (3) damages for the use of property outside the Easement area without permission. During

1. Image adapted from Brunswick County GIS Data Viewer, found at: <http://brunswick.maps.arcgis.com/apps/webappviewer/index.html?id=6df283e1aa634006baeedf6daac40d38&query=Parcels,PIN,107515634896>.

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the course of litigation, the Homeowners HOA failed to respond timely to discovery requests by the Condo UOA, and the trial court entered an order deeming each of the Condo UOA's Requests for Admission to be granted.

In June 2017, the trial court granted the Condo UOA's motion for summary judgment, ordering the Homeowners HOA to move the new card gate facility (gate and keypad) and to restrict the Homeowners HOA's use to the Easement area on the western side of Lot 21 and to repair any outstanding damage caused to Lots 21 and 22 by the installation and removal of the new card gate facility. The trial court also awarded punitive damages and attorney's fees to the Condo UOA.

The Homeowners HOA appeals.

II. Analysis

On appeal, the Homeowners HOA "abandons any issue in this appeal as to whether it had the right to move the card gate to a different location within the easement," essentially conceding that it did not have the right to do so under the terms of the Easement. Rather, the Homeowners HOA contends that the issues raised in the complaint and the respective governing statutes do not support the trial court's findings and conclusions regarding Lot 22, nor its awards of punitive damages and attorney's fees. We address each argument in turn.

A. Lot 22

[1] The Homeowners HOA challenges the portions of the trial court's order directing it to repair the damage caused by its placement of the new keypad onto *Lot 22*, the lot where the condominium units are situated. Specifically, the Homeowners HOA contends that the Condo UOA never mentioned Lot 22 in its complaint, nor did the Condo UOA show that it was a real party in interest regarding any claim pertaining to Lot 22. We disagree.

North Carolina follows the "notice theory" of pleading. "Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). This simpler method of pleading is mindful of the "liberal opportunity for discovery and the other pretrial procedures" used in our trial process to narrow and refine the

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issues, claims, and facts relative to an action. *Id.* at 442-43, 364 S.E.2d at 384.

Here, it is true that the Condo UOA never specifically alleged in its complaint that part of the new card gate facility, namely the new keypad, was actually constructed on Lot 22. But the Condo UOA clearly alleged in its complaint that the Homeowners HOA improperly moved the keypad eastward outside the Easement area without permission and that the Condo UOA wanted the keypad moved back to its original location, and that the Condo UOA wanted the Homeowners HOA to repair any damage caused to the property by the new card gate facility. Specifically, the Condo UOA alleged that the Homeowners HOA moved its card gate facility “approximately 30 (thirty) feet eastward . . . adjacent to the eastern property line of Lot 21[,]” which could be understood as the western property line of Lot 22. Also, the Condo UOA prayed the trial court to enter an order directing the Homeowners HOA to “repair any damage to the property caused by the installation and/or the removal of said gate.” There is no ambiguity in the complaint as to the identity of the card gate facility which the Condo UOA alleges was wrongfully installed by the Homeowners HOA. Therefore, we conclude that the Condo UOA met the requirements of notice pleading with regard to the new keypad placed onto Lot 22.

[2] Further, we conclude that the Condo UOA qualified as the “real party in interest” to bring the claim regarding any damage to Lot 22 caused by the new card gate facility, notwithstanding that the Condo UOA only owns Lot 21 and that Lot 22 is technically owned in common by the condominium unit owners themselves.² Our Supreme Court has held that an association may sue in its own name on behalf of its members, so long as the association represents a joint interest “common to the entire membership, [or] shared by all in equal degree.” *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and

2. Our Condominium Act states that a development will not be considered a condominium under the Act “unless the undivided interests in the common elements are vested in the unit owners” themselves, and not in a separate association. N.C. Gen. Stat. § 47C-1-103(7) (2017).

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(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. (quoting *Hunt v. Washington State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977)). It is undisputed here that the Condo UOA, which owns Lot 21, is the association for the condominium unit owners who own Lot 22. For instance, in the complaint, the Condo UOA alleged:

3. The members of the Plaintiff Association are the owners of units in Ocean Point, Phase 1, A Condominium, located in Ocean Isle Beach, Brunswick County, North Carolina, as condominium is shown and depicted on maps recorded in Condo Map 6, Pages 52-61 of the Brunswick County Registry, North Carolina, with the Declaration of Condominium being recorded in Book 734, at Page 548 of the Brunswick County Registry on the 10th day of June, 1988.

Defendant admitted this allegation in its answer. Additionally, a search of Condo Map 6, Pages 52-61, on the Brunswick County Registry reveals the property referred to is Lot 22. There is nothing in the record which shows that any particular condominium unit owner was damaged differently than the other unit owners by the placement of the keypad onto Lot 22. Therefore, we conclude that the placement of the keypad onto the common area of Lot 22 affected the condominium unit owners equally such that the Condo UOA had standing to pursue the claim on behalf of the unit owners.

B. Punitive Damages

[3] The Homeowners HOA argues that the trial court erred “in granting plaintiff’s request for summary judgment” regarding the award of punitive damages. We agree.

In its order, the trial court awarded the Condo UOA \$10,000 in punitive damages. However, the trial court did not cite to any findings or otherwise explain upon what basis it was making the award.

We conclude that the trial court erred for two reasons. First, most basically, it is generally not appropriate for the trial court at the summary judgment stage to award punitive damages. *See Cockerham-Ellerbee v. Town of Jonesville*, 190 N.C. App. 150, 157, 660 S.E.2d 178, 182 (2008) (holding that punitive damages were not appropriate at summary judgment because whether clear and convincing evidence of willful and

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wanton conduct existed was a question for the jury.) Second, we cannot discern the basis for the award; the trial court did not indicate whether the award was based on a tort or other claim for which punitive damages might be available *or* on the claim for declaratory relief or other claim for which punitive damages are generally not recoverable. *See Id.* at 154-56, 660 S.E.2d at 181-82. It simply decreed that punitive damages were awarded. Therefore, we vacate the portion of the trial court's order awarding punitive damages to the Condo UOA and remand the issue for further proceedings consistent with this opinion.

C. Attorney's Fees

[4] Lastly, the Homeowners HOA challenges the trial court's award of attorney's fees. In North Carolina, attorney's fees are taxable as costs only when expressly authorized by statute. *See City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972).

Here, the trial court failed to state the statutory basis for its award or otherwise make appropriate findings to support its award of attorney's fees. *See, e.g., Owensby v. Owensby*, 312 N.C. 473, 476, 322 S.E.2d 772, 774 (1984) (holding that, in awarding attorney's fees, the trial court must "make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based"). Rather, the only mention of the attorney's fees at all is in the decretal paragraph containing the award itself. We, therefore, vacate the trial court's award of attorney's fees. On remand, the trial court may revisit the issue but must make adequate findings of fact and conclusions of law to support any award of attorney's fees.

III. Conclusion

We hold that the trial court did not err in ordering the Homeowners HOA to make all necessary repairs to Lot 22 resulting from movement of the card gate facility. The Condo UOA's pleadings adequately showed that it was a real party in interest with respect to Lot 22 and placed the Homeowners HOA on notice that it sought relief from all harm caused by movement of the card gate facility. And, on appeal, the Homeowners HOA expressly abandoned any issue as to whether it had the right to install the new card gate facility in the location where it made the installation.

We hold that the trial court did err in awarding punitive damages at the summary judgment stage. Therefore, we vacate the trial court's

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award of punitive damages and remand the issue for further proceedings for a trial on this issue.

Finally, we hold that the trial court erred in awarding the Condo UOA attorney's fees. Specifically, the trial court failed to state the basis for the award or to make appropriate findings necessary to support its award of attorney's fees. We, therefore, vacate the trial court's award of attorney's fees and remand the matter for reconsideration by the trial court. On remand, the trial court may consider additional evidence and make any new findings of fact and conclusions of law.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges DAVIS and INMAN concur.

JOSEPH PADRON, PLAINTIFF

v.

BENTLEY MARINE GROUP, LLC, LARRY D. BREHM, KEENAN W. GREEN,
AND NOEL WINTER, DEFENDANTS

No. COA18-537

Filed 4 December 2018

Jurisdiction—personal—minimum contacts—shareholder in defendant company—no other contacts with state

The requirements of due process did not permit the state of North Carolina to exercise personal jurisdiction over a former shareholder in a boat manufacturing company in a product liability action where defendant shareholder's only contact with North Carolina was his status as a former investor in the company, even if the company might be subject to personal jurisdiction in the state.

Appeal by defendant Keenan W. Green from order entered 20 March 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2018.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Matthew J. Millisor, for plaintiff-appellee.

Poyner Spruill LLP, by Karen H. Chapman and John M. Durnovich, for defendant-appellant Keenan W. Green.

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ZACHARY, Judge.

Defendant Keenan W. Green appeals from the trial court's order denying his motion to dismiss plaintiff Joseph Padron's complaint against him for lack of personal jurisdiction. Defendants Bentley Marine Group, LLC, Larry D. Brehm, and Noel Winter are not parties to the instant appeal. We conclude that North Carolina lacks personal jurisdiction over Green in the instant case, and accordingly reverse and remand for entry of an order granting Green's motion to dismiss.

Background

Plaintiff filed a complaint on 3 July 2017 against defendants Bentley Marine Group, Brehm, Winter, and Green for damages resulting from a 4 July 2014 boating accident that took place in North Carolina wherein "Plaintiff's left hand was severely injured and disfigured while using a Bentley Industries 2006 Model 240 Cruise pontoon boat." According to the complaint, the Boat was manufactured by Bentley Industries, LLC, "a defunct limited liability company previously organized under the laws of South Carolina." The complaint alleges that the Boat "was a dangerous and defective product at the time it was manufactured and designed, in that it failed to take account for an inherently deadly flaw in its design—a so-called 'pinch point' that led to the loss of Plaintiff's finger." The complaint further alleges that "Bentley Industries, LLC failed to provide any adequate warning, instruction, or recall related to the dangerous and defective manufacture and design of the Boat, although it knew or should have known of that dangerous and defective condition and had the opportunity to provide timely and effective warning."

The complaint alleges that sometime in 2008, about two years after Bentley Industries manufactured the Boat, "there was some sort of transaction involving Bentley Industries, LLC and Defendants [Bentley Marine Group, Brehm, Green, and/or Winter], in which one or more of said Defendants purchased Bentley Industries, LLC, including both its assets and liabilities." The complaint alleges that defendants, "by virtue of purchasing Bentley Industries, LLC, at a time when the dangerous and defective nature of the Boat and other similar boats was or should have been evident, . . . are legally liable for all claims based upon the negligent and defective manufacture and design of the Boat," and further, that prior to the date that plaintiff was injured, defendants were "aware of the negligent and defective manufacture and design of the Boat . . . , yet none of the Defendants . . . issued any warning, let alone any proper, adequate, or effective warning, regarding the dangerous and defective

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nature of the Boat, despite having the opportunity and responsibility to do so.”

The complaint seeks to hold Green and his fellow defendants jointly and severally liable for plaintiff’s injuries. The complaint further alleges that Green “served as the alter ego of Defendant Bentley Marine Group,” and therefore seeks to “pierce the corporate veil of Defendant Bentley Marine Group, LLC to reach the personal assets” of Green.

None of the defendants are residents of North Carolina. The complaint alleges that Green is a resident of South Carolina and that Bentley Marine Group “is or was a limited liability company organized under the laws of South Carolina.” Plaintiff’s complaint nevertheless alleges that Green “is subject to personal jurisdiction in the State of North Carolina pursuant to N.C. Gen. Stat. 1-75.4(4) (Local Injury; Foreign Act).” Plaintiff makes similar allegations as to the other defendants.

Green filed a motion to dismiss plaintiff’s complaint against him for lack of personal jurisdiction, among other grounds. Green attached to his motion to dismiss an affidavit in which he provided, *inter alia*, that:

2. I am a citizen and resident of Charleston, South Carolina where I have resided almost all of my life.
3. I received a copy of the Complaint at my office in Summerville, South Carolina.
4. I have never been a resident of the State of North Carolina.
5. I have no ownership interest in any company located or doing business in North Carolina.
6. I do not have any family members that reside in North Carolina.
7. I have never personally derived revenue directly from goods used or consumed or services rendered in North Carolina.
8. I have never owned, used or possessed rights to any real or personal property located in North Carolina, nor do I maintain any banking or other financial accounts in North Carolina.
9. I am not licensed or registered to do business in North Carolina.

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10. I have never had a personal office or address of any kind in North Carolina.

11. Prior to the filing of this matter, I have never been sued or made a general appearance in North Carolina.

12. I do not have a registered agent for service of process in North Carolina.

With regard to his involvement with Bentley Marine Group, Green's affidavit further provided that "I have never commingled my funds or assets with those of Bentley Marine Group, LLC" and that "I have never personally co-owned any financial accounts or assets owned or controlled by Bentley Marine Group, LLC." Finally, Green maintained that "[w]ith respect to allegations [in the complaint], I was not involved in the day-to-day activities or management of Bentley Marine Group, LLC. The extent of my involvement with Bentley Marine Group, LLC was as a silent member for a very brief period of time in 2008."

Plaintiff responded by submitting an affidavit in which he stated that:

- 1) As this lawsuit reveals, I was injured badly while using [the] [B]oat in North Carolina.
- 2) My research of this type of "Bentley" boat shows that it was a brand that was sold all over the United States, including in North Carolina.
- 3) I have confirmed that to this day, boats of the type in question are available for sale in North Carolina.
- 4) My personal research also shows that injuries of the type that happened to me had happened to other people before it happened to me.
- 5) When I got on [the] [B]oat in North Carolina, I did not expect to suffer a terrible injury there that would force me to have to sue the boat owners. Unfortunately, that is what happened, and I want my day in court against whoever is determined to be legally responsible.

Green's motion to dismiss was heard before the Honorable Hugh B. Lewis at the 28 February 2018 session of the Mecklenburg County Superior Court. The trial court denied Green's motion to dismiss by order entered 20 March 2018. The trial court's order does not contain findings of fact. Defendant Green timely appealed.

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On appeal, Green argues that it was error for the trial court to deny his motion to dismiss in that the record does not reveal the requisite level of contacts with North Carolina needed in order for North Carolina to exercise personal jurisdiction over him. We agree.

Grounds for Appellate Review

Despite the trial court's order being interlocutory, Green nevertheless has a right of immediate appeal from the denial of his motion to dismiss in that it constitutes "an adverse ruling as to the jurisdiction of the court over the person." *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 249, 625 S.E.2d 800, 802 (2006) (quoting N.C. Gen. Stat. § 1-277(b)).

Standard of Review

It is settled that "[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140, 515 S.E.2d 46, 48 (1999). "[U]pon a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010). If the defendant "supplements [his] motion with affidavits or other supporting evidence, the allegations of the plaintiff's complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint[.]" *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (citation and quotation marks omitted). Instead, the plaintiff "must respond by affidavit or otherwise setting forth specific facts showing that the court has jurisdiction." *Id.* (citation and quotation marks omitted).

In the instant case, the trial court's order does not contain findings of fact, nor did either party request the same. "In such a situation it is presumed that the trial court found facts sufficient to support [its] order," *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 306, 655 S.E.2d 446, 449 (2008), "and our role on appeal is to review the record for competent evidence to support these presumed findings." *Stetser v. TAP Pharm. Prods.*, 162 N.C. App. 518, 520, 591 S.E.2d 572, 574 (2004); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2017).

Discussion

The analysis of "whether a non-resident defendant is subject to personal jurisdiction of North Carolina's courts" is two-pronged. *Robbins*

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v. Ingham, 179 N.C. App. 764, 768, 635 S.E.2d 610, 614 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 221, 642 S.E.2d 448 (2007). “First, there must be a basis for jurisdiction under the North Carolina long-arm statute, and second, jurisdiction over the defendant must comport with the constitutional standards of due process.” *Id.*; N.C. Gen. Stat. § 1-75.4 (2017). Nevertheless, “our long-arm statute was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process.” *Robbins*, 179 N.C. App. at 770, 635 S.E.2d at 615 (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977)). Accordingly, because the “statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion comports with due process.” *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 913 (1985).

As our Supreme Court has stated, in order for the exercise of personal jurisdiction over a non-resident defendant to comply with due process, “there must exist certain minimum contacts between the non-resident defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Tom Togs, Inc., v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986). The minimum contacts test requires “some act by which the defendant purposefully avail[ed] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Id.* “Whether minimum contacts are present is determined by ascertaining what is fair and reasonable under the circumstances, not by using a mechanical formula.” *Robbins*, 179 N.C. App. at 770, 635 S.E.2d at 615.

In light of these standards, although the order does not contain findings of fact, we may nevertheless presume that the trial court found that North Carolina could appropriately exercise personal jurisdiction over Green (1) because the provisions of North Carolina’s long-arm statute had been satisfied, and (2) because Green had the requisite minimum contacts with North Carolina to satisfy the demands of due process. Green’s primary contention on appeal pertains to the latter finding: that “endorsing the exercise of personal jurisdiction” based on the record in this case “would eviscerate fundamental due-process protections.” That is, as an out-of-state resident, Green maintains that he cannot “be hauled into court in North Carolina for a product-liability lawsuit against an out-of-state company simply because of his brief, passive investment in that company more than a decade ago.”

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In response, plaintiff first argues that Bentley Marine Group's involvement in the stream of commerce in North Carolina, through its sale of boats in this State, is sufficient to confer personal jurisdiction not only over Bentley Marine Group, but also Green. Plaintiff's argument on this point is misplaced.

To be sure, there will exist sufficient minimum contacts to permit a forum state to exercise personal jurisdiction over a corporation where that corporation has " 'deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.' " *Tart v. Prescott's Pharm., Inc.*, 118 N.C. App. 516, 521-22, 456 S.E.2d 121, 126 (1995) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 62 L. Ed. 2d 490, 502 (1980)). However, the fact that a court may properly exercise personal jurisdiction over a corporation under a "stream of commerce" analysis does not establish that a court may properly exercise personal jurisdiction over the corporation's individual shareholders. *Id.* Instead, the minimum contacts analysis must "focus[] on the actions of the non-resident defendant over whom jurisdiction is asserted, and not on the unilateral actions of some other entity." *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 213, 458 S.E.2d 15, 18 (1995).

If an individual shareholder "conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him." *United Buying Grp., Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979). Absent sufficient individual contacts with the forum state, however, "personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins*, 179 N.C. App. at 771, 635 S.E.2d at 615. Nor may the requisite level of minimum contacts sufficient to confer personal jurisdiction be established based solely upon an individual's status as a shareholder. *See Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 50 (2008) (Arrowood, J., dissenting), *rev'd for the reasons stated in the dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009); *see also J.M. Thompson Co.*, 72 N.C. App. at 427, 324 S.E.2d at 915 ("If, by merely acquiring . . . an economic interest in a foreign corporation, a person became responsible for every obligation incurred by that corporation, and subject to suit in whatever state the corporation happened to be located or incorporated, a negative impact on corporate investing and mergers would result. We find no justification in logic or law for discouraging investments in this fashion.").

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Here, it is well established that Green's investment in Bentley Marine Group does not, on its own, constitute "some act by which" Green purposefully availed himself "of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of [our] laws." *Carswell Distrib. Co. v. U.S.A.'s Wild Thing*, 122 N.C. App. 105, 107, 468 S.E.2d 566, 568 (1996). And while Bentley Marine Group would indeed be subject to personal jurisdiction under a stream of commerce analysis, the record is otherwise devoid of any act by Green that would subject him to the same.

For instance, the record does not suggest that after investing in Bentley Marine Group, Green personally participated in the marketing, sale, design, manufacture, or recall of its boats. Nor does plaintiff's affidavit contradict Green's assertions that he was "not involved in the day-to-day activities or management of Bentley Marine Group," or that his involvement was limited to that of "a silent member for a very brief period of time in 2008." *E.g., Rauch v. Urgent Care Pharm.*, 178 N.C. App. 510, 518, 632 S.E.2d 211, 217-18 (2006). Instead, the record reveals that Green has never been a North Carolina resident, nor has he ever owned real or personal property in North Carolina. *E.g., id.* Quite plainly, plaintiff has proffered no evidence to suggest that Green's contacts with North Carolina consist of anything beyond mere investments in a company that manufactures boats which were or can be purchased here. *E.g., Robbins*, 179 N.C. App. at 771, 635 S.E.2d at 615.

Nevertheless, plaintiff also argues that because Green "served as the alter-ego" of Bentley Marine Group, and because North Carolina has personal jurisdiction over Bentley Marine Group, Green is likewise subject to personal jurisdiction in North Carolina under a veil-piercing analysis. Plaintiff's arguments on this point are also misplaced.

"Piercing the corporate veil . . . allows a plaintiff to impose legal liability for a corporation's obligations, or for torts committed by the corporation, upon some other . . . individual that controls and dominates a corporation" to such an extent that the corporation exists as "a mere instrumentality or alter ego" of that individual. *Green v. Freeman*, 367 N.C. 136, 145, 749 S.E.2d 262, 270 (2013) (emphasis omitted). "The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form." *Id.* at 146, 749 S.E.2d at 271.

Plaintiff relies on veil piercing to assert personal jurisdiction over Green on the theory that "if the corporate form of a liable entity is

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disregarded, and an individual defendant is identified as the alter ego thereof, [h]e will be held liable for claims against the corporation.” This assertion is indeed true. However, it does not necessarily follow that the individual defendant could be held liable *in a North Carolina court*. Plaintiff confuses veil piercing with personal jurisdiction. *Cf. Ridgeway Brands Mfg., LLC*, 188 N.C. App. at 306, 655 S.E.2d at 449 (“[P]laintiff cites no authority for its proposition that if an out-of-state corporation is the alter ego of a North Carolina corporation, then the courts of North Carolina have personal jurisdiction over the out-of-state corporation.”).

By way of contrast, in *Tart v. Prescott’s Pharmacies*—one of the primary cases upon which plaintiff relies—personal jurisdiction was properly exercised over the individual defendants because they had specifically orchestrated the advertising and sale in North Carolina of their principal corporation’s weight-loss drugs that injured the plaintiff. 118 N.C. App. at 522, 456 S.E.2d at 126. In fact, the individual defendants were the “principal officers and directors” of the corporation and had been federally charged, in their individual capacities, for their fraudulent representations concerning the weight-loss drugs. *Id.* at 521, 518, 456 S.E.2d at 125, 123. It was these specific contacts that conferred personal jurisdiction upon the defendants, not the status of the individual defendants as “alter egos” of the corporation.

In any event, in the instant case, plaintiff’s complaint contains but one allegation to support Green’s status as an alter ego:

21. Upon information and belief, . . . [Defendant Green] served as the alter ego of Defendant Bentley Marine Group[.]

The record is devoid of any pertinent facts tending to establish Green’s control over Bentley Marine Group beyond this single conclusory allegation. In response to Green’s motion to dismiss and accompanying affidavit, the only additional evidence that plaintiff introduced was his own affidavit, which makes no mention of Green whatsoever. Accordingly, we conclude that the pleadings and affidavits fall short of constituting competent evidence that Green operated as the alter ego of Bentley Marine Group for purposes of establishing personal jurisdiction. *See Ridgeway Brands Mfg., LLC*, 188 N.C. App. at 306, 655 S.E.2d at 449 (“We hold that plaintiff’s conclusory allegation in the Second Amended Complaint is insufficient to establish that Trevally is the alter ego of Ridgeway for purposes of determining whether the courts of North Carolina have jurisdiction over Trevally.”). Thus, the trial court’s order cannot be sustained on this ground.

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Conclusion

In sum, because the record reveals that Green's only contact with North Carolina was Green's status as an investor in a corporation that may be subject to personal jurisdiction in North Carolina, the evidence is insufficient to establish the level of minimum contacts that due process demands for the proper exercise of personal jurisdiction over an individual. Accordingly, the trial court's order denying Green's motion to dismiss for lack of personal jurisdiction must be reversed as a matter of law.

REVERSED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA

v.

JIMMY LEE FARMER

No. COA18-65

Filed 4 December 2018

Constitutional Law—right to speedy trial—Barker factors—63-month delay—late assertion of right

A defendant whose criminal trial was delayed nearly 63 months after his arrest failed to demonstrate a violation of his right to a speedy trial where the delay was caused by a backlog of pending cases in the county and a shortage of assistant district attorneys, defendant continued to petition the court for resources to develop his case for at least 2 years following his arrest, defendant failed to assert his right until almost 5 years after his arrest, and defendant's ability to defend his case was not impaired.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 20 July 2017 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna Szamosi, for the State.

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Edgerton Law Office, by Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where defendant has not demonstrated that his constitutional right to a speedy trial has been violated, we affirm the trial court's ruling.

On 7 May 2012, defendant Jimmy Lee Farmer was indicted in Rowan County Superior Court for first-degree sex offense with a child and indecent liberties with a child. The facts giving rise to the indictment showed that on 8 March 2012, four-year-old Savannah¹ was molested by defendant while visiting her grandmother's home. Savannah's grandmother was married to defendant. One afternoon, while visiting her grandmother's house, Savannah was outside with her family and asked to go inside for a snack. Defendant carried Savannah into the home and eventually into the bedroom where he removed Savannah's clothing and touched her genitals. Savannah's grandmother went inside and did not see them in the kitchen. She went to the bedroom where she saw Savannah lying on the bed. When Savannah got off the bed, she pulled her underwear up, and defendant rushed out of the room without making eye contact. Savannah initially told her grandmother she was jumping on the bed. However, she later told her mother defendant touched her. Savannah's mother called the Rowan County Sheriff's Department to investigate, and defendant was later arrested. Additional relevant facts later brought out at trial revealed that defendant had sexually molested Savannah's cousin when she was between the ages of five and nine years old.

Defendant waived arraignment on 24 May 2012 and 5 November 2012. On 15 July 2013, defendant filed a motion requesting a bond hearing to reduce his bond; however, defendant's motion was not calendared. Defendant's trial was scheduled for 30 January 2017 until defendant's defense counsel and Paxton Butler, the Assistant District Attorney (ADA) for Rowan County (hereinafter ADA), agreed to continue the case and calendar it for the 17 July 2017 trial session. Nearly five years after the indictment and a few weeks after his case was first scheduled for trial, defendant filed a motion for a speedy trial on 6 March 2017 and requested that the trial court either dismiss the case or establish a peremptory date for trial. On 11 July 2017, defendant filed a motion to dismiss alleging a violation of the right to a speedy trial found in the

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

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North Carolina Constitution and the United States Constitution. Per the motion, defendant had “the same counsel throughout the life of the case.”

The matter came before the Honorable Lori I. Hamilton, Judge presiding, who heard the motion on 17 July 2017 just prior to trial. Defendant called Amelia Linn, Rowan County Assistant Clerk of Court, to testify regarding the motion to dismiss based on a speedy trial violation. Linn testified that her office was the keeper of records and she was the supervisor of the criminal division records. Linn also testified that at least 65 trial sessions had occurred during the time between defendant’s indictment and his trial. Additionally, the court records showed defendant’s case was calendared for the 9 May 2012 session and then rescheduled for the 30 January 2017 session. Between those two sessions, there was no *trial* activity in defendant’s case and no subpoenas were issued.² These records were admitted into evidence without objection by the ADA.

After reviewing the evidence and representations made by both parties, the trial court applied the factors in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972) (hereinafter the *Barker* factors) and determined that defendant’s right to a speedy trial was not violated. Subsequently, defendant’s motion to dismiss was denied and the State proceeded to trial. Defendant did not call any witnesses.

On 20 July 2017, defendant was found guilty of both charges. Judge Hamilton entered consecutive sentences of 338 months to 476 months with credit given for time served while awaiting trial. Defendant immediately gave notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss because the State violated his constitutional right to a speedy trial. Specifically, defendant argues that the State’s failure to calendar his trial date in a timely manner was unreasonable as he waited approximately five years before his jury trial. While this was a

2. We note there was pre-trial activity in defendant’s case. On 29 July 2013, in response to defendant’s motion, the court granted an order allowing funds for a private investigator. On 21 January 2014, defendant filed a motion for funds for an expert analyst, which was granted by the trial court on 22 January 2014. The State filed for a protective order on 10 December 2013 precluding copies of the DVD and pictures of the victim from being reproduced. Additionally, on 23 January and 12 July 2017, defendant filed two motions in limine—to exclude evidence of defendant’s 1983 murder conviction of his wife and daughter, and to exclude evidence of prior bad acts—which the trial court granted on 18 July 2017.

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significantly long time to await trial, we disagree that the five-year delay constituted a speedy trial violation based on the facts of this case.

“The denial of a motion to dismiss on speedy trial grounds presents a question of constitutional law subject to *de novo* review.” *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 126, 131 (2016). “We therefore consider the matter anew and substitute our judgment for that of the trial court.” *Id.*

The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker*, 407 U.S. at 514, 33 L.Ed.2d at 101).

“In determining whether a defendant has been deprived of his right to a speedy trial, [pursuant to] N.C. Const. art I, § 18; U.S Const. amend VI, our courts consider four interrelated factors together with such other circumstances as may be relevant.” *State v. Chaplin*, 122 N.C. App. 659, 662, 471 S.E.2d 653, 655 (1996) (quotations omitted). These *Barker* factors include: “(1) the length of delay, (2) the reason for the delay, (3) the defendant’s assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay.” *Id.* (quoting *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989)). “None of these [*Barker*] factors are determinative; they must all be weighed and considered together[.]” *State v. Wilkerson*, ___ N.C. App. ___, ___, 810 S.E.2d 389, 392 (2018).

Length of Delay

In the instant case, defendant was arrested and remained incarcerated for nearly 63 months—approximately five years, two months and twenty-four days—before his case was tried. While “the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial[.]” the “post[-]accusation delay [is] presumptively prejudicial at least as it approaches one year.” *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (quotations omitted). Here, the

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length of the delay is significant enough to trigger an inquiry into the remaining *Barker* factors.

Reason for the Delay

Second, defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution[,] must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

Id. (citation omitted).

Defendant argues there was administrative neglect by the State to calendar his trial and motions. Specifically, defendant contends that the State allowed his case to be idle while there were 77 administrative sessions and 78 trial sessions between 2012 and 2017. The State acknowledged that there was a considerable delay in calendaring defendant's case. However, the State presented evidence of crowded dockets and earlier pending cases given priority as a valid justification for the delay.

According to the record, it is undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases. The State asserts that, at minimum, defendant also played a role in the delay as the record shows defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses. Significantly, defendant filed his motion for a speedy trial after he agreed to continue his case to the next trial session in 2017. Thus, defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial.

Although case backlogs are not encouraged, we agree with the trial court's conclusion that defendant did not establish a *prima facie* case that the delay was caused by neglect or willfulness of the prosecution. The record supports that neither party assertively pushed for this case to be calendared before 2017, and after defendant agreed to continue his case, scheduling conflicts prevented defendant's case from being calendared before 20 July 2017.

Assertion of Right

"A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who

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does not.” *State v. Strickland*, 153 N.C. App. 581, 587, 570 S.E.2d 898, 903 (2002). A “[d]efendant is not required to demand that the state prosecute him” as it is the State’s duty to assure that a defendant’s case is brought to trial in a timely fashion. *State v. Pippin*, 72 N.C. App. 387, 395, 324 S.E.2d 900, 906 (1985). “But a defendant’s failure to assert his speedy trial right, or his failure to assert the right sooner in the process [weighs] against his contention that he has been denied his constitutional right to a speedy trial. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 133.

Here, defendant formally asserted his right to a speedy trial on 6 March 2017, almost five years after he was arrested. The trial court acknowledges in its findings that at least two years following defendant’s arrest, defendant was still petitioning the court for resources to develop his case. In 2013 and 2014, defendant filed motions for expert funding to aid in his defense, both of which were granted. Although defendant contends he did not have the authority to calendar his case sooner, defendant did not take affirmative steps to bring his case to the court’s attention until 2017. Within four months of his assertion of a speedy trial right, defendant’s case was calendared and tried. Given the short period between defendant’s demand and his trial, defendant’s failure to assert his right sooner weighs against him in balancing this *Barker* factor.

Prejudice

“Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect.” *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. In considering this factor, “[a] defendant must show actual, substantial prejudice.” *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

The constitutional right to a speedy trial addresses three concerns: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these concerns, most important is whether the prosecutor’s delay hampered defendant’s ability to present his defense.

Johnson, ___ N.C. App. at ___, 795 S.E.2d at 133 (citation and quotations omitted).

Here, defendant contends he was prejudiced as the length of the delay could have potentially affected the witnesses’ ability to accurately recall details, and therefore, possibly impaired his defense. *See Barker*, 407 U.S. at 532–33, 33 L. Ed. 2d at 118 (“Loss of memory . . . is not always

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reflected in the record because what has been forgotten can rarely be shown. . . . [I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”). However, the victim, who was nine at the time she testified, was able to recall details of the incident itself although she demonstrated some trouble remembering details before and after the incident which occurred when she was three years old. Other witnesses, however, testified and outlined the events from that day. Also, as the trial court pointed out, defendant has had access to all the witnesses’ interviews and statements to review for his case and/or use for impeachment purposes. Considering that the information was available to defendant, we do not believe defendant’s ability to defend his case was impaired.

Although defendant has not provided evidence or sufficiently argued pretrial incarceration detrimentally impacted his life, we recognize the disadvantages defendant could experience by the “restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility” while in confinement. *Id.* at 533, 33 L. Ed. 2d at 118. However, as we have previously discussed, defendant’s lack of assertiveness in bringing his case to the court’s attention before 2017 contradicts his argument of anxiety or concern about the status of his case. To some extent we are inclined to believe “he had hoped to take advantage of the delay in which he had acquiesced.” *Id.* at 535, 33 L. Ed. 2d at 119. Thus, after carefully balancing the delay with potential prejudice, we remain unpersuaded by defendant’s argument that he suffered prejudice as a result of the delay.

Conclusion

Having considered the *Barker* factors and other relevant circumstances, we conclude that defendant has failed to demonstrate that his constitutional right to a speedy trial was violated. Accordingly, we affirm the trial court’s denial of defendant’s motion to dismiss.³

AFFIRMED.

Judge HUNTER, JR., concurs.

Judge ARROWOOD dissents in separate opinion.

3. We urge the trial court—and prosecutors in particular—to carefully attend to the backlog of cases. The deprivation of a speedy trial is not taken lightly; especially those where, like here, pre-trial incarceration extends for over five years. This is a significant delay that *potentially* infringes on constitutional rights. Unlike the facts and circumstances in this case which did not show a clear constitutional violation, a slight shift in relevant facts could have easily indicated unfair prejudice to a defendant so as to require dismissal.

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ARROWOOD, Judge, dissenting.

I dissent. The majority spends a great deal of time detailing defendant's previous record and the despicable nature of the crime with which defendant was charged. As I understand the requirements of Article I, Section 18 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution, the right to a speedy trial does not turn on whether defendant is an upstanding citizen. I also do not see where a defendant's prior record or the heinous nature of the crime is among the factors to be applied under the cases such as *Barker v. Wingo* 407 U.S. 514, 33 L. Ed. 2d 101 (1972), which have interpreted the considerations relevant to whether the State has violated this right. *See id.* at 530-33, 33 L. Ed. 2d at 115-19. Analyzing the factors to be applied, none of which support the State's position, I would find defendant demonstrated that his constitutional right to a speedy trial was violated.

Our Court considers "[t]he denial of a motion to dismiss on speedy trial grounds . . . *de novo*["] *State v. Johnson*, 251 N.C. App. 260, 265, 795 S.E.2d 126, 131 (2016) (citation omitted).

To determine "whether a defendant has been deprived of his right to a speedy trial, N.C. Const. art I, § 18; U.S.[.] Const. amend VI, our courts consider four interrelated factors together with such other circumstances as may be relevant." *State v. Chaplin*, 122 N.C. App. 659, 662, 471 S.E.2d 653, 655 (1996) (citation and internal quotation marks omitted). These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the resulting prejudice to the defendant. *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (citing *Barker*, 407 U.S. at 530-32, 33 L. Ed. 2d at 117-18) (citation omitted). "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

Instead the factors and other circumstances are to be balanced by the court with an awareness that it is dealing with a fundamental right of the accused which is specifically affirmed in the Constitution. The burden is, nonetheless, on the defendant to show that his constitutional rights have been violated and a defendant who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice.

Chaplin, 122 N.C. App. at 662-63, 471 S.E.2d at 655 (citations and internal quotation marks omitted).

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I. Length of Delay

I agree with the majority that the delay in this case, five years, two months and twenty-four days, is presumptively prejudicial. *See State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003). Therefore, the length of the delay triggers an inquiry into the remaining *Barker* factors. In addition, this is not an isolated incident in this judicial district. This is the second case this Court has considered from this district within the last year where there has been a delay of over five years in bringing a case to trial. Such delays not only affect defendants, but also the victims, who are held in limbo and unable to put the offenses in the past and attempt to heal and move on with their lives without the potential of having to relive the incidents through testimony many years in the future.

II. Reason for the Delay

“[D]efendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution.” *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (citation omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Once a defendant “makes a *prima facie* showing that the delay resulted from neglect or willfulness by the State, the burden shifts to the State to provide a neutral explanation for the delay.” *Johnson*, 251 N.C. App. at 266-67, 795 S.E.2d at 131 (citation and internal quotation marks omitted).

Here, defendant alleges administrative neglect by the State. Unlike the majority, I would hold defendant established a *prima facie* case that the delay was due to the prosecution’s neglect, as “[a] showing of a particularly lengthy delay establishes a *prima facie* case that the delay was due to the neglect or wilfulness of the prosecution[.]” *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 655-56 (citations and internal quotation marks omitted). Therefore, the State must offer evidence fully explaining the reasons for the delay that are sufficient to rebut defendant’s *prima facie* showing.

To rebut defendant’s case, the State maintains: (1) defendant acquiesced to the delay, and (2) Rowan County’s dockets were overcrowded.

First, I disagree that defendant acquiesced to the delay. Admittedly, defendant moved for expert funding in 2013 and 2014, agreed to the State’s request to continue the case from the January 2017 calendar to the next trial session, and waited over four years to file the instant motion. However, these facts are insufficient to show that defendant consented to the entirety of the five year, two month and twenty-four day delay in bringing the case to trial.

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Defendant's efforts to refine his case in 2013 and 2014 while awaiting trial do not demonstrate an agreement to delay trial, and defendant's agreement to the State's request to continue the trial from January 2017 to the next trial term only shows acquiescence to the passage of 1 of the 78 trial sessions held while defendant was incarcerated.¹ Additionally, although the trial court's finding that defendant waited over four years to file the motion at issue weighs against defendant's argument that he was deprived of his right to a speedy trial, the last minute nature of the motion does not show defendant assented to the State's delay of his trial.

Second, while I agree that congested dockets can constitute a valid basis for delay, responsibility for such delay nonetheless belongs to the State and ultimately weighs against the State. *Johnson*, 251 N.C. App. at 267, 795 S.E.2d at 132. Additionally, the reason for delay is closely associated with the length of delay. *State v. Pippin*, 72 N.C. App. 387, 392-93, 324 S.E.2d 900, 904-905 (1985). In light of these considerations, and the lack of additional basis for the delay, I would hold that the extensive delay before us is outside of constitutional bounds. This result is supported by our Court's recent unpublished opinion, *State v. Smith*, 259 N.C. App. 940, 814 S.E.2d 485, 2018 WL 2648289 (N.C. Ct. App. June 5, 2018) (unpublished), which both the State and defendant discuss on appeal.

In *Smith*, our Court considered another case delayed by the crowded docket in Rowan County Superior Court, in which over five and a half years passed between the defendant's arrest in April 2011 and his trial in November 2016. *Smith*, 259 N.C. App. at ___, 814 S.E.2d at ___, 2018 WL 2648289 at *3. Without deciding whether defendant met his *prima facie* burden, our Court held that, regardless, there was "sufficient evidence . . . to support the trial court's conclusions that the State's reasons for delay were 'reasonable and valid justifications for delay in this case[.]'" *Id.* at ___, 814 S.E.2d at ___, 2018 WL 2648289 at *4. These reasons were: the overcrowding of the Rowan County Superior Court docket, the victim recanted, creating the need for additional law enforcement investigation, defendant's counsel was permitted to withdraw from representation when he was elected as a district court judge, defendant's attorneys never filed a motion or request to calendar defendant's case for trial, and the State never refused a request to calendar the case for trial. *Id.* "Additionally, weighing against defendant, the court made findings that

1. Although the trial court found that "it appears that both parties acted in good faith with one another in scheduling the matters for trial as soon as practicable" after 30 January 2017, this finding, without more, does not suffice to show defendant acquiesced in the delay of his trial until July 2017, particularly given that he filed the motion for speedy trial in March 2017.

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defendant's counsel discussed . . . filing a speedy trial motion with defendant early on in the case but they agreed not to push for a trial because time might work to their benefit." *Id.* Thus, although there was a lengthy period of incarceration prior to trial, we held that the "delays attributable to the defense outweigh the crowded docket and" weigh the reason for delay against defendant. *Id.* at ___, 814 S.E.2d at ___, 2018 WL 2648289 at *5. Here, as discussed, the trial court did not find significant delays attributable to the defense as in *Smith*. In particular, there is no evidence that defendant was using the delay as trial tactic hoping the delay would aid in getting the victim to recant the allegations as was shown in *Smith*.

In addition, while the reason for the delay may be an overcrowded docket and not due to willfulness related to the staff of the District Attorney's office, the State has the responsibility to adequately fund the criminal justice system with sufficient prosecutors and other court personnel to timely dispose of cases. In my view it is totally unacceptable to have judicial districts where both crime victims and those accused of the crimes are waiting over five years for those charges to be resolved because there are not enough resources to try the cases sooner.

Our State has an obligation to adequately fund the judicial system to meet constitutional requirements. This obligation is demonstrated by the State's obligation to provide counsel for indigent defendants pursuant to *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963). See *State v. Morris*, 275 N.C. 50, 56-57, 165 S.E.2d 245, 249 (1969); see also *Boyer v. Louisiana*, 569 U.S. 238, 246, 185 L. Ed. 2d 774, 779 (2013) (Sotomayor, J., dissenting from dismissal of *writ of certiorari*) (applying the logic of *Vermont v. Brillon*, 556 U.S. 81, 173 L. Ed. 2d 231 (2009), in which the Supreme Court noted that, in evaluating speedy trial claims, "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State[,]" *id.* at 94, L. Ed. 2d at 242, Justice Sotomayor opined that "[w]here a State has failed to provide funding for the defense and that lack of funding causes a delay, the defendant cannot reasonably be faulted" in evaluating a speedy trial claim).

Similarly, here, the State has an obligation to fund the criminal justice system in a way that does not violate a suspect's Sixth Amendment right to a speedy trial and the public's expectation of timely justice. See *Spivey*, 357 N.C. at 131 n. 2, 579 S.E.2d at 263 n. 2 (Brady, J., dissenting) ("At some point . . . budgetary constraints can no longer justify . . . waiting periods for criminal defendants. . . . [C]rowded dockets . . . must eventually yield to both a suspect's Sixth Amendment right to a speedy trial and the public's expectation of timely justice.").

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Moreover, the successful and efficient administration of government assumes the legislative branch will fulfill this obligation. Where it fails to do so, it is the fault of the State and judicial oversight must protect an accused's right to a speedy trial. Therefore, this factor should be weighed against the State.

III. Assertion of Right

"A defendant is not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal." *Johnson*, 251 N.C. App. at 268-69, 795 S.E.2d at 132-33 (citation omitted). However, the "failure to assert his speedy trial right, or his failure to assert the right sooner in the process, does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Id.* at 269, 795 S.E.2d at 133 (citation and internal quotation marks omitted).

Here, defendant asserted his right to a speedy trial four years and eleven months after he was arrested, and the case was called for trial less than four months later. The eleventh-hour nature of this motion carries only minimal weight in defendant's favor. *See id.*

IV. Prejudice

I disagree with the majority's conclusion that defendant did not suffer prejudice as a result of the delay. I would hold that defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration.

"Prejudice[] should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Pippin*, 72 N.C. App. at 396, 324 S.E.2d at 906 (alteration, citation and internal quotation marks omitted). The constitutional right to a speedy trial: (i) prevents oppressive pretrial incarceration; (ii) minimizes the accused's anxiety and concern; and (iii) limits the possibility that the defense will be impaired. *Id.* (citation omitted).

Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id. at 396, 324 S.E.2d at 907 (citations and internal quotation marks omitted).

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Here, the majority determined defendant was not prejudiced because defendant's ability to defend his case was not impaired, and defendant did not demonstrate that his incarceration detrimentally impacted his life. While I agree the delay did not impede defendant's ability to defend his case, I would hold that defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration. Nonetheless, absent a more concrete showing of actual prejudice, this fourth factor weighs only slightly in defendant's favor.

V. Conclusion

Having considered the *Barker* factors and the relevant circumstances before the Court, I would hold defendant demonstrated that his constitutional right to a speedy trial was violated. Accordingly, I would reverse the trial court's denial of defendant's motion.

STATE OF NORTH CAROLINA

v.

TYLER DEION GREENFIELD, DEFENDANT

No. COA17-802

Filed 4 December 2018

1. Criminal Law—prosecutor's closing argument—no objection

In a murder trial, where defendant did not object to two statements made by the prosecutor during closing argument, the trial court was not required to intervene *ex mero motu* when the prosecutor stated that defendant did not accept responsibility for his actions and suggested, without evidence, that defendant might have committed another offense. Without an objection, defendant failed to preserve any constitutional arguments and the prosecutor's statements, even if erroneous, did not amount to plain error and were not so grossly improper as to warrant intervention.

2. Evidence—character—victim as aggressor—specific instances of conduct

In a murder trial, the trial court did not err by excluding defendant's evidence that the deceased victim was a gang leader, had a "thug" tattoo, and possessed firearms, none of which involved "specific instances of conduct" pursuant to Evidence Rule 405(b). Defendant failed to challenge on appeal the trial court's

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exclusion, pursuant to Evidence Rule 403, of the victim's prior conviction for armed robbery, a decision properly made within the court's discretion.

3. Evidence—opinion testimony—detective—whether defendant confessed

In a murder trial, defendant's argument that the trial court committed plain error by allowing a detective to opine that defendant "had already confessed to felony murder" was moot where the Court of Appeals decided to reverse defendant's felony murder conviction on other grounds. Even if not moot, any error did not amount to plain error.

4. Homicide—first-degree felony murder—jury instructions—multiple victims—intended victim

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error in its jury instructions for first-degree felony murder based on AWDWIKISI where the jury marked the verdict sheet finding defendant guilty of both first-degree felony murder and second-degree murder for a single homicide. The jury instructions should have made clear that defendant could be convicted of first-degree felony murder based on AWDWIKISI only if the jury believed the fatal bullet was meant for the second victim, and instead hit the first victim. Neither the jury instructions nor the verdict sheet helped illuminate what the jury believed defendant's intention was when he shot at the victims, necessitating reversal of the first-degree murder conviction.

5. Homicide—second-degree murder—multiple victims—intended victim

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury, the jury's verdict finding defendant guilty of second-degree murder was not in error whether the jury believed defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), because the jury was given the opportunity to acquit based on self-defense against the first victim, but declined to do so, and self-defense was not available regarding the second victim. Judgment entered upon the jury's other verdict finding defendant guilty of first-degree felony murder for the same homicide was vacated based on grounds stated elsewhere in the opinion, and the matter remanded for entry of judgment on second-degree murder.

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6. Assault—assault with deadly weapon with intent to kill inflicting serious injury—jury instructions—self-defense

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error by failing to provide a self-defense instruction regarding the assault charge. Without knowing whether the jury believed that defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), the jury's verdict of guilty for second-degree murder of the first victim, for which defendant was entitled to a self-defense instruction, would be inconsistent with a verdict of guilty of AWDWIKISI, because they are each predicated on a different intended victim. The conviction for AWDWIKISI was vacated and remanded for a new trial.

Judge STROUD dissenting.

Appeal by Defendant from judgments entered 23 February 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for the Defendant.

DILLON, Judge.

Defendant appeals his convictions for first-degree felony murder and for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI). For the following reasons we reverse the judgments and remand as follows: (1) with respect to the AWDWIKISI conviction, Defendant is entitled to a new trial; and (2) with respect to the first-degree felony murder conviction, the trial court shall vacate that judgment and enter judgment convicting Defendant of second-degree murder.

I. Background

Defendant was convicted of assault and murder for shooting two victims, killing one of them, during a drug deal gone bad.

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On 2 February 2015, Defendant was at Jon's¹ home to buy marijuana. Jon's girlfriend, Beth, was also there. The State's evidence tended to show that Defendant shot Jon and Beth while trying to rob Jon.

Defendant, however, testified as follows: Defendant went to buy marijuana from Jon. While in Jon's living room, Defendant picked up a gun from Jon's coffee table which he thought "looked cool." As Defendant was inspecting Jon's gun, Beth became nervous and pointed a gun at Defendant. Defendant then threatened to shoot Beth if Beth did not put her gun down. Beth put down her gun, and Defendant turned to leave. As Defendant was leaving, Jon shot at Defendant. Fearing for his life, Defendant returned fire, intending to shoot Jon but not intending to shoot Beth. Some of Defendant's return fire killed Jon and injured Beth.

Defendant was tried for killing Jon and for assaulting Beth. The jury was instructed on the doctrine of "transferred intent." The jury was also instructed on "self-defense" as to the murder charge but not the assault.

For Jon's death, the jury indicated on the verdict sheet that it had found Defendant guilty of *both* first-degree felony murder (based on the felony of AWDWIKISI) and of second-degree murder. Based on this verdict, the trial court entered judgment convicting Defendant of the greater charge, first-degree felony murder.

For the assault on Beth, the jury found Defendant guilty of AWDWIKISI. The trial court entered judgment based on this verdict.

The trial court sentenced Defendant to life imprisonment without parole. Defendant timely appealed.

II. Analysis

Defendant argues that the trial court committed four errors. We conclude that, except with respect to error in the jury instruction, the trial court did not commit reversible error, as explained in Section II. A. below.

We conclude that the trial court did commit reversible error in its jury instructions resulting in Defendant's convictions for the assault on Beth and the first-degree felony murder of Jon. However, we conclude that the error did not affect the jury's verdict that Defendant had committed second-degree murder when he shot Jon. Accordingly, for the reasons stated in Section II. B. below, we vacate the judgments entered

1. Pseudonyms are used to protect the identities of the victims.

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convicting Defendant of assault and first-degree felony murder and remand for a new trial on the assault charge for the assault on Beth and for entry of judgment for second-degree murder for the death of Jon.

A. Defendant's Arguments Concerning Closing Argument and Evidence

Defendant makes three arguments, unrelated to the jury instructions, which we conclude do not warrant relief on appeal. We address each in turn.

1. Prosecutor's Closing Argument

[1] Defendant argues that the trial court failed to intervene *ex mero motu* concerning two statements made by the prosecutor during closing arguments.

Defendant complains of the prosecutor's statement that "[t]he reason we're here [is that] the defendant will not accept responsibility for his actions." Defendant argues that "[t]he prosecutor's statement invited the jury to hold against [Defendant] his invocation of his constitutional right to plead not guilty and to stand trial before an impartial jury." Our Supreme Court, however, has held that constitutional arguments regarding closing instructions which are not objected to are waived:

Defendant seeks a new trial on the ground that the court's errors [in not intervening *ex mero motu* during the prosecutor's closing based on the State and Federal constitutions and on N.C. Gen. Stat. § 15A-1230].

Because defendant did not object to any of these arguments below, no constitutional argument could have been presented to the trial court. As noted above, failure to raise a constitutional issue at trial generally waives that issue for appeal. [Citations omitted.] Accordingly, we will review these purported errors for a violation of N.C.G.S. § 15A-1230.

State v. Phillips, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011).

Here, Defendant did not object to the prosecutor's statement. Therefore, we are compelled to conclude that Defendant has failed to preserve any constitutional argument concerning the prosecutor's statement. And unlike the defendant in *Phillips*, Defendant here has not made any argument under N.C. Gen. Stat. § 15A-1230. Further, we conclude that any error in this regard did not amount to plain error. Therefore, Defendant's argument concerning this statement is overruled.

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Defendant also complains of the prosecutor's statement that "[p]erhaps [Defendant] had [the weapon] in some other robbery [and] discharged it then." This statement suggests that Defendant may have committed another offense, though there is no evidence that he had done so. The State contends the statement was relevant to the prosecution's theory that Defendant had disposed of the weapon shortly after the shooting, which was evidence of Defendant's guilt.

Defendant did not object to the statement. Where there is no objection, our standard of review is whether the remarks were "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).

We have reviewed the prosecutor's statement in context with the entire closing argument, and we conclude that the statement, if improper, was not so grossly improper to require intervention by the trial court. In so holding, we note other cases where similar or more inflammatory statements were held not to require intervention by the trial court. *See, e.g., State v. Marino*, 229 N.C. App. 130, 135, 747 S.E.2d 633, 637 (2013) (holding that a prosecutor's speculation "that this was not the first time defendant had driven impaired," while improper, did not warrant a new trial). *See also State v. Oxendine*, 330 N.C. 419, 423, 410 S.E.2d 884, 886 (1991). Therefore, we conclude that the trial court did not commit reversible error by failing to intervene *ex mero motu* during the prosecutor's closing argument.

2. Evidence Concerning Character of the Victim

[2] Defendant argues that the trial court erred in excluding evidence that the deceased victim (Jon) was a gang leader, had a "thug" tattoo, and had previously been convicted of armed robbery. Defendant contends that he had offered this evidence to show Jon's violent character which would be relevant to his self-defense argument. Defendant argues that the evidence was admissible under Rules 404(a) and 405(b) of our Rules of Evidence and that the trial court's refusal violated his constitutional right to present his defense.

Rule 404(a) provides that an accused may offer evidence of "a pertinent trait of [the victim's] character." N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017). Our Supreme Court has stated that a defendant claiming self-defense "may produce evidence of the victim's character tending to show [] that the victim was the aggressor" and may be done so "through testimony concerning the victim's general reputation for violence[.]" *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 265-66 (1982).

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Rule 405 of our Rules of Evidence provides *how* character evidence may be offered. N.C. Gen. Stat. § 8C-1, Rule 405 (2017). Rule 405(a) states that evidence concerning the victim’s reputation may be offered. *Id.* Rule 405(b) states that evidence concerning “specific instances of [the victim’s] conduct” may be offered. *Id.* Defendant specifically argues that his evidence concerning Jon’s character was admissible under Rule 405(b); he makes no argument under Rule 405(a).

We conclude that the evidence concerning Jon’s gang membership, his possession of firearms, and his tattoo do not involve “specific instances of conduct” admissible under Rule 405(b). Therefore, we conclude that the trial court did not err by excluding this evidence. Further, we note that there was evidence presented to the jury that Jon was a drug dealer and possessed multiple guns in his residence at the time of the shooting.

Regarding the victim’s prior conviction for armed robbery, the trial court specifically ruled that the evidence was inadmissible under Rule 403, based on its conclusion that unfair prejudice outweighed the probative value of the evidence. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1996) (stating that the trial court may still exclude otherwise admissible evidence if it determines that “its probative value [is outweighed by] the danger of unfair prejudice”). Whether otherwise admissible evidence should be excluded under Rule 403 is left to the sound discretion of the court. *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 90-91 (1998). Here, Defendant has made no argument that the trial court erred in excluding Jon’s prior conviction under Rule 403. Therefore, we conclude that Defendant failed to meet his burden on appeal as to this issue.

3. Detective’s Opinion Testimony

[3] Defendant argues that the trial court committed plain error by allowing a detective testifying for the State to express his “opinion [that Defendant] had already confessed to felony murder.” Our Supreme Court has stated that it reviews “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). Under Rule 10(a)(4) of our Rules of Appellate Procedure, an appellant must demonstrate that a “judicial action” amounted to error. Presumably, here, Defendant is arguing that the trial court should have intervened to strike the detective’s testimony concerning his belief that Defendant had confessed to felony murder. Assuming, *arguendo*, that the trial court committed error, we conclude

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that the argument is moot in light of our reversal of Defendant's felony murder conviction, as explained in Section II. B. below. Further, assuming that the argument is not moot, we conclude that any error by the trial court was not "so basic, so prejudicial, so lacking in its elements that justice cannot have been done," and, therefore, did not rise to the level of plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

B. Jury Instructions on "Transferred Intent" and "Self-Defense"

[4] We conclude that the jury instructions require us to vacate Defendant's convictions for the assault of Beth and the first-degree felony murder of Jon, but not for the jury's verdict finding Defendant guilty of the second-degree murder of Jon. But before discussing our conclusions regarding the jury instructions as to each charge specifically, we first discuss generally the "transferred intent" and "self-defense" instructions given to the jury.

1. Transferred Intent

The trial court gave a general instruction on "transferred intent." Our Supreme Court has described transferred intent as follows:

It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971).² Therefore, under the "transferred intent" rule, if a defendant shoots at A in the heat of passion, without malice, but hits B, he is guilty of voluntary manslaughter. If he shoots A in self-defense but hits B, he is not guilty by reason of self-defense.

The instruction regarding transferred intent given in this case was an accurate statement of the law. The trial court told the jury:

2. This holding in *Wynn* regarding "transferred intent" was most recently affirmed by our Supreme Court in 1998 in *State v. Davis*, 349 N.C. 1, 37, 506 S.E.2d 455, 475 (1998) and by our Court just last year in *State v. Cox*, ___ N.C. App. ___, ___, 808 S.E.2d 339, 348 (2017).

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If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.

This instruction, as given, allowed the jury to convict Defendant for killing Jon even if they believed Defendant was *intending* to shoot Beth when he hit Jon. And it allowed the jury to convict Defendant for assaulting Beth even if they believed Defendant was intending to shoot Jon when he hit Beth.

2. Self-Defense

The State's evidence tended to show that Defendant shot both Jon and Beth during a robbery attempt. Defendant admitted that he shot Jon and Beth, but only to protect himself. Specifically, Defendant testified that (1) Jon shot first; (2) Defendant then returned fire in self-defense as he tried to escape the room in fear that Jon was going to kill him; and (3) Defendant was only trying to hit Jon in his return fire; he was not shooting at Beth.

When instructing on the homicide of Jon, the trial court instructed the jury that it could find Defendant not guilty or guilty of a lesser charge based on self-defense. But the trial court did not instruct the jury on self-defense with respect to the assault on Beth. The instruction on this count, coupled with the transferred intent instruction, created a likelihood of confusion within the jury. Based on our State's jurisprudence, as explained below, the application of self-defense does not turn on whom Defendant actually shot, but rather on whom he intended to shoot. That is, as explained below, Defendant was entitled to a self-defense instruction on the homicide of Jon and the assault of Beth, but only if the jury determined that those crimes were committed with shots *intended* for Jon.

Defendant was *not* entitled to any self-defense instruction for the shots which the jury determined he *intended* for Beth, whether they struck Beth or Jon. Defendant was not so entitled because he testified that he did not intend to hit Beth, but that he was only shooting at Jon. Defendant also testified that he was only in imminent fear of being killed by Jon. He testified that Beth had already put down her gun before he returned fire. *See, e.g., State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *affirmed per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018) (holding that a defendant was not entitled to a self-defense instruction where he testified that he was not intending to shoot the victim when he fired the gun).

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But based on Defendant's testimony, he *was* entitled to the self-defense instruction for all the shots he intended to fire at Jon, *whether they actually killed Jon or injured Beth*. That is, based on Defendant's testimony that Jon was shooting at Defendant, Defendant was entitled to the self-defense instruction with regard to any shots the jury determined he *intended* for Jon and which hit Jon. And based on the "transferred intent" instruction, Defendant was also entitled to a "self-defense" instruction with regard to any shots intended for Jon *but which* actually struck Beth.

C. Jury Verdicts and Judgments

1. Count 1 – Homicide of Jon

On Count 1, Defendant was charged with Jon's homicide. The trial court instructed the jury on a number of theories, including first-degree felony murder, first-degree premeditation/deliberation murder, second-degree murder, and voluntary manslaughter.

On its verdict sheet, the jury checked boxes indicating that it was finding Defendant guilty of *both* first-degree felony murder, based on the felony of AWDWIKISI, *and* of second-degree murder. Based on this verdict (and because Defendant only killed one person), the trial court entered judgment only on the greater charge, first-degree felony murder.

a. First-Degree Felony Murder Judgment – Reversible Error

We conclude that the jury instructions concerning first-degree felony murder based on AWDWIKISI constituted reversible error because the instructions allowed the jury to convict Defendant on this theory even if they believed that Defendant *had intended* to shoot Jon rather than Beth with the fatal shot(s). Specifically, it would be error for the jury to base its felony murder conviction for the killing of Jon on a felony that Defendant *was intending to assault Jon*.

Where a defendant intentionally assaults A with a gun which causes A's death (and there is no other felony involved), the State cannot elevate an otherwise act of second-degree murder or voluntary manslaughter to first-degree murder based solely on the fact that the defendant committed the deadly assault with a deadly weapon. Otherwise, *every instance* where a defendant commits a homicide with a gun would constitute first-degree felony murder.³

3. If every homicide involving a deadly weapon were elevated in this manner, a defendant who shoots his spouse in the heat of passion, without premeditation and deliberation, would be liable for first-degree felony murder rather than simply voluntary manslaughter.

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Based on a holding by our Supreme Court, however, if the jury believed that Defendant *intended* to shoot Beth with the shot(s) that killed Jon, the jurors were free to convict Defendant of first-degree felony murder based on AWDWIKISI. Specifically, in *State v. Terry*, our Supreme Court held that a defendant who fires a deadly weapon at A (Beth, in our case), but hits B (Jon), is guilty of first-degree felony murder of B (Jon), based on the fact that the defendant was committing the felony of assault with a deadly weapon on A when he killed B. *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723-24 (1994). Though this holding seems to be in direct conflict with the “transferred intent” rule stated by our Supreme Court in *Wynn*, we are bound to follow it.⁴

We, however, cannot determine from the jury instructions or from the verdict sheet whether the jury believed Defendant, when he shot Jon, was *intending* to shoot Jon or *intending* to shoot Beth. That is, the instructions did not clearly inform the jury that it could find Defendant guilty of first-degree felony murder based on AWDWIKISI *only if* it determined that the fatal bullet was meant for Beth. And there was evidence presented from which the jury could have inferred either finding. Therefore, we conclude that the jury instructions with respect to Defendant’s conviction for first-degree felony murder constituted reversible error.

b. Second-Degree Murder Verdict – No Reversible Error

[5] In addition to finding Defendant guilty of first-degree felony murder for Jon’s death, the jury also found Defendant guilty of second-degree murder. As stated above, the trial court entered judgment only on the first-degree felony murder verdict.

Second-degree murder occurs where a defendant kills another human being with malice. *State v. Williams*, 288 N.C. 680, 691, 220 S.E.2d 558, 567 (1975). Where the defendant uses a deadly weapon to commit an assault, malice can be presumed. *State v. Lang*, 309 N.C. 512, 525-26,

Or a defendant who shoots and kills someone with malice, but without premeditation and deliberation, would still be guilty of first-degree murder rather than second-degree murder. Such results are clearly not the intent of the General Assembly, nor are they reflected in our Supreme Court’s jurisprudence.

4. In *Terry*, the Supreme Court did not apply its “transferred intent” rule to determine defendant’s culpability when he fired at A but shot B. Rather, the Court held that first-degree felony murder was appropriate, notwithstanding whether the defendant shot with premeditation or merely in the heat of passion. Accordingly, it could be argued that *Terry* conflicts with the statement in *Wynn* that “the malice or intent follows the bullet.”

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308 S.E.2d 317, 323-24 (1983). “[A] pistol or a gun is a deadly weapon.” *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922).

In this case, on the charge of second-degree murder, the jury was instructed on self-defense. We conclude that, for this jury verdict, there was no reversible error. It does not matter whether the jury believed Defendant was shooting at Jon or at Beth when he killed Jon. If the jury believed Defendant was shooting at Jon, the verdict is valid because the jury was given the opportunity to acquit based on self-defense, but declined to do so. And if the jury believed that Defendant shot Jon while trying to shoot Beth, he was not entitled to a self-defense instruction with respect to any shot intended for Beth because he testified that he was not in imminent fear of Beth.

c. Mandate on Homicide Count

We vacate the judgment convicting Defendant guilty of first-degree felony murder. But since there was no reversible error with respect to the second-degree murder verdict, based on the reasoning of our Supreme Court in *State v. Stokes*, we remand for entry of judgment convicting Defendant of second-degree murder.⁵ *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014).

2. AWDWIKISI of Beth

[6] The trial court instructed the jury that it could convict Defendant of AWDWIKISI for the injuries to Beth. The trial court did not give an instruction of self-defense as to this charge. This was error because we do not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. That is, with the transferred intent instruction, it is possible that the jury convicted Defendant of AWDWIKISI, though believing that Defendant intended all his shots to hit Jon, as he testified. And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense. As our Supreme Court stated in *Wynn* with respect to transferred intent: “Such a person is guilty *or innocent* exactly as [if] the fatal act had caused the death of his adversary.” *Wynn*, 278 N.C. at 519, 180 S.E.2d at 139 (emphasis added).

5. In *Stokes*, our Supreme Court cited a line of cases with approval where there was evidence to support a conviction of a greater charge, but the instructions left out an essential element of that greater charge, resulting in an instruction on a lesser charge. *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014). The Court held that it was appropriate to remand for entry on the lesser charge. *Id.*

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The State might argue that the failure to instruct on self-defense was not prejudicial because the jury must have determined that Defendant did not shoot at Jon in self-defense based on the finding of guilt for second-degree murder. But this ignores the possibility that the jury found Defendant guilty of second-degree murder for shots intended for Beth, for which he was not entitled to any self-defense instruction, and that the jury found Defendant guilty of assaulting Beth with shots intended for Jon, for which he was entitled to a self-defense instruction. We simply cannot know what the jury was thinking. Therefore, Defendant is entitled to a new trial with respect to the assault charge. On remand, assuming the evidence is the same, the jury must be instructed on self-defense for the shots the jury believed were intended for Jon that hit Beth.

III. Conclusion

The judgments below are vacated. Defendant is entitled to a new trial with respect to the AWDWIKISI conviction. Regarding the first-degree felony murder conviction, we remand for entry of judgment convicting Defendant of second-degree murder.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I concur in the result of the majority opinion in granting defendant a new trial on AWDWIKISI, but I dissent on the remainder of the charges because I would grant defendant a new trial on all charges. The facts and resulting various charges were somewhat confusing on their own, but the jury instructions and verdict sheet only made the case more confusing by muddling the issues, elements, and legal standards applicable to each charge. Portions of the jury instructions misstated the law and overall the instructions are likely to have misled the jury. Although some portions of the jury instructions are correct statements of the law, it is not possible to separate the AWDWIKISI conviction from the tangled mess of theories and charges. I would therefore reverse and grant a new trial on all charges.

I briefly restate the background since it is important to an understanding of the issues and appropriate jury instructions. On 2 February

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2015, defendant and a friend went to Jon's¹ home to buy marijuana. An altercation started and shots were fired by at least three guns. Jon ultimately died from gunshot wounds. Defendant and Jon's girlfriend, Beth, were also shot but survived. The State and defendant presented different theories at trial on what happened between defendant's arrival at Jon's home and the shootings. The State's theory of the case was that defendant and his friend attempted to rob Jon and murdered him: defendant attempted to rob Jon at gunpoint; Beth grabbed a gun; defendant threatened to shoot Jon in the head if Beth did not put her gun down; Beth put the gun down; and defendant began firing, striking both Jon and Beth. Defendant's theory of the case was self-defense: he went to buy marijuana from Jon and saw a gun on the coffee table; he picked it up to look at it because it "looked cool" "like something off a movie[;]" Jon "started going crazy[;]" Beth grabbed a gun and pointed it at defendant; defendant threatened to shoot if Beth did not put the gun down; Beth put the gun down; defendant turned to run and Jon shot him; defendant began shooting behind himself "as many times as I can till I got to the door."

Defendant was indicted for first and second-degree murder and attempted robbery with a dangerous weapon of Jon and the attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") of Beth. Defendant argued self-defense to the jury. The jury found defendant guilty of first-degree felony murder with the underlying felony being assault, second-degree murder, and AWDWIKISI. The trial court sentenced defendant to life imprisonment without parole. Defendant appealed.

Defendant challenges the jury instructions regarding self-defense. Defendant contends the trial court should have provided a self-defense instruction for the AWDWIKISI and felony murder charges. Defendant argues that

[b]y limiting the jury instructions so that self-defense could not be applied to the assault charges against . . . [Beth] – standing alone or underlying the felony-murder charge – the trial court usurped the jury's function, and Mr. Greenfield was denied his right to present a defense and to a trial by jury.

1. Pseudonyms will be used to protect the identity of the participants who were not charged with a crime in this case and the deceased victim.

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Defendant specifically contends that within the trial court's self-defense instruction it should have included his proposed instruction on transferred intent because defendant's "intent of defending himself against . . . [Jon] transferred to the shooting of . . . [Beth]."²

We review jury instructions as a whole to determine if the law was presented correctly and to ensure that the jury was not misled regarding the applicable law:

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190–91, 729 S.E.2d 703, 708 (2012) (citation, ellipses, and brackets omitted). This Court's review of the jury instructions as a whole is conducted *de novo*. See *State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50, *aff'd per curiam*, 364 N.C. 417, 700 S.E.2d 222 (2010) ("Our Court reviews a trial court's decisions regarding jury instructions *de novo*.").

The trial court must instruct the jury on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm.

2. Under the doctrine of transferred intent "[i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. . . . Such a person is guilty or innocent exactly as if the fatal act had caused the death of his adversary. It is aptly stated that the malice or intent follows the bullet." *State v. Goode*, 197 N.C. App. 543, 550, 677 S.E.2d 507, 512 (2009) (citation, quotation marks, and brackets omitted).

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Moreover, the trial court must provide a self-defense instruction if the above criteria is met even though there is contradictory evidence by the State or discrepancies in the defendant's evidence. With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant.

Before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Id. at 235-36, 691 S.E.2d at 50-51 (citations, quotation marks, and brackets omitted).

The trial court did not provide a self-defense instruction in general on the AWDWIKISI or felony murder charge; furthermore, the trial court did not provide a transferred intent instruction on the one self-defense instruction it did provide on first and second-degree murder and voluntary manslaughter. Thus, the only specific self-defense instruction the jury received was as to Jon, and not to Beth:

The defendant would be excused of first-degree murder on the basis of malice, premeditation, and deliberation, and second-degree murder on the ground of self-defense if, first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.

And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

The State does not argue that defendant did not present evidence which would support his theory of self-defense, but only that defendant was not credible and that since the trial court instructed the jury on

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self-defense as to some of the charges, the jury instructions as a whole were sufficient. This argument fails for two reasons. The defendant's credibility is not a consideration for this Court; that is a determination for the jury to make. *See State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) ("It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury."). Also, when reviewing a trial court's failure to instruct jurors on a self-defense theory, this Court must consider the evidence in the light most favorable to defendant. *See Cruz*, 203 N.C. App. at 235, 691 S.E.2d at 51. Defendant's evidence presented at trial, if believed, would support an instruction of self-defense on both the AWDWIKISI and felony murder charges as he testified: he went to Jon's home to buy marijuana, with no intent to rob anyone; Jon became so upset when he picked up a gun to look at it that Beth intervened pointing a gun at him; and he was the first person shot, as he was trying to run away, shooting back only to defend himself.

Thus, the jury retired to deliberate with the self-defense instruction applying only to "COUNT 1" for "First-Degree Murder with Premeditation and Deliberation Or Second-Degree Murder Or Voluntary Manslaughter" against Jon. Further compounding the lack of a self-defense instruction, the State's closing argument repeatedly stressed that self-defense could not be used for felony murder stating,

Premeditation, deliberation, malice. These are all concepts we'll talk about in just a second, but they don't apply to felony murder. Also what doesn't apply is self-defense. Self-defense also doesn't apply to felony murder. . . .

. . . Self-defense does not apply to felony murder. Again, stress that over and over again. There's not a need to apply self-defense to felony murder that the defendant is charged with.

Thus, with these confusing instructions and statements from the State, the jury retired to deliberate with a somewhat confusing verdict sheet. The verdict sheet presented options for eight different theories of murder or manslaughter under COUNT 1, and the jury was instructed on self-defense as applied to only three of those eight theories. The verdict sheet with the jury's answers to the various theories shows the following for the crimes listed under COUNT 1:

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COUNT 1³

- Guilty of First-Degree Murder;
 Under the felony-murder rule, determine whether the defendant committed: (Mark all that apply)
- Attempted Robbery
- Attempted First-Degree Murder
- Assault with a Deadly Weapon with Intent to Kill
 Inflicting Serious Injury
- Assault with a Deadly Weapon Inflicting Serious Injury
- Assault with a Deadly Weapon with Intent to Kill
- Or Not Guilty
- Or
- First-Degree Murder with Premeditation and Deliberation
- Or
- Second-Degree Murder
- Or
- Voluntary Manslaughter
- Or
- Not Guilty

The verdict sheet is confusing, even to this Court. The jury indicated its confusion as well when it wrote a note to the court asking, “Please explain why it matters that we address both theory’s since it[’]s for the same count? Why is there an ‘or’ instead of an ‘and’ in the charge sheet.”

Adding one more layer of confusion, instead of giving the self-defense instructions as requested by defendant, the trial court instead instructed the jury on accident “[a]s to the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious

3. The verdict sheet did not identify the victim of each Count. Jon was the victim of each crime under Count 1, but four of the underlying felonies could have been regarding Beth. The crimes against Beth were therefore identified both in Count 1, as potential felonies to support felony murder, and separately in Counts 2 and 4 for attempted first-degree murder and the three forms of assault.

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injury of” Beth. After the instructions were given, defense counsel noted his objection to the accident instruction:

the language in it that an injury is accidental if it’s unintentional, and Judge, I believe that under self-defense an act under self defense would be an intentional act, just that it would lawfully be an intentional act.

THE COURT: I understand what you’re saying but I did not give a self-defense instruction for that.

MR. SHOTWELL: I understand, but I’m saying under the theory that if his actions were lawful under self-defense, then by definition they would be intentional.

Thus, in summary, the trial court’s instructions deliberately separated the instruction for first-degree murder based on premeditation and deliberation, second-degree murder; and voluntary manslaughter for which self-defense would apply from the felony murder instructions for which self-defense would not apply. The trial court then instructed on accident, although there was no evidence to support this instruction, and did not instruct on self-defense for AWDWIKISI and felony murder, though there was evidence to support those instructions. Ultimately, the jury found defendant not guilty of attempted robbery with a deadly weapon and did not use this as the basis for the felony murder conviction; this part of the verdict indicates that the jury did not believe the State’s theory of the case that defendant went to Jon’s home and attempted to rob him. The jury actually found defendant guilty of felony murder based only on “Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury[;]” this is the same crime they found defendant guilty of committing against Beth; this is the crime for which defendant unsuccessfully requested a self-defense instruction.

Overall, considering the instructions in their entirety, with the lack of a self-defense instruction which was supported by the evidence, the inclusion of an accident instruction which was not supported by the evidence, the State’s jury argument emphasizing that self-defense could not be used for felony murder, the layout of the verdict sheet and the jury’s question about it, and the not guilty verdict as to attempted robbery with a deadly weapon, I would conclude the jury may have been “misled” by the jury instructions and the result may have been different if the jury had been instructed on self-defense as to AWDWIKISI. Generally *Cornell*, 222 N.C. App. at 191, 729 S.E.2d at 708.

I would therefore reverse defendant’s convictions and grant defendant a new trial on all charges.

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[262 N.C. App. 650 (2018)]

STATE OF NORTH CAROLINA

v.

BRODIE LEE HAMILTON, DEFENDANT

No. COA17-1365

Filed 4 December 2018

1. Criminal Law—discovery—blank audio recording

In a prosecution for trafficking methamphetamine, the trial court did not err by denying defendant's motion to dismiss for a violation of his constitutional rights where the State did not preserve or disclose a blank audio recording. An officer did not act in bad faith where he attempted to record a conversation between an informant and defendant setting up a drug transfer, but the recording device was new and the officer was unsuccessful. While the blank audio recording may have had the potential to be favorable, defendant did not demonstrate that it was material. To the extent that the recording implicated credibility, it was the officer's credibility, not the informant's.

2. Discovery—criminal law—failure to disclose—no sanctions

In a prosecution for trafficking methamphetamine, the trial court did not abuse its discretion by denying defendant's motion for sanctions for a discovery violation where an officer unsuccessfully attempted to record a conversation setting up a drug transfer and the resulting blank recording was neither preserved nor disclosed. The trial court's decision was not arbitrary and was based on its consideration of the materiality of the blank audio file, the circumstances of the failure to provide a complete file to the district attorney's office, the officer's experience and reputation, the evidence itself, and the arguments of counsel.

3. Criminal Law—jury instructions—special request—failure to disclose evidence

In a prosecution for trafficking methamphetamine, the trial court did not err by refusing defendant's requested instruction about the State's failure to disclose a blank recording of defendant's conversation with an informant. The officer testified that the recording device was new and that his attempt to make the recording was not successful. Defendant did not establish bad faith by the officer and did not show that the blank audio recording contained any exculpatory evidence.

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[262 N.C. App. 650 (2018)]

Appeal by defendant from judgments entered 27 January 2017 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Meghan Adelle Jones for defendant-appellant.

BERGER, Judge.

A Macon County jury convicted Brodie Lee Hamilton (“Defendant”) of multiple charges of trafficking methamphetamine and one charge of conspiracy to traffic methamphetamine. For these convictions, the trial court sentenced Defendant to three consecutive terms of 225 to 282 months in prison, and fined him \$750,000.00. Defendant appeals, alleging the trial court erred in (1) denying his motion to dismiss, (2) denying his motion for sanctions, and (3) not providing a special instruction to the jury that had been requested. All three of Defendant’s allegations of error are based on a discovery dispute in which the State had failed to disclose a blank audio recording. After review, we disagree with Defendant’s contentions and find no error.

Factual and Procedural Background

The Macon County Sheriff’s Department received a tip involving drug transportation along a known methamphetamine trafficking route between Atlanta, Georgia and Macon County, North Carolina. The information included specific details about the individuals involved and the vehicle that would be used. Under the direction of Lieutenant Charles Moody (“Lt. Moody”), the department sought to intercept the vehicle by monitoring the back roads of Macon County between the pick-up and drop-off locations.

On June 19, 2015, Jeremy Stanley (“Stanley”) and Elizabeth Tice (“Tice”) were stopped in Macon County after failing to stop at a stop sign. Stanley told deputies that there was a gun in the vehicle, and a trace of its serial number showed the firearm had been stolen. Both Stanley and Tice were arrested for possession of a stolen firearm. Stanley told deputies he wanted to talk and had additional information about the stolen firearm.

Deputies brought in a K9 unit to conduct a “free air” sniff around the vehicle. The K9 unit alerted on the vehicle, and deputies located more

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than two pounds of methamphetamine in a plastic container behind the driver's seat.

Stanley and Tice were then transported to the Macon County Sheriff's Department. Stanley told Lt. Moody that Defendant paid them \$17,000.00 to pick up the methamphetamine in Atlanta. Lt. Moody asked Stanley and Tice if they could help prove Defendant was involved by setting up a controlled delivery of artificial methamphetamine. Stanley used Tice's cell phone to call Defendant, told him that they had problems with their vehicle, and arranged for someone to pick up the drugs at the Smokey Mountain Welcome Center. Lt. Moody testified that he "could hear that there was a person on the other end of the line, but [he] couldn't hear what was being said" by that person.

Defendant was not present at the site of the drug exchange, but instead, the exchange was carried out by two of Defendant's associates. Both associates were arrested on site.

On December 14, 2015, the Macon County Grand Jury indicted Defendant for trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, and conspiracy to traffic methamphetamine. During Defendant's January 2017 trial, defense counsel asked Lt. Moody on cross-examination if he had attempted to record the telephone conversations between Stanley and Defendant. Lt. Moody responded:

I tried to record the telephone call. I don't normally do that. I had a brand-new tape recorder that had just been purchased. I just used that and a microphone and a suction cup to try to record that call . . . and made that attempt. It wasn't until sometime later that I realized that there's no – there's no real conversation that was captured during that recording.

Defense counsel then informed the trial court that he was unaware of Lt. Moody's attempt to preserve the conversation by audio recording as no such information had been provided in discovery. Defense counsel was permitted to question Lt. Moody outside the presence of the jury:

[Defense Counsel:] So what was actually recorded in that?

[Lt. Moody:] Nothing.

[Defense Counsel:] Absolutely nothing?

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[Lt. Moody:] Nothing. An occasional noise, but you couldn't even make out the words. I didn't do a very good job of the installation. I was not familiar with the equipment or with that particular phone.

...

[Defense Counsel:] So you recorded how many phone calls with this device?

[Lt. Moody:] One.

[Defense Counsel:] Which one was that?

[Lt. Moody:] It would have been the first call. And quite honestly, I don't recall if I attempted to record the second one or not. I didn't make any attempt to listen to the recording until a couple of days after that, and there was just nothing there.

[Defense Counsel:] Do we still have the audiotape?

[Lt. Moody:] I don't think so.

THE COURT: What happened to it? I mean, is it a physical tape? Is it digital information?

[Lt. Moody:] It would be a digital tape. . . . A digital – a digital device.

THE COURT: Do you still have that device?

[Lt. Moody:] I don't know, Your Honor. I listened to it – or attempted to listen to the recording several times. There was no recording there. I had other – at least one other officer confirm that there wasn't anything there as well. I don't know if I didn't turn it on, if – if I used – if I placed the microphone on it inappropriately. There was no recording there. . . . There was no – there was no audible information on the recording.

On January 25, 2017, Defendant filed a motion for sanctions seeking dismissal of the charges for what he contended was a willful violation

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of North Carolina's discovery statutes and his constitutional rights. The trial court denied his motion for sanctions.

On January 27, 2017, Defendant was convicted on all counts, sentenced to three consecutive terms of 225 to 282 months in prison, and fined \$750,000.00. Defendant appeals, arguing the State's failure to provide the blank audio recording in discovery warranted dismissal of the charges against him for violation of his constitutional rights and North Carolina's discovery statutes. Defendant also argues the trial court erred in denying his motion for sanctions and not providing the jury a special instruction on spoliation of evidence. We disagree.

I. Motion to Dismiss

[1] Defendant contends the trial court was required to dismiss all charges for the State's failure to preserve and disclose the blank audio recording of the conversation between Defendant and Stanley. Specifically, Defendant asserts that the State violated his constitutional rights as set forth in *Brady v. Maryland*, 373 U.S. 479 (1963), by failing to turn over information that was favorable and material to guilt or punishment. We disagree.

Standard of Review

The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

Analysis

A trial court must dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). Defendant has "the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly." *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).

Pursuant to *Brady v. Maryland*, "[e]vidence favorable to an accused can be either impeachment evidence or exculpatory evidence." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. Evidence is material if, had the evidence been disclosed, there is a reasonable probability of a different result. *Kyles v. Whitley*, 514 U.S. 419 (1995). Defendant "has the burden

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of showing that the undisclosed evidence was material and affected the outcome of the trial.” *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 541 (2004) (citation omitted). However, Defendant is not required to demonstrate that disclosure of the evidence would have resulted in acquittal, but instead, the failure to provide the evidence undermined confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434.

Moreover, when the unpreserved evidence is “potentially useful,” a defendant must demonstrate “bad faith on the part of the police” in order to show a “denial of due process of law.” *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *see also State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (1994); *State v. Dorman*, 225 N.C. App. 599, 620, 737 S.E.2d 452, 466 (2013). “[R]equiring a defendant to show bad faith on the part of police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it.” *Youngblood*, 488 U.S. at 58. However, “[e]vidence of bad faith standing alone, even if supported by competent evidence, is not sufficient to support a dismissal under N.C. Gen. Stat. § 15A-954(a)(4).” *Dorman*, 225 N.C. App. at 622, 737 S.E.2d at 467.

Here, Defendant had the opportunity to question Stanley about his phone call with Defendant, cross-examine Lt. Moody about destruction of the blank audio recording, and argue the significance of the blank audio recording to the jury. Defendant did just that at trial. Defendant merely demonstrated that the blank audio recording could have been potentially useful. However, Defendant has failed to show bad faith on the part of Lt. Moody. It is undisputed that the blank audio recording had not been disclosed to Defendant and had been subsequently destroyed by Lt. Moody. Defendant’s highly speculative assertions about Lt. Moody, standing alone, are insufficient to demonstrate bad faith.

Moreover, while the evidence *may* have had the potential to be favorable, Defendant has failed to demonstrate that the blank audio recording was material. At trial, it was established that Defendant had orchestrated the procurement of a significant quantity of methamphetamine with a series of runners and underlings. Stanley, Tice, and Christopher Prince each provided similar accounts of the role Defendant had played in financing the operation, obtaining the methamphetamine in Atlanta, and transporting that contraband to North Carolina. In light of the evidence at trial, the Defendant’s speculation about the contents and significance of a blank audio recording does not undermine confidence in the outcome of his trial.

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Defendant argues that “[s]ilence with occasional noises, would have been relevant and highly probative evidence in this case,” because it undermined Stanley’s credibility and “indicates that Stanley fabricated [Defendant’s] involvement.” Defendant submits that, because the evidence went to Stanley’s credibility, bad faith need not be shown under *Giglio v. United States*, 405 U.S. 150 (1972). *Giglio v. United States*, however, concerned the failure by the prosecution to disclose the existence of a promise not to prosecute “the only witness linking petitioner with the crime.” 405 U.S. 150, 151 (1972). That witness had denied the existence of the promise on cross examination, and the attorney for the government, unaware of the promise, informed the jury that the witness had received no such concession. *Id.* The United States Supreme Court stated that “[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.” *Id.* at 154 (citations and quotation marks omitted).

Such is not the case here. Stanley was not the only link to Defendant’s involvement in trafficking methamphetamine. Further, to the extent the blank audio recording implicated any witness’ credibility, it was Lt. Moody’s, not Stanley’s credibility. Stanley played no part in the installation of the recording equipment on the phone, or the preservation, destruction, or failure to disclose the existence of the blank audio recording. Even if the blank audio recording had been available to Defendant, the fact that, in substance, it contained no audible information does not implicate Stanley’s credibility. The jury heard, and was able to weigh, Stanley’s testimony in light of the fact that the recording was not preserved. Defendant’s argument is unpersuasive, and we see no error in the trial court’s denial of Defendant’s motion to dismiss.

II. Trial Court’s Denial of Statutory Sanctions

[2] Defendant next argues the trial court erred in denying his motion for sanctions for failure to preserve and disclose the blank audio recording. We disagree.

Standard of Review

Our Courts have consistently held that a trial court’s determination on whether to impose sanctions, pursuant to N.C. Gen. Stat. § 15A-910, for failure to comply with discovery requirements is reviewed for abuse of discretion. *State v. Lane*, 365 N.C. 7, 31, 707 S.E.2d 210, 225 (2011); *see also State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988) (“The sanction for failure to make discovery when required is within

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the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.”). A trial court abuses its discretion when its ruling on discovery related sanctions “was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Allen*, 222 N.C. App. 707, 733, 731 S.E.2d 510, 528 (2012) (citation and quotation marks omitted).

Analysis

North Carolina’s criminal discovery statutes provide that, for the purposes of investigation and prosecution, “law enforcement and investigatory agencies shall make available to the prosecutor’s office a complete copy of the complete files.” N.C. Gen. Stat. § 15A-903(c) (2017). A file, pursuant to the statute, includes

defendant’s statements, the codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, *or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant*. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

N.C. Gen. Stat. § 15A-903(a)(1)(a) (emphasis added).

In addition to contempt, a trial court may impose the following sanctions for failure to comply with discovery:

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2017). Before imposing sanctions, however, the trial court “shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply.” N.C. Gen. Stat. § 15A-910(b).

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Pursuant to Section 15A-903(a), Lt. Moody should have not only documented his efforts to preserve the conversation by audio recording between Stanley and Defendant, but should have also provided the blank audio file to the District Attorney's Office to be turned over to Defendant in discovery because the blank audio recording constituted "any other matter or evidence obtained during the investigation." N.C. Gen. Stat. § 15A-903(a)(1)(a). The statute obviates any requirement that law enforcement evaluate the evidence to determine if it should be turned over to the District Attorney's Office, because anything obtained during the investigation, regardless of perceived evidentiary value, is required to be preserved, documented, and disclosed.

We are not unmindful of the fact that there may be practical barriers for officers and detectives in the field pursuing leads, interviewing witnesses, and securing evidence. Mistakes happen, and operating recording equipment can certainly present problems. Even the most well-intentioned officer can be accused of running afoul of discovery obligations when human fallibility meets technology. The solution in these cases is to document the attempt and turn over the item with that documentation, even if it appears to the officer to lack any evidentiary value. However, the failure to do so does not necessitate the dismissal of charges, or even other lesser sanctions.

At the hearing for Defendant's Motion for Sanctions, the trial court considered the materiality of a blank audio file and the circumstances surrounding Lt. Moody's failure to comply with his obligation to provide his complete file to the District Attorney's Office as required by N.C. Gen. Stat. § 15A-910(b). In denying sanctions, the trial court considered the evidence presented and arguments of counsel concerning the recording. It is uncontroverted that Lt. Moody attempted to record the audio of at least one telephone conversation between Defendant and Stanley. Lt. Moody was unfamiliar with the recording device he used and was not successful in preserving the conversation.

The trial court evaluated Lt. Moody's testimony in light of his considerable law enforcement experience and determined that Lt. Moody's explanation about the events surrounding the recording was credible. The trial court even asked questions of Lt. Moody concerning his failure to preserve the audio file, and stated, "I think he said there was nothing useful on it." The trial court went on to state:

I think you're – you're speculating as to what happened and whether there was any information there. And the second line as to whether that information might have

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been exculpatory is further speculation. I can't sit here and presume that because the information is not there that it's exculpatory without more, and certainly not with Lieutenant Moody's experience and reputation. I would want more to indulge in any such presumption. It sounds like to me, just to be candid with you, that he bought a piece of electronics and he didn't quite figure out how to use it, because of the gray hair on his head, that the electronics and the details of how to use a new toy like that just didn't – didn't make it into his skill set before he tried to use it. That's what it sounds like to me.

...

Nothing came through. Not – not the defendant's voice, nobody's voice. That was what I understood from what he said. There was nothing there.

There is nothing in the record that suggests the trial court's decision not to impose sanctions was so arbitrary that it could not have been the result of a reasoned decision, and we conclude the trial court did not abuse its discretion.

III. Requested Instruction

[3] Defendant alleges the trial court erred when it failed to provide the following requested instruction to the jury:

When evidence has been received which tends to show that an audio recording of alleged phone calls between Jeremy Stanley and the Defendant was in the exclusive possession of the Macon County Sheriff's Office, has been destroyed and that the Sheriff's Office had notice and understanding of its obligations to preserve and provide its complete investigative file to the Defendant, you may infer, though you are not compelled to do so, that audio recordings would be damaging to the State's case. You may give this inference such force and effect as you determine it should have under all of the facts and circumstances.

We disagree.

Standard of Review

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

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instructions is prejudicial and requires a new trial only if ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’ ” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Analysis

“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). “Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation omitted). “The trial court must give a requested instruction that is supported by both the law and the facts.” *State v. Nicholson*, 355 N.C. 1, 67, 558 S.E.2d 109, 152 (2002) (citation omitted).

This Court has previously determined that “destruction of evidence does not amount to the denial of a fair trial unless the defendant can establish (1) the police destroyed the evidence in bad faith; and (2) ‘the missing evidence possessed an exculpatory value that was apparent before it was lost.’ ” *State v. Nance*, 157 N.C. App. 434, 444, 579 S.E.2d 456, 463 (2003) (quoting *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 421 (1997)). In *State v. Nance*, this Court found the trial court did not err when it declined to give a special instruction requested by the defendant concerning lost evidence because defendant failed to meet both prongs of the test set forth in *Hunt*. *Id.* at 445, 579 S.E.2d at 463.

Such is the case here. Again, Defendant has failed to establish bad faith on the part of Lt. Moody, and, beyond mere speculation, Defendant has failed to show that the blank audio recording contained any exculpatory evidence. As in *Nance*, the trial court did not err when it declined to instruct the jury as requested by Defendant.

Conclusion

“Although defendant may not have received a perfect trial, we are confident, after a thorough review of his case, that he received a fair trial.” *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992) (quotation marks omitted). As such, we find no error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE v. MYLETT

[262 N.C. App. 661 (2018)]

STATE OF NORTH CAROLINA

v.

PATRICK MYLETT

No. COA17-480

Filed 4 December 2018

1. Constitutional Law—First Amendment—jury harassment statute—nonexpressive conduct

North Carolina’s jury harassment statute, N.C.G.S. § 14-225.2(a)(2), did not trigger First Amendment protections where it restricted non-expressive conduct that is otherwise proscribable criminal conduct, because the statute prohibited threats and intimidation directed at a juror irrespective of the content. Even assuming the statute implicated the First Amendment, its restrictions were content-neutral and narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation, thereby surviving intermediate scrutiny.

2. Constitutional Law—jury harassment statute—vagueness challenge—notice of proscribed conduct

North Carolina’s jury harassment statute, N.C.G.S. § 14-225.2(a)(2), was deemed not unconstitutionally vague because its prohibition against making threats or intimidating jurors was sufficiently specific to put individuals on notice of the proscribed conduct, following prior case law holding that the undefined word “intimidate” in another statute was not unconstitutionally vague.

3. Conspiracy—juror harassment—meeting of the minds—sufficiency of evidence

In a prosecution for conspiracy to commit juror harassment, the State presented evidence sufficient to be presented to the jury that defendant and two other individuals shared a mutual, implied understanding to harass jurors outside of a courtroom where all three exhibited parallel, contemporaneous behavior such as pacing in the hallway and physically confronting and directing loud accusations at multiple jurors.

4. Evidence—impeachment evidence—social media post—exclusion

In a juror harassment case, defendant failed to show he was prejudiced by the trial court’s decision to exclude a social media post defendant intended to use to impeach a juror-witness who

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testified he suffered emotional distress after being harassed but which defendant failed to disclose during pretrial discovery. The Court of Appeals rejected defendant's unsupported argument that N.C.G.S. § 15A-905(a) did not apply to impeachment evidence.

5. Evidence—juror harassment trial—prior fight—hearsay analysis

In a prosecution for juror harassment, the trial court did not err by allowing juror-witnesses to testify regarding a fight involving defendant and his brother that resulted in his brother being tried for assault on a government official (the trial in which the juror-witnesses served on the jury), while excluding defendant's own testimony about that fight. None of the juror-witnesses' testimony constituted improper character evidence, nor hearsay, where it was offered to show their states of mind when defendant confronted them outside the courtroom after his brother's trial. By contrast, defendant's proffered testimony was inadmissible hearsay because he offered it to prove the truth of the matter asserted.

6. Criminal Law—jury instructions—request for definition—common usage and meaning

In a prosecution for juror harassment, the trial court was not required to define "intimidate" in instructions to the jury, because it is a word of common usage and meaning that can be reasonably construed and unlikely to confuse a jury.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 2 February 2017 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 24 October 2017.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy Solicitor General James W. Doggett, and Deputy Solicitor General Ryan Park, for the State.

Goodman Carr, PLLC, by Rob Heroy, for defendant-appellant.

CALABRIA, Judge.

Patrick Mylett ("defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of conspiracy to commit harassment of a juror pursuant to N.C. Gen. Stat. § 14-225.2(a)(2) (2017).

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After careful review, we conclude that defendant received a fair trial, free from error.

I. Background

In August 2015, defendant and his twin brother (“Dan”) were enrolled as students at Appalachian State University in Boone, North Carolina. On 29 August 2015, the brothers were involved in a fight at a fraternity party. Dan was subsequently charged with assault on a government official and intoxicated and disruptive behavior. On 31 March 2016, a Watauga County Superior Court jury returned a verdict finding Dan guilty of assault on a government official. After sentencing, defendant, Dan, and Dan’s girlfriend (“Kathryn”) loudly confronted six jurors about the verdict as they exited the courtroom and retrieved their belongings from the jury room. One juror reported the incident to the courthouse law enforcement officer, while another juror discussed the matter with the assistant district attorney.

On 19 April 2016, defendant was arrested and charged with six counts of harassment of a juror and one count of conspiracy to commit harassment of a juror. On 18 July 2016, the Watauga County grand jury returned bills of indictment formally charging defendant with these offenses. Dan and Kathryn were also separately charged and tried for the same offenses.

Defendant’s trial commenced during the 30 January 2017 criminal session of Watauga County Superior Court with a hearing on several pretrial motions. Defendant filed pretrial motions to dismiss all charges as unconstitutional, arguing that the juror-harassment statute, N.C. Gen. Stat. § 14-225.2(a)(2), (1) violates the First Amendment, both on its face and as applied to his conduct; and (2) is unconstitutionally vague. Defendant also filed a pretrial motion *in limine*, pursuant to N.C. Rules of Evidence 404(b) and 802, requesting the trial court to order the State’s “witnesses not to make any references to a fight or fights in which [defendant] or [Dan] participated.” The trial court denied each of defendant’s motions, but stated that the ruling on his motion *in limine* was “subject to being reopened based on the form of the question that is asked” at trial.

At trial, all six jurors testified as witnesses for the State. Following the State’s presentation of evidence, defendant renewed his pretrial motions for dismissal and further moved to dismiss all charges for insufficient evidence. After the trial court denied his motions, defendant presented evidence, including his own testimony, and subsequently renewed his motions for dismissal at the close of all evidence.

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At the charge conference, defendant requested that the trial court provide the jury with a definition of “intimidate,” which is not defined by statute. *See* N.C. Gen. Stat. § 14-225.2. The State opposed defendant’s motion, along with his proposed definitions. The trial court denied defendant’s motion, and the jury was not provided with a definition of “intimidate.”

On 2 February 2017, the jury returned verdicts finding defendant not guilty of six counts of juror harassment, but guilty of one count of conspiracy to commit juror harassment. The trial court sentenced defendant to 45 days in the custody of the Watauga County Sheriff, suspended his active sentence, and placed defendant on 18 months of supervised probation. The trial court also ordered defendant to serve 60 hours of community service, enroll in anger management, and obtain 20 hours of weekly employment.

Defendant appeals.

II. Constitutionality

[1] On appeal, defendant argues that the trial court erred by denying his motions to dismiss on the basis of the constitutionality of the juror-harassment statute. Specifically, he asserts that N.C. Gen. Stat. § 14-225.2(a)(2) violates his First Amendment right to free speech and expression; and (2) is void for vagueness. We disagree.

A. Standard of Review

Constitutional challenges to statutes are reviewed *de novo* on appeal. *N.C. Ass’n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016). Yet, even under *de novo* review, we begin with a presumption of validity. *Id.* “This Court presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt[.]” *Id.* (citations omitted); *see also Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991) (“Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.”).

B. Implication of the First Amendment

In First Amendment challenges, the initial determination our Court must make is whether the statute in question—N.C. Gen. Stat. § 14-225.2(a)(2) in the instant case—triggers First Amendment protections. *See State v. Bishop*, 368 N.C. 869, 872, 787 S.E.2d 814, 817 (2016).

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To do so, we must determine whether N.C. Gen. Stat. § 14-225.2(a)(2) “restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct.” *Id.* at 872, 787 S.E.2d at 817. While a seemingly simple task, this inquiry is not always straightforward or clear cut. The United States Supreme Court has long sought to balance the protection of expressive conduct—particularly when such conduct is “inherently” expressive—with the exclusion of otherwise proscribable criminal conduct that just so happens to involve written or spoken words. Compare *Rumsfeld v. Forum for Acad. & Inst’l Rights, Inc.*, 547 U.S. 47, 66, 164 L. Ed. 2d 156, 175 (2006) (extending First Amendment protection “only to conduct that is inherently expressive”), with *United States v. Alvarez*, 567 U.S. 709, 716, 183 L. Ed. 2d 574, 587 (2012) (plurality opinion) (noting that “speech integral to criminal conduct” remains a category of historically unprotected speech).

Recently, in *Bishop*, the North Carolina Supreme Court examined the First Amendment implications arising from our cyberbullying statute. 368 N.C. 869, 787 S.E.2d 814. The statute in question, N.C. Gen. Stat. § 14-458.1(a)(1), prohibited individuals from “[p]ost[ing] or encourage[ing] others to post on the Internet [any] private, personal, or sexual information pertaining to a minor” “[w]ith the intent to intimidate or torment a minor.” N.C. Gen. Stat. § 14-458.1(a)(1)(d) (2015). The Court, in holding the statute applied to expressive conduct and therefore implicated the First Amendment, reasoned the “statute outlawed posting particular subject matter, on the internet, with certain intent[,]” and consequently “appl[ie]d to speech and not solely, or even predominantly, to nonexpressive conduct.” *Bishop*, 368 N.C. at 873, 787 S.E.2d at 817. The Court ultimately held the statute unconstitutional on the basis of its violation of “the First Amendment’s guarantee of the freedom of speech.” *Id.* at 880, 787 S.E.2d at 822.

In the instant case, N.C. Gen. Stat. § 14-225.2(a)(2) applies to non-expressive conduct and does not implicate the First Amendment. N.C. Gen. Stat. § 14-225.2 provides, in part:

- (a) A person is guilty of harassment of a juror if he:
 - (1) With intent to influence the official action of another as a juror, harasses, intimidates, or communicates with the juror or his spouse; or
 - (2) *As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.*

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N.C. Gen. Stat. § 14-225.2(a) (emphasis added). When read in context, it is apparent this language applies to a defendant's conduct—threats and intimidations—directed at a particular class of persons—jurors—irrespective of the content. Unlike the language found in *Bishop*, which was a content-based restriction on internet posts, the language in this statute amounts to a restriction on conduct that is otherwise proscribable as criminal. *See, e.g., State v. Camp*, 59 N.C. App. 38, 42-43, 295 S.E.2d 766, 768-69 (1982) (holding a statute barring the use of a telephone to harass another individual does not implicate the First Amendment because the statute proscribed conduct not speech); *see also State v. Mazur*, __ N.C. App. __, 817 S.E.2d 919 (2018) (unpublished) (upholding the constitutionality of N.C. Gen. Stat. § 14-277.3A—North Carolina's stalking statute—because the statute did not implicate the First Amendment). Accordingly, we hold N.C. Gen. Stat. § 14-225.2(a)(2) proscribes conduct, not speech, and therefore does not implicate the First Amendment. We therefore overrule Defendant's argument.

C. Content-Neutral Restriction

However, even assuming *arguendo* N.C. Gen. Stat. § 14-225.2(a)(2) does implicate the First Amendment, the statute satisfies constitutional requisites.

The second threshold inquiry when examining the First Amendment validity of a statute is whether the portion of the statute limiting speech is “content based or content neutral.” *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. The outcome of this determination governs the appropriate standard of scrutiny we must apply. If a statute is found to be content based, we apply strict scrutiny under which the restrictions “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, __ U.S. __, __, 192 L. Ed. 2d 236, 245 (2015). If, however, we find the restrictions to be content neutral, we apply the less demanding intermediate scrutiny. *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. Under intermediate scrutiny, the State must prove that the statute is “narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information.” *McCullen v. Coakley*, __ U.S. __, __, 189 L. Ed. 2d 502, 507 (2014) (citation and quotation marks omitted).

The United States Supreme Court in *Reed* explained that

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense

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meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by a particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, __ U.S. at __, 192 L. Ed. 2d at 245 (citations and internal quotation marks omitted). As the North Carolina Supreme Court held, “[t]his determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message.” *Bishop*, 368 N.C. at 875, 787 S.E.2d at 819. “Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.” *Reed*, __ U.S. at __, 192 L. Ed. 2d at 247.

In the instant case, it is clear that the jury-harassment statute is content neutral, both on its face and by its purpose and justification. Taking each in turn, nothing on the face of the statute indicates the law applies to certain speech “because of the topic discussed or the idea or message expressed.” *Id.* at __, 192 L. Ed. 2d at 245; *see also Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (holding that South Carolina’s anti-robocall statute was content-based on its face because it applied “to calls with a consumer or political message but [did] not reach calls made for any other purpose”). The statute here does not limit itself to any particular topic or idea. Rather, it applies equally to any idea if the idea is expressed in a manner that intimidates or threatens the specified jurors. The statute may also be justified without reference to the content of the regulated speech because the statute focuses on the form or manner of

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the expression, not the ideas sought to be expressed. The statute does not prohibit a defendant from engaging in expressing his dissatisfaction with a jury or juror's particular vote even directly to the jurors; instead, it prohibits a defendant from expressing his or her message in a particular manner that threatens or intimidates the jurors. Therefore, assuming the statute does implicate the First Amendment, it amounts to a content-neutral restriction. The standard of scrutiny required to withstand a constitutional challenge is intermediate scrutiny.

D. The Statute Survives Intermediate Scrutiny

As discussed above, intermediate scrutiny requires that the statute in question be “narrowly tailored to serve a significant governmental interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 798, 105 L. Ed. 2d 661, 678, 680 (1989) (internal quotation marks omitted) (reaffirming that “a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so”). The United States Supreme Court explained in *Ward* that “the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* at 799, 105 L. Ed. 2d at 680 (citation and internal quotation marks omitted). The Court went on to note that “[s]o long as the means chosen are not substantially broader than necessary to achieve the government’s interest, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.” *Id.* at 800, 105 L. Ed. 2d at 681.

It is undeniable that the State has a substantial interest in protecting the sanctity of the constitutional right to a trial by jury through ensuring that jurors remain free from threats and intimidation directly resulting from their duty to serve. The statute’s proscriptions apply only to the manner in which a defendant seeks to express their message—*i.e.*, the statute prohibits a defendant from engaging in expression only in so far as it intimidates or threatens those jurors specified under the statute. Nothing in the statute, or its application to defendant, suggests the regulation results in “a substantial portion of the burden on speech . . . not serv[ing] to advance [the statute’s] goals.” *Id.* at 799, 105 L. Ed. 2d at 681. Accordingly, even assuming N.C. Gen. Stat. § 14-225.2(a)(2) implicates the First Amendment, the statute is narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation. We therefore reject Defendant’s arguments.

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E. Void for Vagueness

[2] Defendant next argues that the term “intimidate” renders N.C. Gen. Stat. § 14-225.2(a)(2) void for vagueness because the statute “fails to provide . . . sufficient notice as to what constitutes intimidation [and] leaves open whether Defendant intentionally intimidated the juror, or merely whether a juror felt intimidated.” We disagree.

A statute is unconstitutionally vague if it either “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (citation and quotation marks omitted), *aff’d sub nom.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). Yet, the Constitution does not impose “impossible standards of statutory clarity[.]” *Id.* So long as the statute provides fair notice of “the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly,” constitutional requirements are satisfied. *Id.*

This Court has previously held that the word “intimidate” is *not* unconstitutionally vague. *See State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996), *disc. review improvidently allowed*, 345 N.C. 627, 481 S.E.2d 85 (1997). In *Hines*, we upheld the constitutionality of N.C. Gen. Stat. § 163-275(11), which makes it unlawful “to intimidate or attempt to intimidate” election officers in the discharge of their official duties. 122 N.C. App. at 552, 471 S.E.2d at 114. As here, that statute failed to define “intimidate.” *Id.* However, this Court applied the well-established principle of statutory construction that undefined terms “should be given their plain meaning if it is reasonable to do so[.]” and defined “intimidate” as is “commonly defined as ‘to make timid or fearful: inspire or affect with fear: frighten.’” *Id.* (quoting *Websters Third New International Dictionary* (1968)). Thus, this Court concluded that by enacting N.C. Gen. Stat. § 163-275(11), “the legislature intended to prohibit anyone from frightening an individual while conducting election duties.” *Id.*

Here, as in *Hines*, “the statute is specific enough to warn individuals of common intelligence of the conduct which is proscribed and is certainly capable of uniform judicial interpretation.” *Id.* Therefore, we conclude that the undefined term “intimidate” does not render N.C. Gen. Stat. § 14-225.2(a)(2) void for vagueness and overrule Defendant’s constitutional challenges.

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III. Sufficiency of the Evidence

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the conspiracy charge because the State presented insufficient evidence that defendant, Dan, and Kathryn reached “a meeting of the minds or an agreement to intimidate the jury.” We disagree.

In reviewing a criminal defendant’s motion to dismiss, the question for the trial 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 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “[T]he 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).

“The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

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.

Id. (citation and quotation marks omitted). We review the trial court’s denial of a criminal defendant’s motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

“A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner.” *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826-27 (2015) (citation and quotation marks omitted). Conspiracy may be proven through direct or circumstantial evidence. *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). The

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offense is generally “established by a number of indefinite acts, each of which, standing alone, might have little weight, but taken collectively, they point unerringly to the existence of a conspiracy.” *Id.* (citation and quotation marks omitted).

“In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice.” *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (citation and quotation marks omitted). “Nor is it necessary that the unlawful act be completed.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). “Indeed, *the conspiracy* is the crime and not its execution.” *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (emphasis added). Consequently, “no overt act is necessary to complete the crime of conspiracy.” *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citation omitted). Rather, the offense

is complete upon “a meeting of the minds,” when the parties to the conspiracy (1) give sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy, the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also achieves that conceptualization and agrees to cooperate in the achievement of that objective or the commission of the act.

State v. Sanders, 208 N.C. App. 142, 146, 701 S.E.2d 380, 383 (2010) (citations omitted). “Once a conspiracy has been shown to exist, the acts of a co-conspirator done in furtherance of a common, illegal design are admissible in evidence against all.” *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835.

In the instant case, the State presented substantial evidence that defendant, Dan, and Kathryn shared a “mutual, implied understanding” to commit juror harassment. *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (citation and quotation marks omitted). During the sentencing hearing, defendant tensely paced in the hallway outside the courtroom. Defendant confronted each of the six remaining jurors about the verdict as they exited the courtroom after sentencing. More importantly, defendant’s voice grew louder, and his tone more “threatening,” as he became increasingly agitated with each confrontation.

Dan and Kathryn mirrored defendant’s behavior when they joined him in the hallway. According to juror Kinney Baughman’s testimony, when he exited the courtroom, “the whole Mylett family . . . w[as]

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out there pacing, obviously upset[.]” After Baughman retrieved his belongings from the jury room, defendant “immediately engaged” him. Defendant told Baughman that he “had done wrong, that his brother was an innocent man[.]” Baughman attempted to walk away from the group, but quickly realized that he was walking in the wrong direction. When Baughman turned around, Kathryn “immediately . . . pounced” on him, “pointing fingers” in Baughman’s face while “screaming and yelling” similar accusations to those made by defendant.

“Ordinarily, the existence of a conspiracy is a jury question, and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence.” *Sanders*, 208 N.C. App. at 146, 701 S.E.2d at 383 (citation and quotation marks omitted). The parallel behavior exhibited by defendant, Dan, and Kathryn as they confronted the jurors is evidence that the parties mutually understood “the objective to be achieved” and implicitly agreed “to cooperate in the achievement of that objective or the commission of the act.” *Id.* This evidence was sufficient to send the conspiracy charge to the jury.

Defendant also contends that the State presented insufficient evidence that he intended “to threaten or menace any juror.” However, this argument challenges the denial of his motion to dismiss the charges of juror harassment, not conspiracy to commit that offense. As explained above, the law distinguishes “between the offense to be committed and *the conspiracy* to commit the offense.” *Whiteside*, 204 N.C. at 712, 169 S.E. at 712 (emphasis added). Since the jury found defendant not guilty of all six counts of juror harassment, defendant is unable to show that, absent the alleged error, “a different result would have been reached at trial . . .” N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Stanley*, 110 N.C. App. 87, 90, 429 S.E.2d 349, 350 (1993) (declining to address the defendant’s challenge to the trial court’s denial of his motion to dismiss where the “defendant was not convicted of first degree murder or otherwise prejudiced by the court’s refusal to dismiss the charge”). Therefore, defendant’s argument is moot, and we will not address it. *See State v. Marshall*, 304 N.C. 167, 168-69, 282 S.E.2d 422, 423 (1981) (“Since the jury at th[e sentencing] phase returned a verdict favorable to defendant, the questions which he attempts to raise are moot and will not be decided.”).

IV. Evidentiary Challenges

Defendant next asserts several challenges to the trial court’s evidentiary rulings. Specifically, he argues that the trial court erroneously (1)

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excluded a Facebook post proffered by defendant to impeach a juror-witness and (2) admitted the juror-witnesses' testimony about the fraternity party fight underlying Dan's trial, while excluding defendant's testimony about the same issue. We disagree.

A. Standard of Review

As a general rule, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). However, "[w]hen preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

B. Facebook Post

[4] During cross-examination, defendant attempted to introduce juror Kinney Baughman's Facebook post from 2 April 2016, in which Baughman shared an OpenCulture.com post describing a technique for opening a wine bottle with a shoe. Defendant proffered this evidence to impeach Baughman's testimony about his emotional distress resulting from the confrontation following Dan's trial. However, the State objected on the grounds that defendant failed to disclose it during pretrial discovery, as required by N.C. Gen. Stat. § 15A-905(a), and the trial court excluded the post.

N.C. Gen. Stat. § 15A-905 governs a criminal defendant's pretrial discovery obligations in superior court proceedings. Upon the State's motion, the trial court must

order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

N.C. Gen. Stat. § 15A-905(a) (2017).

On appeal, defendant contends that the trial court erroneously excluded Baughman's Facebook post because N.C. Gen. Stat. § 15A-905(a) does not apply to impeachment evidence. Defendant offers no case law supporting this argument, and our research yields none. However, even assuming, *arguendo*, that the trial court erred by

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excluding this evidence, defendant fails to explain how “absent the error a different result would have been reached at trial.” *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. Since defendant fails to meet his burden of showing prejudice, this argument is overruled.

C. Fraternity-Party Fight

[5] Defendant next argues that the trial court erred by permitting the juror-witnesses to testify, over objection, about the fraternity-party fight underlying Dan’s trial, while excluding defendant’s testimony about the same events. Specifically, defendant contends that the jurors’ testimony was improper character evidence and inadmissible hearsay. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant subject to but *one exception*[.]” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Under Rule 404(b), such 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.” *Id.*

Contrary to defendant’s arguments at trial and on appeal, evidence of the fraternity-party fight was not introduced for any improper purpose under Rule 404(b). As the trial court recognized in ruling on defendant’s motion *in limine*, it would have been nearly impossible to exclude all evidence of the fight underlying Dan’s trial. Indeed, this precipitating event “forms part of the history” of defendant’s interaction with the juror-witnesses. *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (citation and quotation marks omitted).

Similarly, the jurors’ testimony on this issue was not hearsay. “Hearsay” is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c). To the limited extent that the jurors even testified about the fight, they did not recount out-of-court statements from Dan’s trial, nor was the evidence offered to prove the truth of the matter asserted. Instead, the testimony was offered for the legitimate, non-hearsay purpose of proving the jurors’ states of mind:

[THE STATE]: And what did you hear or see [defendant] do?

[ROSE NELSON]: Well, he asked me what if—or he said that he hoped that I could live with myself because I had convicted an innocent man, and then as I was making my

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way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that I slept well.

Q. How would you describe the tone of voice he used?

A. To me it was very threatening.

Q. Why do you say that?

A. I guess because of being in the courtroom for the days that I was in the courtroom and listening to what the two young men had done prior to that.

...

Q. And you mentioned—what are you referring to when you say what you heard the two young men do prior to that?

A. I just felt like there was a lot of violence displayed and the whole reason that they were at, you know, in the situation that they were in and their whole demeanor during the whole trial.

Q. How would you describe [defendant]’s demeanor during the trial?

A. Very agitated.

...

Q. After these comments were made to you did you have any sort of physical reaction to it?

A. I did. I left the courtroom, went straight to my husband’s work and I was literally shaking, cause I was nervous. I had never done that before and the fact of the matter that the gentlemen knew what I was driving, where I worked and just very—it just was unnerving to me to know that they had that kind of anger in them and that they could possibly retaliate towards me.

Defendant contends that the trial court denied him an opportunity to testify about the fight and thus to rebut the implication that he committed an act of violence. However, unlike the jurors’ testimony, the evidence that defendant sought to introduce was inadmissible hearsay:

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[DEFENSE COUNSEL]: How were you feeling emotionally?

[DEFENDANT:] I was distraught, I was confused, I was sad, upset, just a overwhelming waterfall of different emotions just taking over.

Q. Can you tell us why you felt that way?

A. I was shocked with the outcome because they had admitted he was spitting out blood and the officer admitted he didn't try to spit on him but I guess—

[THE STATE]: Objection.

THE COURT: Sustained.

(Emphasis added).

Unlike the jurors' testimony, defendant's statement that "the officer admitted he didn't try to spit on him" is inadmissible hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). In his brief, defendant explains that he offered this evidence "to rebut the allegations and show that he and his brother were victims"—i.e. to prove the truth of the matter asserted. Accordingly, unlike the juror-witnesses' testimony on the matter, defendant's testimony regarding the fight was inadmissible hearsay. Therefore, the trial court properly admitted the former and excluded the latter.

V. Jury Instructions

[6] Defendant's final argument is that the trial court erred by denying his request for a jury instruction on the definition of "intimidate." We disagree.

It is the duty of the trial court "to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "Failure to instruct upon all substantive or material features of the crime charged is error." *Id.* However, "[i]t is not error for the court to fail to define and explain words of common usage and meaning to the general public." *S. Ry. Co. v. Jeffco Fibres, Inc.*, 41 N.C. App. 694, 700, 255 S.E.2d 749, 753, *disc. review denied*, 298 N.C. 299, 259 S.E.2d 302 (1979).

Since there is no specific pattern jury instruction for N.C. Gen. Stat. § 14-225.2(a)(2), the State submitted a proposed special jury instruction. At the charge conference, defendant contended that the State's proposed instruction was "vague" and would therefore "make it tough for the jury" unless the trial court also provided a definition of the term "intimidate." Defendant submitted two proposed definitions, which

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would have required the State to prove either: (1) that the defendant means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals; or (2) that the defendant menaced and made coercive statements to the juror, or otherwise threatened in an especially malignant or hostile manner, and that he intended to do so. The State opposed defendant's proposed definitions as unnecessary and contrary to law, and the trial court denied his request.

Defendant contends that the trial court's failure to provide a "legally sufficient" definition of "intimidate" likely confused the jury. However, as explained above, "intimidate" is a word of common usage that may be reasonably construed according to its plain meaning. *Hines*, 122 N.C. App. at 552, 471 S.E.2d at 114 ("Undefined words in a statute should be given their plain meaning if it is reasonable to do so."). Since "intimidate" has a common meaning amongst the general public, the trial court was not required to define the term for the jury. *See S. Ry. Co.*, 41 N.C. App. at 700, 255 S.E.2d at 753-54 (determining that "by reason of," "arising out of," and "incidental to" are "phrases of common usage" that required no "specific definition and explanation" where "the meaning of the terms as were used in the jury instructions was clear and should have been understood by the jury"); *State v. Geer*, 23 N.C. App. 694, 696, 209 S.E.2d 501, 503 (1974) (concluding that the trial court did not err by failing to define "flight" in its instructions to the jury, where the word "was being used in its common, everyday sense").

VI. Conclusion

N.C. Gen. Stat. § 14-225.2(a)(2) prohibits nonexpressive conduct, unprotected speech. The statute provides fair notice of the conduct it condemns—threatening or intimidating former jurors as a result of their service—and does not allow for arbitrary enforcement. Accordingly, N.C. Gen. Stat. § 14-225.2(a)(2) is neither unconstitutionally overbroad nor void for vagueness. Furthermore, the State presented sufficient evidence from which a reasonable juror could conclude that defendant, Dan, and Kathryn conspired to commit juror harassment. Therefore, the trial court did not err by denying defendant's motions to dismiss.

Even if the trial court erred in excluding the Facebook post proffered to impeach a juror-witness, defendant fails to establish prejudice. The jurors' testimony regarding the fraternity-party fight was neither improper character evidence nor inadmissible hearsay, while defendant's testimony on the matter was properly excluded as hearsay. Finally, the trial court did not err by failing to define "intimidate" for the jury because the term is one of common usage and meaning.

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NO ERROR.

Judge ZACHARY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

I. First Amendment¹

I believe N.C. Gen. Stat. § 14-225.2(a)(2) (2017) (“N.C.G.S. § 14-225.2(a)(2)” or “the statute”) is unconstitutional on its face and as applied to Defendant. The relevant language of the statute states: “A person is guilty of harassment of a juror if he: . . . As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.” N.C.G.S. § 14-225.2(a)(2). For simplicity, I will refer to “former jurors” as referenced in N.C.G.S. § 14-225.2(a)(2) as “jurors.”

As the majority opinion recognizes, when considering a First Amendment challenge, “[w]e must first determine whether [the challenged statute] restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct. Answering this question determines whether the First Amendment is implicated.” *State v. Bishop*, 368 N.C. 869, 872, 787 S.E.2d 814, 817 (2016).²

A. *Is the First Amendment Implicated*

I first note that, though the State may have argued this “threshold” issue at trial, on appeal the State seems to concede that the statute *does* implicate the First Amendment, as it does not argue this issue in its brief—its arguments are limited to contentions that the statute survives First Amendment analysis pursuant to either intermediate scrutiny or strict scrutiny. I disagree with the majority opinion’s holding that “[w]hen read in context, it is apparent [the statute’s language] applies to a defendant’s *conduct*—threats and intimidation—directed at a particular class of persons—jurors—*irrespective of the content*[,]” and “not speech.”

1. Much of the analysis in earlier sections of my dissent will also be relevant to later sections.

2. In line with the majority opinion, I will also use “speech” or “protected speech” to refer to both “protected speech” and “expressive conduct.” In addition, although Defendant was only convicted on the conspiracy charge, because his intent to violate N.C.G.S. § 14-225.2(a)(2) is an element of that charge, it is appropriate to consider the constitutionality of the statute as argued by Defendant.

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(Emphasis added). It is, in part, precisely because the statute proscribes conduct “irrespective of the content” of that conduct that it implicates the First Amendment. “A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.” *Texas v. Johnson*, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 355 (1989) (citation omitted). “The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” *Hill v. Colorado*, 530 U.S. 703, 716, 147 L. Ed. 2d 597, 611 (2000).

The fact that the *express language* of the relevant part of N.C.G.S. § 14-225.2(a)(2) proscribes “threatening” or “intimidating” a juror is not sufficient to support a holding that the statute does not implicate the First Amendment. The United States Supreme Court in *Cohen v. California*, for example, held a California statute that “prohibit[ed] ‘maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct’ ” violated the defendant’s First Amendment rights. *Cohen v. California*, 403 U.S. 15, 16, 29 L. Ed. 2d 284, 288 (1971) (citation omitted). The express language of the statute in *Cohen* prohibited “offensive conduct.” The express language of N.C.G.S. § 14-225.2(a)(2) prohibits “threats” or “intimidation.” All three of these terms, on their face, can be defined as “conduct.” However, the Court in *Cohen* held—despite the fact that the express language of the California statute was limited to “conduct”—that statute in reality restricted protected speech, because of the *type* of conduct that *could* be subject to prosecution pursuant to its terms. The defendant in *Cohen* was convicted of “disturbing the peace” through “offensive conduct” for wearing a jacket adorned with the words “F_ck the Draft.” *Id.* at 16, 29 L. Ed. 2d at 288-89 (citation omitted). The Court recognized that, according to longstanding precedent, certain kinds of speech are not protected by the First Amendment because of the inherent dangers involved when those kinds of speech are used. *Id.* at 19–20, 29 L. Ed. 2d at 290-91 (“[T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case.” The Court also held that the defendant’s conduct did not fall within the “fighting words” exception to First Amendment protections.).

The Court in *Cohen* held: “[The defendant’s] conviction . . . rests squarely upon his exercise of the ‘freedom of speech’ protected from

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arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom[.]” *Id.* at 19, 29 L. Ed. 2d at 290. Because the defendant’s alleged offensive *conduct* in *Cohen* was an act of protected speech, it did not matter that some *other* type of conduct might constitute “offensive conduct” that *could* be prosecuted without violating the First Amendment. *Id.* at 26, 29 L. Ed. 2d at 294-95 (“[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. *Because that is the only arguably sustainable rationale for the conviction here at issue*, the judgment below must be reversed.”).

In the present case, although the statute proscribes the following relevant “conduct:” “threaten[ing] in any manner or in any place, or intimidat[ing] [a] former juror” “[a]s a result of the prior official action of [the former] juror[.]” N.C.G.S. § 14-225.2(a)(2), the only “sustainable rationale for the conviction” was Defendant’s “speech”—his verbal communication of his opinion to the jurors that their verdict constituted an injustice to his brother. The verdict of a jury convicting a defendant is unquestionably as much an act of the State as the indictment of that defendant, and a citizen’s right to publicly criticize a jury’s verdict is protected by the First Amendment.

Therefore, the conduct proscribed by N.C.G.S. § 14-225.2(a)(2) implicates protected speech unless it is covered by some previously recognized exception to First Amendment protections. *Virginia v. Black*, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 551 (2003) (“The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 86 L. Ed. 1031 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem’.”). The previously recognized exception most relevant to our analysis of N.C.G.S. § 14-225.2(a)(2) is the “true threat” exception. *See Id.* at 359, 155 L. Ed.2d at 552 (citations omitted) (“the First Amendment also permits a State to ban a ‘true threat’ ”).

The Fifth Circuit recently held a statute that does not explicitly limit the term “threat” to “true threats” cannot be construed in a manner that does not implicate the First Amendment:

[Section 14:122 of the] statute criminalizes “public intimidation,” defined as “the use of violence, force, or *threats*

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upon [a specified list of persons, including any public officer or public employee] with the intent to influence his conduct in relation to his position, employment, or duty.” (Emphasis added.) On its face, the statute is extremely broad. The definition of “threat” generally encompasses any “statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done.” That definition easily covers threats to call your lawyer if the police unlawfully search your house or to complain to a DMV manager if your paperwork is processed wrongly.

. . . .

According to the state, we should construe the statute to apply only to true threats, i.e. “a serious expression of an intent to commit an act of unlawful violence” toward specific persons. There are several reasons why we cannot do so. First, the definition of “threat” is broader than true threats: any “statement of an intention to inflict pain, injury, *damage*, or *other hostile action* on someone in retribution for something done or not done.” [(citing “Oxford Dictionaries (Online ed.)”) (emphasis added by Fifth Circuit).]

Finally, Louisiana’s reliance on its caselaw proves to be a double-edged sword. As plaintiffs note, the Louisiana Court of Appeals has upheld the conviction of a defendant who violated Section 14:122 by threatening “to sue” an officer and “get [his] job” if the officer arrested him. Plainly, such a threat suggests no violence—indeed, the threat appears to be a plan to take perfectly lawful actions. Accordingly, we cannot construe Section 14:122 to apply only to true threats of violence.

It follows that, properly understood, Section 14:122 applies to any threat meant to influence a public official or employee, in the course of his duties, to obtain something the speaker is not entitled to as a matter of right. But so construed, the statute reaches both true threats—such as “don’t arrest me or I’ll hit you”—and threats to take wholly lawful actions—such as “don’t arrest me or I’ll sue you.” In both those examples, the speaker may be legally subject to arrest and is trying to influence a police officer in

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the course of his duties. Thus, Section 14:122 makes both threats a criminal act.

Seals v. McBee, 898 F.3d 587, 593–95 (5th Cir. 2018) (citations and footnotes omitted).

Our Supreme Court in *Bishop* implicitly recognized the necessity, as held in *Seals*, that any definition of “intimidate” in the criminal statute before it would have to rise to the level of a “true threat” in order to survive First Amendment analysis. The Court rejected the State’s argument that, in order to render the statute involved constitutional, the Court itself should “define ‘to intimidate’ as ‘to make timid; fill with fear[,]’ ” because “intimidate” had not been defined by statute or case law *for that specific statute*. The Court reasoned:

While we need not, and do not, address a hypothetical statute limited to proscribing unprotected “true threats”—which the United States Supreme Court has defined as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”—*we do note that such a statute might present a closer constitutional question. Cf. Elonis v. United States*, (“reversing the defendant’s conviction under a federal statute that made ‘it a crime to transmit in interstate commerce “any communication containing any threat . . . to injure the person of another” ’ and for that reason, seeing no need to consider related First Amendment concerns”).

Bishop, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3 (citations omitted) (emphasis added). N.C.G.S. § 14-225.2(a)(2) suffers from this same constitutional deficiency.

N.C.G.S. § 14-225.2(a)(2) fails to define its key terms. Neither “threaten” nor “intimidate” is defined and, absent any clear definition of these terms by the General Assembly, or our appellate courts, we cannot construe the statute in a manner that prohibits only “true threats.” The trial court’s refusal, in the present case, to include in its jury instruction a definition of “intimidate” as limited to a “true threat,” consistent with *Bishop* and *Black*, demonstrates this deficiency in the statute. In *Bishop*, concerning the relevant statute in that case, the Court stated why clear definitions are a requirement:

Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to “intimidate

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or torment” a minor. However, *neither “intimidate” nor “torment” is defined in the statute*, and the State itself contends that we should define “torment” broadly to reference conduct intended “to annoy, pester, or harass.” The protection of minors’ mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.

Bishop, 368 N.C. at 878–79, 787 S.E.2d at 821 (emphasis added). The Court further underscored the necessity, for First Amendment purposes, of limiting terms such as “intimidate” to acts constituting “true threats.” *Id.* at 878 n.3, 787 S.E.2d at 821 n.3. (had “intimidate” been defined in the relevant statute as limited to “true threats,” “such a statute might [have] present[ed] a closer constitutional question”).

Because the majority opinion holds that the statute only proscribes non-expressive conduct, it does not see any need to define “threaten” or “intimidate” in a manner that restricts those terms to actions that constitute “true threats.” Because the State implicitly concedes that the statute implicates First Amendment protections, it—unlike in *Bishop*—does not even suggest any appropriate definitions for those terms.³ Undefined, “threaten” and “intimidate” encompass a multitude of activities that do not constitute “true threats;” those that “communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552; *Bishop*, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3. Instead, the majority opinion’s holding will allow prosecution for protesting government action based on jurors’ claims that a defendant’s actions made them

3. The State does make one argument that the statute does not implicate the First Amendment, but solely based upon its contention that “the inside of a courthouse is a nonpublic forum, where the government has wide latitude to enforce reasonable speech restrictions.” This argument fails: “[The defendant] was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where [the defendant] was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.” *Cohen*, 403 U.S. at 19, 29 L. Ed. 2d at 290 (citations omitted). N.C.G.S. § 14-225.2(a)(2) proscribes the “threatening” or “intimidating” conduct “in any manner or *in any place*,” not just in courthouses. *Id.* (emphasis added). For example, nothing in the statute would have prevented Defendant from prosecution, based upon the identical conduct alleged in this case, if it had occurred in a public square or other location where “the government’s ability to restrict speech is ‘very limited.’” *McCullen v. Coakley*, 573 U.S. ___, ___, 189 L. Ed. 2d 502, 514 (2014); *see also Packingham v. North Carolina*, 582 U.S. ___, 198 L. Ed. 2d 273 (2017).

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feel “timid or fearful.” *State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996) (citation omitted). As the United States Supreme Court has declared:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.*

Terminiello v. City of Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 1134-35 (1949) (citations omitted). In order to be properly excluded from First Amendment protections, the definitions of “threaten” and “intimidate” must not fall below the “true threat” standard set forth by the United States Supreme Court:

[T]he First Amendment . . . permits a State to ban a “true threat.” *Watts v. United States*, 394 U.S. 705, 708 (1969); *accord*, *R.A.V. v. City of St. Paul*, [505 U.S. 377,] 388, (“[T]hreats of violence are outside the First Amendment”); *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 373 (1997).

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts v. United States, supra*, at 708 (“political hyperbole” is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388. . . . [A] prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” *Intimidation* in the *constitutionally proscribable sense of the word is*

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a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent of placing the victim in fear of bodily harm or death*.

Black, 538 U.S. at 359-60, 155 L. Ed. 2d at 552 (citations omitted) (emphasis added); see also *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062 (9th Cir. 2002) (properly construing the relevant federal statute in the defendants' appeal "requires that we define 'threat of force' in a way that comports with the First Amendment [i.e. as a 'true threat'], and it raises the question whether the conduct that occurred here falls within the category of unprotected speech"). Precedent from the United States Supreme Court, cited with favor by our Supreme Court, makes clear that full First Amendment protections apply to statutes like N.C.G.S. § 14-225.2(a)(2) unless the relevant terms, such as "threaten" or "intimidate," have been defined as limited to "true threats." *Black*, 538 U.S. at 359-60, 155 L. Ed. 2d at 552; *Bishop*, 368 N.C. at 878-79, 787 S.E.2d at 820-21. Because the majority opinion does not require that the N.C.G.S. § 14-225.2(a)(2) terms "threaten" and "intimidate" be limited to "true threats" as defined by our Supreme Court and the United States Supreme Court, I would hold that the First Amendment is implicated.

B. *First Amendment Analysis*

1. Content Based or Content Neutral

Having concluded that the First Amendment is implicated, I conduct further First Amendment review. "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641, 129 L. Ed. 2d 497, 516-17 (1994) (citations omitted). As noted by our Supreme Court, the correct level of scrutiny depends on the nature of the speech proscribed:

Having concluded that [the statute at issue] limits speech, we now consider a second threshold inquiry: whether this portion of the [relevant] statute is content based or content neutral. This central inquiry determines the level of scrutiny we apply here. Content based speech regulations must satisfy strict scrutiny. Such restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." In contrast, content neutral measures—such as those governing only the time,

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manner, or place of First Amendment-protected expression—are subjected to a less demanding but still rigorous form of intermediate scrutiny. The government must prove that they are “narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

Bishop, 368 N.C. at 874–75, 787 S.E.2d at 818 (citations omitted). I would hold the statute is content based and, therefore, apply strict scrutiny. In the alternative, I would also hold the statute, as written and interpreted, fails intermediate scrutiny.

“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed v. Town of Gilbert, Ariz.*, __ U.S. __, __, 192 L. Ed. 2d 236, 245 (2015); *see also Bishop*, 368 N.C. at 875–76, 787 S.E.2d at 819 (“strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based”).

N.C.G.S. § 14-225.2(a)(2) states: “A person is guilty of harassment of a juror if he: . . . *As a result of the prior official action of another as a juror* in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.” N.C.G.S. § 14-225.2(a)(2) (emphasis added). On its face, the statute criminalizes communication of any perceived threat to, or any form of intimidation of, a juror, by any person, based upon that person’s reaction to a verdict, an indictment, or any other official action taken by the juror. In simpler terms, as long as some theory of threat or intimidation is alleged, the statute prohibits persons from expressing their discontent *in response to government action*—specifically the actions jurors perform for the State as required by N.C. Const. art. I, §§ 24-26 and our General Statutes. The fact that the State action in a trial is accomplished in part through our jury system does not diminish the governmental nature of that action.

In *Bishop*, our Supreme Court held:

Here, it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute “defin[es] regulated speech by [its] particular subject matter.” The provision under which defendant was arrested and prosecuted prohibits “post[ing] or encourag[ing] others to post . . . private, personal, or sexual information pertaining to a minor.” The statute criminalizes some messages but not others, and makes it impossible to determine

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whether the accused has committed a crime without examining the content of his communication.

Bishop, 368 N.C. at 876, 787 S.E.2d at 819. In the present case, N.C.G.S. § 14-225.2(a)(2) criminalizes some messages—dissatisfaction with the official acts of a juror—but not others—dissatisfaction with a juror’s comments concerning the verdict, for example. Therefore, it is “impossible to determine whether the accused has [violated the statute] without examining the content of his communication.” *Id.* In the present case, the State had to examine the content of Defendant’s communications to the jurors in order to determine that those communications were in response to an official act—voting to convict Defendant’s brother—and, also, in order to conclude that the communications constituted “threats” or “intimidation.” Had the State determined, based upon what Defendant allegedly said to the jurors, that Defendant’s actions were solely in response to some non-official act—*e.g.* a disparaging comment made by a juror concerning Defendant or his brother, no violation of the statute would have occurred. Likewise, had the State determined that, pursuant to the majority opinion’s interpretation of the statute, Defendant’s comments to the jurors could not have caused the jurors to feel “frightened” or “timid,” it could not have charged Defendant. I would hold that strict scrutiny should apply. *Id.*

2. The Statute Fails Both Strict Scrutiny and Intermediate Scrutiny

However, I would also hold that the statute, as written and interpreted, fails even intermediate scrutiny and, therefore, violates the First Amendment. “Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest.” *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012) (citation omitted). In order to survive intermediate scrutiny review, “[t]he government must prove that [the restrictions on speech] are ‘narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818 (citation omitted). “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil.” *Frisby v. Schultz*, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 432 (1988) (citation omitted). I believe the statute fails to satisfy the requirements that must be met to pass intermediate scrutiny.

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I recognize the important governmental interest in preventing juror harassment, but I also recognize the countervailing fundamental right to challenge governmental action in a nonviolent manner. “[T]he assertion of a valid governmental interest ‘cannot, in every context, be insulated from all constitutional protections.’” *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 281 (2017). As I discuss below with regard to Defendant’s overbreadth analysis, the statute is extremely broad in scope—not “narrowly tailored.” “A person is guilty of harassment of a juror if he: . . . As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.” N.C.G.S. § 14-225.2(a)(2) (emphasis added). The statute is without any real limitation beyond its limitation on *the type of speech that is proscribed*. For example, the statute does not include any express limitations with respect to: time; place; persons who may commit the offence; what kind of “official action” is sufficient to trigger the statute; the method of making or communicating a threat; the intent to actually threaten, or how “threat” is defined or proven; the intent to actually intimidate, or how “intimidation” is defined or proven;⁴ or the reasonableness of a juror’s reaction to the alleged threat or intimidation. Nor does it clarify whether a juror’s subjective feelings are relevant to the analysis.⁵ I believe N.C.G.S. § 14-225.2(a)(2) is “more restrictive than necessary to achieve [the legitimate government] interest” involved. *Hest Techs.*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted); see also *McCullen*, 573 U.S. at __, 189 L. Ed. 2d at 520 (citation omitted) (the statute cannot “‘regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals’”).

Further, it cannot be said with confidence that the statute “‘leave[s] open ample alternative channels for communication of the information[.]’” *Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818, because the statute, as interpreted in the majority opinion, makes almost any expression of dissatisfaction to a juror, based upon the juror’s prior official actions, subject to prosecution. It is unclear how anyone who wanted to express dissatisfaction in response to a verdict—or other official action

4. In the federal context, a defendant must *intend that his actions will be perceived* as a “true threat.” *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at 16-17. The State’s position at trial was that *no* specific intent was required; that the issue for the jury was “not whether [D]efendant intended to threaten or intended to intimidate[.]” only whether the jurors “were indeed intimidated, or were indeed threatened[.]” The State informed the jury during its closing argument that no such intent was required.

5. In the present case, the State elicited lengthy testimony concerning alleged fears by the jurors that Defendant, Dan, or Kathryn might come to the jurors’ houses to harm them.

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rendered by a juror—could determine what methods of communication might be interpreted as “threatening” or “intimidating” under the statute. The statute could well have a significant chilling effect on such expression. For example, there is nothing in the statute as interpreted in the majority opinion that would prevent prosecution of a group of people who had gathered in a public space outside a courthouse to voice their dissatisfaction with a verdict in a high profile case. The mere public gathering of people angry with a verdict could be deemed “threatening” or “intimidating,” no matter what anyone in the crowd verbally or physically communicated in the presence of the departing jurors. Based upon the majority opinion’s holding, it is certain that a demonstrator shouting to departing jurors that the jurors had convicted an innocent person and should feel bad for having done so, *could* be prosecuted in North Carolina. See *Black*, 538 U.S. at 365, 155 L. Ed. 2d at 555-56 (citations and quotation marks omitted) (“It is apparent that the provision as so interpreted would create an unacceptable risk of the suppression of ideas. . . . As interpreted . . . , the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”). Further, the State may not rely on prosecutorial discretion in order to save an otherwise unconstitutional statute:

Not to worry, the Government says: The Executive Branch construes § 48 to reach only “extreme” cruelty, and it “neither has brought nor will bring a prosecution for anything less.” The Government hits this theme hard, invoking its prosecutorial discretion several times. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

United States v. Stevens, 559 U.S. 460, 480, 176 L. Ed. 2d 435, 451 (2010) (citations omitted). I do not believe the statute survives intermediate scrutiny. A “true threat” requirement could likely save the statute in this regard, but the majority opinion holds there is no such requirement.

However, because I believe strict scrutiny is actually the appropriate standard for this case, I would hold that the restrictions on speech in the statute “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818 (citations omitted). “The State must show not only that a challenged content based

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measure addresses the identified harm, but that the enactment provides ‘the least restrictive means’ of doing so. Given this ‘exacting scrutiny,’ it is perhaps unsurprising that few content based restrictions have survived this inquiry.” *Bishop*, 368 N.C. at 877-78, 787 S.E.2d at 820 (citations omitted). Obviously I do not believe the statute meets this demanding standard, and I would hold that N.C.G.S. § 14-225.2(a)(2) “restricts speech, not merely nonexpressive conduct; that this restriction is content based; and that it is not narrowly tailored to the State’s asserted interest in protecting [jurors and the judicial process] from the harms of [potential juror intimidation].” *Id.* at 880, 787 S.E.2d at 822. “It is well established that, as a general rule, the Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’ That is what North Carolina has done here. Its law must be held invalid.” *Packingham*, 582 U.S. at ___, 198 L. Ed. 2d at 283 (citation omitted). I would hold that N.C.G.S. § 14-225.2(a)(2) “violates the First Amendment’s guarantee of the freedom of speech.” *Bishop*, 368 N.C. at 880, 787 S.E.2d at 822.

II. As Applied

Assuming, *arguendo*, N.C.G.S. § 14-225.2(a)(2) is not unconstitutional on its face, I would hold that it was unconstitutional as applied in the present case. Because I believe the First Amendment is implicated in this case, the actions of Defendant and his associates were protected by the First Amendment absent sufficient evidence that their *actual* conduct demonstrated Defendant had made an agreement with either Dan or Kathryn to communicate a “true threat” to one or more of the six jurors involved, and that they intended to follow through with their intent to intimidate at least one juror at the time the agreement was made. After thoroughly reviewing the trial testimony of all the witnesses, and watching the video footage of the actual interactions between the different parties, I cannot find evidence of conduct reaching the level of a “true threat,” or of any conspiracy to communicate such a “true threat.”

In the present case, *all six* of the jurors who testified said that the content of Defendant’s speech—as well as that of Dan and Kathryn—was limited to the following, or variations thereof: telling the jurors that their verdict was wrong, and that Dan was innocent; telling the jurors that their verdict had ruined Dan’s life; telling the jurors that, due to their verdict, Dan would not be able to find a job; and telling the jurors that they hoped the jurors could “sleep well” and “live with themselves.” *Every* juror testified that no one in Defendant’s party made any statements indicating an intent to physically injure anyone, or an intent to act violently in any manner. *Every* juror testified that none of the physical actions of Defendant or the other parties demonstrated an intent to

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physically harm any juror. *Some* jurors did testify that they *felt* intimidated, and that they formed concerns that Defendant, Dan, or Kathryn could, at some later time, try and track them down at their homes and harm them. However, not a single juror could articulate anything concrete that happened at the courthouse in support of their fears that they might be in some future danger at the hands of Defendant, Dan, or Kathryn.

The video does not show any threatening actions by Defendant, Dan, or Kathryn. Every juror explained that their feelings of fear or anxiety were primarily based upon their knowledge that Dan had been in a violent fight in the past (where Dan was badly beaten), that Defendant had been present at that fight, and that Dan had acted belligerently toward the police and others following that fight as they were attempting to aid him. No juror articulated anything that Defendant or the others had done beyond expressing displeasure with the jury verdict in a manner the jurors felt was aggressive and disrespectful. I can find nothing that rose to the level of a “true threat” in the evidence presented at trial.

More importantly to this analysis, the trial court did not give any instructions defining what could constitute a “threat” or “intimidation.” Specifically, the instruction given allowed the jury to convict Defendant *without making any determination* that the State proved beyond a reasonable doubt that anything Defendant, Dan, or Kathryn did constituted a “true threat,” or that limited any conspiracy to one in which the alleged conspirators intended to communicate any “true threat.” *Brandenburg v. Ohio*, 395 U.S. 444, 448–49, 23 L. Ed. 2d 430, 434 (1969) (as applied First Amendment violation found when “[n]either the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action”). In the present case, the jury acquitted Defendant on all the charges requiring proof that Defendant actually “threatened” or “intimidated” the jurors—even under the broad definitions of “threat” and “intimidate” that they were allowed to apply. Because Defendant was convicted based upon his protected speech, and the trial court’s instructions *did not require the jury to find a conspiracy to communicate a “true threat”* in order to convict Defendant, I would also find the statute violated Defendant’s First Amendment rights as applied to him in this case.

III. Overbreadth

For the reasons articulated above, I would also hold that the statute is facially overbroad under the First Amendment. “According to our First Amendment overbreadth doctrine, a statute is facially invalid if

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it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S. 285, 292, 170 L. Ed. 2d 650, 662 (2008) (citation omitted). “[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas.” *Id.* (citations omitted). “The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” *Id.* at 293, 170 L. Ed. 2d at 662. N.C.G.S. § 14-225.2(a) (2) prohibits any person from taking any action that a juror, law enforcement officer, or prosecutor deems to be “threatening” or “intimidating”—including acts of protected speech or expressive conduct—so long as that action is interpreted as having been taken in response to any official action of a juror. The prohibited action may occur at any time, and in any place, and the State need not prove that the person had any intent to “threaten” or “intimidate,” only that the action could be interpreted as “threatening” or “intimidating.” The amount of protected speech potentially prohibited by the statute is substantial, and I would hold that it “is facially invalid [because] it prohibits a substantial amount of protected speech.” *Id.* at 292, 170 L. Ed. 2d at 662. However, I believe a statute could be drafted in such a manner as to pass constitutional muster by including a “true threat” requirement: “[T]his opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission.” *Packingham*, 582 U.S. at ___, 198 L. Ed. 2d at 281; *Bishop*, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3 (citations omitted).

IV. Void for Vagueness

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909 (1983) (citations omitted). Based on my analysis of the facts and the law above, I would find this statute is void for vagueness. There are many actions that could lead to prosecution under the statute that ordinary people would not understand as prohibited, and would instead understand as an exercise of free speech in response to governmental action. I believe the statute does encourage arbitrary and discriminatory enforcement, including in the present case.

The majority opinion holds that, because this Court found the term “intimidate” was not unconstitutionally vague in *Hines*, 122 N.C.

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App. at 552-53, 471 S.E.2d at 114, Defendant's argument fails. However, Defendant's argument is not limited to the definition of "intimidate," and the majority opinion's holding here is predicated on its earlier holding that, even for First Amendment purposes, "threaten" and "intimidate" are not required to be defined as "true threats." Instead, the majority opinion adopts the dictionary definition of "intimidate" as set forth in *Hines*: " 'Intimidate' is commonly defined as 'to make timid or fearful: inspire or affect with fear: frighten.' " *Id.* at 552, 471 S.E.2d at 114 (citation omitted). I do not believe, for example, the statute as written "define[s] the criminal offense with sufficient definiteness that ordinary people can understand" what conduct might make a juror feel "timid" or "fearful;" when or where protest against official action of a juror will be lawful, and when or where such protest will be unlawful; what "official actions" are covered by the statute; or whether any *intent* to "frighten" or "make feel timid" is actually required. *Kolender*, 461 U.S. at 357, 75 L. Ed. 2d at 909.

V. Jury Instruction

I would hold that the trial court erred in denying Defendant's request for jury instructions properly defining "intimidation." There was considerable confusion at the charge conference concerning what specific words would be included in the instruction because the pattern instruction is actually an instruction for N.C.G.S. § 14-225.2(a)(1) with a footnote stating: "This instruction deals with harassing, intimidating, or communicating with a prospective or sitting juror as defined in G.S. 14-225.2(a)(1). For threatening or intimidating a former juror as defined in G.S. 14-225.2(a)(2) amend the charge accordingly." N.C.P.I. – Crim. 230.60. The State made a last minute request to change its written request from simply "intimidating" to "threatening or intimidating." Defendant had come to the charge conference with two written alternative proposals to add to the pattern instruction, one of which stated: "Regarding the term intimidate, the State would be required to prove that [D]efendant means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See State v. Bishop*, __ N.C. __, 787 S.E.2d 814, FN3 (2016)." Defendant's attorney argued that defining "intimidate" was required "in order to find the statute constitutional[.]"⁶ The trial court

6. I also note that Defendant's attorney asked for an instruction on specific intent, and requested that the instruction conform to the language of the indictment, which stated that Defendant "did threaten and intimidate" the jurors, not that Defendant "threatened or intimidated" the jurors. The trial court also denied those requests, but Defendant does not argue those issues on appeal.

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denied Defendant's request, and instructed the jury without any definition of "threaten" or "intimidation," and without any requirement that the evidence demonstrated that Defendant conspired with either Dan or Kathryn to communicate a "true threat," as follows:

[D]efendant has been charged with threatening and or intimidating a juror. Now I charge that for you to find [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that a person had served as a juror and had just been discharged from that jury service. Second, that [D]efendant threatened and/or intimidated that person. And, third, that [D]efendant threatened and/or intimidated that former juror as a result of a prior official action of that person as a juror.

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person had served as a juror, and had been discharged from that jury service as a juror, and that [D]efendant threatened and/or intimidated that person, and that [D]efendant intended thereby to threaten and/or intimidate that person as a result of a prior official action of that person as a juror, it would be your duty to return a verdict of guilty.⁷

The trial court's denial of the requested instruction allowed the jury to convict Defendant on a theory that, in response to Dan's verdict, he conspired with another person "to make timid or fearful: inspire or affect with fear: [or] frighten" a juror, *Hines*, 122 N.C. App. at 552, 471 S.E.2d at 114 (citation omitted)—instead of requiring the State to prove that the conspiratorial intent of Defendant and another was to communicate a "true threat" as required by the First Amendment. I would vacate Defendant's conviction on this basis as well.

7. I note in the first paragraph, where the trial court is laying out the elements of the crime, it included no scienter element. The instruction as rephrased in the second paragraph seems to include an element of intent; however, based upon the charge conference and the first paragraph of the instruction, I read "intended thereby" to mean that Defendant had to intend for his "threatening or intimidating" actions to be in response to the juror's prior service. The Ninth Circuit, reviewing Supreme Court cases, has held: "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *U.S. v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (footnote omitted). For federal criminal statutes, the United States Supreme Court requires proof that a defendant *intended* his communication to be perceived as a true threat. *Elonis*, 575 U.S. at ___, 192 L. Ed. 2d at 16-17.

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VI. Conspiracy

I would first hold that Defendant's motion to dismiss the conspiracy charge should have been granted because there was no evidence presented that Defendant made an agreement with anyone to communicate a "true threat" to any juror. However, even absent consideration of the constitutional issues discussed above, I do not believe there was sufficient evidence presented at trial to support the charge of conspiracy even under the majority opinion's reasoning. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citations omitted).

The State was required to prove that Defendant, along with either Dan or Kathryn, made an agreement to harass at least one juror by threats or intimidation, and that the conspirators "intended the agreement to be carried out at the time it was made." *State v. Euceda-Valle*, 182 N.C. App. 268, 276, 641 S.E.2d 858, 864 (2007) (citations and quotation marks omitted). I disagree with the majority opinion's contention that Defendant's argument "that the State presented insufficient evidence that he intended 'to threaten or menace any juror'" is irrelevant to the conspiracy charge. While it is true that there is nothing inconsistent or improper when a jury convicts on a conspiracy charge but acquits on the underlying criminal charge—*each co-conspirator must actually form the intent to commit the underlying offense before they can conspire with one another to commit that offense. Id.* As the trial court correctly instructed, it was the State's burden to prove that Defendant and any co-conspirator "*intended at the time the agreement was made that it would be carried out[.]*" (Emphasis added). Finally, "[w]hile conspiracy can be proved by inferences and circumstantial evidence, it cannot be established by a mere suspicion, *nor does a mere relationship between the parties or association show a conspiracy.*" *Id.* (citations and quotation marks omitted) (emphasis added); *see also State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229–30 (2000) (citation omitted) ("If, however, the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.'"). I find the evidence of conspiracy in the present case amounts to nothing more than mere suspicion or conjecture based upon the relationship between the alleged conspirators and the fact that they were together when they expressed to the jurors their disagreement with Dan's conviction.

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First, the State conceded at trial that no conspiracy occurred while Defendant, Dan, or Kathryn were still inside the courtroom.⁸ As the State argued in its closing: “I’m not saying they planned it beforehand. I’m saying they acted on it when they got out into the lobby[.]” Therefore, I review the evidence from the “lobby,” or common area right outside the courtroom. For a significant amount of time, Defendant was alone in the lobby. Rose Nelson (“Nelson”) was the first juror to leave the courtroom, but there could not have been any conspiracy to intimidate Nelson, because she left the courtroom before Dan or Kathryn joined Defendant in the lobby. None of Defendant’s interactions between jurors Kinney Baughman (“Baughman”), William Dacchille (“Dacchille”), Denise Mullis (“Mullis”), or Lorraine Ratchford (“Ratchford”), as they exited the hallway and walked to the jury room, could have constituted evidence of a conspiracy either—for the same reason: Dan and Kathryn were still in the courtroom at that time. Therefore, during these initial confrontations, when Defendant was alone, Defendant had already formed the intent, and acted upon that intent, to tell the jurors things like “he hoped that [Nelson] could live with [herself] because [she] had convicted an innocent man, and then as [Nelson] was making [her] way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that [she] slept well[;]” that Dan was “an innocent man, he’s an innocent man[;]” that “[Mullis] got it wrong, that [she] made a mistake[;]” and “congratulations, you [Ratchford] just ruined [Dan’s] life.” The jury determined that these actions did not constitute “threatening” or “intimidating” the jurors even under the broad definitions of these terms allowed by the trial court. Dacchille and Ratchford testified that they did not have any further disturbing interactions with Defendant and, therefore, they had no such interactions after Dan and Kathryn had joined Defendant. Mullis testified that while she was in the jury room she “could hear voices,” but “didn’t know what was being said[,]” and that nobody said anything to her as she left the jury room and entered the stairwell.

The only juror to actually engage with the family in the lobby—as opposed to silently walking past Defendant, Dan, and Kathryn while leaving the lobby—was Baughman. Baughman was in the jury room—with Dacchille, Mullis, and Ratchford—when first Kathryn, followed by Defendant’s and Dan’s mother (“Ms. Mylett”), then Dan, exited the courtroom and joined Defendant in the lobby.⁹ Kathryn was crying as she

8. In order to fully review the relevant events, it is necessary to watch the video.

9. I note that the reason Defendant, Dan, Kathryn, and Ms. Mylett remained in the lobby during the period that followed appears to be that they were waiting for Dan’s

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left the courtroom and walked around the open courtroom door toward Defendant, who was standing still with his back to the courtroom wall. There was a period of less than one second when Kathryn's face was facing in Defendant's direction, and Defendant clearly noticed Kathryn was upset. Defendant immediately approached her to place his hand on her head, then her back, in what appeared to be a consoling gesture, as she walked in a semicircle and stood with her face inches away from the exterior wall of the courtroom.

The video shows that this approximately one-second period when Defendant saw that Kathryn was crying was the only moment Defendant could have made eye contact with her during the time period from when she joined Defendant in the lobby and Baughman's exit from the lobby—when Baughman entered the stairwell. Defendant *never* made eye contact with Dan or appeared to communicate with him in any manner during this period of time. There is nothing about the interaction between Defendant and Kathryn that suggests Defendant was doing anything other than trying to console her. I do not believe any other possible inference rises above the level of speculation or conjecture. Seconds after leaving the courtroom, Dan appeared to notice Baughman as he was walking out of the jury room, and Dan walked several steps toward the jury room door. He stopped when he was approximately seven to eight feet away from the jury room door, just as Baughman was emerging. Ms. Mylett was behind Dan, and Kathryn was still near the courtroom wall, but she then started walking toward Baughman. Defendant walked behind Ms. Mylett and stood a couple of feet behind his brother as Baughman walked by first Dan, then Ms. Mylett, then Kathryn. From the time Baughman entered the lobby, the attention and focus of Defendant, Dan, Kathryn—and Ms. Mylett—was almost exclusively on Baughman. The video does not show any discernible interaction between Defendant and anyone other than Baughman—there is no video evidence that Defendant interacted with Dan or Kathryn after his initial, brief contact with Kathryn.

From the video, it appears that Dan and Kathryn began talking to Baughman right as Baughman began to walk past them, and Dan stepped back and away from Baughman to make more room for Baughman to pass by him. Defendant was behind Dan, approximately five feet away from Baughman, and Baughman continued and walked past Ms. Mylett, then Kathryn. It is unclear from the video whether Defendant or

attorney to finish up in the courtroom and join them. Once Dan's attorney exited the courtroom and joined them in the lobby, they all immediately left the courthouse together.

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Ms. Mylett were engaging with Baughman at this time, but Baughman testified that Defendant spoke to him as he initially walked past the family, saying “that his brother was an innocent man, that [Baughman] had done wrong.” The attention of Defendant, Dan, and Kathryn was constantly focused on Baughman throughout this encounter; they were never in positions to make eye contact with each other, and they did not touch each other. Logically, by this time—when Defendant, Dan, and Kathryn had all begun to express their frustration over the verdict with Baughman—the conspiracy to intimidate jurors—if any—would have already been committed. The actions of Defendant, Dan, and Kathryn following this initial confrontation were simply a continuation of what had already begun, and add little to the sufficiency analysis for the conspiracy charge.

Baughman first testified that the family “surrounded” him, but upon watching the video, he agreed: “Not surround me. They were grouped there in front of me as I was coming out of the room.” Both Dan and Defendant had their hands in their pants pockets as Baughman walked past them, and Kathryn was holding the shoulder strap of a leather bag with both hands. Baughman further testified that Kathryn “pounced” on him and was telling him “but you convicted [Dan], you sent him to jail, you ruined his life and it’s all your fault.” Baughman testified that Dan “did a lot of shaking of his head.” When Baughman was first confronted after leaving the jury room, Dacchille, Ratchford, and Mullis were still in the jury room. None of them could hear what was being said except Ratchford, who testified that she heard Kathryn “screaming [Dan will] never get a job.” Dacchille walked from the jury room directly to the stairwell while Baughman was still in the lobby, but nobody engaged him.

Baughman kept walking toward the hallway, and neither Defendant nor Dan moved at all from where they had been standing. Kathryn walked away from Baughman. From the video, Kathryn was the most animated, but her most animated actions occurred when she was on the opposite side of the room from Baughman. Baughman was nearing the hallway when he stopped, turned, and engaged with Defendant, who was saying something to him. Baughman then walked toward Defendant, and engaged in a brief conversation with him. Baughman testified as to the reason he engaged with Defendant, stating “you know, I’m a former professor, I like to explain things.” Baughman was trying to explain to Defendant why the jury reached the verdict that it had reached, but Defendant and Kathryn were interrupting him to say that Dan was innocent. Baughman then decided to walk to the stairwell, instead of down the hallway, so he again walked across the lobby and past the family. It

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appears that Defendant and Kathryn continued to argue with Baughman as Baughman walked by and into the stairwell. Defendant, Kathryn, and Dan all moved *away* from Baughman as he passed by, insuring that Baughman's path out of the lobby was not blocked. From the video evidence, there is nothing suggesting Defendant, Dan, or Kathryn had communicated with each other in any manner during this relevant period,¹⁰ much less conspired to harass Baughman. Although conspiracy does not require the commission of the underlying crime, the fact that Defendant, Dan, and Kathryn clearly moved away from Baughman whenever he was trying to walk past them was certainly not evidence that could have been reasonably interpreted as *supporting* the conspiracy charge.

There was also no testimonial evidence suggesting any conspiracy to threaten or intimidate. When the State asked what tone of voice Defendant was using at this time, Baughman testified: "Well, it's firm, but, I mean, he's not yelling at me here. So the way I recall was, [Defendant was saying] my brother was innocent, he's an innocent man, and, you know, we had done wrong. In this case, you know, I'd done -- you done wrong." Baughman testified that Defendant was not raising his voice, but that he was talking in a tone that was "not pleasant[.]" and that Defendant "was clearly upset about the verdict." Baughman testified that during the encounter he "didn't feel physically confronted[.]" or that anyone was "about to inflict violence" on him—that he "didn't feel like anybody was going to attack me here that day[.]" Concerning his interactions with the family, the State asked Baughman: "Had you ever had a quote-unquote discussion like this before?" Baughman answered that he had not in this particular context where his "civic duty" and "the law is concerned," but that "I think probably we've all been in animated discussions before." Baughman further testified that he never heard anyone talking about wanting to intimidate the jurors in any manner. *Every* other juror also testified that they did not hear Defendant conspiring with Dan or Kathryn, and none of them testified that they witnessed any actions that they believed indicated any such conspiracy, or that they believed any such conspiracy existed. It was the State's burden to elicit testimony from the jurors that could support the conspiracy charge, and I do not believe that burden was met.

I do not believe that Baughman's testimony or the video evidence provides evidence from which a conspiracy can be reasonably inferred. Baughman's testimony was that he engaged in debate about the verdict

10. Other than when Defendant briefly placed his hand on Kathryn as she cried by the courtroom wall.

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with Defendant, who was arguing that Dan was innocent; that Kathryn was the only one who raised her voice; and that Dan did not engage verbally as much—he mainly just shook his head. Baughman did *not* give any testimony that Defendant engaged in any conduct associated directly with either Dan or Kathryn beyond the mere fact that they were all in the lobby together as they expressed to him their disagreement with the verdict. Baughman *did* testify that he did *not* feel that he was being threatened, that he had been in “similarly animated discussions” in other contexts, and that he did not hear anything that would suggest Defendant was conspiring with anyone to threaten or intimidate him. Further, nothing in Baughman’s testimony suggested that he observed any non-verbal conduct suggesting any such conspiracy. As discussed above, I also believe the video evidence fails to provide competent evidence of a conspiracy between Defendant and Dan or Kathryn. I do not believe Baughman’s testimony concerning fear he allegedly felt *after* he had left the courthouse adds anything to the State’s conspiracy case. Because the totality of “the evidence [wa]s sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense” I believe “the motion to dismiss [should have been] allowed.” *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229–30 (citation omitted).¹¹

11. Although I believe the critical period is limited to the time leading up to the initial group confrontation with Baughman, I would also hold, considering all the evidence, that the evidence was insufficient to survive Defendant’s motion to dismiss with respect to any of the jurors individually, or with respect to “the jurors,” in part, or as a whole.

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STATE OF NORTH CAROLINA

v.

RONTEL VINCAE ROYSTER

No. COA18-2

Filed 4 December 2018

Drugs—trafficking in cocaine—possession—sufficiency of evidence

In a prosecution for trafficking in cocaine by possession, the State failed to offer substantial evidence that defendant knowingly possessed over 400 grams of cocaine which was discovered in a black box eighteen hours after defendant handed over the closed box in exchange for the return of his kidnapped father.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 4 October 2016 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Geeta N. Kapur and James D. Williams, Jr., for defendant.

ELMORE, Judge.

Defendant Rontel Vincae Royster appeals from judgment entered upon a jury verdict finding him guilty of trafficking in cocaine by possession pursuant to N.C. Gen. Stat. § 90-95(h)(3)(c). On appeal, defendant contends the trial court erred in denying his motion to dismiss the trafficking charge because the State failed to sufficiently prove that he knowingly possessed cocaine found in a black box in a wooded area approximately eighteen hours after defendant allegedly produced the same box in exchange for his kidnapped father. We agree and vacate defendant's conviction accordingly.

I. Background

On 6 July 2015, a grand jury indicted defendant for trafficking in cocaine based on his alleged possession of 400 grams or more of the substance on 29 December 2013. The evidence presented at defendant's 2016 trial tended to show the following.

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On the evening of 28 December 2013, Humberto Anzaldo was visiting friends at the Otter Creek Mobile Home Park when he observed a heated argument between two men known as Polo and Scrappy about the loss of \$150,000.00. Anzaldo overheard the men discuss kidnapping someone, and he later observed Polo, Scrappy, and a man named Hector Lopez leave the trailer park in a gray two-door BMW.

Defendant's father, Ronald Royster ("Mr. Royster"), testified that two or three Hispanic men came to his home looking for defendant that same evening. The men entered Mr. Royster's home, asked if he had spoken with defendant, put a gun to Mr. Royster's head, and tied his hands together with a cord. The men then led Mr. Royster to a gray two-door BMW, blindfolded him, and drove him to an unknown location, which he later learned to be the Otter Creek Mobile Home Park. Upon arriving at the trailer park, the men phoned defendant and allowed Mr. Royster to speak with him. Mr. Royster told defendant, "I don't know what's going on; you need to come and talk to them."

Sometime the next morning, defendant and a man named Demarcus Cates arrived at the trailer park in a white car. Polo, Lopez, and Anzaldo approached the two men as they exited the car, while Scrappy led Mr. Royster out of a trailer and into the car. According to Anzaldo, defendant produced a black box that was first handed to Cates, passed around, and eventually given to Scrappy. None of the men looked inside the box during this exchange, and Anzaldo specifically testified that he did not know what was in the box on 29 December 2013.

Shortly after the exchange, an argument broke out between Cates and Polo. Anzaldo observed the two men yelling and shoving each other before he heard gunshots and ran to the back of one of the trailers. Scrappy, while still holding the box, also ran from the shooting and into the woods behind the trailer park. Defendant, Cates, and Mr. Royster left the trailer park, and Polo died shortly thereafter as a result of multiple gunshot wounds to the head.

On the morning of 30 December 2018—approximately eighteen hours after the shooting—law enforcement deployed eight K-9 units to perform a grid search of the wooded area behind the trailer park. Fifty to seventy-five yards into the woods, officers discovered a black box containing a large amount of cocaine. The box was completely dry despite the heavy rain from the previous night, and a mason jar containing additional cocaine was found nearby. The mason jar was also dry.

At the close of the State's evidence, defendant moved to dismiss the trafficking charge on the basis that the State had failed to prove the

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essential element of possession under N.C. Gen. Stat. § 90-95(h)(3)(c). Defense counsel specifically argued

that the definition of possession, either actual or constructive, part of that definition is that the defendant must knowingly possess the substance; must be aware of its presence. And there is absolutely no evidence, at this point, that this Defendant was aware, in any fashion, of the contents of that box. . . . Along with that, by [the box] not being found until 18 or so hours later, the last that we know it is in the possession of some individual by the name of Scrappy. . . . [T]he State has not been able to produce any evidence of what occurred between the time that [Scrappy] took possession of the box and the time it was found the next morning in a totally different location.

In denying defendant's motion to dismiss, the trial court explained that "the State is entitled to all reasonable inferences."¹

Defendant chose not to testify on his own behalf, but offered evidence in the form of testimony from one law enforcement officer who had been dispatched to the trailer park on 30 December 2013. The officer indicated that Anzaldo had given several inconsistent statements during the course of the investigation, and he reiterated that the box of cocaine was found to be completely dry even though it had rained heavily on the night of 29 December 2013.

At the close of all the evidence, defendant renewed his motion to dismiss the trafficking charge, which the trial court again denied. Following the jury's guilty verdict, the trial court sentenced defendant to 175 to 222 months' imprisonment. Defendant appeals.

II. Discussion

In his sole argument on appeal, defendant contends the State failed to offer substantial evidence that he knowingly possessed a certain amount of cocaine on 29 December 2013. Defendant emphasizes that "none of the State's witnesses testified about what was in the box" on that date and that "[e]ven the State's key eyewitness, Humberto Anzaldo,

1. Co-defendant Cates was tried separately and convicted of voluntary manslaughter in November 2015. *See State v. Cates*, ___ N.C. App. ___, 799 S.E.2d 279, 2017 WL 1650090 (2017) (unpublished). At the conclusion of the State's evidence in that trial, Judge Michael O'Foghludha granted Cates' motion to dismiss the charge of trafficking in cocaine by possession.

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testified that he never looked in the black box on December 29, 2013 and didn't know what was in it." Thus, according to defendant, the trial court erred in denying his motion to dismiss the trafficking charge for insufficient evidence. We agree.

"On a motion to dismiss for insufficient evidence, '[t]he question for the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense.' " *State v. Butler*, 147 N.C. App. 1, 9-10, 556 S.E.2d 304, 310 (2001) (quoting *State v. McCullers*, 341 N.C. 19, 29, 460 S.E.2d 163, 168 (1995)). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). However, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson*, 298 N.C. 640, 656–57, 260 S.E.2d 591, 602 (1979) (citations omitted). "The denial of a motion to dismiss for insufficient evidence is a question of law, which we review *de novo*." *Rouse*, 198 N.C. App. at 381-82, 679 S.E.2d at 523 (citations omitted).

Pursuant to N.C. Gen. Stat. § 90-95(h)(3), any person who "possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine[.]'" Additionally,

if the quantity of such substance or mixture involved:

. . . .

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 222 months in the State's prison and shall be fined at least two hundred fifty thousand dollars (\$250,000).

N.C. Gen. Stat. § 90-95(h)(3)(c) (2017).

In the instant case, the State asserts that "there was substantial evidence showing that on the day of the shooting, 29 December 2013, Defendant possessed the black lockbox and that it contained 400 grams or more of cocaine." As to evidence of the exact contents of the box

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on that date, the State cites to (1) the heated argument between Polo and Scrappy on the evening of 28 December 2013, (2) the kidnapping of defendant's father that same evening, (3) defendant's production of a closed black box in exchange for his father on the morning of 29 December 2013, and (4) the discovery of a black box containing at least 996 grams of cocaine in the woods on the morning of 30 December 2013. While we agree that this sequence of events raises a suspicion as to the commission of the offense charged, we conclude that it is just that: a suspicion. Thus, we hold that the trial court erred in denying defendant's motion to dismiss.

III. Conclusion

Because the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013, the trial court should have granted defendant's motion to dismiss the charge of trafficking in cocaine by possession, and we vacate defendant's conviction accordingly.

VACATED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Defendant was convicted of trafficking cocaine *by possession*. Police found a large quantity of cocaine in a black box abandoned in the woods, the same black box which Defendant gave as ransom to individuals who, the day before, had kidnapped his father. Defendant argues that the trial court should have dismissed the trafficking by possession charge, contending that the lapse of time between the time Defendant possessed the black box and the time police discovered it the next day with cocaine inside was too great to create a reasonable inference that there was cocaine in the box when Defendant possessed it the day before. The majority agrees with Defendant and has ordered the judgment be vacated.

I respectfully dissent for two independent reasons, which I address in turn below. First, Defendant did not preserve his argument on appeal because the basis for his current argument on appeal is not the same as the basis of the argument Defendant made before the trial court. And second, the time lapse from the time Defendant possessed the box and

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the time drugs were discovered in the box, given the other evidence, was not too great to foreclose a reasonable inference that drugs were in the box when Defendant possessed the box. That is, while the evidence in some cases may foreclose allowing juries from inferring that drugs found in a container were in the container the day before, or even the hour before, the evidence in *this* case does not foreclose such inference from being made.

I. Waiver of Argument

Defendant has not preserved his “insufficiency of the evidence” argument because the ground for his argument on appeal is different from the ground he argued before the trial court. *See State v. Jones*, 223 N.C. App. 487, 495, 734 S.E.2d 617, 623 (2012), *aff’d*, 367 N.C. 299, 758 S.E.2d 345 (2014) (holding that a defendant, making a motion to dismiss at trial, has preserved the argument only on the ground asserted at trial and that any other grounds to support the argument are waived on appeal).

“Felonious possession of a controlled substance has two essential elements. [1] The substance must be possessed and [2] the substance must be *knowingly* possessed.” *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (emphasis added). The basis for Defendant’s motion *at trial* was based on the second element, whether there was sufficient evidence that Defendant *knew* there was cocaine in the black box when he possessed it. On appeal, though, Defendant’s argument is based on the first element, whether there was sufficient evidence that cocaine was, in fact, in the box at the time Defendant possessed it. Therefore, Defendant has not preserved his argument for appeal.

II. There Was Sufficient Evidence To Submit Charge to the Jury

Even assuming that Defendant has preserved his argument, I conclude that Judge Hardin got it right. While the evidence in some cases may foreclose allowing juries from reasonably inferring that drugs found in a container were in the container the day before, or even the hour before, the evidence in *this* case, taken in the light most favorable to the State, did not foreclose such inference from being made by the jury.

To be sure, there was no *direct* evidence that cocaine was in the black box at the time Defendant possessed it: No one testified as to having seen cocaine in the box when Defendant exchanged the box for the safe return of his father. However, I conclude that the circumstantial evidence raised a strong enough inference that cocaine was in the box at that time to allow the jury to make the call. Indeed, in my view the

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strongest inference from the circumstantial evidence, taken in the light most favorable to the State, suggests that cocaine was in the box at the time Defendant possessed it. This circumstantial evidence tended to show as follows:

Scrappy complained to Polo that he was upset that he had “lost \$160,000 in cocaine to some [] guys,” and Scrappy enlisted Polo to help him “straighten that out.” That night, he and Polo kidnapped Defendant’s father. The next day, Defendant arrived where his father was being held and exchanged the black box, which felt “pretty heavy” to Scrappy, in return for his father. When an argument ensued and gunshots were being fired, Scrappy ran into the woods clinging to the black box. The next day, police found the black box abandoned in the woods with a large quantity of cocaine inside.

Based on the evidence, when viewed in the light most favorable to the State, a juror could reasonably infer that there was cocaine in the black box when Defendant passed it to Scrappy. In my view, it is the strongest inference. It is certainly possible that cocaine was somehow placed in the box *after* Defendant gave it to Scrappy. But it seems unlikely that Scrappy would have left the woods, filled the box with over \$100,000 worth of cocaine, returned to the woods near the place of the shooting, and abandoned the box and cocaine. In any event, whether the evidence established Defendant’s guilt *beyond a reasonable doubt* was, in my view, a question for each juror to determine, as Judge Hardin ruled. The jurors made their call, and the judgment based on their verdict should stand.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 DECEMBER 2018)

BALDWIN HOMES, INC. v. LE No. 18-285	Washington (17CVS127)	Reversed
IN RE E.W. No. 18-487	Mecklenburg (15JT69)	Affirmed
IN RE M.A.K. No. 18-499	Greene (16JT26) (16JT27)	Affirmed
IN RE N.H. No. 18-493	Buncombe (15JA37)	Affirmed
RATHKAMP v. DANIELLO No. 17-760	Mecklenburg (15CVD14421)	Affirm in part; dismiss in part; reverse and remand in part; vacate in part
SHALLOTTE PARTNERS, LLC v. BERKADIA COMMERCIAL MORTG., LLC No. 17-1288	Mecklenburg (14CVS3030)	Affirmed
STATE v. CODY No. 18-503	Guilford (07CRS109840) (07CRS109843)	Affirmed
STATE v. DOWD No. 18-491	Wake (15CRS226278-79) (15CRS226392) (16CRS28)	No Error
STATE v. GOULD No. 18-425	Bertie (13CRS50001-2) (17CRS50)	No Error
STATE v. GRAVES No. 17-1380	Alamance (13CRS52081)	No prejudicial error
STATE v. HASSELL No. 18-345	Craven (14CRS53664-65)	Affirmed
STATE v. JAMISON No. 18-292	Guilford (15CRS79657-61) (15CRS79672-76)	No Plain Error.

STATE v. KRAFT No. 18-330	Forsyth (15CRS40206)	Reversed
STATE v. NGUYEN No. 17-1163	Forsyth (13CRS60074) (13CRS60085) (13CRS7754)	No Prejudicial Error
STATE v. NOBLE No. 18-299	Onslow (15CRS53805)	No Error
STATE v. PAYNE No. 17-1132	Buncombe (14CRS710842-43)	No Error
STATE v. RUDISILL No. 18-464	Catawba (16CRS1220-22) (17CRS103)	No Error In Part, Affirmed In Part.
STATE v. SMITH No. 17-1161	Brunswick (15CRS53194) (15CRS53196)	No prejudicial error.
STATE v. STEPHENS No. 18-363	Randolph (14CRS3032) (14CRS56023)	No Error
WBTB, LLC v. ASHE CTY. No. 18-452	Ashe (17CVS397)	Dismissed
ZAK v. SWEATT No. 18-616	Moore (14CVD1022)	Dismissed

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AGENCY

Vicarious liability—respondeat superior—caregiving services—Defendant disability services company could be held vicariously liable for the torts committed by one of its caregivers while providing services to the company's clients under the contract (between the company and the caregiver), where the contract gave defendant company authority to exercise sufficient control over defendant caregiver in his performance of caregiving services to be deemed an employee for purposes of respondeat superior. **McKenzie v. Charlton, 410.**

ANIMALS

Lost—dog—adoption—statutory procedure—The trial court's dismissal of plaintiffs' tort claims against defendant for not returning their lost dog was affirmed, where Animal Control satisfied its statutory duty (N.C.G.S. § 19A-32.1) to hold plaintiffs' lost dog for a minimum of 72 hours, after which time plaintiffs lost any ownership rights in the dog and defendant became the dog's lawful owner through a formal adoption. **Lambert v. Morris, 583.**

APPEAL AND ERROR

Abandonment of issues—failure to argue—In an appeal by respondent city in a zoning action involving a conditional use permit, the petitioner's compliance with the seven requirements for a conditional use permit in the city's Uniform Development Ordinance were either unchallenged and established as a matter of law, or the city abandoned any arguments on appeal. **PHG Asheville, LLC v. City of Asheville, 231.**

Appealability—interlocutory orders—motions to dismiss—The petitioner's motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) in a child abuse action in which petitioner was placed on the responsible persons list were dismissed on appeal as interlocutory. There is no right to appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(1). The denial of a Rule 12(b)(6) motion is also an interlocutory order from which no immediate appeal may be taken; while defendant argued that this constituted the dismissal of a defense, the effect of the order was that the defense was not proven as a matter of law. Nothing precluded petitioner from making his argument at his hearing on judicial review pursuant to N.C.G.S. § 7B-323. **In re Duncan, 395.**

Appealability—preservation of issues—interlocutory order—denial of motion for trial—substantial right—The denial of petitioner's motion for a new trial affected a substantial right that could be lost without immediate review and his arguments were heard on appeal. **In re Duncan, 395.**

Denial of motion to seal worker's compensation award—privacy concerns—interlocutory appeal—substantial right—In an interlocutory appeal from a worker's compensation case, plaintiff's invocation of statutory and constitutional privacy protections sufficiently demonstrated the Full Industrial Commission's order denying his motion to seal his entire file to prevent disclosure of his medical information affected a substantial right. **Mastanduno v. Nat'l Freight Indus., 77.**

Inconsistent verdict—no motion for a new trial—The argument that a jury verdict was inconsistent was overruled in an action involving multiple claims relating to funds transferred between the parties where the appropriate motion (for a new trial) was never made. **Boone Ford, Inc. v. IME Scheduler, Inc., 169.**

APPEAL AND ERROR—Continued

Invited error—testimony elicited by defendant—request for plain error review—A defendant convicted of first-degree murder was not entitled to plain error review of the admission of expert ballistics testimony where defendant invited the alleged error by eliciting the complained-of statement on cross-examination. **State v. Hairston, 106.**

Judicial notice—materials not submitted to lower court—relevant to subject matter jurisdiction—In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency, the 287(g) agreement signed between the Mecklenburg County Sheriff and ICE was properly included in the record on appeal despite not being submitted to the trial court, because appellate courts may consider important public documents that were not before the lower tribunal to determine the existence of subject matter jurisdiction. **Chavez v. Carmichael, 196.**

Mootness—prisoners released to Immigration and Customs Enforcement—public interest exception—In an appeal by a sheriff from the trial court's orders directing the release of two criminal defendants being detained on behalf of the federal Immigration and Customs Enforcement (ICE) agency, the appeal was not moot even though the defendants were no longer in the sheriff's custody after being turned over to ICE. The appeal fell within the public interest exception because of the need to resolve whether state courts possess jurisdiction to review habeas corpus petitions of suspected alien detainees held under the authority of the federal government, a determination that would impact habeas petitions filed by other detainees. **Chavez v. Carmichael, 196.**

Motion for new trial—basis—inflammatory and irrelevant evidence—not raised at trial—not warranting new trial—The trial court correctly denied defendant's motion for a new trial where defendant alleged that highly inflammatory and irrelevant evidence had been admitted. Of the five instances cited by defendant, three were not raised at trial and the other two did not warrant a new trial. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Notice of appeal—designation of court to which appeal is taken—non-jurisdictional violation—Plaintiff's failure to designate the court to which he was appealing the Industrial Commission's Opinion and Award in his notice of appeal was a non-jurisdictional violation of the Appellate Rules and did not warrant dismissal of plaintiff's appeal where plaintiff's only appeal of right was in the Court of Appeals and defendants participated in the appeal. **Bradley v. Cumberland Cty., 376.**

Notice of appeal—order appealed—omission—waiver—In a custody case, defendant mother's arguments that the trial court exceeded its authority under Civil Procedure Rule 35 by ordering her to submit to a psychological examination were waived and dismissed for failure to include in her notice of appeal the relevant order of the trial court. **Routten v. Routten, 436.**

Notice of appeal—service—by email—non-jurisdictional violation—Where plaintiff improperly served opposing counsel his notice of appeal from the Industrial Commission's Opinion and Award by email, the violation of the Appellate Rules was non-jurisdictional and did not warrant dismissal where all parties had actual notice, as evidenced by defendants' participation in the appeal. **Bradley v. Cumberland Cty., 376.**

APPEAL AND ERROR—Continued

Notice of appeal—service—certificate of service in record—non-jurisdictional violation—Plaintiff's failure to include in the record a certificate of service of his notice of appeal from the Industrial Commission's Opinion and Award was a non-jurisdictional violation of the Appellate Rules and did not necessitate dismissal. **Bradley v. Cumberland Cty., 376.**

Notice of appeal—timeliness—jurisdictional violation—Plaintiff's failure to establish in the appellate record that his notice of appeal was timely filed with the Industrial Commission was a jurisdictional violation of the Appellate Rules and required dismissal. **Bradley v. Cumberland Cty., 376.**

Preservation of issues—contemporaneous objection—identification of improper evidence—In a dispute between a hospital and a physician regarding an employment agreement, defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence. In a nine-day trial with extensive testimony and documentary evidence, even if defendant's "continuing objection" to parol evidence was valid, defendant's brief did not clearly identify the specific evidence he claimed should not have been admitted, precluding an opportunity to respond by plaintiff as well as appellate review. **Hamlet H.M.A., LLC v. Hernandez, 51.**

Preservation of issues—failure to act below—The appellants (IME Scheduler and Cash for Crash) did not preserve for appeal the issue of whether the trial court erred by denying a motion notwithstanding the verdict on a conversion claim where there was no motion for directed verdict at the close of all the evidence. **Boone Ford, Inc. v. IME Scheduler, Inc., 169.**

Preservation of issues—failure to object—cruel and unusual punishment—Defendant failed to preserve for appellate review his argument that his consecutive sentences totaling 138 years violated his constitutional right to be free from cruel and unusual punishment where he failed to lodge an objection before the trial court. **State v. Hill, 113.**

Preservation of issues—lost profits—motion in limine—appeal argued on different grounds—Defendant (a county board of education) did not preserve for appeal the issue of lost profits in an action arising from a confidential complaint to defendant about a school superintendent and a defamation action. Defendant did not base its motion in limine on the same grounds argued on appeal. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Preservation of issues—motion to disqualify prosecutor—ruling required—Defendant's third request to disqualify the entire district attorney office from pursuing habitual felon status against him was not preserved for appellate review because, unlike his first two motions, he did not obtain a ruling from the trial court, and instead elected to forgo the trial and unconditionally plead guilty to habitual felon status. **State v. Perry, 132.**

Preservation of issues—objection outside jury's presence—failure to object in jury's presence—Defendant in a first-degree murder trial failed to preserve appellate review of testimony regarding a prior shooting incident where defendant objected to the proffered testimony outside the jury's presence but failed to object again when the testimony was actually introduced in the jury's presence. **State v. Hairston, 106.**

APPEAL AND ERROR—Continued

Preservation of issues—pro se motion—writ of certiorari—A writ of certiorari was granted by the Court of Appeals for a robbery defendant where defendant filed a pro se notarized, handwritten “Motion for Appeal” with the superior court but failed to serve his motion on the State. **State v. Guy, 313.**

Preservation of issues—sovereign immunity—not argued below—Defendant, a county board of education, did not preserve for appellate review the issue of whether sovereign immunity barred a negligent infliction of emotional distress claim where the issue was not argued below. The question of whether the invasion of privacy claim would be barred by sovereign immunity was not addressed for reasons stated elsewhere in the opinion. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Record on appeal—district court judgment—notice of appeal to superior court—petition for writ of certiorari—The Court of Appeals treated defendant’s appeal from the superior court’s judgment of driving while impaired (DWI) as a petition for writ of certiorari—and granted said petition—where the record did not contain the district court’s DWI judgment or the notice of appeal to the superior court and thus failed to establish that the superior court had jurisdiction. **State v. Myers McNeil, 497.**

Record on appeal—transcript—unavailable—adequate alternative—meaningful appellate review—Defendant was awarded a new trial on charges stemming from a sexual assault where a portion of the trial transcript, which included cross-examination of the victim, was missing. Defense counsel made sufficient efforts to reconstruct the missing portion of the transcript, those efforts did not produce an adequate alternative to a verbatim transcript, and the lack of an adequate alternative deprived defendant of meaningful appellate review where defense counsel was precluded from identifying potential meritorious issues for appeal. **State v. Yates, 139.**

Waiver—argument—failure to provide support—Respondent mother did not present a meritorious challenge to the trial court’s retention of jurisdiction in a juvenile proceeding where she argued that the trial court did not analyze whether the case should have been transferred to a Chapter 50 proceeding but she did not provide support for her assertion. **In re Y.L., 575.**

Waiver—not raised below—temporary custody review—due process argument—In a custody case, defendant mother’s argument that the trial court violated her due process rights by conducting a temporary custody review in the judge’s chambers and not in open court were waived and dismissed where defendant’s counsel did not object to the review being held in chambers, the trial court did not alter the custody arrangement already in place, and defendant did not raise the procedural due process issue in her Rule 59 and 60 motions to set aside the permanent custody order. **Routten v. Routten, 436.**

Waiver—specific grounds for objection—Defendant waived appellate review of his argument that the trial court’s refusal to sever offenses that had been consolidated for trial, arising from two gang-related shootings, prevented a fair trial because it allowed the jury to hear testimony regarding defendant’s gang ties and evidence of a seven-year-old’s murder. Defendant’s failure to state this specific ground for objecting to the ruling at trial constituted waiver. **State v. Knight, 121.**

ASSAULT

Assault with deadly weapon with intent to kill inflicting serious injury—jury instructions—self-defense—In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error by failing to provide a self-defense instruction regarding the assault charge. Without knowing whether the jury believed that defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), the jury's verdict of guilty for second-degree murder of the first victim, for which defendant was entitled to a self-defense instruction, would be inconsistent with a verdict of guilty of AWDWIKISI, because they are each predicated on a different intended victim. The conviction for AWDWIKISI was vacated and remanded for a new trial. **State v. Greenfield, 631.**

ATTORNEY FEES

Statutory basis—supporting findings—In an action to determine the rights and duties bestowed by an easement, the trial court erred in awarding attorney fees to plaintiff condo association after granting summary judgment without specifying the statutory basis for its award or making appropriate supporting findings of fact. **Ocean Point Unit Owners Ass'n, Inc. v. Ocean Isle W. Homeowners Ass'n, Inc., 603.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning hearing—permanent plan—statutory mandate—The trial court erred by granting custody of a neglected child to his maternal grandparents without first adopting a permanent plan as required by statute (N.C.G.S. § 7B-906.2). **In re D.A., 559.**

CHILD CUSTODY AND SUPPORT

Best interests—custody to one parent—parents' respective progress—The trial court did not abuse its discretion by determining it was in the children's best interest to award custody to their father where the children had been adjudicated neglected and dependent based on physical abuse by the mother's boyfriend. At the time of the permanency planning hearing, the mother was not actively participating in her case plan and was not working with the department of social services (DSS), while the father had contacted DSS as soon as he heard of the children's removal and had done everything DSS had asked of him to ensure a safe home for the children. **In re Y.L., 575.**

Civil contempt—findings of fact—ability to pay—The trial court's findings of fact were too minimal to support its conclusion that defendant father's failure to pay child support was willful. The bare findings that he owned a boat, car, and cell phone; that he spent money on gas and food; and that he had medical issues but was not prevented from working did not sufficiently indicate the necessary evaluation of defendant's actual income, asset values, and reasonable subsistence needs to support a conclusion that defendant had the present ability to pay both his child support obligations and purge payments for civil contempt. **Cty. of Durham v. Burnette, 17.**

Evidence—domestic violence—consideration by trial court—The Court of Appeals rejected defendant mother's contention that the trial court failed to consider evidence of domestic violence perpetrated by plaintiff father before making its

CHILD CUSTODY AND SUPPORT—Continued

custody determination, where the trial court made findings regarding altercations between the parties and those findings were supported by competent evidence. **Routten v. Routten, 436.**

Findings of fact—sufficiency of evidence—In a custody case, the trial court's numerous findings of fact were based on competent evidence consisting of testimony from both parties, neighbors, and medical professionals. **Routten v. Routten, 436.**

Pro se motions—amended by counsel—original motions voluntarily dismissed—In a custody case, the Court of Appeals rejected defendant mother's argument that the trial court should have considered her pro se Rule 59 and 60 motions rather than the amended motions subsequently filed by her attorney, where defendant's own counsel took voluntary dismissal of the pro se motions and defendant did not voice any disagreement for that action, nor did she advance any authority for her arguments on appeal. **Routten v. Routten, 436.**

CHILD VISITATION

Conditions—supervised—burden of cost—The trial court erred by ordering that visitation between a mother and her children occur at a supervised visitation center without addressing the costs, who must pay, and whether the mother had the ability to do so. **In re Y.I., 575.**

Electronic—telephone calls—supplement to visitation—In a custody case remanded for other reasons, the Court of Appeals instructed the trial court that if it allowed defendant mother to have visitation with her children, electronic visitation in the form of telephone calls or other electronic contact may be ordered only as a supplement, not as a replacement, to defendant's visitation rights. **Routten v. Routten, 436.**

Noncustodial parent—discretion given to custodial parent—improper delegation of authority—In a custody case, the trial court improperly delegated authority to the custodial parent to determine, in his discretion, the amount of visitation the noncustodial parent could exercise with her children. **Routten v. Routten, 436.**

CIVIL PROCEDURE

Motion to amend—relation back—The trial court did not err by allowing an amendment to the complaint under N.C.G.S. § 1A-1, Rule 15(c) where the only difference between the original and the amended complaint was a reference to attached exhibits. The original complaint clearly gave notice of the subject matter to both defendants. **QUB Studios, LLC v. Marsh, 251.**

Rule 4—service of process—private process server—In a medical malpractice case, the trial court properly dismissed plaintiff's claims against defendant medical center where she used a private process server instead of the sheriff to serve defendant with the complaint. Private process service is authorized by statute only when the sheriff is unable to fulfill the duties of a process server, a showing not met here. Although plaintiff's process server filed an affidavit pursuant to Rule 4, a self-serving affidavit does not itself create authority for an affiant. **Locklear v. Cummings, 588.**

Rule 53—compulsory referee—adoption of report by trial court—findings and conclusions—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not err by adopting the appointed referee's

CIVIL PROCEDURE—Continued

report where the report's findings were sufficiently supported by the evidence and in turn supported the report's conclusions. **Bullock v. Tucker, 511.**

Rule 53—compulsory referee—judicial adoption of report—entry of proper judgment—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court's review and adoption of a report from the appointed referee pursuant to N.C.G.S. § 1A-1, Rule 53, while proper, was incomplete without entry of a proper judgment, and the trial court was directed to do so upon remand. **Bullock v. Tucker, 511.**

Rule 53—compulsory referee—judicial review of report—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court conducted a proper review, pursuant to N.C.G.S. § 1A-1, Rule 53(g)(2), of a report issued by an appointed referee. The record reflects the trial court gave more than a perfunctory examination of the report before adopting it, and defendants' written exception to the report "in its entirety" without reference to specific findings relieved the trial court of the requirement to review the evidentiary sufficiency supporting the report's findings. **Bullock v. Tucker, 511.**

Rule 60—jurisdiction—reference in complaint to exhibits—clerical error—not an error of law—While it is true N.C.G.S. § 1A-1, Rule 60(b) is not designed for review of errors of law, plaintiffs' Rule 60 motion was premised on the initial complaint properly referencing only one of two exhibits. The error was clerical, not an error of law, and the trial court had jurisdiction to review the motion. **QUB Studios, LLC v. Marsh, 251.**

Rule 60—lack of evidence or argument—The trial court did not err by denying a plaintiffs' motions under N.C.G.S. § 1A-1, Rule 60 where plaintiffs did not present evidence that its attorney acted in a negligent manner evincing a lack of due care and did not present an argument about the Rule 60(b)(6) catch-all provision, thus abandoning it. **QUB Studios, LLC v. Marsh, 251.**

Rule 60—relief from summary judgment—separate action—collateral attack—The trial court did not err by denying defendant's Rule 60(b) motions for relief where the motions constituted an impermissible collateral attack on the original summary judgment which this action sought to enforce. **QUB Studios, LLC v. Marsh, 251.**

Rule 60(b) relief—modification of prior order—propriety—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the Court of Appeals rejected defendants' argument that the trial court erroneously modified a consent order upon the appointed referee's suggested remedy of Rule 60(b) relief, because the order from which the trial court struck a provision requiring plaintiffs to remove equipment from the lake upon termination of the lease was not entered by consent but upon the court's decision. **Bullock v. Tucker, 511.**

Rule 60(b) relief—striking of specific performance requirement—doctrine of impossibility—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not abuse its discretion by awarding Rule 60(b) relief in the form of striking the requirement from a prior order that plaintiffs be required to remove equipment from the lake upon termination of the parties' lease, since extraordinary circumstances existed which prevented plaintiffs from fulfilling that specific performance. **Bullock v. Tucker, 511.**

CONSPIRACY

Juror harassment—meeting of the minds—sufficiency of evidence—In a prosecution for conspiracy to commit juror harassment, the State presented evidence sufficient to be presented to the jury that defendant and two other individuals shared a mutual, implied understanding to harass jurors outside of a courtroom where all three exhibited parallel, contemporaneous behavior such as pacing in the hallway and physically confronting and directing loud accusations at multiple jurors. **State v. Mylett, 661.**

CONSTITUTIONAL LAW

Double jeopardy—robbery and possession of stolen goods—sentencing—Although it was not raised below in a prosecution for robbery and possession of stolen goods, defendant's double jeopardy rights were violated where he was convicted of both crimes, requiring judgment to be arrested on the conviction for possession of stolen goods. **State v. Guy, 313.**

Effective assistance of counsel—no direct appeal—The direct appeal of an ineffective assistance of counsel claim was dismissed without prejudice to the right to file a motion for appropriate relief in the trial court where the record was inadequate for review on appeal. **State v. Allen, 284.**

Effective assistance of counsel—underlying issues—no error—There was no ineffective assistance of counsel in a prosecution for resisting a public officer and second-degree trespass where defense counsel explicitly consented to a jury instruction and did not argue that there was a fatal variance between the indictment and the evidence. It was held elsewhere in the opinion that there was no error in the jury instruction and no fatal variance. **State v. Nickens, 353.**

First Amendment—jury harassment statute—nonexpressive conduct—North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), did not trigger First Amendment protections where it restricted nonexpressive conduct that is otherwise proscribable criminal conduct, because the statute prohibited threats and intimidation directed at a juror irrespective of the content. Even assuming the statute implicated the First Amendment, its restrictions were content-neutral and narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation, thereby surviving intermediate scrutiny. **State v. Mylett, 661.**

Jury harassment statute—vagueness challenge—notice of proscribed conduct—North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), was deemed not unconstitutionally vague because its prohibition against making threats or intimidating jurors was sufficiently specific to put individuals on notice of the proscribed conduct, following prior case law holding that the undefined word "intimidate" in another statute was not unconstitutionally vague. **State v. Mylett, 661.**

Motion for appropriate relief—immigration consequences of plea agreement—Padilla not retroactive—The trial court erred in granting defendant's motion for appropriate relief in which defendant challenged his 1997 no contest plea on the basis that he was not properly informed by his counsel of the impact his conviction would have on his immigration status, including the risk of deportation. The case relied on by defendant for support, *Padilla v. Kentucky*, 559 U.S. 356 (2010), did not apply retroactively. **State v. Bennett, 287.**

CONSTITUTIONAL LAW—Continued

North Carolina—jury trial—Petitioner had no right to a trial by jury where he was placed on a list of responsible individuals (RIL) pursuant to N.C.G.S. § 7B-311(b) after an investigation for child abuse. The right to a jury trial is limited to cases where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. While the right to trial by jury can still be created by statute, it is undisputed that no statutory right exists to a jury trial upon petition for judicial review pursuant to N.C.G.S. § 7B-323. The proceeding in the present case was unknown at common law. Furthermore, petitioner did not raise to the trial court his argument that the matter was akin to a common law defamation action that existed when the Constitution of 1868 was adopted, and the argument was not preserved for appeal. Even if he had done so, placing his name on the RIL list could not be reasonably analogized to defamation. **In re Duncan, 395.**

Protected status as parent—denial of custody and visitation—necessary findings—unfit or acted inconsistently with protected rights—In a custody case, the trial court failed to make the necessary findings of fact that defendant mother was unfit or had acted inconsistently with her constitutionally protected status as a parent before denying her all custodial and visitation rights to her children. **Routten v. Routten, 436.**

Right to confrontation—deceased victim—statements to officer—nontestimonial—The trial court did not violate defendant's Sixth Amendment right to confront witnesses in a prosecution for robbery and other offenses by admitting testimony from an officer about statements made to him by the victim, subsequently deceased, after the robbery but before defendant had been apprehended. The Confrontation Clause of the Sixth Amendment only applied to testimonial statements. These statements were nontestimonial because they were provided in an effort to assist the police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects. **State v. Guy, 313.**

Right to speedy trial—Barker factors—63-month delay—late assertion of right—A defendant whose criminal trial was delayed nearly 63 months after his arrest failed to demonstrate a violation of his right to a speedy trial where the delay was caused by a backlog of pending cases in the county and a shortage of assistant district attorneys, defendant continued to petition the court for resources to develop his case for at least 2 years following his arrest, defendant failed to assert his right until almost 5 years after his arrest, and defendant's ability to defend his case was not impaired. **State v. Farmer, 619.**

CONTEMPT

Civil—child support order—order still in force—In a civil contempt proceeding based on a mother's failure to pay child support arrears, the trial court properly found that its child support order remained in force at the time of the show cause hearing, even though the mother's son had turned eighteen years old and was no longer in school, because arrears were still owed to the county. **Cumberland Cty. ex rel. Mitchell v. Manning, 383.**

Civil—child support—failure to pay—ability to pay—In a civil contempt proceeding based on a mother's failure to pay child support arrears, no competent evidence appeared in the record to support the trial court's findings that the mother had the ability to comply with the underlying child support order at the time of the show cause hearing and had the ability to purge the contempt conditions. **Cumberland Cty. ex rel. Mitchell v. Manning, 383.**

CONTRACTS

Negligent representation claim—directed verdict—The trial court did not err by granting a directed verdict for plaintiff in a negligent misrepresentation claim in an action involving funds transferred between the parties where the evidence, taken in the light most favorable to the moving party (defendants), did not establish that plaintiff owed defendants any separate duty of care beyond that of the contractual relationship. Moreover, any error was harmless. **Boone Ford, Inc. v. IME Scheduler, Inc.**, 169.

Repayment of physician recruitment loans—compromise verdict—multiple components—The jury's verdict awarding repayment of loans that were made by a hospital to a physician under a Physician Recruitment Agreement was not a compromise verdict requiring a new trial even though it only awarded \$334,341.14 of the \$902,259.66 total loan amount. The amount of the verdict, standing alone, was not sufficient to show an abuse of discretion by the trial court in denying defendant physician's motion for a new trial, because extensive evidence was presented that the total sum comprised 21 payments stemming from different types of obligations. **Hamlet H.M.A., LLC v. Hernandez**, 51.

COSTS

Motions for dismissal—properly denied—costs denied—The trial court did not err by awarding costs in a negligent infliction of emotional distress action where defendant's motions to dismiss were properly denied. **Carlton v. Burke Cty. Bd. of Educ.**, 176.

CRIMINAL LAW

Discovery—blank audio recording—In a prosecution for trafficking methamphetamine, the trial court did not err by denying defendant's motion to dismiss for a violation of his constitutional rights where the State did not preserve or disclose a blank audio recording. An officer did not act in bad faith where he attempted to record a conversation between an informant and defendant setting up a drug transfer, but the recording device was new and the officer was unsuccessful. While the blank audio recording may have had the potential to be favorable, defendant did not demonstrate that it was material. To the extent that the recording implicated credibility, it was the officer's credibility, not the informant's. **State v. Hamilton**, 650.

Joinder—transactional connection—gang-related shootings—The trial court did not abuse its discretion by declining to sever multiple offenses, arising from two gang-related shootings, that had been consolidated for trial. There was sufficient transactional connection between the offenses because they arose from a continuous course of violent criminal conduct related to gang rivalries, they occurred on the same day, the same pistol was used, and some witnesses were present at both shootings. Further, severance is not required where a defendant argues he would have elected to testify regarding one offense but not others. **State v. Knight**, 121.

Jury instruction—acting in concert—supported by the evidence—The trial court did not commit plain error by instructing the jury on acting in concert where defendant contended that the instruction was not supported by the evidence. Even if defendant was not the person who had robbed the victim, there was substantial evidence that defendant was aiding or otherwise assisting others in a common plan or purpose to rob the victim and flee the scene. **State v. Guy**, 313.

CRIMINAL LAW—Continued

Jury instructions—deviation from agreed-upon pattern jury instructions—error—harmless—Although the trial court erred by deviating from the agreed-upon pattern jury instructions regarding reliance on hearsay statements, defendant failed to demonstrate prejudicial error where the trial court had given the instruction six times throughout trial and where the record reflected overwhelming evidence of defendant's guilt. **State v. Knight, 121.**

Jury instructions—disjunctive—appropriate theory supported by evidence—The trial court's error in instructing the jury on an alternative theory of embezzlement unsupported by the evidence did not rise to the level of plain error where the appropriate theory of embezzlement was supported by overwhelming evidence. **State v. Booker, 290.**

Jury instructions—incorrect instruction—definition of serious bodily injury—The trial court did not plainly err by incorrectly stating in a jury instruction on assault inflicting serious bodily injury that the State's burden could be satisfied by the defendant causing a substantial risk of serious permanent disfigurement. Given the evidence that the victim actually suffered serious permanent disfigurement, it was not reasonably probable that the outcome would have been different but for the error. **State v. Hill, 113.**

Jury instructions—request for definition—common usage and meaning—In a prosecution for juror harassment, the trial court was not required to define "intimidate" in instructions to the jury, because it is a word of common usage and meaning that can be reasonably construed and unlikely to confuse a jury. **State v. Mylett, 661.**

Jury instructions—special request—failure to disclose evidence—In a prosecution for trafficking methamphetamine, the trial court did not err by refusing defendant's requested instruction about the State's failure to disclose a blank recording of defendant's conversation with an informant. The officer testified that the recording device was new and that his attempt to make the recording was not successful. Defendant did not establish bad faith by the officer and did not show that the blank audio recording contained any exculpatory evidence. **State v. Hamilton, 650.**

Motion to disqualify prosecutor—conflict of interest—proof required—The trial court did not abuse its discretion by denying defendant's motions to disqualify the entire district attorney's office from prosecuting his case for common law robbery and attaining habitual felon status because there was no proof of an actual conflict of interest. The assistant district attorney who had previously represented defendant in one of the predicate felony convictions supporting habitual felon status had not represented defendant in any proceedings related to the current charges. **State v. Perry, 132.**

Motion to disqualify prosecutor—previous denials not based on State's assurance—The Court of Appeals rejected defendant's argument that his third motion to disqualify the entire district attorney office from pursuing habitual felon status against him should have been allowed after the participation in the first phase of his trial (for common law robbery) by an assistant district attorney (ADA) who had previously represented defendant in one of the predicate felony convictions. The trial court's first two denials were not conditioned on the ADA not participating; the court merely noted that the prosecutor had "given assurances" that the ADA would not be involved. **State v. Perry, 132.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—no objection—In a murder trial, where defendant did not object to two statements made by the prosecutor during closing argument, the trial court was not required to intervene *ex mero motu* when the prosecutor stated that defendant did not accept responsibility for his actions and suggested, without evidence, that defendant might have committed another offense. Without an objection, defendant failed to preserve any constitutional arguments and the prosecutor's statements, even if erroneous, did not amount to plain error and were not so grossly improper as to warrant intervention. **State v. Greenfield, 631.**

Prosecutor's closing argument—reference to gang affiliation—no *ex mero motu* intervention—There was no abuse of discretion in a robbery prosecution where the trial court did not intervene *ex mero motu* when the State's argument included a reference to defendant's gang affiliation. The prosecutor merely commented on the evidence presented by defendant at trial and did not focus on defendant's gang involvement. It has been consistently held that a prosecutor may argue that a jury is the voice and conscience of the community. **State v. Guy, 313.**

Prosecutor's closing arguments—defendant's right to a jury trial—plain error analysis—There was no plain error in a prosecution for trafficking in cocaine where the prosecutor improperly argued that defendant had exercised his right to a jury trial despite the evidence against him. The evidence against defendant was overwhelming. **State v. Degraffenried, 308.**

Self-defense—jury instructions—stand-your-ground provision—Failure to include the relevant stand-your-ground provision in the jury instructions in a homicide prosecution constituted prejudicial error and warranted a new trial. The trial court had agreed to give a pattern jury instruction which included duty to retreat and stand-your-ground provisions but failed to do so. If the defendant's evidence, taken as true, is sufficient to support an instruction for self-defense, it must be given even though the State's evidence is contradictory. **State v. Irabor, 490.**

DAMAGES AND REMEDIES

Pain and suffering—medical malpractice—An award for pain and suffering in a medical malpractice action against a hospital was remanded for a new trial where a doctor testified that a decedent who had suffered chest pain earlier in the day more likely than not suffered pain at home before dying. Where the only evidence was that it was likely that decedent experienced pain because he had previously experienced chest pain, the evidence was insufficient to establish damages for pain and suffering to a reasonable degree of certainty. However, the jury only separated the damages into economic and non-economic categories and it was impossible to determine which portion of the award was for pain and suffering. The matter was remanded for a new trial on the issue of non-economic damages. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

Punitive damages—summary judgment stage—basis—In an action to determine the rights and duties bestowed by an easement, the trial court erred by awarding punitive damages after granting summary judgment for plaintiff condo association, a stage not generally appropriate for this type of damages. Moreover, the trial court did not provide the underlying basis for awarding punitive damages. **Ocean Point Unit Owners Ass'n, Inc. v. Ocean Isle W. Homeowners Ass'n, Inc., 603.**

DISCOVERY

Criminal law—failure to disclose—no sanctions—In a prosecution for trafficking methamphetamine, the trial court did not abuse its discretion by denying defendant's motion for sanctions for a discovery violation where an officer unsuccessfully attempted to record a conversation setting up a drug transfer and the resulting blank recording was neither preserved nor disclosed. The trial court's decision was not arbitrary and was based on its consideration of the materiality of the blank audio file, the circumstances of the failure to provide a complete file to the district attorney's office, the officer's experience and reputation, the evidence itself, and the arguments of counsel. **State v. Hamilton, 650.**

DIVORCE

Alimony—amount and duration—statutory factors—In a divorce and custody action, the trial court did not abuse its discretion in awarding defendant mother alimony calculated from the parties' date of separation and not the date of divorce, nor in denying defendant's claim for attorney fees, where its unchallenged findings of fact referenced the required statutory factors contained in N.C.G.S. § 50-16.3A. **Routten v. Routten, 436.**

Alimony—duration—statutory factors—discretion—The trial court did not abuse its discretion in granting 10.5 years of alimony to a wife where it properly considered the required factors of N.C.G.S. § 50-16.3A(b), made findings of fact regarding the relevant factors, and exercised its discretion. **Rea v. Rea, 421.**

Alimony—findings of fact—foster children, marital misconduct, retirement income, and reasonable expenses—In an alimony case, the trial court's findings of fact on issues related to foster children, marital misconduct, retirement income, and reasonable expenses were supported by competent evidence. **Rea v. Rea, 421.**

DRUGS

Jury instruction—acting in concert—reasonable inference—In a prosecution for methamphetamine-related charges, the trial court properly instructed the jury on an acting in concert theory based on sufficient evidence that the woman arrested with defendant at his home where ingredients and paraphernalia associated with methamphetamine production were found was involved in a common plan or scheme to make methamphetamine with him. **State v. Bennett, 89.**

Trafficking in cocaine—possession—sufficiency of evidence—In a prosecution for trafficking in cocaine by possession, the State failed to offer substantial evidence that defendant knowingly possessed over 400 grams of cocaine which was discovered in a black box eighteen hours after defendant handed over the closed box in exchange for the return of his kidnapped father. **State v. Royster, 701.**

EMBEZZLEMENT

Indictment—fraudulent intent—acts constituting embezzlement—The Court of Appeals rejected defendant's argument that her embezzlement indictment was invalid for failure to allege fraudulent intent and to specify the acts constituting embezzlement. The concept of fraudulent intent was contained within the meaning of "embezzle" and the allegation that she "embezzled \$3,957.81 entrusted to her in a fiduciary capacity as an employee of Interstate All Battery Center" adequately apprised her of the charges against her. **State v. Booker, 290.**

EMOTIONAL DISTRESS

Instructions—theory—included in pleading—The trial court did not err in a negligent infliction of emotional distress action by instructing the jury on failure to secure information. The negligent act plaintiffs brought forward at trial was within the pleadings. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Negligent infliction—breach of duty—sufficiency of evidence—Plaintiffs presented sufficient evidence that defendant (a county board of education) breached its duty to them in an action for negligent infliction of emotional distress arising from plaintiffs' confidential complaint to defendant about the superintendent of the school board where the complaint became public. The superintendent ultimately filed a lawsuit against plaintiffs. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Negligent infliction—duty owed—Plaintiffs produced sufficient evidence that defendant (a county board of education) owed a duty to plaintiffs where plaintiffs brought an issue to defendant's attention through written documents marked as confidential and with the assurance of the chairperson that confidentiality would be maintained, and those documents became public. **Carlton v. Burke Cty. Bd. of Educ., 176.**

Negligent infliction—foreseeability—sufficiency of evidence—Plaintiffs presented sufficient evidence of the reasonable foreseeability of emotional distress in an action for the negligent infliction of emotional distress arising from the disclosure of plaintiffs' confidential complaint to a school board about the school superintendent. Defendant's motion to dismiss an invasion of privacy claim was not considered because the jury awarded the full amount to both plaintiffs and did not divide the amount between the two claims. **Carlton v. Burke Cty. Bd. of Educ., 176.**

EVIDENCE

Breach of contract—parol evidence—Rule 59 motion—In a dispute between a hospital and a physician regarding an employment agreement, where defendant physician failed to preserve for appellate review his argument that the jury should not have been allowed to consider parol evidence, the Court of Appeals determined all of the evidence was properly before the jury and defendant's argument that his Rule 59 motion for a new trial should have been granted was without merit. **Hamlet H.M.A., LLC v. Hernandez, 51.**

Character—victim as aggressor—specific instances of conduct—In a murder trial, the trial court did not err by excluding defendant's evidence that the deceased victim was a gang leader, had a "thug" tattoo, and possessed firearms, none of which involved "specific instances of conduct" pursuant to Evidence Rule 405(b). Defendant failed to challenge on appeal the trial court's exclusion, pursuant to Evidence Rule 403, of the victim's prior conviction for armed robbery, a decision properly made within the court's discretion. **State v. Greenfield, 631.**

Identification of defendant—not impermissibly suggestive—The trial court did not err by denying defendant's motion to suppress in- and out-of-court identification evidence under the totality of the circumstances. The evidence supported the trial court's findings that the authorities substantially followed statutory and police department policies in each photo lineup and that the substance of any deviation from those policies revolved around defendant's neck tattoos. **State v. Mitchell, 344.**

Impeachment evidence—social media post—exclusion—In a juror harassment case, defendant failed to show he was prejudiced by the trial court's decision to

EVIDENCE—Continued

exclude a social media post defendant intended to use to impeach a juror-witness who testified he suffered emotional distress after being harassed but which defendant failed to disclose during pretrial discovery. The Court of Appeals rejected defendant's unsupported argument that N.C.G.S. § 15A-905(a) did not apply to impeachment evidence. **State v. Mylett, 661.**

Juror harassment trial—prior fight—hearsay analysis—In a prosecution for juror harassment, the trial court did not err by allowing juror-witnesses to testify regarding a fight involving defendant and his brother that resulted in his brother being tried for assault on a government official (the trial in which the juror-witnesses served on the jury), while excluding defendant's own testimony about that fight. None of the juror-witnesses' testimony constituted improper character evidence, nor hearsay, where it was offered to show their states of mind when defendant confronted them outside the courtroom after his brother's trial. By contrast, defendant's proffered testimony was inadmissible hearsay because he offered it to prove the truth of the matter asserted. **State v. Mylett, 661.**

Medical malpractice—administrative and clinical—hospital accreditation documents—mixed claims—not prejudicial—There was no prejudicial error in a medical malpractice action against a hospital in the admission of some of the hospital's accreditation documents. Although the claim was for both administrative and clinical negligence, and the administrative negligence claim proceeded erroneously, evidence of the defendant's policies and protocols was relevant to establish a standard of care for clinical negligence and defendant did not show that the evidence impacted the verdict on clinical negligence. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

Opinion testimony—detective—whether defendant confessed—In a murder trial, defendant's argument that the trial court committed plain error by allowing a detective to opine that defendant "had already confessed to felony murder" was moot where the Court of Appeals decided to reverse defendant's felony murder conviction on other grounds. Even if not moot, any error did not amount to plain error. **State v. Greenfield, 631.**

Post-arrest silence—door opened by defendant—The trial court did not plainly err by permitting testimony concerning defendant's post-arrest silence where defendant opened the door for the prosecutor to ask a police detective about his attempts to contact her. Even assuming that the portion of the testimony concerning the extent to which other defendants facing embezzlement charges had spoken to the detective was improper, there was no probable impact on the jury given the overwhelming evidence against defendant. **State v. Booker, 290.**

FALSE PRETENSE

Checks—affidavit to obtain credit—single taking rule—Defendant met his burden of showing plain error in a prosecution arising from his having submitted one false affidavit to obtain credit from a bank for three checks. The bank extended credit for only one of the three checks and defendant was convicted of obtaining property by false pretense and attempting to obtain property by false pretense, in violation of the single taking rule. Defendant committed a single act—filing one affidavit, not three—and there was no evidence from which the jury could have inferred three affidavits. The trial court erred by not instructing the jury that it could not convict on both counts. **State v. Buchanan, 303.**

HABEAS CORPUS

Jurisdiction—subject matter—federal immigration detainer—exclusive jurisdiction of federal government—The trial court lacked subject matter jurisdiction to review two petitioners' habeas corpus petitions seeking relief from a federal immigration hold, and was therefore without authority to order a county sheriff to release petitioners from custody, because immigration matters are within the exclusive jurisdiction of the federal government. **Chavez v. Carmichael, 196.**

Jurisdiction—subject matter—state habeas corpus petition—federal immigration law—In a matter involving habeas corpus petitions filed by two criminal defendants seeking relief from detention by a county sheriff acting under a 287(g) agreement with the federal Immigration and Customs Enforcement (ICE) agency, the Court of Appeals rejected petitioners' argument that N.C.G.S. § 162-62 prevented the sheriff from detaining them on behalf of ICE. Section 128-1.1, a more specific statute and therefore controlling, expressly authorizes state and local law enforcement officers to enter into formal cooperative agreements and perform the functions of immigration officers, including detention of suspected aliens. **Chavez v. Carmichael, 196.**

Petition in state court—federal immigration detainer—infringement on federal authority—The trial court lacked jurisdiction to issue habeas relief to two petitioners seeking release from a federal immigration detainer enforced by a county sheriff, because state courts have no jurisdiction to review habeas petitions, other than to dismiss for lack of jurisdiction, nor do they have authority to issue writs of habeas corpus or intervene in any way with detainees being held under the authority of the federal government. State and local law enforcement officers acting pursuant to formal cooperative agreements with the Department of Homeland Security or Immigration and Customs Enforcement are de facto federal officers performing immigration functions, including detention and turnover of physical custody. **Chavez v. Carmichael, 196.**

HOMICIDE

First-degree felony murder—jury instructions—multiple victims—intended victim—In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error in its jury instructions for first-degree felony murder based on AWDWIKISI where the jury marked the verdict sheet finding defendant guilty of both first-degree felony murder and second-degree murder for a single homicide. The jury instructions should have made clear that defendant could be convicted of first-degree felony murder based on AWDWIKISI only if the jury believed the fatal bullet was meant for the second victim, and instead hit the first victim. Neither the jury instructions nor the verdict sheet helped illuminate what the jury believed defendant's intention was when he shot at the victims, necessitating reversal of the first-degree murder conviction. **State v. Greenfield, 631.**

Second-degree murder—multiple victims—intended victim—In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury, the jury's verdict finding defendant guilty of second-degree murder was not in error whether the jury believed defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), because the jury was given the opportunity to acquit based on self-defense against the first victim, but declined to do so, and self-defense was not available regarding the second victim. Judgment entered upon the jury's other verdict finding defendant guilty of first-degree felony murder

HOMICIDE—Continued

for the same homicide was vacated based on grounds stated elsewhere in the opinion, and the matter remanded for entry of judgment on second-degree murder. **State v. Greenfield, 631.**

INDICTMENT AND INFORMATION

Amendments—substantial alteration of charge—underlying crime—The trial court erred by allowing the State to amend an indictment for second-degree kidnapping by changing the underlying crime from “assault inflicting serious injury” (a misdemeanor) to “assault inflicting serious *bodily* injury” (a felony). This substantial alteration required the judgment to be vacated and remanded for resentencing on the lesser-included crime of false imprisonment. **State v. Hill, 113.**

Fatal variance—second-degree trespass—person in charge—The Court of Appeals declined to invoke Appellate Rule 2 where a defendant who was charged with resisting arrest moved to dismiss because of a fatal variance between the indictment and the evidence at trial. Defendant failed to argue how any deficiency resulted in a manifest injustice and failed to argue how the purported error prevented the proper presentation of a defense. **State v. Nickens, 353.**

Sufficiency of indictment—resisting a public officer—An indictment for resisting a public officer was sufficiently specific and facially valid where it identified the officer by name and office, the duties to be discharged by the officer, and the general manner in which defendant obstructed the officer. The indictment could have been more specific, but hyper-technicality is not required and this indictment identified the ultimate facts, allowing defendant to mount a defense. **State v. Nickens, 353.**

Sufficiency—description of offense—omission of word—assault—An indictment was sufficient to charge defendant with assault with a deadly weapon inflicting serious injury even though it omitted the word “assault” from the description of the offense (“defendant . . . did E.D. with a screwdriver, a deadly weapon”) because the indictment, viewed as a whole, substantially followed the language of the statute and apprised defendant of the charged crime—it correctly listed the offense as “AWDW SERIOUS INJURY” and referenced the correct statute. **State v. Hill, 113.**

JUDGMENTS

On the pleadings—findings—In a matter based on a summary judgment in prior matter, where there were motions to dismiss on multiple grounds, the trial court did not abuse its discretion by denying defendant’s motion for written findings and conclusions on a motion for judgment on the pleadings. While it is appropriate for the trial court to enter findings and conclusions on Rule 60(b) motions, if the trial court had to determine facts, a judgment on the pleadings—a matter of law—would not have been appropriate. **QUB Studios, LLC v. Marsh, 251.**

JURISDICTION

Condemnation action—order affecting title and area—mandatory appeal—Rule 59 motion—not a proper substitute—The Court of Appeals did not have jurisdiction to review the denial of plaintiff’s motion to reconsider the trial court’s determination that a town’s eminent domain claim was for a public purpose because the motion was not a proper Rule 59 motion that would toll the thirty-day period for filing notice of appeal. Orders from condemnation proceedings concerning title and

JURISDICTION—Continued

area must be immediately appealed; a Rule 59 motion would be proper only upon the discovery of new evidence that was not available at the time of the Section 108 hearing. **Town of Apex v. Rubin, 148.**

Personal—minimum contacts—shareholder in defendant company—no other contacts with state—The requirements of due process did not permit the state of North Carolina to exercise personal jurisdiction over a former shareholder in a boat manufacturing company in a product liability action where defendant shareholder's only contact with North Carolina was his status as a former investor in the company, even if the company might be subject to personal jurisdiction in the state. **Padron v. Bentley Marine Grp., LLC, 610.**

Personal—motion to dismiss denied—The trial court did not err by denying defendant's motion to dismiss for lack of personal jurisdiction where defendant offered general case law but no factual basis for the court lacking personal jurisdiction over him specifically. Moreover, this action was premised on a prior judgment to which defendant was a party and in which he participated. **QUB Studios, LLC v. Marsh, 251.**

State court—federal immigration detainer—exclusive jurisdiction of federal government—State courts may not infringe on the federal government's exclusive jurisdiction over immigration matters, even in the absence of a formal cooperative agreement between a state or local authority and the federal Immigration and Customs Enforcement agency, since federal law authorizes such cooperation with or without a formal agreement. **Chavez v. Carmichael, 196.**

Subject matter—enforcement of prior judgment—Subject matter jurisdiction was present where a complaint seeking enforcement of a prior judgment was proper and not challenged by defendant, the amended complaint related back, and the trial court had jurisdiction to consider plaintiffs' motion for relief. **QUB Studios, LLC v. Marsh, 251.**

JURY

Dismissal—failure to follow instructions—different responses to same question—The trial court did not abuse its discretion by dismissing an impaneled juror in defendant's murder trial where a bailiff reported that the juror had expressed an opinion that the district attorney had behaved rudely, the juror gave a different response to the same question during two separate hearings regarding his statement to the bailiff, and the juror ignored the trial court's instructions. **State v. Knight, 121.**

Selection—race-based peremptory challenge—race of juror—subjective impression—In a prosecution for methamphetamine-related charges, defendant was not entitled to *Batson* relief upon his allegation that the prosecutor improperly dismissed two African-American prospective jurors solely on the basis of race. The trial court's finding that three out of five African-American prospective jurors were passed by the State and remained on the jury panel was accepted by the State, and was an indication that the prospective jurors' race was clear to the court, precluding the need to make further inquiry into the prospective jurors' race for the record. **State v. Bennett, 89.**

LANDLORD AND TENANT

Breach of contract—foul odor and mold—judgment notwithstanding the verdict—The trial court properly denied plaintiff-landlord's motion for judgment

LANDLORD AND TENANT—Continued

notwithstanding the verdict on its breach of contract claim in a commercial landlord-tenant dispute. Although there was evidence that defendant-tenants breached their lease, they presented at least a scintilla of evidence—that plaintiff had failed to remedy the sources of a foul odor and mold problem—in support of their counterclaim for constructive eviction. **Brennan Station 1671, LP v. Borovsky, 1.**

Constructive eviction—foul odor and mold—judgment notwithstanding the verdict—In a commercial landlord-tenant dispute, the trial court erred by granting plaintiff-landlord’s motion for judgment notwithstanding the verdict to overturn the jury’s verdict and award on defendant-tenants’ counterclaim for constructive eviction. Defendant-tenants presented at least a scintilla of evidence that plaintiff-landlord had breached the lease by not remedying the sources of a foul odor and mold problem upon defendant-tenants’ adequate and repeated notices of the problem. **Brennan Station 1671, LP v. Borovsky, 1.**

Constructive eviction—jury instructions—language of lease and relevant law—The trial court’s omission of plaintiff-landlord’s preferred phrasing from its jury instructions did not amount to a misstatement of law where the instructions tracked the language and provisions of the lease agreement and reflected the relevant law of constructive eviction. **Brennan Station 1671, LP v. Borovsky, 1.**

Constructive eviction—lost profits—after vacating premises—question for jury—In a commercial landlord-tenant dispute, the trial court erred by instructing the jury that it could award damages only for defendant-tenants’ lost profits through the date defendant-tenants vacated the leased premises. Because defendant-tenants could prove their lost profits after vacating the premises with reasonable certainty, the issue should have been before the jury. **Brennan Station 1671, LP v. Borovsky, 1.**

LIENS

Special proceeding—sale of estate property—prior recorded lien extinguished—In a special proceeding to sell property to repay the debts of an estate, the trial court did not err in concluding the sale of the property extinguished a prior recorded lien on the property. Since the lienholder was made a party to and therefore was bound by the special proceeding, its lien followed the proceeds of the sale. Even though the proceeds were embezzled, the buyers paid for the property and took it free and clear of the lien. **Nationstar Mortg. LLC v. Curry, 218.**

MEDICAL MALPRACTICE

Administrative and medical negligence—instructions—JNOV on administrative negligence improperly denied—In a medical malpractice action involving both administrative and medical or clinical negligence in which a JNOV was improperly denied on administrative negligence, defendant did not show that the error impacted the jury instructions to its detriment. The instructions used “implement” and “follow” in regard to protocols, but the two terms were not synonymous in this case. However, considered in their entirety, the instructions were not likely to mislead the jury because there was ample evidence that defendant failed to follow its policies and that the attending emergency room nurse did not collect or communicate pertinent medical information. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

MEDICAL MALPRACTICE—Continued

Administrative negligence—pleadings—The trial court erred by allowing plaintiff to proceed on an administrative negligence theory in a medical malpractice case where the issue was the sufficiency of the pleading. The definition of “medical malpractice action” has been expanded to include the breach of administrative or corporate duties by hospitals and there are two kinds of corporate negligence claim: negligence in clinical or medical care and negligence in the administration or management of the hospital. The negligence allegations in this case were not sufficient to put defendant on notice of a claim of administrative negligence. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.**, 526.

Contributory negligence—not reporting EMT treatment to emergency room personnel—The trial court did not err in a medical malpractice action against a hospital by granting plaintiff’s motion for a directed verdict on contributory negligence where decedent did not report to emergency room personnel that EMTs gave him medication on his way to the hospital. There was no evidence that defendant failed to report his symptoms. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.**, 526.

Expert witness—community standard of care—sufficiency of evidence—The trial court did not abuse its discretion in a medical malpractice action by determining that plaintiff’s expert qualified as an expert on the community standard of care. North Carolina law does not prescribe a particular method by which a medical doctor must become familiar with the standard of care in a particular community. The expert’s testimony here was based on review of a lengthy demographics package, internet research, and the expert’s comparison of this community to the Albany Medical Center, where he had practiced and where he taught. Although defendant contended that the evidence was not sufficient to show familiarity with community standards because the expert had never been in the area, had never practiced in North Carolina, held a license in North Carolina, or previously testified in North Carolina, there was precedent holding sufficient similar basis for determining familiarity with the community standard of care. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.**, 526.

MOTOR VEHICLES

Driving while impaired—multiple tests—implied consent rights—A driving while impaired defendant’s right to be re-advised of his implied consent rights was not violated where a first test on an intoxilyzer machine failed to produce a valid result and the test was administered again on a second machine without an additional advisement to defendant of his rights. The request that defendant provide another sample for the same chemical analysis of his breath was not a “subsequent chemical analysis” that would trigger a re-advisement pursuant to N.C.G.S. § 20-139.1(b5) because defendant was not asked to submit to a different chemical analysis for his blood or other bodily fluid or substance in addition to the breath analysis. **State v. Cole**, 466.

Driving while impaired—officer’s subjective opinion—In a driving while impaired prosecution, an officer’s testimony that he would have given defendant a ride home if he tested low enough did not establish that the officer lacked sufficient information to believe that defendant was appreciably impaired. The officer’s subjective opinion is not material; the search is valid when the objective facts known to the officer meet the required standard. **State v. Cole**, 466.

MOTOR VEHICLES—Continued

Driving while impaired—sentencing—prior conviction—The trial court did not err by concluding that defendant’s prior driving while impaired conviction constituted a “prior conviction,” even though the conviction was on appeal, and finding a grossly aggravating factor based on that conviction. There is no statutory language limiting the definition of prior conviction to a “final” conviction or only to those not challenged on appeal. The plain and unambiguous language of N.C.G.S. § 20-179(c)(1)(a) defines a prior conviction merely as a conviction that occurred within seven years of the subsequent offense. **State v. Cole, 466.**

Driving while impaired—superior court—jurisdiction—dismissal of district court charge—functional equivalent—The superior court correctly denied defendant’s motion to dismiss an indictment for lack of jurisdiction where defendant was initially charged with misdemeanor driving while impaired, the State began a superior court proceeding by presentment and indictment, and the district court action was never formally dismissed. Although the district court has exclusive jurisdiction for the trial of misdemeanors, the superior court may obtain jurisdiction by initiating a presentment. To the extent that concurrent jurisdiction exists, the first court to exercise jurisdiction obtains jurisdiction to the exclusion of the other. Here, there was no evidence that the district court exercised its jurisdiction after concurrent jurisdiction existed, and the State made clear its intent to abandon the district court action. This served as the functional equivalent of a dismissal. **State v. Cole, 466.**

Speeding to elude arrest—property damage exceeding \$1,000—sufficiency of evidence—In a prosecution for speeding to elude arrest, there was sufficient evidence to support the essential element of property damage exceeding \$1,000 where defendant drove through a house as he wrecked the car. N.C.G.S. § 20-141.5 does not specifically define how to determine the value of the “property damage”; it could be either the cost to repair the damage or the decrease in the value of the damaged property as a whole. Although a police officer did not testify as an expert, the jury could bring to the question their common sense and their knowledge gained from their experiences of everyday life. **State v. Gorham, 483.**

PARTIES

Standing—real party in interest—condo association—suing on behalf of constituent members—In an action to determine the rights and duties bestowed by an easement, plaintiff condo association qualified as a real party in interest to assert a claim that defendant neighboring homeowners association wrongfully installed a gate card facility on a lot owned by the condo association members in common. The condo association had standing to sue in its own name on behalf of its members where the condo owners were equally affected by the placement of the keypad on their commonly owned lot. **Ocean Point Unit Owners Ass’n, Inc. v. Ocean Isle W. Homeowners Ass’n, Inc., 603.**

PLEADINGS

Amended complaints—statute of limitations—relation back—The trial court did not err by denying defendant’s Rule 12(b)(6) motion to dismiss which was based on the argument that the amended complaint would have violated the statute of limitations. It was held elsewhere in the opinion that the amendment properly related back to the original complaint and complied with the statute of limitations. **QUB Studios, LLC v. Marsh, 251.**

PLEADINGS—Continued

Judgment on the pleadings—judicial notice of prior action—In an action based on a summary judgment in a prior action, the trial court's judicial notice of the prior proceeding did not convert the current proceeding for judgment on the pleadings into one for summary judgment. **QUB Studios, LLC v. Marsh, 251.**

Judgment on the pleadings—prior summary judgment order—The trial court did not err by granting plaintiffs' motion for judgment on the pleadings in a matter based on a summary judgment in a prior proceeding. Defendant's assertions of affirmative defenses constituted impermissible collateral attacks on the summary judgment order in the prior action. **QUB Studios, LLC v. Marsh, 251.**

Notice—identity of subject matter—sufficiency of allegations—In an action to determine the rights and duties bestowed by an easement, plaintiff condo association's allegations were sufficient to put defendant neighboring homeowners association on notice regarding the identity of the card gate facility plaintiff alleged was wrongfully installed by defendant. **Ocean Point Unit Owners Ass'n, Inc. v. Ocean Isle W. Homeowners Ass'n, Inc., 603.**

Rule 9(j) certification—motion to amend—motions to dismiss—In a medical malpractice case, the trial court erred by denying plaintiff's motion to amend her complaint to include the proper Rule 9(j) certification and by dismissing plaintiff's claims. Plaintiff inadvertently used certification language from a prior version of Rule 9(j), and her motion to amend was accompanied by affidavits averring that her experts' review occurred prior to the filing of the original complaint. **Locklear v. Cummings, 588.**

POLICE OFFICERS

Resisting a public officer—sufficiency of the evidence—There was sufficient evidence of resisting a public officer where defendant became upset and began cursing in a driver's license office and a uniformed Division of Motor Vehicles inspector, who had arrest authority, attempted to escort her out of the office. Defendant argued that there was insufficient evidence that the inspector was discharging a duty of his office, but the evidence showed that the inspector discharged a duty falling within the scope of N.C.G.S. § 20-49 and N.C.G.S. § 20-49.1 and that defendant's conduct satisfied each element of resisting arrest. **State v. Nickens, 353.**

POSSESSION OF STOLEN PROPERTY

Constructive possession—drugs and stolen debit card—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss felony charges of possession of stolen goods and possession of marijuana. Both a stolen debit card and marijuana were found close to defendant and his car, and defendant and those with whom he acted in concert had the ability to exercise control over the contraband. **State v. Guy, 313.**

PROCESS AND SERVICE

Notice of special proceeding—affidavit of service—presumption of valid service—In a special proceeding to sell property to repay the debts of an estate, an affidavit of service meeting the requirements of N.C.G.S. § 1-75.10 sufficiently showed proof of service to provide notice to the holder of a deed of trust on the subject property. The holder of the deed of trust failed to rebut the presumption of

PROCESS AND SERVICE—Continued

valid service arising from the affidavit, and admitted it had been served and received prior notice of the special proceeding, despite not being named in the caption of the petition. **Nationstar Mortg. LLC v. Curry, 218.**

PUBLIC OFFICERS AND EMPLOYEES

Career employees—dismissal—just cause—grossly inefficient job performance—An administrative law judge’s findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of grossly inefficient job performance. The employee performed her job according to the directions given by her management group during the incident that gave rise to her dismissal. **Rouse v. Forsyth Cty. Dep’t of Soc. Servs., 262.**

Career employees—dismissal—just cause—unacceptable personal conduct—An administrative law judge’s findings of fact were supported by substantial evidence and supported the conclusion that the dismissal of a career county social services employee could not be upheld on the ground of unacceptable personal conduct. There was no just cause for dismissal where the employee had a long, discipline-free career with respondent-employer, had a record of good job performance, and performed her job as directed by her management group. **Rouse v. Forsyth Cty. Dep’t of Soc. Servs., 262.**

Career employees—dismissal—procedural due process—notice of potential punishment—A county department of social services (DSS) violated a career DSS employee’s procedural due process rights by failing to provide her with sufficient notice of the potential punishment to be determined during a pre-disciplinary conference and then subsequently dismissing her. The notice stated that the punishment being considered was dismissal from the Family and Children’s *Division* of the county DSS agency, while the actual punishment being considered was dismissal from the county DSS agency. **Rouse v. Forsyth Cty. Dep’t of Soc. Servs., 262.**

Career employees—wrongful termination—back pay—attorney fees—An administrative law judge lacked authority to award back pay and attorney fees to a career local social services employee who had been wrongfully terminated from employment. **Rouse v. Forsyth Cty. Dep’t of Soc. Servs., 262.**

RAPE

Sufficiency of evidence—number of counts—The evidence was sufficient to support defendant’s conviction for 33 counts of statutory rape where the victim testified that defendant had sexual intercourse with her at least once per week for 71 weeks. **State v. Hill, 113.**

ROBBERY

Acting in concert—sufficiency of the evidence—The trial court did not err by denying defendant’s motion to dismiss a charge of robbery with a dangerous weapon where, even though defendant was not identified at the scene of the crime, the jury could have made reasonable inferences from the evidence that defendant acted in concert to commit the robbery. **State v. Guy, 313.**

SEARCH AND SEIZURE

Domestic violence visit—evidence discovered—warrant obtained—The trial court did not err by denying defendant's motion to suppress evidence from an armed robbery discovered in a search of his home pursuant to a warrant obtained after officers saw the evidence during a domestic violence visit. Defendant did not object to officers entering his home; there was no merit to defendant's contention that the officers' entry into his home to investigate domestic violence was a mere subterfuge; and the officers did not participate in a warrantless search during the domestic violence visit because defendant's girlfriend merely showed the officers items she had discovered before the officers arrived. **State v. Mitchell, 344.**

Fruit of the poisonous tree—traffic stop—roadside breath test—subsequent intoxilyzer test—There was no plain error in a prosecution for driving while impaired (DWI) where the trial court admitted evidence discovered after an allegedly unlawfully compelled roadside breath test. The trial court did not address whether subsequent evidence was obtained as a result of the roadside test, but held the initial stop was justified by defendant's license plate not being illuminated. The superior court's findings were sufficient to justify the initial traffic stop and supported a conclusion that the officer had probable cause to arrest defendant for DWI, which justified the later intoxilyzer test. **State v. Cole, 466.**

Probable cause—search incident to arrest—open container—expired license—In a prosecution for possession of cocaine and driving without a license, the trial court properly denied defendant's motion to suppress drugs found on his person during a traffic stop, based upon sufficient evidence and findings of fact that after defendant was stopped for running a red light, the law enforcement officer observed an open container of alcohol in the vehicle and discovered that defendant was driving without a valid driver's license. Although the trial court ruled that the officer had a reasonable suspicion which justified extending the traffic stop, the officer did not need reasonable suspicion where probable cause arose during the stop to search defendant's person and arrest him. **State v. Jackson, 329.**

Traffic stop—extension—ordinary inquiries incident to stop—A traffic stop of defendant was not unlawfully extended where an officer was investigating whether defendant's vehicle was being operated without a valid license, made ordinary inquiries incident to the traffic stop, and acquired reasonable suspicion that defendant was operating the vehicle while impaired. **State v. Myers McNeil, 497.**

SENTENCING

Consolidated sentence—judgment arrested—remanded for resentencing—Defendant's consolidated sentence for misdemeanor possession of stolen goods and possession of marijuana was remanded where the judgment for possession of stolen goods was arrested. A defendant with this prior record level can only be sentenced to a maximum of 20 days in custody and the possession of marijuana sentence was for 60 days. **State v. Guy, 313.**

Prior record level—possession of drug paraphernalia—pre-2014 conviction—The State failed to carry its burden of proving at defendant's sentencing hearing that his pre-2014 conviction for possession of drug paraphernalia was a Class 1 misdemeanor counting as one point toward defendant's prior record level. Because the General Assembly in 2014 distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor (no points), from possession of paraphernalia related to other drugs, a Class 1 misdemeanor (one point), the State had to prove that the

SENTENCING—Continued

pre-2014 conviction was for non-marijuana paraphernalia in order to assign a point for that conviction. The matter was remanded for resentencing at the appropriate prior record level. **State v. McNeil, 340.**

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—refiled complaint—relation back—A negligence claim against a hospital arising from the emergency room treatment of a decedent was barred by the statute of limitations, regardless of whether plaintiff pleaded wrongful death in addition to medical malpractice, where both limitations periods expired prior to plaintiff refiled a voluntarily dismissed claim. Relation-back applies only to those claims in the second complaint that were included in the voluntarily dismissed complaint. Medical or clinical negligence and administrative negligence are distinct claims and any administrative negligence claim in the second complaint did not relate back because there were no allegations of breaches of administrative duties in the first complaint. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

TERMINATION OF PARENTAL RIGHTS

Grounds—adequacy of notice—The trial court erred by terminating a father's parental rights on the ground of failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(5)) where the termination petition failed to provide adequate notice to the father that this ground would be at issue in the termination hearing. **In re L.S., 565.**

Grounds—failure to legitimate—sufficiency of evidence—The trial court erred by terminating a father's parental rights on the ground of failure to legitimate (N.C.G.S. § 7B-1111(a)(5)) where no evidence in the record supported a finding that the children were born out of wedlock or that the father had failed to legitimize the children. **In re L.S., 565.**

No-merit brief—mandatory service requirement—frustration of counsel—no issues on appeal—Where the father's counsel in a termination of parental rights case filed a no-merit brief but was unable to send a copy of the required documents to the father pursuant to Rule of Appellate Procedure 3.1(d) because the father refused to divulge his address, the Court of Appeals invoked Rule of Appellate Procedure 2 to suspend the mandatory service requirement of Rule 3.1(d) in light of appellate counsel's exhaustive efforts to locate the father and in the interest of expediting a decision in the public interest. The Court dismissed the father's appeal pursuant to *In re L.V.*, 260 N.C. App. 201 (2018), because the father failed to argue or preserve any issues for review. **In re D.A., 71.**

No-merit brief—no issues on appeal—independent review—Where the mother's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record, because the mother failed to argue or preserve any issues for review. *See In re L.V.*, 260 N.C. App. 201 (2018). **In re D.A., 71.**

No-merit brief—Rule 3.1(d)—independent review—Where a mother's parental rights were terminated on the grounds of neglect and dependency, her attorney filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d), and the mother did

TERMINATION OF PARENTAL RIGHTS—Continued

not file a separate brief, the Court of Appeals elected to conduct an independent review of the record in its discretion and concluded that any arguments the mother might advance on appeal were frivolous. **In re I.B., 402.**

No-merit brief—Rule 3.1(d)—independent review—not required—The Court of Appeals reaffirmed its holding that Rule of Appellate Procedure 3.1(d) does not require the appellate court to conduct an independent review of the record in termination of parental rights cases in which the parent's attorney has filed a no-merit brief and the parent has not filed a separate brief. The clear and unambiguous text of Rule 3.1(d) does not require such review, and the exclusion of such language must be presumed to be purposeful. **In re I.B., 402.**

TRESPASS

Implied consent—motion to dismiss—The trial court properly denied defendant's motion to dismiss a charge of second-degree trespass where defendant refused to leave a driver's license office and became belligerent with employees. A Division of Motor Vehicles inspector revoked defendant's implied consent when he told defendant to leave the office. **State v. Nickens, 353.**

Second-degree—jury instructions—extra words included—The trial court did not err in a second-degree trespass prosecution where the indictment alleged that a Division of Motor Vehicles inspector was a "person in charge" of the premises but the instruction included the additional words "a lawful occupant, or another authorized person." The list of people who can tell a defendant not to remain on the premises in the applicable statute was merely a disjunctive list of descriptors, not additional theories. Substantial differences in the extra descriptors used in this case could not be determined from the plain words of the statute. **State v. Nickens, 353.**

UNFAIR TRADE PRACTICES

Learned profession exception—physician claim against hospital—employment contract—In an issue of first impression, the Court of Appeals held that a defendant physician's claim that a hospital made false representations to induce him to enter an employment contract involved a business arrangement, not professional services rendered, and was therefore not exempt from the Unfair and Deceptive Trade Practices Act (UDTP) under the learned profession exception. The trial court erred by granting directed verdict dismissing defendant's UDTP claim. **Hamlet H.M.A., LLC v. Hernandez, 51.**

WATERS AND ADJOINING LANDS

Riparian rights—non-commercial fishing—granted to predecessor in title—Defendant landowner had the right to fish in plaintiff's lake based on the riparian right originally granted to a predecessor in title in an earlier deed. **Everett's Lake Corp. v. Dye, 46.**

WORKERS' COMPENSATION

Opinion and award—medical information—privacy concerns—constitutional analysis—The Court of Appeals found no constitutional privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Given the importance

WORKERS' COMPENSATION—Continued

of maintaining open proceedings in this state's worker's compensation system and the legislature's determination that these documents are public records, plaintiff's privacy interests did not outweigh the public interests at stake, and the Industrial Commission was not required to seal his file. **Mastanduno v. Nat'l Freight Indus.**, 77.

Opinion and award—medical information—privacy concerns—statutory analysis—The Court of Appeals found no federal or state statutory privacy right allowing a worker's compensation claimant to shield from public view medical information contained in an Opinion and Award, which is a public record. Pursuant to N.C.G.S. § 97-92(b), medical records and documents other than Awards are already protected from public disclosure; other statutes cited by plaintiff that protect an individual's health information either did not apply or had express exemptions for worker's compensation or other judicial proceedings. **Mastanduno v. Nat'l Freight Indus.**, 77.

ZONING

Conditional use permit—denied by city council—de novo review by superior court—In a conditional use case involving the building of a hotel, the superior court review of a city council decision to deny the permit appropriately applied de novo review to determine the initial legal issue of whether petitioner had presented competent, material, and substantial evidence. The superior court's order showed that it did not weigh the evidence. **PHG Asheville, LLC v. City of Asheville**, 231.

Conditional use permit—hotel—harmony with neighborhood—Petitioner's "use or development" of a property for a hotel established a prima facie case of harmony with the area or neighborhood under the city's Uniform Development Ordinance (UDO). Although the city contended that "use" should be distinguished from "development" in the UDO, petitioner's expert witness established a prima facie case of harmony of the use and development within the area. **PHG Asheville, LLC v. City of Asheville**, 231.

Conditional use permit—hotel—traffic—Although the city argued in a zoning action involving a conditional use permit for a hotel that petitioner did not establish a prima facie case that the proposed hotel would not cause undue traffic congestion or create a traffic hazard, no competent, material, and substantial evidence was presented to refute an analysis from petitioner's expert traffic engineer. The speculations of lay members of the public and unsubstantiated opinions of city council members did not constitute competent evidence to rebut the expert. **PHG Asheville, LLC v. City of Asheville**, 231.

Conditional use permit—prima facie entitlement—impact on adjoining property—material evidence—A petitioner seeking a conditional use permit for a hotel presented material evidence to the city council about the hotel's impact on adjoining property. Petitioner's expert testimony had a logical connection to whether the project would impair the value of adjoining property and the city council's lay notion that the expert's analysis was based upon an inadequate methodology did not constitute competent rebuttal evidence. **PHG Asheville, LLC v. City of Asheville**, 231.

Conditional use permit—city council decision—findings—judicial review—individual findings not specifically addressed—The trial court did not misapply the standard of review in a zoning case involving a conditional use permit for a hotel where it did not specifically address each of the city council's 44 findings because no competent, material, and substantial evidence was presented to rebut petitioner's

ZONING—Continued

prima facie showing. The council's 44 findings were unnecessary, improper, and irrelevant. **PHG Asheville, LLC v. City of Asheville, 231.**

Land use ordinance—high-impact land use—asphalt plant—definition of “educational facility”—An application for construction of an asphalt plant was improperly denied because of its proposed location within 1,500 feet of a central administrative office for the county's schools. Based on the plain language of the ordinance, the administrative office did not meet the definition of “educational facility” and thus the asphalt plant was not prohibited at that location. **Appalachian Materials, LLC v. Watauga Cty., 156.**

