NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 265

16 APRIL 2019

4 JUNE 2019

RALEIGH
2020

CITE THIS VOLUME

265 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY

PHIL BERGER, JR.
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
REUBEN F. YOUNG
CHRISTOPHER BROOK

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG

PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Eugene H. Soar
Michael W. Rodgers
Lauren M. Tierney
Carolina Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DUKE ENERGY PROGRESS, INC., PLAINTIFF
v.
JOHN M. KANE; KATHERINE K. KANE F/K/A KATHERINE KNOTT;
DAVID E. TYSON; TREVA W. TYSON; WILLIAM BATEHAM NICHOLSON, JR.;
AND LAUREN ELIZABETH STANGE, DEFENDANTS

No. COA18-239

Filed 16 April 2019

1. Statutes of Limitation and Repose—easement—proposed tree removal—real property under color of title—section 1-38—mootness

In an action by a power company to enforce an easement agreement to allow the removal of a redwood tree that encroached on high-voltage power lines, the property owners' claim that the action was barred by the seven-year statute of limitations (pursuant to N.C.G.S. § 1-38) was mooted by the owners' acknowledgement that the power company forever held the easement right and had the right to maintain its power lines. Since the power company held its easement without dispute, there was no color of title that would invoke the statute of limitation in section 1-38.

2. Easements—residential property—power lines—tree removal—express language of easement agreement

In an action by a power company to enforce an easement agreement to allow the removal of a redwood tree that encroached on high-voltage power lines, the express language of the easement unambiguously gave the power company the right to clear any interferences, subject to reasonableness and sufficient justification. The trial court's unchallenged findings and conclusions established that

the removal of the tree was necessary to prevent irreparable injury to the power lines and that the entry onto the defendants' land was conducted in a reasonable manner.

Judge DIETZ concurring with separate opinion.

Appeal by defendants from order entered 13 November 2017 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 30 October 2018.

Parker Poe Adams & Bernstein LLP, by Jamie S. Schwedler and Michael J. Crook, for plaintiff-appellee.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, for defendant-appellants.

BRYANT, Judge.

Where plaintiff had a right to enter defendants' properties pursuant to a valid easement, we affirm the trial court's ruling of summary judgment in favor of plaintiff.

In 1911, the predecessor to plaintiff Duke Energy Progress, Inc., recorded with the Wake County Register of Deeds, an easement over a 50-foot strip of land for the purpose of maintaining high-voltage power lines. The easement granted the right to maintain, operate, and "keep in right" the easement (hereinafter "Easement Agreement"). In addition, the Easement Agreement grants plaintiff "the right to clear and keep cleared, at least fifty (50) feet of the said right of way, and the perpetual right to maintain, operate[,] and keep in repair the line . . . ." Over the next century, as the area developed, the property remained burdened by the easement.

Defendants David E. Tyson and Treva W. Tyson ("the Tysons") purchased their property in 1995. Defendants John M. Kane and Katherine K. Kane ("the Kanes") purchased their property in 2013. Both properties were subject to the recorded easement, which was in their chain of title and over which the power lines were visible. In 2017, the Kanes sold their property to defendants William Bateman Nicholson, Jr., and Lauren Elizabeth Stange (together "the Kane Successors"), who were made parties to the lawsuit. The Kanes remained named parties as permitted by Rule 25(d). We refer to all of the above, whose properties were subject to the recorded easement, collectively, as "defendants."

In late December 2014, plaintiff conducted routine maintenance of the power line and discovered two trees inside the 50-foot radius: a 44-foot tall willow tree on the Kanes' property and a 57-foot tall dawn redwood tree on the Tysons' property. The power line was 10 feet above the willow tree and 6 feet above the redwood tree. Due to their height, species, character, and proximity, plaintiff determined it was necessary to remove both trees because the power lines were susceptible to snag and could interfere with providing electricity to its customers. Plaintiff notified defendants of its concerns that necessitated its intent to remove the trees and requested access to defendants' properties. Defendants denied plaintiff access.

On 18 May 2015, plaintiff filed a complaint for declaratory relief to enforce the Easement Agreement—specifically, for plaintiff to enter the properties and remove the trees. Plaintiff also sought a preliminary injunction to prevent defendants from interfering with plaintiff's entry onto their properties. On 4 June 2015, plaintiff's motion for preliminary injunction was granted in part as to the redwood tree and denied in part as to the willow tree. The trial court found that while the redwood tree presented eminent risk of damage to the power line, the willow tree was not likely to cause damage.

On 3 March 2016, plaintiff filed an amended complaint. In response, defendants filed an answer and asserted counterclaims including a color of title counterclaim, to wit: that "[t]he easement holder[,] under the terms of the easement agreement[,] abandoned the easement on or about the year 1914 by failing to occupy and use the easement-bound property." Plaintiff filed a motion to dismiss and reply to the counterclaims. By order dated 17 October 2016, the trial court dismissed defendants' color of title claim under the Marketable Title Act.

On 17 April 2017, plaintiff moved for summary judgment on all claims and counterclaims presented by defendants. Plaintiff requested the motion be granted on grounds that:

> 1. [Plaintiff] is entitled to judgment as a matter of law on its claim for Declaratory Judgment because the plain and unambiguous language of the easement agreement allows [plaintiff] to remove both trees at issue in this lawsuit;
>
> 2. [Plaintiff's] claim is not barred by the statute of limitations because [plaintiff] asserted its claim to remove an encroachment within the applicable twenty-year limitations periods; and

> 3. Defendants' counterclaims for a "prescriptive easement" and an "adverse easement" over their own property fails because, to the extent such claims exist under North Carolina law, there is no evidence of [d]efendants' hostile use of the easement area throughout the twenty-year prescriptive period.

Defendants also moved for summary judgment asserting plaintiff's action was barred by the statute of limitations. The cross-motions were heard before the Honorable R. Allen Baddour, Judge presiding, who granted plaintiff's motion and denied defendants' motion on 6 November 2017. Defendants appeal.

On appeal, defendants challenge the trial court's grant of summary judgment in favor of plaintiff contending that the Easement Agreement is ambiguous and presents a genuine issue of material fact.

"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) (citation and quotation marks omitted).

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 quotation marks 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 issue of material fact exists for trial or must provide an excuse for not doing so.

Id.

I. Statute of Limitations

[1] First, defendants assert that plaintiff's claims are procedurally barred by the statute of limitations as both the willow tree and the redwood tree had been planted outside the statute of limitations. Defendants concede the twenty-year statute of limitations applies to the willow tree, but argue that the willow tree has been planted for over thirty years–outside the period for plaintiff to assert claims. We note that since defendants filed for appellate review of the trial court's order, the willow tree has been felled. As the redwood tree remains in dispute, we will address defendants' issues as to the redwood tree only.

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law and summary judgment is appropriate.

Pembee Mfg. Corp. v. Cape Fear Const. Co., 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (internal citations omitted).

An easement, while considered to be an incorporeal hereditament, is also *real property* because it "implies an interest in the land" that grants a degree of control over a specified portion of land. *Duke Energy Carolinas, LLC v. Gray*, 369 N.C. 1, 6, 789 S.E.2d 445, 448 (2016). Our Supreme Court has stated an encroachment on an easement is considered an injury to that interest in real property and therefore, subject to N.C. Gen. Stat. § 1-40 (2017), which governs injuries to real property. *See id.* Specifically, where a plaintiff's claim does not allege damages for any injury to an easement but instead seeks to regain control over its use of the easement, such claims are subject to the twenty-year statute of limitations in N.C.G.S. § 1-40. *Id.*

Defendants, however, argue plaintiff's claims are subject to a shorter statute of limitations because color of title exists. Specifically, defendants argue N.C. Gen. Stat. § 1-38 governs because plaintiff's title is defective–leaving ambiguity as to defendants' right to grow trees at their residences. As the redwood tree has been planted for over seven years, defendants argue plaintiff is barred from asserting claims. For the following reasons, we overrule defendants' argument on appeal.

Under N.C. Gen. Stat. § 1-38, no action shall be sustained against a possessor of real property that is known and visible under color of title for seven years. N.C.G.S. § 1-38 (2017). "Color of title is bestowed

by an instrument that purports to convey title to land but *fails to do so*[.]" *White v. Farabee*, 212 N.C. App. 126, 132, 713 S.E.2d 4, 9 (2011) (emphasis added). "When the description in a deed embraces not only land owned by the grantor but also *contiguous land which he does not own*, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own." *Price v. Tomrich Corp.*, 275 N.C. 385, 391, 167 S.E.2d 766, 770 (1969) (emphasis added).

Defendants' express statement in their brief contradicts their position that color of title exists: "[t]here is little dispute that [plaintiff], the current 'heirs, successors, and assigns', 'forever' holds this easement right for its stated purposes. There is little dispute that [plaintiff] has the right to maintain the lines." Accordingly, defendants mooted their statute of limitations claim based on color of title where they acknowledge plaintiff "forever holds [the] easement right" and "has the right to maintain the lines." Defendants' argument is overruled.

II. Scope of Easement Agreement

[2] Next, defendants argue the trial court erred in failing to determine the scope of the easement which would cause the "least injury" to defendants' residential property. We disagree.

"[T]he interpretation of documents, including deeds and wills, is generally an issue of law unless a document is ambiguous on its face and, as such, is also reviewable *de novo*." *Simmons v. Waddell*, 241 N.C. App. 512, 518–19, 775 S.E.2d 661, 670 (2015). "When courts are called upon to interpret deeds or other writings, they seek to ascertain the intent of the parties, and, when ascertained, that intent becomes the deed, will, or contract." *Id.* at 520, 775 S.E.2d at 671 (citation and quotation marks omitted).

"An express easement in a deed, as in the instant case, is, of course, a contract." *Id.* (citation and quotation marks omitted).

> A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court. If the agreement is ambiguous, however, interpretation of the contract is a matter for the jury. Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties.

Id. (internal citations and quotation marks omitted).

Here, the Easement Agreement delineates plaintiff's right to enter on the properties which also includes the right to clear any interferences affecting the easement:

> And the [grantors] bargain, sell, grant and convey unto [grantee] . . . the right to clear and keep cleared, at least fifty (50) feet of the [easement], and the perpetual right to maintain, operate, and keep in repair the [power] line or lines[.]" And the [grantee], his heirs, successors and assigns shall have the right to cut and remove on either side of the [easement] any timber, trees, overhanging branches, or other obstructions, which do or may endanger the safety or interfere with the use of the poles, towers, or fixtures or wires thereto attached[.]

Also within the Easement Agreement was a condition placed upon plaintiff's clearing right that stated, plaintiff "entering upon the [easement] over the land of the [grantors], shall do so at such place and manner as will do *the least injury* to the lands and crops of the [grantors].

On its face, there is little ambiguity in the language of the Easement Agreement and the circumstances surrounding its creation that the grantors intended for the grantees—now plaintiff—to access the land in order to "construct, operate[,] and maintain [the easement] for the purpose of transmitting electric or other power or telephone or telegraph lines[.]" The Easement Agreement expressly gives plaintiff a clear, unequivocal right to enter the land and clear any interferences consistent with the easement right. However, the condition noted above indicates that plaintiff's right is not absolute; and thereby, the removal must be justified and reasonable. *See Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) ("When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit.").

In reviewing the record, we note the trial court's preliminary injunction order set forth evidence presented by plaintiff as to the redwood tree's interference with the easement and need to remove the tree:

> 3. A fifty-seven foot tall dawn redwood tree [] stands on [the Tysons' property] and also stands within [plaintiff's] easement. . . . The [redwood tree] reaches above the power line and is only six feet away from the power line horizontally. The [trial c]ourt finds as a fact

> that the [redwood tree] poses an eminent risk of contact with and damage to the power line.
>
> 4. The only safe way for [plaintiff] to remove the [redwood tree] is to come upon [the Tysons' property] and to station machinery, equipment, and personnel within the easement.

Additionally, the trial court in its conclusion of law stated:

> 4. [Plaintiff] has also shown that the issuance of a [p]reliminary [i]njunction is *necessary to prevent an irreparable injury, namely a widespread power outrage that could impact thousands of Wake County citizens.*

(emphasis added). The trial court's findings of fact and conclusions of law are not disputed by either party. Therefore, it remains a matter of record that the removal of the redwood tree was necessary to prevent irreparable injury to plaintiff's easement. Additionally, the entry onto the Tysons' property was within reason and the least injurious.

Alternatively, defendants have asked this Court to interpret broadly the condition within the Easement Agreement to mean that plaintiff is limited to what it can do within the easement. However, where the Easement Agreement is clear as to plaintiff's rights to the easement, we decline to impose further restrictions on that right. *See Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 300, 524 S.E.2d 558, 563 (2000) ("[T]he courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." (citation omitted)).

Accordingly, the trial court's ruling is

AFFIRMED.

Judge INMAN concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring in the judgment.

The majority correctly holds that the twenty-year limitations period in N.C. Gen. Stat. § 1-40 applies in this case, not the seven-year limitations period for possession under color of title in N.C. Gen. Stat. § 1-38. Color

of title requires "a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of conveyance used." *McManus v. Kluttz*, 165 N.C. App. 564, 568, 599 S.E.2d 438, 443 (2004). So in this case, the seven-year limitations period would apply only if Defendants could show that any of them acquired the property under a deed that purported to grant title free of Duke Energy's utility easement, although that easement in fact remained. Defendants have not made that showing; indeed, they concede that Duke Energy holds an easement across their property, they merely dispute the scope of that easement.

Likewise, the majority correctly holds that the easement is unambiguous and permits Duke Energy to clear trees within the path of the easement. The terms of the easement give Duke Energy "the right to clear and keep cleared, at least fifty (50) feet of the said right of way." There is no dispute that the redwood tree is within this fifty-foot right of way. Thus, as a matter of law, the easement permits Duke Energy to clear the redwood tree.

Defendants contend that Duke Energy's absolute authority to cut down any trees within the right of way is curbed by two separate provisions in the easement. The first states that Duke Energy "shall have the right to cut and remove *on either side* of the said right of way any timber, trees, overhanging branches, or other obstructions, which do or may endanger the safety or interfere with" the utility lines. This provision addresses trees *not* within the right of way, but whose branches extend into it. That is not the redwood tree in this case; that tree itself is inside the right of way.

The second provision states that Duke Energy "in entering upon said right of way . . . shall do so at such place and manner as will do the least injury to the lands." This provision protects *other* property that the company may encounter as it enters the easement to clear it; it does not limit the company's "right to clear and keep cleared" the right of way by cutting down any trees that are within it.

Because the language of the easement unambiguously permits Duke Energy to remove the redwood tree, I concur in the majority's opinion.

IN THE MATTER OF H.N.D. & L.N.A-D.

No. COA18-958

Filed 16 April 2019

1. Termination of Parental Rights—grounds for termination—dependency—sufficiency of evidence

The trial court properly terminated a mother's parental rights to her children based on dependency where there existed clear, cogent, and convincing evidence to support the court's findings of fact detailing (1) the mother's inability to provide care or supervision for her children—based on a prolonged history of domestic violence issues in the home and the mother's failure to engage in recommended services—and (2) the likelihood of that inability to continue into the foreseeable future.

2. Appeal and Error—mootness—permanency planning order—ceasing reunification efforts—subsequent termination of parental rights—independent basis

A mother's appeal from a permanency planning order ceasing efforts to reunify her with her children was rendered moot by an order terminating her parental rights where the latter order contained findings of fact and conclusions of law independent of the permanency planning order.

Appeal by Respondent-Appellant Mother from orders entered 28 March 2017 and 27 June 2018 by Judge Cheri Siler-Mack in Cumberland County District Court. Heard in the Court of Appeals 27 February 2019.

Elizabeth Kennedy-Gurnee for Petitioner-Appellee Cumberland County Department of Social Services.

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

Stephen M. Schoeberle for Guardian ad Litem.

COLLINS, Judge.

Respondent-Appellant Mother (Mother) appeals from orders ceasing reunification efforts with and terminating her parental rights to her minor children L.N.A-D. (Lee) and H.N.D. (Hank)[1] (collectively, the

1. Pseudonyms are used to protect the minors' identities.

Children). She contends that the trial court erred by making various findings of fact and conclusions of law in both orders. We affirm in part and dismiss in part.

I. Background

On 24 February 2014, Petitioner-Appellee Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging that Lee was neglected and dependent. The DSS petition alleged the following: (1) Mother had a history of domestic violence with Lee's father Jerry Dennings; (2) Mother and Dennings had a physical altercation on or about 27 December 2013 in which Dennings hit Mother in Lee's presence and forced her out of the house threatening to kill her if she took Lee, after which Mother left Lee with Dennings; (3) Mother stated that she attempted to retrieve Lee from the house on 30 December 2013, but could not do so because Dennings fired a gun at her; (4) Dennings was involved in a physical altercation with another woman involving a gun in Lee's presence on 17 February 2014; (5) the police came to Dennings' house on 17 February 2014, Dennings fled as a result leaving Lee unsupervised, and Mother retrieved Lee the same day; (6) starting on 17 February 2014, Mother told social workers she had moved with Lee into the house of another man with whom she had children, and with whom she had a similar history of domestic violence, including multiple physical altercations in the presence of Mother's children.

DSS obtained nonsecure custody of Lee on 24 February 2014. On 5 May 2014, pursuant to an agreement between DSS and Mother, the trial court adjudicated Lee dependent because of domestic violence issues, and on 26 June 2014 a disposition order was entered. On 18 November 2014, an initial permanency planning hearing took place, and the trial court established a plan of reunification with Mother. In its permanency planning order, the trial court found that Mother and Dennings continued to reside together as a couple and that they had not appropriately addressed their domestic violence issues. The trial court thus concluded that it was not possible for Lee to return to his parents' custody because the conditions which had led to his removal had not yet been alleviated. Subsequent permanency planning orders continued with a plan of reunification.

Following Hank's birth on 3 April 2015, DSS filed a petition alleging that Hank was neglected and dependent. The 17 April 2015 petition described the findings from the prior order adjudicating Lee dependent, and alleged continuing issues between Mother and Dennings, including a 17 April 2015 argument in which Dennings threatened to break Mother's

neck. DSS obtained nonsecure custody of Hank on 17 April 2015. At a 23 September 2015 hearing, DSS and Mother stipulated to Hank's dependent status because of domestic violence issues. On 24 May 2014, the trial court entered an adjudication and disposition order adjudicating Hank dependent.

By written order entered 24 March 2017, the trial court ordered the primary permanent plans for both Lee and Hank to be adoption, and no longer reunification with Mother. In so doing, the trial court found a "long and enduring" history of domestic violence between Mother and Dennings, including an incident in August 2016 in which Dennings was arrested for assaulting Mother with a deadly weapon and Mother sought a restraining order against Dennings. The orders were entered on 28 March 2017, and Mother timely preserved her right to appeal them on 30 March 2017. Subsequent permanency planning orders continued with the plan of adoption.

On 19 September 2017, DSS filed a petition to terminate Mother's rights to the Children. Hearings took place in February and March 2017, after which the trial court entered an order terminating Mother's parental rights on 27 June 2018. Mother timely noticed her appeal of the permanency planning order ceasing reunification efforts and the order terminating her parental rights on 18 July 2018.

II. Appellate Jurisdiction

This Court has jurisdiction to hear Mother's appeal under N.C. Gen. Stat. § 7B-1001(a)(5) (2017)[2] and Mother is a proper party under N.C. Gen. Stat. § 7B-1002(4) (2017).

III. Issues on Appeal

Mother raised the following issues on appeal: (1) whether the trial court erred in ceasing reunification efforts with Mother; and (2) whether the trial court erred in terminating Mother's parental rights. Because we conclude that the trial court did not err regarding the termination of parental rights, a conclusion which renders Mother's appeal of the cessation of reunification efforts moot and obviates analysis thereof, we will address the termination of parental rights first.

---

2. N.C. Gen. Stat. § 7B-1001 was amended effective 1 January 2019 such that appeals involving orders terminating parental rights made after that date now lie directly to our Supreme Court. 2017 N.C. Sess. Laws ch. 41, § 8.(a); *compare* N.C. Gen. Stat. § 7B-1001(a) (2017) (jurisdiction with Court of Appeals prior to 1 January 2019), *with* N.C. Gen. Stat. § 7B-1001(a1) (2017) (jurisdiction with Supreme Court from 1 January 2019 onward). Since Mother's appeal was noticed prior to 1 January 2019, we have jurisdiction to hear Mother's appeal.

IV. Analysis

a. Order Terminating Parental Rights

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). In the initial adjudication phase, the petitioner has the burden to "show by clear, cogent and convincing evidence that a statutory ground to terminate exists" under N.C. Gen. Stat. § 7B-1111 (2017). *Id.* (citation omitted). If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004). If the trial court so determines, it may terminate the parent's rights in its discretion. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

In reviewing a trial court's order to terminate parental rights, this Court must first determine, with respect to the adjudication phase, whether the "findings of fact are supported by clear, cogent and convincing evidence[.]" *In re S.N.*, 194 N.C. App. 142, 145-46, 669 S.E.2d 55, 58 (2008) (citation omitted). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt," and requires "evidence which should fully convince." *In re Mills*, 152 N.C. App. 1, 13, 567 S.E.2d 166, 173 (2002) (citations omitted). If satisfied that the record contains clear, cogent, and convincing evidence supporting the findings of fact, the Court must then determine whether the findings of fact support the trial court's conclusions of law. *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. This Court reviews the trial court's legal conclusions *de novo*. *Id.* Finally, with respect to the disposition phase, this Court reviews a trial court's decision that termination is in the best interests of the child for abuse of discretion, and will reverse only where the trial court's decision is "manifestly unsupported by reason." *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

[1] Our analysis of the order terminating Mother's rights is limited to whether the trial court erred in the adjudication phase, by either (1) making findings of fact unsupported by clear, cogent, and convincing evidence, or (2) by erroneously concluding that N.C. Gen. Stat. § 7B-1111 provides grounds to terminate Mother's rights to the Children. Mother does not argue that the trial court erred in the disposition phase,

i.e., in deciding that termination of her rights was in the best interests of the Children, and as such that issue is not before us.

In its order, the trial court concluded that the following five separate grounds existed to terminate Mother's rights: (1) neglect, N.C. Gen. Stat. § 7B-1111(a)(1); (2) failure to make reasonable progress, N.C. Gen. Stat. § 7B-1111(a)(2); (3) failure to pay for the Children's care, N.C. Gen. Stat. § 7B-1111(a)(3); (4) dependency, N.C. Gen. Stat. § 7B-1111(a)(6); and (5) abandonment, N.C. Gen. Stat. § 7B-1111(a)(7). A determination that any of the grounds existed is sufficient to affirm. *T.D.P.*, 164 N.C. App. at 290-91, 595 S.E.2d at 738.

The trial court concluded that grounds existed to terminate Mother's rights under N.C. Gen. Stat. § 7B-1111(a)(6), which sets forth that a parent's rights to her child may be terminated if "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C. Gen. Stat. §] 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6).

The trial court made the following pertinent and specific findings of fact underpinning its conclusion that N.C. Gen. Stat. § 7B-1111(a)(6) is applicable in this case:

> 65. The juveniles are dependent as defined by N.C. Gen. Stat. § 7B-101(9) in that the Respondent Mother does not have an ability to provide care or supervision to the juveniles based on her unwillingness to remain independent from the Respondent Father, as well as her issues with domestic violence, instability, and untreated mental health issues. Additionally, the Respondent Father does not have an ability to provide care of supervision for the juveniles based on his untreated mental health issues that result in explosive anger outbursts, substance abuse issues, and issues of domestic violence.
>
> 66. The Court finds that these causes or conditions prevent the Respondents from having the ability to parent in that both the Respondent Mother and the Respondent Father continue to minimalize the seriousness of the domestic violence between them, as well as the Respondent Father's failure to acknowledge any issues with substance abuse.
>
> 67. The Court accepted as evidence the previously completed examinations from the underlying files wherein the

Respondents were examined by a psychiatrist, physician, public or private agency or any other expert to ascertain the parent's ability to care for the juveniles resulting in the Respondent Father's Comprehensive Mental Health Assessment/Parenting Evaluation submitted to the Court as Cumberland County Department of Social Services Exhibit #13, and the Respondent Mother's Comprehensive Mental Health Assessment/Parenting Evaluation submitted to the Court as Cumberland County Department of Social Services Exhibit #12. The Court finds, based on these reports, the following:

a. In 2014, the Respondent Father completed a Comprehensive Mental Health Assessment and Parenting Evaluation as ordered by the Court. It was noted that the Respondent Father has a significant history of mental health issues, substance abuse, and legal problems. He was previously diagnosed by the Haymount Institute with Mood Disorder NOS, Alcohol Abuse, Nicotine Dependence, Cannabis Dependence, Opioid Dependence, Amphetamine (Ecstasy) Dependence, Bipolar Disorder, Post Traumatic Stress Disorder, and Intermittent Explosive Disorder. His current diagnosis included Adjustment Disorder with mixed anxiety and depressed mood and Cannabis Use Disorder-mild. It was recommended that the Respondent Father reengage in mental health treatment to address his depressive and anxious symptoms, engage in individual therapy to address coping skills and anger management, continue with substance abuse counseling and treatment to address triggers that could lead him to use again, engage in couples' counseling to address the issues of violence and power and control evident in his relationships, and see a psychiatrist for medication management if the therapist believes medication management would be helpful. The Court finds that the Respondent Father did not engage in the recommended services.

b. In 2014, the Respondent Mother completed a Comprehensive Mental Health Assessment and Parenting Evaluation as ordered by the Court. During the evaluation, the assessor noted that the Respondent Mother attempted to present herself in a favorable manner, which invalidated the results. The Respondent Mother appeared to minimize

her problems, and there were discrepancies between the information that the Respondent Mother provided and the Respondent Mother's collateral records. The Respondent Mother did not report any symptoms that met the criteria for a mental health diagnosis; however, the tests results were invalid and suggested she may exhibit some signs of hypervigilance. The assessor also noted as part of her evaluation that the Respondent Mother was residing with the Respondent Father Dennings and that their relationship was fraught with domestic violence. It was recommended that the Respondent Mother complete family counseling with her children, complete couples' counseling with the Respondent Father to address their dynamic of domestic violence, and that she participate in individual counseling to address barriers to having healthy relationships. The Court finds that the Respondent Mother did not engage in the recommended services, especially as it pertains to the couples counseling needed to address the dynamic of domestic violence and she quit individual counseling before her therapist released her.

68. The Court finds, based on the above mental health assessments and the willful failure of the Respondents to engage in the recommended services, that the Respondents are currently incapable of providing for the proper care and supervision for the juveniles and that there is a reasonable probability that such incapability will continue for the foreseeable future due to the lack of completion of services and the repetition of the domestic violence pattern seen in this matter, particularly with respect to the August 2016 incident.

69. The Court finds that Respondent Parents lack an appropriate alternative child care arrangement in that no kin or relative has been appropriate or given by the Respondents throughout the pendency of the case.

Based upon these findings, the trial court concluded that Mother's rights were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(6).

There is clear, cogent, and convincing record evidence to support these findings of fact. In his testimony before the trial court, Dennings admitted to (1) being diagnosed with explosive disorder and (2) using drugs a week before the hearing and failing to complete substance

abuse counseling. The record also contains evidence that Dennings was charged with criminal child neglect in 2014 for a physical altercation with a woman other than Mother that involved a gun and took place in Lee's presence. Regarding the history of domestic violence between Mother and Dennings, the record contains: (1) evidence that Mother told a social worker that Dennings had threatened to "break her face[,]" threatened to kill her, and subsequently shot a gun at her in 2013; (2) an Incident Report from the Fayetteville Police Department describing the August 2016 incident for which Dennings was arrested for assault with a deadly weapon because he "pistol whipped [Mother] with his handgun[,]" and noting that Mother was hospitalized as a result and initially sought to press charges against Dennings for the assault; and (3) the Domestic Violence Impact Statement filled out by Mother on the day of the August 2016 incident, in which she describes being choked by Dennings both in an earlier incident in 2013 and in the August 2016 incident in which Dennings allegedly pistol-whipped her. The record also contains evidence that Mother conceded that the Children were dependent in the meaning of N.C. Gen. Stat. § 7B-101 based upon the dynamic of domestic violence between her and Dennings. In its 5 May 2014 order adjudicating Lee dependent, the trial court noted that Mother had stipulated with DSS that she was "unable to provide for the care, control and supervision of" Lee, and stipulated that Lee was dependent "due to domestic violence," including the December 2013 incident where Mother and Dennings had a physical altercation in Lee's presence. Additionally, in an executed Stipulation Agreement dated 9 June 2015 between Mother, DSS, and Hank's guardian ad litem, Mother agreed to Hank's dependency adjudication based upon the fact that she and Dennings "were unable to provide for the care or supervision of the juvenile" because of "[d]omestic violence," and also expressly agreed to the incorporation of certain allegations from the relevant petition as factual bases for the order adjudicating Hank's dependency, including (1) Mother's "history of domestic violence with . . . Dennings," (2) that Mother had engaged in a physical altercation with Dennings in December 2013 while Lee was in their care, and (3) that Mother had not substantially completed services ordered by the court. We thus determine that the trial court's findings regarding Dennings' issues, the existing pattern of domestic violence between Mother and Dennings, and the Children's resulting dependency are each supported by clear, cogent, and convincing evidence in the record.

The record also contains clear, cogent, and convincing evidence that Mother was, is, and will likely remain unwilling to cut Dennings out of her and the Children's lives, despite their troubled history together. Before the trial court, Mother testified that she did not follow through

with pressing charges against Dennings for the August 2016 incident because it would interfere with her work. Mother also testified that: (1) she facilitated contact between Dennings and the Children during one of her visits with the Children in January 2017, despite having knowledge that the trial court had ordered Dennings was to have no contact with the Children at the time; (2) she had seen Dennings socially without the Children as recently as February 2018; and (3) she intends to have contact with Dennings going forward "when it's involving the kids and stuff[.]"

Mother is correct that she and Dennings were never ordered not to have contact with each other. But whether Mother was legally required to stay away from Dennings is not a question before us today. A question that *is* before us today is whether Mother is incapable of providing for the proper care and supervision of her children, and if so, whether Mother's incapability is reasonably probable to continue into the foreseeable future. N.C. Gen. Stat. § 7B-1111(a)(6). Despite the fact that Mother was and remains free to maintain a relationship with Dennings, Mother's stated intent to keep Dennings in her life—and importantly, to keep Dennings in the Children's lives—in spite of the enduring pattern of violence Mother has suffered at Dennings' hands[3] is clear, cogent, and convincing evidence that Mother is incapable of providing for the proper care and supervision of the Children, such that the Children are dependent in the meaning of N.C. Gen. Stat. § 7B-101 (2017), and that there is a reasonable probability that the incapability will continue for the foreseeable future. N.C. Gen. Stat. § 7B-1111(a)(6). We accordingly conclude that the trial court was authorized to terminate Mother's rights to the Children pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), and we affirm the trial court's decision to do so on that basis.

Because we affirm the trial court's termination of Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(6), we need not address the other grounds upon which termination was based. *T.D.P.*, 164 N.C. App. at 290-91, 595 S.E.2d at 738.

b. Order Ceasing Reunification

[2] Mother also contends that the trial court erred in ceasing reunification efforts with her in its 26 October 2016 order.

---

3. Whether Mother "was the victim, and not the perpetrator or aggressor" in her history of violence with Dennings is of no moment. *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007) ("The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.").

In *In re V.L.B.*, 164 N.C. App. 743, 596 S.E.2d 896 (2004), this Court held that a mother's appeal from a permanency planning order ceasing reunification efforts with her was rendered moot by the trial court's subsequent order terminating her parental rights. *Id.* at 745, 596 S.E.2d at 897. The *In re V.L.B.* Court so held because the trial court "made independent findings and conclusions that d[id] not rely on the permanency planning order" in the order terminating the mother's parental rights after it heard the testimony of witnesses and admitted the underlying case file into evidence. *Id.*

The trial court here followed the same course. The trial court specifically found in its order ceasing reunification efforts that "termination of parental rights should not be pursued" at the time of that order. Months later, after taking significant additional testimony and admitting the case file into evidence, the trial court made extensive findings of fact and conclusions of law not found in the order ceasing reunification efforts, and terminated Mother's parental rights. Notably, these included findings regarding then-current conditions leading the trial court to conclude that N.C. Gen. Stat. § 7B-1111(a)(6) was applicable at that time.

Since we conclude that the trial court did not err in terminating Mother's parental rights, and since, like in *In re V.L.B.*, the order terminating Mother's parental rights made findings of fact and conclusions of law independent of the order ceasing reunification efforts, we conclude that Mother's appeal of the order ceasing reunification efforts with her has been rendered moot.

V. Conclusion

Because we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence in the record, that the findings of fact support the trial court's conclusions of law, and because Mother has not challenged the trial court's determination that termination of Mother's rights is in the best interests of the Children, we hold that the trial court did not err in terminating Mother's parental rights. We further hold that the question of whether the trial court erred in ceasing reunification efforts was rendered moot by the proper termination order.

We accordingly affirm the trial court's order terminating Mother's parental rights and dismiss Mother's appeal of the permanency planning order ceasing reunification efforts.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges DILLON and INMAN concur.

JACKSON v. DON JOHNSON FORESTRY, INC.

[265 N.C. App. 20 (2019)]

BETTY BURDEN JACKSON, NANCY BURDEN ELLIOTT; JAMES BURDEN, REBECCA BURTON BELL, DARREN BURTON, CLARENCE BURTON, JR. AND JOHN BURDEN, PLAINTIFFS

v.

DON JOHNSON FORESTRY, INC. AND EAST CAROLINA TIMBER, LLC, AND NELLIE BURDEN WARD, ALBERT R. BURDEN, LEVY BURDEN, CLARENCE L. BURDEN AND BRENDA B. MILLER, OTHER GRANDCHILDREN DEFENDANTS, AND EAST CAROLINA TIMBER, LLC, THIRD-PARTY/COUNTERCLAIM PLAINTIFF

v.

ESTATE OF WILLIAM F. BAZEMORE BY AND THROUGH ITS EXECUTORS, NELLIE WARD AND TARSHA DUDLEY, AND ESTATE OF FLORIDA BAZEMORE BY AND THROUGH ITS ADMINISTRATOR, MARIA JONES, THIRD-PARTY/COUNTERCLAIM DEFENDANTS

No. COA18-354-2

Filed 16 April 2019

1. Estates—life tenancy—timber harvesting—remaindermen—standing

A testator's grandchildren—to whom a tract of land passed in fee simple absolute upon the death of the testator's last living child, who had a life estate—had standing to sue for damages for the unauthorized cutting of timber during the preceding life tenancy.

2. Estates—life tenancy—timber harvesting—permitted by terms of will—without life tenant's authorization

A testator's grandchildren—to whom a tract of land passed in fee simple absolute upon the death of the testator's last living child, who had a life estate—had no claim for the unauthorized cutting of trees more than 12 inches in diameter (Large Trees) during the preceding life tenancy. The testator's will gave the life tenant the right to cut and sell any Large Tree from the property, and, even if the Large Trees were cut without the life tenant's authorization, it was the life tenant who suffered the loss—not the grandchildren.

3. Estates—life tenancy—timber harvesting—for profit

A testator's grandchildren—to whom a tract of land passed in fee simple absolute upon the death of the testator's last living child, who had a life estate—presented sufficient evidence to create a genuine issue of material fact that a timber company had cut trees of less than 12 inches in diameter (Small Trees) on the property to sell for profit during the preceding life tenancy, which the life tenant did not have the right to authorize. The contract provided that the property would be "clear cut," and there was evidence that some trees were used for "pulp" (which is typically made from smaller trees);

thus, the question of damages for the cutting of Small Trees was for the jury to determine.

4. Wills—construal—intention of testator—permission to cut trees

A provision in a will that any timber sale made by the testator's children shall be approved by the executrices and their attorneys was not intended to be a veto power, so any failure by the testator's last living child to obtain this permission was harmless with respect to the sale of trees larger than 12 inches in diameter, which were permitted to be cut and sold for profit by the terms of the will.

5. Estates—life tenancy—timber harvesting—pursuant to contract with life tenant—third-party liability—no double damages

A timber company that wrongfully cut timber during a life tenancy was liable for damages to the remaindermen, who inherited the property in fee simple absolute. The timber company's contract with the life tenant to cut the timber (which the life tenant had no right to cut and sell) did not excuse the company from liability. However, the company was not liable for double damages pursuant to N.C.G.S. § 1-539.1 since it was not a trespasser.

6. Estates—life tenancy—timber harvesting—third-party liability—indemnity

The estates of a life tenant and her husband were liable to indemnify a timber company for damages caused by unauthorized timber cutting where the husband acted as the life tenant's agent to contract for the timber cutting.

7. Estates—life tenancy—timber harvesting—liability of broker—good-faith reliance on power of attorney

A broker with whom a life tenant contracted to procure a buyer for timber was not liable to the remaindermen for damages for unauthorized cutting. Pursuant to statute, a person who relies in good faith on a power of attorney is not responsible for misapplication of property, even where the attorney-in-fact (the life tenant's husband) exceeds his authority.

Appeal by Plaintiffs, appeal by Defendant East Carolina Timber, LLC, and appeal by Third-Party Defendant Estate of Florida Bazemore, all from judgment entered 9 November 2017 by Judge Wayland J. Sermons, Jr., in Bertie County Superior Court. Heard in the Court of Appeals 3 October 2018.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis and Casey L. Peaden, for the Plaintiff.

Yates, McLamb & Weyher, L.L.P., by Christopher J. Skinner and Denaa J. Griffin, for Defendant Don Johnson Forestry, Inc.

McAngus Goudelock & Courie, PLLC, by Elizabeth H. Overmann, and Ward and Smith, P.A., by E. Bradley Evans, for Defendant and Third-Party/Counterclaim Plaintiff East Carolina Timber, LLC.

Dixon & Thompson Law PLLC, by Paul Faison S. Winborne, for the Third-Party/Counterclaim Defendant Estate of Florida Bazemore.

DILLON, Judge.

This is an appeal and cross-appeal by a number of parties from a summary judgment order entered in this case involving alleged damages caused by the unauthorized cutting of timber from a certain tract of land.

I. Background

In 1982, Z. J. Burden died, bequeathing a large tract of land (the "Property") to his lineal descendants. Specifically, pursuant to Mr. Burden's will, Mr. Burden's five children, or the survivor(s) of them, received a life estate in the Property[1]; and the fee simple remainder interest was held by those grandchildren of Mr. Burden who were alive at the death of the last of Mr. Burden's five children. That is, the Property would not pass in fee simple absolute to Mr. Burden's grandchildren until *all* of his children had died, and would only pass to those grandchildren who survived all of Mr. Burden's five children.

Mr. Burden's will also granted to his children, or the survivor(s) of them, during the life tenancy, the right to sell any timber growing on the Property that was at least twelve (12) inches in diameter for any reason they saw fit, without having to share the proceeds from the sale with the remaindermen-grandchildren.

In early 2014, Florida Bazemore was the sole surviving child of Mr. Burden and, therefore, was the sole owner of the life estate in

1. Actually, the terms of Mr. Burden's will provided that the Property would first pass to Mr. Burden's widow for life, before passing to their five children for their lives.

the Property. After entering a nursing home, Mrs. Bazemore signed a General Power of Attorney, naming her husband, William Bazemore, and two others as her attorneys-in-fact.

Shortly thereafter, Mr. Bazemore entered into a broker's agreement with Defendant Don Johnson Forestry, Inc. (the "Broker"), to procure a buyer for the timber growing on the Property. The Property had not been timbered since the mid-1980's. The Broker procured an offer from Defendant East Carolina Timber, LLC, (the "Timber Buyer") to purchase the timber growing on the Property.

In March 2014, Mr. Bazemore signed an agreement to sell the timber growing on the Property to the Timber Buyer.

During the summer of 2014, the Timber Buyer cut a number of trees from the Property, paying $130,000; $122,000 of this money was paid to the Bazemores, and the remainder was paid to the Broker for its brokerage commission.

In May 2015, Mr. Bazemore died. Two months later, in July 2015, Mrs. Bazemore died. Upon her death, the Property passed to Mr. Burden's then-living grandchildren *per stirpes* in fee simple absolute.

In October 2015, several of Mr. Burden's grandchildren[2] (the "Grandchildren") commenced this action against the Broker and the Timber Buyer for cutting timber from the Property during Mrs. Bazemore's life tenancy. The Grandchildren sought double the value of the timber cut, pursuant to N.C. Gen. Stat. § 1-539.1.

The Broker and Timber Buyer each answered denying liability. And the Timber Buyer asserted a third-party complaint against Mr. and Mrs. Bazemore's estates for indemnity.

In November 2017, after a hearing on summary judgment motions, the trial court entered a summary judgment order, which did three things: (1) it granted the Broker's motion for summary judgment, thereby dismissing the Grandchildren's claims against it; (2) it granted the Grandchildren's motion for summary judgment on their claims against the Timber Buyer, awarding $259,596 in double damages; and (3) it granted the Timber Buyer's motion for summary judgment against Mr.

---

2. The remaining grandchildren were subsequently made parties, denominated in the caption as "Other Grandchildren Defendants."

and Mrs. Bazemore's estates for indemnity. Each part of the summary judgment order was timely appealed. For the reasons stated below, we affirm in part, reverse in part, and remand for further proceedings, as detailed in Section III (Conclusion) below.

II. Analysis

A. Mrs. Bazemore's Rights in the Trees During Her Life Tenancy

Rights in a particular piece of property have been described as a "bundle of sticks"[3] or "bundle of rights,"[4] where various people/entities could own different rights in that property. These rights include the right to timber the property.

Mr. Burden, as the fee simple absolute titleholder, owned substantially all of the "sticks" or "rights" in the Property. When Mr. Burden died, he left some of the "sticks" to Mrs. Bazemore, as a life tenant, and other "sticks" to the Grandchildren, as remaindermen. Important to the present case are the sticks owned by Mrs. Bazemore and by the Grandchildren relating to the timber on the Property.

Mr. Burden bequeathed to Mrs. Bazemore a life estate, which carries with it some rights in the trees. Specifically, our Supreme Court has held that, absent some other express grant, a life tenant's right to cut timber from her land is limited. That is, a life tenant is allowed to "clear tillable land to be cultivated for the necessary support of [her] family," and she may "also cut and use timber appropriate for necessary fuel" or to build structures on the property. *Dorsey v. Moore*, 100 N.C. 41, 44, 6 S.E. 270, 271 (1888). Further, a life tenant is permitted to harvest and sell sufficient timber needed to maintain the property. *Fleming v. Sexton*, 172 N.C. 250, 257, 90 S.E. 247, 250 (1916). However, a life tenant commits waste if she cuts timber "merely for sale,–to sell the timber trees, and allow them to be cut down and manufactured into lumber for market[:]"

> It would take from the land that which is not incident to the life-estate, and the just enjoyment of it, consistently with the estate and rights of the remainder-man or reversioner. The law intends that the life-tenant shall enjoy his estate in such reasonable way as that the land shall pass

---

3. *See U.S. v. Craft*, 535 U.S. 274, 278 (2002); *Everett's Lake Corp. v. Dye*, ___ N.C. App. ___, ___ n.1, ___ S.E.2d ___, ___ n.1, 2018 WL 4996362 (2018).

4. *In re Greens of Pine Glen*, 356 N.C. 642, 651, 576 S.E.2d 316, 322 (2003).

> to the reversioner, as nearly as practicable unimpaired as to its natural capacities, and the improvements upon it.

Moore, 100 N.C. at 44, 6 S.E. at 271 (citations omitted).[5]

Mr. Burden, however, bequeathed to Mrs. Bazemore more "sticks" in the timber than that normally held by a life tenant, as was his right as the fee simple owner. *See Fletcher v. Bray*, 201 N.C. 763, 767-68, 161 S.E. 383, 385-86 (1931). Specifically, in addition to bequeathing to Mrs. Bazemore the "sticks" in the timber normally reserved for a life tenant, Mr. Burden bequeathed to Mrs. Bazemore the *unfettered* right to cut and sell any tree with a diameter of twelve (12) inches or more (hereinafter the "Large Trees") during her life tenancy. This arrangement was similar to that in *Fletcher v. Bray*, where the fee simple owner bequeathed a life estate in certain property to his wife *and* the right to dispose of the trees thereon *for any reason* during her life tenancy, with the remainder to his nephews and nieces in fee simple. *Id*. Our Supreme Court held that this arrangement was lawful:

> The court holds the opinion that the standing timber was severed by the testator from the fee and the absolute dominion thereof given the wife, and such severance was designed for her benefit rather than for the benefit of [the remaindermen]. Therefore, [wife], upon the sale of the timber, was entitled to hold the proceeds in her own right as her own property [and had the right to bequeath the proceeds as she saw fit].

Id. at 768, 161 S.E. at 386.

Therefore, Mrs. Bazemore had the unfettered right *during her life tenancy* to profit from any Large Tree, pursuant to Mr. Burden's will. However, her right to the smaller trees during her life tenancy was limited to that of a life tenant.

B. The Grandchildren's Right to Seek Relief as Remaindermen

[1] Where there is an unauthorized cutting of trees during a life tenancy, the remaindermen may seek relief. But the type of relief that a

---

5. In an opinion written by Judge John Haywood in 1800, the Court of Conference, which was our State's appellate court prior to the establishment of our Supreme Court in 1818, defined waste by a life tenant as "an unnecessary cutting down and disposing of timber, or destruction thereof upon wood lands, where there is already sufficient cleared land for the [life tenant] to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils and the like[.]" *Ballentine v. Poyner*, 3 N.C. 268, 269 (1800).

remainderman can seek depends on whether his interest is vested or contingent.

Our Supreme Court has held that a *vested* remainderman or reversioner has many remedies. Specifically, he "has his election either to bring trover for the value of the tree after it is cut, or an action [for trespass] on the case in the nature of waste, in which, besides the value of the tree considered as timber, he may recover damages for any injury to the inheritance which is consequent upon the destruction of the tree." *Burnett v. Thompson*, 51 N.C. 210, 213 (1858). Indeed, the right to bring an action for waste has been codified in Chapter 1, Article 42 of our General Statutes. *See* N.C. Gen. Stat. § 1-42 (2017).

However, owners of a *contingent* future interest "cannot recover damages for waste already committed, [but] they are entitled to have their [contingent] interests protected from [future] threatened waste or destruction by injunctive relief." *Gordon v. Lowther*, 75 N.C. 193, 193 (1876); *see also Peterson v. Ferrell*, 127 N.C. 169, 170, 37 S.E. 189, 190 (1900) (holding that both vested and contingent remaindermen have the right to seek an injunction to protect against future waste); *Edens v. Foulks*, 2 N.C. App. 325, 331, 163 S.E.2d 51, 54 (1968) (stating that "[i]t is well settled in this State, as in other states, that a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste").

In the present case, the Timber Buyer argues that the Grandchildren have no standing to sue *for damages* because they were mere contingent remaindermen when the trees were cut. Indeed, their interest was contingent on their surviving Mrs. Bazemore. We conclude, though, that it is irrelevant whether the Grandchildren's remaindermen interest in the Property may have been contingent under Mr. Burden's will: They did not bring suit until after Mrs. Bazemore's death, after their interest became a *vested* fee simple interest. Though neither party cites a case on point on this issue, we conclude that once a contingent remainderman's interest vests, he may bring suit for damages, even for acts committed during the life tenancy. Indeed, in discussing the limited right of a contingent remainderman to seek only injunctive relief, our Supreme Court stated that a contingent remainderman "could not maintain [an] action [for damages] *during the life of the first taker*." *Latham v. Roanoke R. & Lumber Co.*, 139 N.C. 9, 51 S.E. 780, 780 (1905) (emphasis added). Our Supreme Court reasoned that, during the life tenancy, it is impossible to know what, if any, damage any particular contingent remainderman will

suffer or which remainderman will vest and actually will suffer the damage. *Id.* at 11-12, 51 S.E. at 780-81.[6] But once the life tenancy terminates, this concern disappears.[7]

Further, our General Assembly has provided that *any* remainderman whose interest has become a vested present interest may sue for damages for timber cut during the preceding life tenancy. N.C. Gen. Stat. § 1-537 (2017) ("Every heir may bring action for waste committed on lands . . . of his own inheritance, as well in the time of his ancestor as in his own.")

Therefore, we conclude that the Grandchildren do have standing to seek relief for damage caused by any unauthorized cutting of timber on the Property which occurred during Mrs. Bazemore's life tenancy.

C. The Large Trees

[2] The Grandchildren argue that they are entitled to damages for the trees which were cut, contending that the contract between Mr. Bazemore (purportedly signed on behalf of Mrs. Bazemore) and the Timber Buyer was not validly executed.

We conclude that the Grandchildren have no claim regarding the Large Trees. Even if the contract was not valid, any claim pertaining to the cutting of Large Trees, which occurred during the life tenancy of Mrs. Bazemore, belonged to Mrs. Bazemore alone, and now to her estate. That is, the Large Trees belonged to Mrs. Bazemore during the life tenancy pursuant to the express grant in Mr. Burden's will, and they were severed from the property during the life tenancy. Unlike typical remaindermen, because of Mr. Burden's express grant to Mrs. Bazemore (and the other life tenants), the Grandchildren had no rights in the Large Trees during the life tenancy, *see Fletcher*, 201 N.C. at 768, 161 S.E. at

---

6. Our holding on this issue is the rule in other jurisdictions as well. *See, e.g.*, *Fisher's Ex'r v. Haney*, 180 Ky. 257, 262, 202 S.W. 495, 497 (1918) (holding that though a contingent remainderman can only seek injunctive relief during the life tenancy, this limiting rule has no application once the remainderman becomes vested at the death of the life tenant); *In re Estate of Hemauer*, 135 Wis. 2d 542, 401 N.W.2d 27, 1986 Wisc. App. LEXIS 3973, *3 (1986) (holding "that the [contingent] remaindermen's cause of action for waste did not accrue until [the life tenant's] death because the remaindermen had no right to enforce prior to her death").

7. Neither party makes any argument that the Grandchildren's claims are time-barred, and it does not appear that they are. But we note that claims of a remainderman for waste committed during the life tenancy but brought after the death of the life tenant may be time-barred. *See, e.g.*, *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001).

386; and, therefore, they had no rights in the Large Trees which were severed from the Property during the life tenancy. Therefore, assuming that the Large Trees were cut without Mrs. Bazemore's authorization, it is Mrs. Bazemore who suffered. The Grandchildren can make no claim for waste of their inheritance since Mr. Burden had "severed" the Large Trees from the fee that they were entitled to inherit. *Id.* And they have no claim for trover, as the Large Trees, once cut, belonged to Mrs. Bazemore.

D. The Small Trees

[3] We conclude that the Grandchildren are entitled to any damage caused by the cutting of trees less than twelve (12) inches in diameter (hereinafter the "Small Trees") by the Timber Buyer. Mrs. Bazemore's interest in the Small Trees was only that of a life tenant, as Mr. Burden did not expressly grant her any additional rights in the Small Trees in his will. And there was no evidence offered at summary judgment suggesting that the Small Trees were cut for any reason other than for profit, which, as explained above, is not permissible for a life tenant to authorize.

The Timber Buyer argues that it is entitled to summary judgment, in any event, because the Grandchildren failed to put on any evidence showing that any of the trees cut by the Timber Buyer were, in fact, Small Trees. However, we conclude that there was *enough* evidence presented to survive summary judgment on this point. Specifically, the contract with the Timber Buyer provided that the Property would be "clear cut," suggesting that *all* of the marketable trees on the Property would be cut, not just the Large Trees. Further, there is evidence which identifies the types of trees actually cut by the Timber Buyer, including trees used for "pulp" and "chip-in-saw." Such are typically made from smaller trees, less than twelve (12) inches in diameter.

It certainly would have been better if the Grandchildren had offered an affidavit of a witness who expressly stated that at least one Small Tree was cut. However, we conclude that the record was sufficient to create an issue of fact that at least one Small Tree was cut, and therefore sufficient to reach the jury on the question of damages.

E. Approval for Sale

[4] The Grandchildren contend that Mrs. Bazemore, in fact, did *not* have the authority to direct the cutting of *any* trees because she failed to *first* procure the permission of Mr. Burden's executors and the executors'

attorneys to do so. The Grandchildren point to Item #5 of Mr. Burden's will, which states as follows:

> During the life time of my wife and children, they may sell merchantable timber not less than twelve inches in diameter, . . . without Court order and without my grandchildren sharing in the proceeds of the sale of the timber. *Any timber sale made by my children shall be approved by all of them and my executors, as well as the attorneys for my Executrices.*

(Emphasis added).

When the language of a will is not clear and unambiguous, it is the duty of the courts to construe the meaning of the will. *Pittman v. Thomas*, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983). Our Supreme Court has long held "that the primary object in interpreting a will is to give effect to the intention of the testator[.]" *Misenheimer v. Misenheimer*, 312 N.C. 692, 696, 325 S.E.2d 195, 197 (1985). The intent of the testator is to be "ascertained from the four corners of the will," as the best evidence of the testator's intent is the words on the page. *Wachovia Bank & Tr. Co. v. Shelton*, 229 N.C. 150, 155, 48 S.E.2d 41, 44 (1948). For the reasons stated below, we disagree with the Grandchildren's argument.

It could be argued that the italicized sentence in the above passage from Mr. Burden's will is ambiguous. For example, the provision could be construed as *a directive* to the executrices and their attorneys not to stand in the way of, but rather to cooperate with, the children's exercise of their right to cut the Large Trees. Or the provision could be construed to mean that the executrices and their attorneys had some bigger role in the decision-making process.

We conclude that Mr. Burden did not intend to grant to his executrices and their attorneys any *discretion* to veto the children's exercise of their right to profit from the cutting of the Large Trees. Rather, a better reading is that Mr. Burden wanted his executrices and their attorneys to be involved to make sure that any exercise of the children's right was carried out in conformance with the terms of his will. Therefore, any failure by Mrs. Bazemore to obtain approval was harmless with respect to the cutting of the Large Trees, because Mr. Burden's executrices and their attorneys had no discretion to withhold their consent in this regard.

Additionally, when the trees were being cut, Mr. Burden's estate had long since been closed. And, in any event, Mrs. Bazemore was the only surviving child and executrix. That is, Mr. Burden named his widow and

Mrs. Bazemore as executrices, and Mr. Burden's widow had already died when the trees were cut.

In conclusion, in this opinion, we are recognizing that the Grandchildren have a claim for the Small Trees that were cut. However, we conclude that the Grandchildren's argument concerning the language in Item #5 does not give rise to a claim concerning the Large Trees. We construe that, pursuant to Item #5, Mrs. Bazemore had the right to cut the Large Trees for her benefit and that no one had the right to veto her exercise of this right. Any failure by her to obtain the approval of some third party was harmless with respect to the cutting of the Large Trees.

F. Liability of Timber Buyer

[5] Our Supreme Court has held that a third party may be liable for wrongfully cutting timber to a remainderman whose interest has vested, specifically, for trover (the value of the trees) or for "an action on the case in the nature of waste" (the damage to the land). *Burnett*, 51 N.C. at 213.

Our Supreme Court has held that even if the third party contracts with the life tenant to cut timber, the third party is still liable to the remaindermen if any cutting is unauthorized. *Dorsey*, 100 N.C. at 45, 6 S.E. at 272. It is no excuse that the third party acted under a contract with the life tenant, where the life tenant, otherwise, had no right to have the timber cut:

> The judgment, it seems, is founded upon the supposition that the contract between the life-tenant in possession and the [third party], purporting to give them the right to cut and remove the timber, had the legal effect to exempt [the third party] from liability to the [remaindermen] on such account. *This was a misapprehension of the law applicable.*

*Id.*at 45-6, 6 S.E. at 272.

Therefore, we conclude that the Timber Buyer is liable to the Grandchildren for any damage caused by the cutting of the Small Trees.

But we further conclude that the Timber Buyer is not liable for double damages pursuant to N.C. Gen. Stat. § 1-539.1. Specifically, our Court has held that a third party is not liable for double damages under this statute if the third party was not trespassing on the land itself when the cutting occurred. *Matthews v. Brown*, 62 N.C. App. 559, 561, 303 S.E.2d 223, 225 (1983). In *Matthews*, a timber company had the contractual

right to enter upon a tract of land and cut some trees, but the evidence demonstrated that the company cut more trees than it was authorized to cut. *Id.* at 560, 303 S.E.2d at 224. We held that the award of damages for the unauthorized cutting of trees was appropriate, but that the doubling of the award was not since the company was lawfully on the land. *Id.* at 561, 303 S.E.2d at 225 (holding that N.C. Gen. Stat. § 1-539.1 does not apply unless the defendant was a "trespasser to the land"). In the present case, the Timber Buyer was authorized by Mr. Bazemore, who was acting within his apparent authority as Mrs. Bazemore's agent, to enter the Property and was therefore not a trespasser.

G. Indemnity from the Estates of the Bazemores

[6] The trial court concluded that the estates of Mr. and Mrs. Bazemore are liable to indemnify the Timber Buyer, as a matter of law. We agree.

As to Mrs. Bazemore's liability, the third party may be entitled to indemnity from the life tenant with whom he contracted. N.C. Gen. Stat. § 1-539.1(c). And, here, we conclude that the evidence establishes, as a matter of law, that Mr. Bazemore was acting as Mrs. Bazemore's agent when he contracted with the Timber Buyer.

As to Mr. Bazemore's liability, our Supreme Court has held that "[a]n agent who makes a contract for an undisclosed principal is personally liable as a party to it unless the other party had actual knowledge of the agency and of the principal's identity." *Howell v. Smith*, 261 N.C. 256, 258-59, 134 S.E.2d 381, 383 (1964).

H. The Broker

[7] The Grandchildren argue that the Broker, with whom Mr. Bazemore contracted to procure a buyer, was liable to them for any unauthorized cutting.

The trial court held that the Broker was not liable, as a matter of law. We agree. Section 32A-40[8] of our General Statutes provides that a person who relies in good faith on a power of attorney is not responsible for the misapplication of property, even where the attorney-in-fact exceeds or improperly exercises his authority.

Here, there was no evidence of actionable negligence or bad faith on the part of the Broker. The evidence shows that the Broker reasonably acted in good faith to ensure that Mr. Bazemore had the authority

8. N.C. Gen. Stat. § 32A-40 (2017) has since been re-codified as N.C. Gen. Stat. § 32C-1-119(c), effective as of 1 January 2018.

to sell the timber on the Property: Mr. Bazemore assured the Broker of his authority to sell all of the timber on the Property; the Broker spoke to the Bazemores' attorney to confirm Mr. Bazemore's authority to sell the timber; the Broker communicated with all of Mrs. Bazemore's attorneys-in-fact; and the Broker checked the tax card to ensure that Mrs. Bazemore was the record owner of the Property. We believe that it is too much to ask this Broker, who is not an attorney, to have reviewed Mr. Burden's will and to have done any more to understand the exact rights Mrs. Bazemore had in the trees on the Property.

III. Conclusion

The Grandchildren were entitled to summary judgment on the issue of *liability* against the Timber Buyer for damages caused by any Small Trees cut from the Property. Therefore, that portion of the summary judgment order is affirmed.

There is, however, a genuine issue of material fact as to the *damages* suffered by the Grandchildren for the Small Trees which were cut. Therefore, we reverse that portion of the summary judgment order granting the Grandchildren judgment as to the amount of damages, and we remand this issue for trial.

As the issue of damages has yet to be decided, we vacate that portion of the summary judgment order awarding costs to the Grandchildren from the Timber Buyer. The trial court may consider this issue at the conclusion of the trial.

The Timber Buyer is not liable to the Grandchildren for any Large Trees as a matter of law. Therefore, we reverse that portion of the summary judgment order granting the Grandchildren judgment on liability and for damages as to the Large Trees, and we remand with instructions to enter summary judgment for the Timber Buyer on this issue.

The Timber Buyer is not liable to the Grandchildren pursuant to N.C. Gen. Stat. § 1-539.1 for double damages, as a matter of law, for any damages which may be found for the cutting of the Small Trees. Therefore, we reverse that portion of the summary judgment order granting summary judgment for the Grandchildren on this issue, and we remand with instructions to enter summary judgment for the Timber Buyer on this issue.

The estates of Mr. and Mrs. Bazemore are liable to the Timber Buyer for indemnity for any liability of the Timber Buyer to the Grandchildren for damage caused by any wrongful cutting of the Small

Trees, as a matter of law. And the trial court properly awarded costs to the Timber Buyer. Therefore, we affirm those portions of the summary judgment order.

The Broker is not liable to the Grandchildren for any of the trees cut by the Timber Buyer, as a matter of law. And the trial court properly awarded costs to the Broker. Therefore, those portions of the summary judgment order are affirmed.

AFFIRMED IN PART, REVERSED IN PART, REMANDED IN PART.

Judges STROUD and BERGER concur.

STATE OF NORTH CAROLINA
v.
ROBERT DARYL BAUGUSS

No. COA18-795

Filed 16 April 2019

1. Sexual Offenses—statutory sexual offense with a child—attempt—hands up skirt

There was sufficient evidence to convict defendant of attempted statutory sexual offense with a child where defendant attempted to put his hands up a child's skirt between her legs while he was driving. An abundance of evidence showed defendant's communications with the child's mother indicating his intent to engage in sexual activity with the child, which the jury could infer defendant attempted to carry out when the child pushed his hands away from her private area.

2. Sexual Offenses—statutory sexual offense with a child—attempt—intent—overt act

There was sufficient evidence to convict defendant of attempted statutory sexual offense with a child where, in a written exchange with the child's mother, defendant stated his intent to commit sexual acts with the child and instructed the mother to have the child wear a dress without underwear for his visit to their home. Further, defendant took overt actions to carry out his intent by encouraging the mother to groom her child for sexual activity with him, instructing her to dress the child without underwear, and going to the child's house to perpetrate the sexual assault.

3. Sexual Offenses—statutory sexual offense with a child—aiding and abetting—encouraging activity between a parent and child

There was sufficient evidence to convict defendant of five counts of statutory sexual offense with a child based on the theory that defendant aided and abetted the sexual offenses that a mother committed against her own child. In numerous written messages, defendant encouraged the mother's commission of the sexual acts and even requested videos of the mother committing these acts. Explicit instruction to perform each specific act was not required to convict defendant of the offenses.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 23 February 2018 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lauren M. Clemmons, for the State.

Mark Hayes for defendant-appellant.

ARROWOOD, Judge.

Robert Daryl Bauguss ("defendant") appeals from judgments entered on his convictions of failing to register a sex offender online identifier, first-degree sexual exploitation of a minor, two counts of attempted statutory sex offense of a child, and five counts of statutory sexual offense of a child. For the reasons stated herein, we find no error.

I. Background

On 6 September 2016, a Wilkes County Grand Jury indicted defendant for failure to register a sex offender online identifier and first-degree sexual exploitation of a minor. On 15 May 2017, the grand jury issued additional indictments for seven counts of statutory sexual offense of a child.

The matter came on for trial on 19 February 2018 in Wilkes County Superior Court, the Honorable Michael D. Duncan presiding. The State's evidence tended to show as follows.

On 29 July 2013, Wilkes County Sheriff's Deputy Nancy Graybeal received a report of Facebook conversations between defendant and A.M.[1] that indicated possible child sex abuse. Defendant was a registered sex offender at the time, based on a previous conviction for taking indecent liberties with a child. As a registered sex offender, defendant was prohibited from using social media websites and was required to report any online identifiers, including screen names, to the sheriff of his county of residence. However, defendant did not register the screen name he used to carry out these Facebook conversations with A.M., "Rod Love[.]"

Defendant was arrested at A.M.'s house on 29 July 2013. Detective Graybeal interviewed A.M. on the front porch. A.M. admitted to communicating with defendant on Facebook and sharing photos of her daughter with him. She also admitted to recording a video of her daughter, "Dee," who was six years old at the time of defendant's arrest.

A.M. went to the police station, where she underwent another interview, and allowed officers to look through her cell phone. Nude photos of Dee were stored on the phone, as well as two videos depicting A.M. performing sexual acts on her daughter. A.M. admitted to having performed oral sex on Dee three times and to having touched Dee's vagina four times. She also admitted to sending the photos and at least one video to defendant, some at his request. She explained that she sent these photos and videos, and worked to facilitate sexual interactions between defendant and her daughter to "bait" defendant into a relationship with her.

Defendant was also interviewed at the police station. He admitted to using the screen name "Rod Love" on Facebook in 2013, and also admitted to receiving and requesting nude images and videos of Dee from A.M. Defendant stated that he believed A.M. agreed to sexually abuse her daughter and facilitate sexual interactions with defendant because A.M. was "in love" with him, and thought the pictures and videos of Dee would induce a relationship between them.

The State introduced records of Facebook conversations between defendant and A.M. at trial, which tend to show A.M. and defendant had an ongoing agreement and plan for A.M. to teach Dee to be sexually active so that defendant could perform sexual acts with her. The State also introduced the images and videos of Dee that were extracted from defendant's phone.

---

1. Pseudonyms and initials are used throughout this opinion to protect the identity of the juvenile.

Defendant made a general motion to dismiss all charges at the close of the State's evidence. The trial court denied the motion. Defendant presented no evidence, and made a motion for a directed verdict. The trial court considered this motion as a renewed motion to dismiss, which the trial court denied.

The jury was instructed on attempted sexual offense with a child, sexual offense with a child under a theory of aiding and abetting, failing to comply with the sex offender registration law, and first-degree, second-degree, and third-degree sexual exploitation of a minor. The jury returned verdicts of guilty for all charges.

The trial court sentenced defendant to consecutive terms of 317 to 441 months of imprisonment for each of the five statutory sexual offense charges. Defendant was also sentenced to 207 to 309 months of imprisonment for one count of attempted statutory sexual offense to be served consecutively. The remaining offenses were consolidated into a consecutive sentence of 207 to 309 months imprisonment.

Defendant appeals.

II. Discussion

Defendant argues the trial court erred by denying his motion to dismiss the two attempted sexual offense charges and by denying his motion to dismiss the five statutory sexual offense charges.

Our "Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Substantial evidence exists if there "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) (citations omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

A. Attempted Sexual Offenses

"A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C. Gen. Stat. § 14-27.4A(a) (2013).[2] " 'Sexual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. . . ." N.C. Gen. Stat. § 14-27.1(4) (2013).[3]

To establish the elements of attempted statutory sexual offense, the State must offer substantial evidence of: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Sines*, 158 N.C. App. 79, 85, 579 S.E.2d 895, 899 (citation and internal quotation marks omitted), *cert. denied*, 357 N.C. 468, 587 S.E.2d 69 (2003). The intent required for attempted statutory sexual offense is the intent to engage in a sexual act. *Id.* at 86, 579 S.E.2d at 900.

Defendant was convicted on two counts of attempted sexual offense: (1) 17 CRS 213, described on the verdict sheet as "Attempted Statutory Sex Offense of a Child by an Adult in the truck/car[,]" and (2) 17 CRS 214, described on the verdict sheet as "Attempted Statutory Sex Offense of a Child by an Adult in [A.M.'s House.]" Defendant argues the evidence at trial was insufficient to provide substantial evidence of either attempted statutory sexual offense because insufficient evidence was presented of: (1) his intent to engage in a sexual act with Dee, or (2) of an overt act in furtherance of that intention. We disagree.

1. In Defendant's Truck/Car

[1] First, we address the 17 CRS 213, attempted statutory sexual offense of a child "in the truck/car[.]" At trial, A.M. testified about a time that defendant drove her and Dee to pick up medication for her husband. Dee sat between defendant and A.M. Defendant "tried to put his hands" up Dee's skirt "between her legs." Dee pushed defendant's hand away and crawled closer to her mother. A.M. stated she was not going to make Dee "do anything." After Dee's rebuff, defendant appeared "aggravated."

Defendant argues that his attempt to put his hands between Dee's legs "does not provide any rational basis" to infer defendant intended

2. This statute is recodified as N.C. Gen. Stat. § 14-27.28 by S.L. 2015-181, § 10(a), effective 1 December 2015.

3. This statute is recodified as N.C. Gen. Stat. § 14-27.20 by S.L. 2015-181, § 2, effective 1 December 2015.

to perform a sexual act. Defendant asserts that because he was driving a vehicle, "an inference of cunnilingus would make no sense at all" and "no evidence exists to support an inference" defendant intended any type of penetrative contact, especially considering the fact Dee was wearing underwear. We disagree.

"[T]he intent required for attempted statutory sexual offense is the intent to engage in a sexual act." *Sines*, 158 N.C. App. at 86, 579 S.E.2d at 900. "Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence, it must ordinarily be proven by circumstantial evidence, *i.e.*, by facts and circumstances from which it may be inferred." *State v. Robinson*, 310 N.C. 530, 535, 313 S.E.2d 571, 575 (1984) (quoting *State v. Gammons*, 260 N.C. 753, 756, 133 S.E. 2d 649, 651 (1963)).

The specific date defendant attempted to put his hand up Dee's skirt is unknown, but Facebook messages tend to show it occurred on or prior to 19 July 2013. Messages between A.M. and defendant on that date indicate defendant was upset. A.M. told defendant that Dee loved him "to death. She just [was not] used to the other stuff[.]"

Of the images extracted from defendant's cell phone, two videos and one or two images were taken prior to 19 July 2013. A video of Dee dancing while clothed was taken on 7 July 2013. A video of Dee nude in the bathtub, washing her hair, was created on 15 July 2013. A clothed image of Dee on her front porch was taken on 16 July 2013. A nude photo of Dee in the bathtub was also recovered, but investigators were unable to determine when it was made. Defendant admitted during his interview with police that he had become aroused by this photo.

Conversations of a sexual nature involving Dee occurred between defendant and A.M. on 9 July 2013. A.M. told defendant she would "suck" him, and defendant stated she should "run that by [Dee]" to make sure A.M. could hold his hand, though A.M. indicated Dee would not be involved in that activity. Messages of a sexual nature were also sent on 15 July 2013, including defendant's inquiries about sexual acts between A.M. and Dee, and a request for explicit pictures of Dee. A.M. asked defendant to come over and play cards at her house on 15 July 2013, and he stated he needed "to get some money 1st" so A.M. would not be "mad" that he wanted to see Dee.

In the conversation on 19 July 2013, A.M. asked defendant if he loved "all the ones [he] played around with" or if he had "feelings for one more then [*sic*] the others." He replied, "its just something about [Dee], idk [I don't know][.]" At trial, A.M. testified defendant had expressed

his desire to "try something" sexual with Dee. In his interview with law enforcement, defendant stated he would not have engaged in intercourse with Dee, but would have "play[ed]" with her vagina by licking and rubbing it.

This evidence, viewed in the light most favorable to the State, supports a reasonable inference defendant attempted to engage in a sexual act with Dee, as defined in the statute, when he placed his hand between her legs and tried to put his hand up her skirt. The evidence also supports a conclusion that defendant's act of trying to reach up her skirt is an overt act that exceeded mere preparation. We find no error in the trial court's denial of defendant's motion to dismiss this charge for insufficiency of the evidence.

2. Inside A.M.'s House

[2] The other incident of attempted sexual offense occurred on 27 July 2013, when defendant instructed A.M. to have Dee wear a dress without wearing underwear because he was coming over to visit. Defendant argues the evidence was insufficient to provide substantial evidence of attempted statutory sexual offense because insufficient evidence was presented of (1) his intent to engage in a sexual act with Dee, or (2) of an overt act in furtherance of that intention. We disagree. Taking the evidence in the light most favorable to the State, the evidence tends to show defendant had the intent to engage in a sexual act against Dee, and committed an overt act that would have aided the commission of a statutory sexual offense against the victim.

First, there was sufficient evidence of defendant's intent to engage in a sex offense against Dee. The State's evidence tends to show A.M. and defendant had an ongoing agreement and plan for A.M. to teach Dee to be sexually active so that defendant could perform sexual acts with her. A.M. explained to law enforcement that she participated in this scheme because she wanted to use defendant's sexual attraction for Dee to "bait" him into a relationship with her. Defendant admitted to this scheme, and his awareness of A.M.'s intent to induce him into a relationship in an interview with law enforcement.

Facebook messages from 30 May 2013 to 28 July 2013 were admitted into evidence to support A.M.'s testimony, and also as evidence of defendant's interest in committing a sexual offense against Dee. The messages show A.M. sent defendant numerous photos and at least one video of Dee, including a video that showed A.M. performing cunnilingus on Dee in her bedroom on 26 July 2013. The following exchange then took place, on 27 July 2013, after defendant viewed the video:

[Defendant]: I want to do that sooooooooooooooo bad

[Defendant]: get a vid of her playing with it

[A.M.]: U got everything apparently lol

[Defendant]: yes

. . . .

[Defendant]: I want it sooooooooooooooooooooooo bad

[A.M.]: I'm trying to figure how to get her to

[Defendant]: fig it out soon plz

. . . .

[A.M.]: I think if she watched a time or two she would join in

[Defendant]: k

. . . .

[Defendant]: I WANT HER [P****]

. . . .

[Defendant]: will she put a dress on with out panies [*sic*]

[A.M.]: Sometimes

[Defendant]: get her to do that today

[A.M.]: I will try. Why

[Defendant]: im [coming] up today

[A.M.]: Yay!!!!!!

[A.M.]: I will do my best but I don't know if she will with someone here

. . . .

[A.M.]: What time u coming

[Defendant]: idk yet

[A.M.]: I know ur coming after everything we talked about. . . .

Based on the context in which defendant instructed A.M. to have Dee wear a dress without wearing underwear—because he was going to A.M.'s house to commit a sex offense against Dee—we hold there is substantial evidence of defendant's intent to commit a sex offense against Dee. This intent is further evidenced by defendant's previous attempt to put his hand between Dee's legs when she wore a skirt, and also by defendant's admission that he would have committed a sexual act against Dee if given the opportunity.

In light of this intent, we turn to defendant's assertion that there was insufficient evidence of an overt act in furtherance of that intention.

Attempt requires an overt act which must be

> adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (citation omitted). In *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996), our Supreme Court applied the law as summarized by *Price* and held that the defendant's "sneak approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery[.]" *Id.* at 668-69, 477 S.E.2d at 922. Further, the court held the crime of attempted armed robbery could not be abandoned, even though the defendant did not take the money, "[o]nce defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing [the victim][.]" *Id.* at 670, 477 S.E.2d at 922.

Here, defendant clearly intended to commit a sexual offense against Dee, and took overt actions towards that end. A.M. admitted that she and defendant planned to train Dee for sexual acts with defendant, and defendant's Facebook messages to A.M. and his interview with law enforcement demonstrate that he agreed to, encouraged, and participated in this plan. In light of this context, defendant's instruction to dress Dee without panties was more than "mere words" because it was a step in defendant's scheme to "groom" Dee for sexual activity.

Although defendant did not make it to A.M.'s house the day that he gave the instruction, he sent Facebook messages assuring A.M. he would arrive the next day "around 5 or 6" and again agreeing to commit a sexual offense against Dee. When defendant arrived at A.M.'s house in accordance with the plan, he was met by law enforcement and arrested.

The Facebook messages and A.M.'s testimony show that, at the time defendant traveled to A.M. and Dee's home and was arrested, Dee had been sexually assaulted by her mother multiple times to groom her for sexual activity with defendant, and defendant had also tried to put his hand between her legs as a part of this process. Dee had also been the victim of numerous explicit photographs and videos as a part of the scheme to "groom" her. From this evidence, a jury could reasonably conclude defendant traveled to A.M.'s house to commit a sexual act in support of his stated intent, and had taken multiple steps to groom the victim, facilitating his ability to carry out the crime.

Our Court's holding in *State v. Key*, 180 N.C. App. 286, 636 S.E.2d 816 (2006), *disc. rev. denied*, 361 N.C. 433, 649 S.E.2d 399 (2007) supports this result. In *Key*, our Court held there was substantial evidence of an overt act towards the crime of second-degree burglary where there was clear intent to commit the crime and the evidence tended to show the defendant went to the victim's home and "stood up on the door sill—and not merely on the porch—for thirty to sixty seconds." *Id.* at 293, 636 S.E.2d at 822. By going to the home and standing on the door sill, defendant took an overt step towards accomplishing his intent. *Id.* Similarly, here, defendant's act of traveling to A.M.'s home constitutes substantial evidence of an overt act towards accomplishing his clear intent to commit a sex offense against Dee. Thus, we disagree with the dissent's conclusion that the evidence only tends to show defendant took preparatory steps that are insufficient to establish an overt act.

The dissent cites *State v. Walker*, 139 N.C. App. 512, 518, 533 S.E.2d 858, 861 (2000) to support its argument that there was insufficient evidence of an overt act. However, *Walker* is inapposite to the facts before us. In *Walker*, the defendant attacked a victim he had never met in a bathroom, throwing her to the ground. *Id.* at 514, 533 S.E.2d at 859. The defendant laid on top of her, tried to cover her mouth, and struck her. *Id.* He said "shut up bitch" and told her to roll onto her stomach. *Id.* He also touched her side. *Id.* at 515, 533 S.E.2d at 859. She began to scream, and the defendant eventually ran away. *Id.* The Court held that from this evidence there was insufficient evidence that defendant manifested "a sexual *motivation* for his attack." *Id.* at 518, 533 S.E.2d at 861 (emphasis added). Thus, the issue in that case was decided based on the

defendant's intent, which an overt act did not demonstrate, and is not controlling here, where defendant's intent to commit a sexual offense was clear.

Here, as in *Key*, defendant took extensive preparatory steps that demonstrate his intent to commit a sexual offense. Then, by instructing A.M. to have Dee wear a dress without wearing underwear because he was coming over to visit, and going to A.M.'s house in accordance with the plan decided over Facebook messages, he performed an overt act towards accomplishing this end. Therefore, the trial court did not err by denying defendant's motion to dismiss this attempt offense.

B. Statutory Sexual Offenses

[3] Defendant was found guilty of five counts of statutory sexual offense of a child by an adult, identified as "inside the bathtub[,]" "outside the bathtub[,]" "performing oral sex in the bedroom[,]" "digital penetration in the bedroom[,]" and "digital penetration in the living room" for aiding and abetting the sexual offenses A.M. committed against Dee. Defendant argues the trial court erred in denying his motion to dismiss these charges because the evidence did not show he encouraged or instructed A.M. to perform cunnilingus or digitally penetrate Dee, or that any statement caused her to perform sexual acts on Dee. We disagree.

Defendant appears to assert his Facebook conversations with A.M. were "fantasies," but argues that even if they were taken at face-value, they were "devoid of any instruction or encouragement" to A.M. to specifically perform sexual acts, *i.e.* cunnilingus or penetration of Dee's vagina. However, defendant is mistaken that such explicit instruction is required.

In order to find a defendant guilty of a crime under the theory of aiding and abetting, the State must produce evidence tending to show:

> (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.

State v. Dick, 370 N.C. 305, 311, 807 S.E.2d 545, 549 (2017) (quoting *State v. Francis*, 341 N.C. 156, 459 S.E.2d 269 (1995)).

The defendant need not be present at the scene of the crime, *id.* at 310, 807 S.E.2d at 548-49, nor "expressly vocalize [his] assent to the criminal conduct." *State v. Marion*, 233 N.C. App. 195, 204, 756 S.E.2d

61, 68, *disc. rev. denied*, 376 N.C. 520, 762 S.E.2d 444 (2014) (citation omitted). "Communication of intent to the perpetrator may be inferred from the defendant's actions and from his relation to the perpetrator." *State v. Allen*, 127 N.C. App. 182, 185, 488 S.E.2d 294, 296 (1997) (citation omitted).

The record is replete with evidence of the relationship between defendant and A.M. A.M. repeatedly stated she considered defendant to be her friend. Defendant knew A.M. wanted a more significant relationship with him, and believed she was using Dee as bait to try to initiate a sexual relationship between them. Numerous messages between defendant and A.M. support a reasonable inference of a plan between them to engage in sexual acts with Dee.

At trial, A.M. stated she had described the sexual acts she had performed on Dee to defendant because he had told her he liked to hear about them. Defendant argues this description of sexual acts after the fact are insufficient to support a finding defendant knew of or about these acts prior to their occurrence, a requirement for aiding and abetting. However, the record supports an inference that defendant encouraged A.M. to perform such acts on Dee.

As early as 15 July 2013, defendant had received nude photos of Dee and a promise by A.M. to send more nude photos of Dee. Defendant specified he wanted the photos to be as "close as u can and as wide open as u can[.]" Defendant also initiated the idea of sexual "play" between A.M. and Dee. He told A.M. he believed Dee "want[ed] to." That day, A.M. made a video of Dee while she was nude in the bathtub.

Ten days later on 25 July 2013, messages indicate A.M. "had fun" the previous day, but on that day "she[,]" which was likely Dee, was "being stubbern [*sic*]" and "only wants to in the bath." On 26 July 2013, defendant asked A.M. if she had "been lickin." A.M. replied no, but she had "rubbed a little yesterday evening." Later that day, A.M. made a video of her performing cunnilingus on Dee in her bedroom, and sent it to defendant. Defendant replied later he wanted "to do that sooooooooooooooo bad." He then requested a video of Dee "playing with it[.]" A.M. made a video on 29 July 2013 of her rubbing Dee's vagina while Dee was on the couch.

Defendant cites to statements made by A.M. in her initial recorded interview, which was not included in the record on appeal. He argues these statements support his assertion that A.M. initiated the sexual abuse of her daughter and acted on her own, and that defendant had no prior knowledge of the sexual acts. However, at trial, A.M. admitted to

lying to the police during her initial interview in order to keep defendant from getting in trouble. The jury heard A.M.'s pretrial interview, along with all other evidence. It was their duty to weigh and resolve any conflicting evidence. *See State v. Griffin*, 18 N.C. App. 14, 16, 195 S.E.2d 569, 570 (1973) ("It is the duty of the jury to weigh and analyze the evidence and to determine whether that evidence shows guilt beyond a reasonable doubt.") (citation and internal quotation marks omitted).

Giving the State the benefit of all reasonable inferences, substantial evidence was presented to support a conclusion defendant aided and abetted in A.M.'s five sexual offenses against Dee. We find no error in the trial court's denial of defendant's motion to dismiss the five charges of sexual offense.

III. Conclusion

For the forgoing reasons, the trial court did not err.

NO ERROR.

Judge STROUD concurs.

Judge TYSON concurs in part and respectfully dissents in part by separate opinion.

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

The majority's opinion finds no error in the trial court's denial of all of defendant's motions to dismiss. I agree defendant has failed to show prejudicial errors in the trial court's denial of the motion to dismiss the five charges of sexual offense or in the denial of defendant's motion to dismiss the attempted sexual offense, which occurred inside defendant's vehicle. I disagree with the majority opinion's conclusion to uphold the trial court's ruling that the State presented substantial evidence of any overt act by the defendant to support the separate, purported attempted sexual offense against Dee while inside of A.M.'s house. I concur in part and respectfully dissent in part.

A person is guilty of a statutory sexual offense if the perpetrator is at least eighteen years old and engages in a sexual act with a victim under the age of thirteen. N.C. Gen. Stat. § 14-27.4A (2013). In the statute, a "sexual act" excludes vaginal intercourse, but includes "cunnilingus, fellatio, analingus, or anal intercourse" and "penetration, however slight, by any object into the genital or anal opening of another person's body."

State v. Minyard, 231 N.C. App. 605, 616, 753 S.E.2d 176, 185 (2014) (citation omitted).

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citations omitted).

Defendant does not dispute his or Dee's age, but argues insufficient evidence was presented of either his purported intent to engage in sexual acts with Dee or of any purported overt act in furtherance of that intention. Defendant was convicted on two counts of attempted sexual offense, *based upon two specific and unrelated instances*.

The first incident, which we all agree the State presented substantial evidence of an attempt, was defendant's attempt to put his hand up Dee's skirt while they were inside his vehicle with her mother on or about 19 July 2013. The second incident of attempted sexual offense purportedly occurred between 27 July 2013 and 29 July 2013. Defendant had requested of Dee's mother, A.M., on 27 July 2013 to have Dee wear a dress without wearing underwear, because he was planning to visit. Though he did not come over that day or the next day, defendant arrived at A.M.'s house on 29 July 2013, where he was arrested. Contrary to the majority's opinion, our precedents support neither defendant's request of A.M. nor his arrival at her house to constitute an overt act to meet the elements of the attempted sexual offense.

An unlawful attempt requires an overt act which must be

> adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory.

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (citation omitted). In cases involving other offenses, "mere words" or mere preparation have not been adequate to support a conviction for attempt.

In *State v. Daniel*, the jury was instructed that if the defendant had "cursed" the victim, "and ordered him to come to him, and [the victim] obeyed through fear, the defendant was guilty of an assault." 136 N.C. 571, 573, 48 S.E. 544, 544 (1904). Our Supreme Court held that "[m]ere words, however insulting or abusive, will not constitute an assault," but

"[w]here an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun and there has been a sufficient offer or attempt." *Id.* at 574, 48 S.E. at 545.

In attempted robbery with a dangerous weapon cases, words *accompanied by* the defendant's drawing out a firearm was held enough to show both intent to commit robbery and an overt act in furtherance thereof. *See*, *e.g.*, *State v. Davis*, 340 N.C. 1, 13, 455 S.E.2d 627, 633 (1995) ("defendants drew their pistols, and [one] told the victim, 'Buddy, don't even try it.' Such actions have been held to be sufficient evidence of attempted armed robbery even without a demand for money or property"); *State v. Taylor*, 362 N.C. 514, 539, 669 S.E.2d 239, 261 (2008) (the defendant approached the victim "from behind, pointed a gun at him, and indicated he should 'stay still' and empty his pockets. These words and actions are evidence of both defendant's intent to rob . . . and an 'overt act calculated to bring about' that result." (citation omitted)).

Drawing a gun on a victim, *along with* some type of statement is enough "in the ordinary and likely course of things [to] result in the commission" of robbery. *See Price*, 280 N.C. at 158, 184 S.E.2d at 869. Conversely, defendant's request to Dee's mother is more analogous to the "mere words" used in the cases cited above, and is easily distinguished from defendant's attempt inside his vehicle, which we all agree sustains that separate conviction, but which cannot be used to "bootstrap" an overt act for the other attempt conviction.

The facts of *State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996), cited in the majority's opinion, are consistent with the aforementioned attempted robbery cases where words plus the drawing of a gun were enough to constitute an overt act. However, in this instance, defendant's message to A.M. requesting her to have Dee wear a dress without her wearing underwear does not rise to the level of an overt act. Further, no evidence tends to show if A.M. had dressed Dee as defendant had requested when he arrived and was arrested at her home two days later. Viewed in the light most favorable to the State and consistent with precedents, these words are best described as merely preparatory. *See Price*, 280 N.C. at 158, 184 S.E.2d at 869.

The majority's opinion also asserts defendant's travel to A.M.'s house on the day of his arrest was an overt act to support an unlawful attempt to commit a sexual act on Dee that day. Defendant's going over to A.M.'s house two days after his text request did not "amount to the commencement of the consummation [of a sexual act]. It [was] merely

preparatory." *Price*, 280 N.C. at 158, 184 S.E.2d at 869. I respectfully disagree this action was an overt act to support this conviction.

After extensive review of the precedents and controlling case law, no attempted sexual offense case exists where an overt act to support the charge was not identified. In a case alleging an attempted first-degree rape, this Court found no overt act occurred to support the conviction for attempt, even though the defendant therein, attacked a woman inside a public bathroom, demanded that she roll onto her stomach, and touched her side with his hand. *State v. Walker*, 139 N.C. App. 512, 518, 533 S.E.2d 858, 861 (2000). Though this Court found the attack was vicious, "there was insufficient evidence that defendant manifested, by an overt act, a sexual motivation for his attack on the victim." *Id.* Because a conviction for an attempt can only be sustained through substantial evidence of intent *and an overt act*, mere words or defendant's preparation alone is not an overt act to support this conviction for attempt. *See id.*

Conversely, and consistent with the other attempt conviction before us, which we affirm, the overt acts identified in attempted sexual offense cases clearly would have led to the completion of the sexual offense. *See, e.g.*, *Minyard*, 231 N.C. App. at 618, 753 S.E.2d at 186 (finding an overt act where the defendant placed his penis on the victim's buttocks); *State v. Henderson*, 182 N.C. App. 406, 412-13, 642 S.E.2d 509, 513 (2007) (finding an overt act where the defendant removed his pants, walked into the room where his daughter was, stood in front of her, and requested that she put his penis in her mouth); *State v. Buff*, 170 N.C. App. 374, 380, 612 S.E.2d 366, 371 (2005) (finding "several overt acts" occurred where the defendant had touched the victim's breast and vaginal area).

The majority's opinion points to other instances where Dee had previously been victimized as a result of the plan between defendant and A.M. to "groom" Dee for sexual acts. While these other instances may support the other crimes for which defendant was convicted, they cannot be applied to the particular offense of the purported attempted sexual act in A.M.'s house on the date of defendant's arrest two days after he made his request to her mother for her to dress Dee in a certain manner. *See State v. Shue*, 163 N.C. App. 58, 62, 592 S.E.2d 233, 236 (2004) (evidence of taking indecent liberties with one brother cannot be used to show an attempt to commit indecent liberties with the other brother, even though the defendant entered the bathroom stall with the child, fixed the lock, grabbed the child's arm, and then exited the stall).

The majority's opinion also cites *State v. Key* to support its assertion that defendant's mere presence at A.M.'s house, alone, was an overt act.

Key involved charges of, *inter alia*, first-degree rape and attempted second-degree burglary. 180 N.C. App. 286, 288, 636 S.E.2d 816, 819 (2006). The majority's opinion cites to the discussion in the case concerning the attempted burglary. A defendant standing in the doorway of a home may constitute an overt act for an attempted burglary conviction, but such an action is inapplicable to, and does not support a conviction for, an attempted sexual offense or the particular facts of this case.

The "elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *Id.* at 292, 636 S.E.2d at 821 (quoting *State v. Rick*, 342 N.C. 91, 101, 463 S.E.2d 182, 188 (1995)). This Court found a defendant standing in the doorway of a house is evidence of his intent to commit a burglary, where he would have to break and enter another's house. *Key*, 180 N.C. App. at 293, 636 S.E.2d at 822. This Court also found this action was an overt act, beyond mere preparation, to commit a burglary. *Id.* However, such behavior is inapplicable to support the conviction of an attempted sexual offense, because breaking and entry into a dwelling is not an element of the statutory sexual offense. *See Minyard*, 231 N.C. App. at 616, 753 S.E.2d at 185.

The majority's opinion also purports to distinguish the facts and holding in *State v. Walker*, by asserting that case was decided based on the defendant's intent, which was not demonstrated by an overt act. 139 N.C. App. at 518, 533 S.E.2d at 861. However, intent is often proved through a finding of an overt act. *See Key*, 180 N.C. App. at 293, 636 S.E.2d at 822. Intent, standing alone without an overt act, is not an attempt.

Evidence of an overt act is required to support an attempt conviction because "without it there is too much uncertainty as to what the [defendant's] intent actually was." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 616 (1984) (citation omitted). While we may agree defendant may have planned and intended to perform sexual acts on Dee at some point, the State's evidence is insufficient to prove he intended and attempted to do so on the day he was arrested.

Defendant came over to A.M.'s house two days after had he made his request to A.M. to dress Dee in a specific manner. No evidence was presented concerning how Dee was dressed the day defendant was arrested or showing defendant had or attempted any contact with her. Intent, often proven through overt acts, must correlate to "the time of the offense at issue." *See Shue*, 163 N.C. App. at 62, 592 S.E.2d at 236.

The State failed to present any substantial evidence of an overt act to support the conviction that defendant attempted to commit a sexual offense on Dee in A.M.'s house. I disagree with the conclusion of no error in the trial court's denial of defendant's motion to dismiss this attempt charge. This conviction should be reversed and the case remanded for resentencing. I concur in the majority's opinion's holding of no error for the defendant's other convictions, but respectfully dissent from the conclusion of no error in the defendant's conviction of an attempted sexual offense at A.M.'s house.

STATE OF NORTH CAROLINA
v.
CYPRESS MONIQUE BROWN

No. COA18-1107

Filed 16 April 2019

Search and Seizure—traffic stop—reasonable suspicion—community caretaking doctrine—profanity yelled from a vehicle

In a prosecution for driving while impaired, the trial court erred in denying defendant's motion to suppress because neither the reasonable suspicion standard in *Terry v. Ohio*, 392 U.S. 1 (1968) nor the community caretaking doctrine justified a warrantless stop, where the sole reason for stopping defendant was that a police deputy heard someone yell a profanity from inside defendant's vehicle as it passed by a group of police officers. Although the deputy was concerned that a domestic dispute might have been taking place inside the vehicle, he admitted that he did not know how many people were inside the car, who had yelled the profanity, the reason for the yelling, or who the profanity was directed toward.

Judge BRYANT concurs in the result only without separate opinion.

Appeal by defendant from judgment entered 26 July 2018 by Judge Julia Lynn Gullett in Alexander County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Edward L Hedrick, V, and Robert E. Campbell for defendant.

ARROWOOD, Judge.

Cypress Monique Brown ("defendant") appeals the denial of her motion to suppress from judgment entered on her guilty plea to driving while impaired ("DWI") pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (hereinafter "*Alford* plea"). For the following reasons, we reverse.

I. Background

Defendant received a citation for DWI after being stopped on a rural road outside of Taylorsville by an Alexander County sheriff's deputy at approximately 3:00 in the morning on 5 August 2017. Defendant was convicted of DWI in Alexander County District Court on 16 April 2018 and appealed for a trial *de novo* in Superior Court.

On 26 July 2018, defendant filed a motion to suppress all evidence on the basis that the stop was illegal. Defendant specifically asserted that there was no reasonable suspicion to stop her. The motion to suppress was accompanied by an affidavit of defendant's counsel asserting that the deputy used the mere utterance of profanity as a pretext to initiate a traffic stop of defendant. Defendant's motion to suppress was heard in Alexander County Superior Court before the Honorable Julia Lynn Gullett on 26 July 2018. The deputy who pulled defendant over was the only witness to testify at the hearing. On 11 October 2018, the trial court entered an order denying defendant's motion to suppress. The trial court made the following findings based on the deputy's testimony:

> 1. On August 5th of 2017, Deputy Hoyle, an officer with eight and half years of experience as a deputy for the Alexander County Sheriff's Office, was standing outside his patrol car in the parking lot of a closed gas station between 2:20 and 2:25 in the morning, and that there were several other officers also in the parking lot and they all had marked cars.
>
> 2. Further, that there were no businesses open for several miles in either direction, and that Deputy Holye [sic] saw a vehicle come down the road. He heard yelling from inside the vehicle and he heard the words, "mother fucker". [sic]

3. Deputy Hoyle testified in court that he was concerned that someone might be involved in a domestic situation or an argument of some time. [sic] That he got in his patrol car and caught up with the vehicle from which he heard the words.

4. The vehicle then slowed down below the 55-mile per hour speed limit.[1] The Court further finds that there is a road sign in the area suggesting a 45 miles per hour speed limit because of curves.

5. The officer testified that he waited until they got to a lighted area after the curves and initiated the traffic stop to make sure everybody was okay. The Court finds that the car pulled past the lighted parking lot and pulled over on the side of the road.

6. The Court further finds that the deputy did not observe any violations of the rules of the road; that the vehicle stopped at a stop light; that the vehicle appropriately turned right. The deputy observed no weaving, no crossing of any lines, and nothing abnormal about the operation of the vehicle, except for going less than the speed limit.

7. The Court does find that there was a road sign that suggested driving below the speed limit in that area[.]

Based on its findings, the trial court issued the following relevant conclusions:

4. The Court finds that reasonable suspicion requires that an officer have a reasonable and articulable reason for stopping the vehicle.

5. The Court, in this situation, finds that the officer's articulable and reasonable suspicion for stopping the vehicle was a community caretaking function.

6. The Court finds that the officer has indicated that his reason for stopping the vehicle was to make sure everything was okay. That he thought perhaps that

1. There is no evidence that defendant was ever driving above 55 miles per hour. Rather, Deputy Hoyle testified that he observed defendant slow down to well below 55 miles per hour, never stating that defendant's starting speed was above 55 miles per hour.

there was some type of argument or domestic dispute. That is the reason that he stopped the vehicle.

7. In this matter, the Court finds that, under the totality of those circumstances, it was reasonable for the officer to believe that someone in the vehicle might be in danger and finds that there was reasonable suspicion for the stop.

Following the trial court's denial of her motion to suppress, defendant entered an *Alford* plea to DWI, reserving her right to appeal the denial of her motion to suppress. The trial court entered an impaired driving judgment on 26 July 2018 sentencing defendant to 60 days in the custody of the Misdemeanant Confinement Program, suspended on condition defendant be placed on unsupervised probation for 12 months. Defendant gave notice of appeal in open court and the trial court stayed judgment pending disposition of this appeal.

II. Discussion

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress. Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

Defendant does not challenge any specific finding by the trial court except that portion of finding of fact number 6 finding that defendant stopped at a stop light. Both the State and defendant agree that the evidence was that defendant stopped at a stop sign, not a stop light. Despite this error, the significance of the finding is apparent; to show that defendant was adhering to the rules of the road.

Instead of challenging the trial court's findings, the crux of defendant's argument on appeal is that the trial court's findings do not support its conclusion that the stop was proper because the deputy had reasonable suspicion for stopping for a community caretaking function. Defendant first argues the trial court erred by conflating two separate exceptions to the warrant requirement. Nevertheless, defendant contends the record does not support a warrantless stop based on a reasonable suspicion or a community caretaking function. We agree.

This Court explained the relevant search and seizure law in *State v. Smathers*, 232 N.C. App. 120, 753 S.E.2d 380 (2014).

> The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Traffic stops are recognized as seizures under both constitutions. *See State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) ("A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief.") (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667 (1979)). Although a warrant supported by probable cause is typically required for a search or seizure to be reasonable, *State v. Phillips*, 151 N.C. App. 185, 191, 565 S.E.2d 697, 702 (2002), traffic stops are analyzed under the "reasonable suspicion" standard created by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Styles*, 362 N.C. at 414, 665 S.E.2d at 439. "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification." *Id.* (citation and quotation marks omitted). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981)). "When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, how the [warrantless search] was exempted from the general constitutional demand for a warrant." *State v. Nowell*, 144 N.C. App. 636, 642, 550 S.E.2d 807, 812 (2001).

232 N.C. App. at 123, 753 S.E.2d at 382-83.

We agree with defendant that the trial court appears to comingle two separate exceptions to the warrant requirement, the reasonable articulable suspicion standard and the community caretaking standard, when concluding "that the officer's articulable and reasonable suspicion for

stopping the vehicle was a community caretaking function."[2] On appeal, we address the standards separately.

In *Smathers*, this Court, upon the concession of the State, noted that the stop of the defendant was not based on a reasonable articulable suspicion of criminal activity that would permit a warrantless stop of the defendant's vehicle under *Terry*. 232 N.C. App. at 123, 753 S.E.2d at 383. Other exceptions to the warrant requirement, such as exigent circumstances and the automobile exception were also unhelpful "because they apply only to situations where officers are investigating or preventing criminal activity." *Id.* at 124, 753 S.E.2d at 383. Instead, this Court adopted the community caretaking doctrine as a valid exception to the warrant requirement, *id.* at 126, 753 S.E.2d at 384, and held the officer's stop of the defendant after he observed the defendant's vehicle strike an animal that ran into the road fit into the exception and was reasonable under the Fourth Amendment, *id.* at 131, 735 S.E.2d at 388.

In the present case, the evidence and the trial court's findings give no indication that there was any basis for a traffic stop or a reasonable articulable suspicion of criminal activity to justify a *Terry* stop. The deputy testified and the trial court found that the sole reason for the stop of defendant's vehicle was that the deputy heard someone in the vehicle yell "mother f*****" as it drove by the location where the deputy was standing with other officers. Whether the deputy was justified in stopping defendant's vehicle under the community caretaking doctrine based on what he heard is a separate and distinct question.

In *Smathers*, after reviewing methods developed in other jurisdictions, this Court adopted a three-pronged test that it believed "provides a flexible framework within which officers can safely perform their duties in the public's interest while still protecting individuals from unreasonable government intrusions." *Id.* at 128, 753 S.E.2d at 386. This Court explained that,

> [u]nder [the] test, . . . the State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and

---

2. We note that the State's argument to the trial court against suppression relied on reasonable articulable suspicion to support the stop based on *Terry*. On appeal, the State does not even cite *Terry* and argues only that the stop was proper under the community caretaking exception to the warrant requirement.

> (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

Id. at 128-29, 753 S.E.2d at 386. The Court then listed considerations in assessing the weight of the public need or interest against the intrusion of an individual's privacy. *Id.* at 129, 753 S.E.2d at 386.

We, however, do not reach the balancing of the interests in this case because we do not think the totality of the circumstances establish an objectively reasonable basis for a community caretaking function under the second prong. As stated above, the sole basis for the stop of defendant's vehicle was that the deputy heard someone in the vehicle yell "mother f*****" as it passed by. The deputy testified that he only heard the words "mother f*****" and knew it came from the vehicle because there were no other vehicles on the road. The deputy did not know if the driver or a passenger yelled the words, did not know if there were passengers in the vehicle, did not know if the windows on the vehicle were up or down, and did not know who the words were directed towards. The deputy acknowledged that "[i]t could be directed towards us. It could be a sign of people inside the vehicle fighting. It could have been somebody on the telephone. There are multiple scenarios with that." We do not believe these facts, much less the trial court's findings which we are directed to review on appeal, establish an objectively reasonable basis for a stop based on the community caretaking doctrine.

In *Smathers*, the Court made clear that "this exception should be applied narrowly and carefully to mitigate the risk of abuse." *Id.* at 129, 753 S.E.2d at 386. Therefore, as defendant points out, in cases where the community caretaking doctrine has been held to justify a warrantless search, the facts unquestionably suggest a public safety issue. There are no such facts in this case and the State does not direct our attention to any case applying the community caretaking doctrine to facts similar to those in the present case; and we are unable to find any cases.

Given the facts in this case, we hold the yelling of a profanity, which constitutes the totality of the circumstances justifying the stop in this case, did not establish an objectively reasonable basis for a stop based on the community caretaking doctrine. Thus, the trial court erred in denying defendant's motion to suppress in this case.

III. Conclusion

For the reasons discussed, we hold the trial court erred in denying defendant's motion to suppress and we reverse the judgment entered on defendant's *Alford* plea.

REVERSED.

Judge DILLON concurs.

Judge BRYANT concurs in the result only without separate opinion.

STATE OF NORTH CAROLINA
v.
KENNETH CALVIN CHANDLER, DEFENDANT

No. COA18-14

Filed 16 April 2019

Criminal Law—guilty plea—informed choice—equivocation regarding guilt—acceptance of plea

The trial court did not err in refusing to accept defendant's guilty plea—to indecent liberties with a child, in exchange for the State's dismissal of first-degree sex offense—where defendant's admission of guilt in the written plea, verbal assertion of factual innocence, and stated motivation for entering the plea (to prevent the victim from being exposed to further legal proceedings) were contradictory and indicated a lack of informed choice.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 11 August 2017 by Judge Mark E. Powell in Madison County Superior Court. Heard in the Court of Appeals 31 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennifer T. Harrod, for the State.

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

BERGER, Judge.

A Madison County jury found Kenneth Calvin Chandler ("Defendant") guilty of first-degree sex offense with a child and taking indecent liberties with a child. Defendant appeals, arguing that the trial judge improperly

refused to accept a tendered guilty plea in violation of the statutory mandate in N.C. Gen. Stat. § 15A-1023(c). We disagree.

Factual and Procedural Background

Defendant was indicted for first-degree sex offense with a child and indecent liberties with a child. Defendant reached a plea agreement with the State and signed a standard AOC-CR-300 Transcript of Plea to resolve these charges on February 6, 2017. Defendant's Transcript of Plea was also signed by his attorney and the prosecutor.

On page one of the Transcript of Plea, there are three boxes available to describe the type of plea a defendant is entering: (1) guilty, (2) guilty pursuant to *Alford* decision, and (3) no contest. Defendant checked that he was pleading guilty.

Page two of the Transcript of Plea has standard questions concerning the type of plea entered. In response to question 13, "Do you now personally plead guilty, [or] no contest to the charges I just described[,]" Defendant checked the box marked "guilty," and answered in the affirmative. Question 14 has subparts (a), (b), and (c). Each subpart concerns the different pleas available to a defendant. Subpart (a) is used with a guilty plea, (b) is for no contest pleas, and (c) is specifically for *Alford* pleas. Because Defendant was pleading guilty, in response to the question in subpart (a), "Are you in fact guilty[,]" Defendant again answered in the affirmative on the Transcript of Plea.

Page three of the Transcript of Plea addresses the plea arrangement made by the State. According to the Transcript of Plea, in exchange for Defendant's guilty plea, the State agreed to dismiss the charge of first degree sex offense. Page three also contains signature lines for Defendant, defense counsel, and the prosecutor. Defendant acknowledged that the terms and conditions stated in the Transcript of Plea were accurate. Defense counsel certified that he and Defendant agreed to the terms and conditions stated in the Transcript of Plea. The prosecutor's certification states that the conditions stated in the Transcript of Plea were agreed to by all parties for entry of the plea.

On February 7, 2017, the State called Defendant's case and indicated to the trial court that the Defendant planned to enter a plea. The prosecutor asked defense counsel how Defendant pleaded, and defense counsel responded, "Pursuant to negotiations, guilty." The Transcript of Plea was submitted to the trial court, and during the colloquy with Defendant, the following exchange occurred:

[The Court:] Do you understand that you are pleading guilty to the following charge: 15 CRS 50222, one count of indecent liberties with a minor child, the date of offense is April 19 to April 20, 2015, that is a Class F felony, maximum punishment 59 months?

[Defendant:] Yes, sir.

[The Court:] Do you now personally plead guilty to the charges I just described?

[Defendant:] Yes, sir.

[The Court:] Are you, in fact, guilty?

[Defendant:] Yes, sir.

[The Court:] Now, I want to make sure you understand – you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because *I want to make sure that you understand exactly what you're doing*.

[Defendant:] Well, the reason I'm pleading guilty is to keep my granddaughter from having to go through more trauma and go through court.

[The Court:] Okay.

[Defendant:] *I did not do that*, but I will plead guilty to the charge to keep her from being more traumatized.

[The Court:] Okay, I understand, [Defendant]. Let me explain something to you. I practiced law 28 years before I became a judge 17 years ago, and I did many trials and many pleas of guilty and represented a lot of folks over the years. And I always told my clients, I will not plead you guilty unless you are, in fact, guilty. I will not plead you guilty if you say "I'm doing it because of something else. I didn't do it." And that's exactly what you told me just then, "I didn't do it." *So for that reason I'm not going to accept your plea*. Another judge may accept it, but I will never, ever, accept a plea from someone who says, "I'm doing it because of another reason, I really didn't do it." And

> I'm not upset with you or anything like that, I just refuse to let anyone do anything, plead guilty to anything, that they did not – they say they did not do. I want to make sure that you understand you have the right to a trial, a jury trial. Do you understand?
>
> [Defendant:] Yeah, I understand that. We discussed that, me and my lawyer.
>
> [The Court:] Okay.
>
> [Defendant:] And like I say, *I did not intentionally do what they say I've don*e.
>
> [The Court:] Okay, that's fine. That's good.
>
> [Defendant:] But like I say, I told [defense counsel] that *I would be willing to plead guilty to this, have a plea deal, to keep this child from having to be drug through the court system*.
>
> [The Court:] That's fine. I'm not going to accept your plea on that basis because I really don't want you to plead guilty to anything that you stand there, uh, and you've said you didn't do. So I'm not going to accept your plea. We'll put it over on another calendar where another judge will be here. If you want to do that, you be sure and tell the judge what you told me if you still feel that way. I'm going to write it down here on this transcript of plea of why I didn't take your plea.
>
> See, the easy thing for me to do is just take pleas and put people in jail or do whatever I need to do, or think is best for their sentence, and that's easy. But I can't lay down and go to sleep at night knowing that I put somebody in jail or entered a sentence of probation or whatever to something they did not do, or they say they did not do. I don't know any of the facts of your case; I don't know anything except what I just read in the indictment. That's all I know. But when a man or woman says, I didn't do something, that's fine, I accept that.

(Emphasis added.)

Defendant's case was continued and subsequently came on for trial on August 7, 2017. Prior to trial, Defendant was arraigned again, and

pleaded not guilty. Defendant continued to maintain that he was factually innocent when he testified at trial that

> [Defendant:] I just remember saying that I don't, I don't understand why [the victim] would lie. I don't understand why all this whatever happened had happened, but I know that I didn't – . . . And I know it wasn't true.
>
> . . . .
>
> [Defense Counsel:] Did you ever knowingly touch [the victim]?
>
> [Defendant:] No, sir.

A Madison County jury convicted Defendant of first degree sex offense and indecent liberties with a child, and received consecutive sentences of 192 to 291 months and 16 to 29 months in custody. Defendant argues for the first time on appeal that the trial court erred on February 7, 2017 when it rejected his plea. Specifically, Defendant asserts that a trial court judge is required to accept a guilty plea pursuant to N.C. Gen. Stat. § 15A-1023(c), even when a defendant maintains his innocence. We disagree.

Analysis

> If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

N.C. Gen. Stat. § 15A-1023(c) (2017).

"A valid guilty plea . . . serves as an admission of all the facts alleged in the indictment or other criminal process." *State v. Thompson*, 314 N.C. 618, 623-24, 336 S.E.2d 78, 81 (1985) (citations omitted). A guilty plea is "[a]n express confession" by a defendant who "directly, and in the face of the court, admits the truth of the accusation." *State v. Branner*, 149 N.C. 559, 561, 63 S.E. 169, 170 (1908). "A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned." *Id.* at 561-62, 63 S.E. at 170.

"A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *State v. Chery*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) (citation and quotation marks omitted). *North Carolina v. Alford* notes that:

> Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, . . . and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

North Carolina v. Alford, 400 U.S. 25, 37-38 n.10 (1970) (citations omitted).

A defendant's plea must be the product of his informed choice, and a trial court cannot accept a plea from a defendant unless it so finds. N.C. Gen. Stat. § 15A-1022(b) (2017). "[A] plea of guilty . . . may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly." *State v. Tinney*, 229 N.C. App. 616, 621, 748 S.E.2d 730, 734 (2013) (quoting *State v. Ford*, 281 N.C. 62, 67-68, 187 S.E.2d 741, 745 (1972)). Whether a defendant's plea was the product of his informed choice is a question of law reviewed *de novo*. *Id.* (citation omitted).

The trial court correctly rejected Defendant's tendered guilty plea because the trial court did not and could not find that it was the product of his informed choice. Here, the trial court expressed concern that Defendant did not fully understand what he was doing by tendering a plea of guilty:

> Now, I want to make sure you understand – you hesitated a little bit there and looked up at the ceiling. I want to make sure that you understand that you're pleading guilty to the charge. If you need additional time to talk to [defense counsel] and discuss it further or if there's any question about it in your mind, please let me know now, because I want to make sure that you understand exactly what you're doing.

Defendant did not respond that he understood what he was doing. When questioned about whether he understood what he was doing by pleading *guilty*, Defendant maintained his innocence.

Judge Pope was thus presented with a defendant who provided a plea transcript with "an admission of all the facts alleged in the indictment or other criminal process," *Thompson*, 314 N.C. at 624, 336 S.E.2d at 81 (citation omitted), but who asserted factual innocence. This conflict in Defendant's answers cannot result in a finding that Defendant knowingly, intelligently, and understandingly tendered a plea of guilty to the trial court because of the conflicting and contradictory information provided to the trial court by Defendant. To find otherwise would be to rewrite the plea agreement as an *Alford* plea.[1]

Upon inquiry by Judge Pope about whether Defendant understood what he was doing, Defendant never "clearly expressed [a] desire to enter" a plea, and he never stated or intimated in any way that "his interests require entry of a guilty plea." Defendant did not assert in the trial court, nor does he argue here, that it is in his best interest to plead pursuant to *Alford*. Defendant stated he was attempting to plead guilty so the victim would not have to go through the difficulty of testifying, but he did not and has not asserted that it was in his best interest to plead pursuant to *Alford*. Defendant maintained his innocence, and his plea of not guilty and subsequent testimony at trial demonstrate that he believed the presumption of innocence and trial by a jury of his peers were in his best interests.[2]

Conclusion

Because the trial court did not err in refusing to accept Defendant's plea of guilty, we will not disturb the judgment.

NO ERROR.

---

1. Plea agreements are in essence contracts. *State v. Blackwell*, 135 N.C. App. 729, 731, 522 S.E.2d 313, 315 (1999), *remanded on other grounds*, 353 N.C. 259, 538 S.E.2d 929 (2000). This Court has no authority to mandate that the prosecutor must offer Defendant an *Alford* plea. Based upon the plain language of the Transcript of Plea, the prosecutor here agreed to a concession on charges on the condition that Defendant plead guilty. It is the prosecutor who has the discretion to craft the terms of a plea and sign a plea transcript. "The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district[.]" N.C. Const. art. IV, § 18. "The clear mandate of that provision is that the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State." *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 871 (1991). This Court would exceed its authority were it to craft a plea arrangement for the State.

2. We note that if we were to accept Defendant's argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas, not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

Judge STROUD concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

I. Summary of Dissent

Our General Assembly has provided that a trial court "must" accept a plea arrangement between the prosecutor and the defendant where the conditions of Section 15A-1023(c) are met. There is nothing in Section 15A-1023(c) which gives the trial court discretion to reject an arrangement simply because the defendant claims during the required colloquy that he did not, in fact, commit the crime.

Our General Assembly has empowered the *prosecutor* to decide whether to require a defendant to admit to the crime as a condition of agreeing to a plea arrangement. And if a defendant acts contrary to this condition of their deal by professing his innocence during the colloquy, it is the *prosecutor* who has the right to withdraw the offer. But it is of no concern of the trial court.

Here, the prosecutor did not withdraw from the plea deal based on Defendant's profession of innocence during the colloquy. And there is no indication that the requirements of Section 15A-1023(c) were not met. Therefore, I must conclude that the trial judge was compelled by statute to accept the plea.

Further, I conclude that Defendant was prejudiced by the trial judge's failure to accept the plea deal. Specifically, Defendant was charged with two crimes; the State agreed to dismiss one of the charges in exchange for his plea of guilty to the other charge; and after the trial judge rejected his plea, Defendant was subsequently tried, convicted, and sentenced for *both* crimes.

II. Analysis

Defendant challenges his convictions arguing that the first judge who heard his guilty plea failed to follow a statutory mandate requiring that the judge accept the guilty plea. Defendant contends that, if he had been allowed to plead guilty to only the indecent liberties charge, he would have been exposed to sentencing for only one charge, rather than for both charges.[1]

1. I acknowledge that Defendant failed to object to the first judge's refusal to accept his guilty plea. However, the trial judge had a *statutory* duty to accept the guilty plea in this

Defendant and the prosecutor entered into a plea deal whereby Defendant agreed to plead guilty. During the colloquy, Defendant stated that he wanted to plead guilty but that he was, in fact, innocent. In North Carolina, there is no constitutional or statutory barrier for a defendant to plead guilty while maintaining his innocence. This type of plea is what is known as an *Alford* plea, named for the United States Supreme Court case *North Carolina v. Alford*.[2]

Our General Assembly has provided three types of pleas: guilty, not guilty, and no contest (*nolo contendere*). *See* N.C. Gen. Stat. § 15A-1022 (2017). Our General Assembly has not expressly delineated *Alford* pleas as a fourth type of plea nor has that body prescribed such pleas to be made in our courts. Rather, *Alford* pleas are a creation of the judicial branch and are recognized as a subset of *guilty* pleas, and not a subset of *no contest or not guilty* pleas. *See*, *e.g.*, *State v. Ross*, 369 N.C. 393, 395, 794 S.E.2d 289, 290 (2016) (stating that the "[d]efendant entered an *Alford* plea of guilty"); *State v. Miller*, 367 N.C. 702, 705, 766 S.E.2d 289, 291 (2014) ("Defendant entered an *Alford* plea of guilty[.]"); *State v. Baskins*, ___ N.C. App. ___, ___, 818 S.E.2d 381, 387 n.1 (2018) (recognizing that "an *Alford* plea [is] when the defendant pleads guilty without an admission of guilt"); *State v. Salvetti*, 202 N.C. App. 18, 28, 687 S.E.2d 698, 705 (2010) (discussing *Alford* pleas as a subset of guilty pleas, and ensuring the defendant understood this relationship).

The extent of a trial judge's discretion to accept or reject a plea arrangement has been set by our General Assembly. A judge's discretion depends on *the type* of plea entered. For instance, the General Assembly has given discretion to trial judges whether to accept a "no contest"

---

case. N.C. Gen. Stat. § 15A-1023(c) (2017). And our Supreme Court has long held that "[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Therefore, Defendant's failure to object is not fatal to our consideration of this appeal.

2. In *Alford*, the Court held that the federal constitution allowed for a trial court to accept a defendant's guilty plea, even where the defendant claims his innocence. *North Carolina v. Alford*, 400 U.S. 25, 37-8 (1970). However, the Court did not hold that state trial courts are *required* to accept *Alford* pleas, leaving the decision to "the States in their wisdom." *Id.* at 39. While many states, including North Carolina, allow *Alford* pleas, there are some states that have chosen not to accept *Alford* pleas where the defendant maintains his or her own innocence under their own state's constitutional provisions. *See*, *e.g.*, *State v. Urbina*, 115 A.3d 261, 269 (N.J. 2015) (recognizing a strong disapproval of *Alford* pleas by the New Jersey Supreme Court); *Webster v. State*, 708 N.E.2d 610, 614 (Ind. Ct. App. 1999) ("For many years, Indiana has declined to accept a guilty plea where a defendant contemporaneously maintains his innocence.").

plea. N.C. Gen. Stat. § 15A-1022(d) (2017) ("The judge *may* accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty . . . ." (emphasis added)).

On the other hand, however, *and relevant to this present case*, the General Assembly has provided that a trial judge "must" accept a guilty plea where (1) the plea is based on his or her own informed choice, (2) a factual basis exists for the plea, and (3) sentencing is left to the discretion of the court. N.C. Gen. Stat. § 15A-1023 (2017). The General Assembly has made no exception to this statutory mandate for the subset of guilty pleas known in the judiciary as *Alford* pleas.[3]

Here, Defendant wished to plead guilty to the indecent liberties charge in order to avoid possible punishment on the sex offense charge. The prosecutor agreed to this arrangement. Granted, the prosecutor's acceptance was conditioned on the inclusion of a provision in the agreement that Defendant acknowledged that he was in fact guilty. To require this condition as part of a plea deal is certainly within a prosecutor's discretion. Defendant signed the agreement. But during the colloquy when Defendant suggested that he did not in fact commit the crime, it was on the prosecutor to withdraw the offer, which the prosecutor had the discretion to do. *See State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980) ("The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.").

But whether Defendant's guilty plea was an admission of actual guilt or an *Alford* plea was of no concern to the trial judge, as our General Assembly has not authorized the judge to consider this as a factor. Since the plea arrangement did not contain any sentencing recommendation, the trial court could have rejected the plea *only if* it found either (1) that the plea was not the product of Defendant's informed choice or (2) there was not a factual basis for the plea. Here, there is no indication that Defendant did not make an informed choice. And it is apparent that there was a sufficient factual basis for Defendant's plea, because a jury later found that Defendant had committed both crimes beyond a reasonable doubt.

The only plausible legal argument that could be made that the trial court had discretion under the statute to reject Defendant's plea is based

---

3. My research failed to uncover the phrase "*Alford* plea" occurring anywhere in the text of our General Statutes.

on the "factual basis" prong. Specifically, one could argue that there was no factual basis for the provision in the plea arrangement that Defendant was admitting guilt, as Defendant professed his innocence during the colloquy. For the following reasons, though, I do not believe that this argument is a winning one.

Specifically, whether or not a defendant actually admits to the crime is not part of the information which makes up the "factual basis" prong:

> A defendant's bare admission of guilt, or plea of no contest, always contained in [the Transcript of Plea], does not provide the "factual basis" contemplated by G.S. 15A-1022(c) . . . . The statute, if it is to be given any meaning at all, must contemplate that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.

State v. Sinclair, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980); *see also State v. Bollinger*, 320 N.C. 596, 603, 359 S.E.2d 459, 463 (1987) (stating that "[n]othing in N.C.G.S. § 15A-1022 requires the court to make [] an inquiry [of the defendant as to whether he was in fact guilty]"). The information which makes up the "factual basis" prong is the "information [from which] an independent judicial determination of defendant's actual guilt" could be made. *State v. Agnew*, 361 N.C. 333, 337, 643 S.E.2d 581, 584 (2007). And the General Assembly has provided a number of sources from which this information could be presented apart from the words of the defendant. *See* N.C. Gen. Stat. § 15A-1022(c) (2017).[4]

Rather than being part of the information for the "factual basis" prong, Defendant's admission of actual guilt is simply a condition which the State required to induce it to enter into the plea arrangement. And when Defendant acted contrary to this condition, it was certainly the right of the prosecutor to walk away from the deal based on this "breach." But the prosecutor waived this potential breach by not speaking up during the colloquy.

I note the State's waiver argument; namely that since Defendant was given a second opportunity to plead guilty before a different judge but elected to plead not guilty, he waived any argument on appeal. *See State v. Gaiten*, 277 N.C. 236, 239, 176 S.E.2d 778, 781 (1970) ("[I]t is a general rule that a defendant may waive the benefit of statutory or constitutional

4. The statute provides that the "factual basis" may be based on, for example, "[a] statement of the facts by the prosecutor," "[a]n examination of the presentencing report," or "sworn testimony" from third parties. N.C. Gen. Stat. § 15A-1022(c)(1), (3)-(4).

provisions by express consent, failure to assert it in apt time, or *by conduct inconsistent with a purpose to insist upon it*." (emphasis added)).

However, I further note that it is *the State's burden* to point to evidence of Defendant's waiver. Here, in order to show that Defendant waived any argument concerning the first judge's refusal to accept his guilty plea, the State must show that the same plea arrangement was still on the table when he later went to trial and pleaded not guilty. But the State has not pointed to any evidence and I found no evidence in the record showing that the plea arrangement allowing Defendant to plead guilty to indecent liberties in exchange for dismissal of the sex offenses charge was still available when his case went to trial. Indeed, the State does not make any argument in its brief that the deal was still on the table. Therefore, it cannot be said that Defendant waived his statutory rights by pleading not guilty at trial where there is no evidence that the prior deal was still on the table.

Accordingly, my vote is to remand the matter and to "instruct the district attorney on remand to renew the plea offer accepted by [D]efendant and presented to the trial court." *State v. Lineberger*, 342 N.C. 599, 607, 467 S.E.2d 24, 28 (1996). If Defendant agrees to the offer—even if he still verbally professes his innocence during the colloquy as he did before—the trial court must (1) accept the plea under Section 15A-1023(c), (2) vacate the current judgment, and (3) enter a new judgment based on the guilty plea to include a sentence as allowed by law. If Defendant rejects the plea offer on remand, then the current judgment should not be disturbed, as Defendant otherwise received a fair trial.[5]

5. I note that in *Lineberger*, our Supreme Court ordered that the defendant was entitled to a new trial if on remand his guilty plea was not accepted. *Lineberger*, 342 N.C. at 607, 467 S.E.2d at 28. However, the Court was construing Section 15A-1023(b), which gives the trial court discretion to accept a plea where a sentence is recommended, but which requires the trial court to grant the defendant a continuance if it does not accept the plea. N.C. Gen. Stat. § 15A-1023(b). In *Lineberger*, the Court held, not only did the trial court fail to properly exercise its discretion in considering the plea, but it also failed to grant a continuance when it rejected the plea. *Lineberger*, 342 N.C. at 606-7, 467 S.E.2d at 28. In the present case, Defendant makes no argument regarding the conduct of the trial itself. Therefore, we conclude that the judgment should be vacated only if Defendant accepts the plea previously offered.

STATE v. FIELDS

[265 N.C. App. 69 (2019)]

STATE OF NORTH CAROLINA
v.
MELVIN LAMAR FIELDS

No. COA18-673

Filed 16 April 2019

1. Assault—inflicting serious bodily injury—permanent protracted condition that causes extreme pain—rip in genitals

There was substantial evidence to present the charge of assault inflicting serious bodily injury to the jury where defendant's assault caused a rip in the victim's genitals—requiring 15 stitches, pain medication, time off from work, and modified duties upon return to work—tending to show a permanent or protracted condition that causes extreme pain. Further, the victim was left with a significant, jagged scar, which tended to show serious permanent disfigurement.

2. Assault—habitual misdemeanor assault—predicated on misdemeanor assault inflicting serious injury—conviction of felony assault inflicting serious bodily injury—same conduct

Where the jury found defendant guilty of felony assault inflicting serious bodily injury, the trial court erred by entering judgment and sentencing defendant for habitual misdemeanor assault, which was predicated on a misdemeanor assault inflicting serious injury charge arising from the same conduct.

Judge BERGER concurring in part and dissenting in part.

Appeal by Defendant from Judgments entered 12 January 2018 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Lisa Bradley, for the State.

Richard Croutharmel for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Melvin Lamar Fields (Defendant) appeals from Judgments adjudicating him guilty of (1) Assault Inflicting Serious Bodily Injury and

(2) Habitual Misdemeanor Assault. The Record before us demonstrates the following:

On 15 August 2016, a Grand Jury indicted Defendant for Malicious Maiming of Privy Member and Assault Inflicting Serious Bodily Injury. On 6 February 2017, the Grand Jury entered a superseding indictment for Attempted Malicious Castration or Maiming of a Privy Member and Assault Inflicting Serious Bodily Injury. The Grand Jury additionally indicted Defendant for Assault, and for Habitual Misdemeanor Assault, a separate substantive offense. These indictments alleged, on 2 November 2015, Defendant attacked and tore the scrotum of A.R.,[1] a transgender woman. In advance of trial, Defendant stipulated to two prior misdemeanor assaults as elements of Habitual Misdemeanor Assault.

At the close of the State's evidence, Defendant moved to dismiss the charges against him on the grounds of insufficiency of the evidence. Specifically, Defendant alleged the "evidence is insufficient as a matter of law on every element of each charge to support submission of the charge to the jury," and "there is a variance between the crime alleged in the indictment and the crime for which the State's evidence may have been sufficient for submission to the jury[.]" Defendant also argued, "as it relates to the attempted malicious maiming indictment, the [S]tate has failed to show there was . . . any specific intent . . . with malice to maim, disfigure, or render impotent" A.R., A.R. was "not permanently injured," and "the [S]tate has failed to show that there was serious bodily injury" to A.R. The trial court denied the Motion. Defendant declined to offer evidence on his own behalf and renewed his Motion to Dismiss, which the trial court again denied.

The trial court submitted to the jury the two felony charges of Attempted Castration or Maiming and Assault Inflicting Serious Bodily Injury. Rather than submit the charge of Habitual Misdemeanor Assault, the trial court submitted the underlying predicate misdemeanor offense of Assault Inflicting Serious Injury, pursuant to N.C. Gen. Stat. § 14-33(c)(1).

The jury returned verdicts finding Defendant not guilty of Attempted Castration or Maiming, guilty of Assault Inflicting Serious Bodily Injury, and guilty of Assault Inflicting Serious Injury. The jury further found as an aggravating factor Defendant took advantage of a position of trust or confidence to commit the offense.

---

1. Initials are used to protect the victim.

The trial court found Defendant had a prior felony record level of III. The court sentenced Defendant to a minimum of 19 months and a maximum of 32 months, in the presumptive range, for Assault Inflicting Serious Bodily Injury; and a minimum of 9 months and a maximum of 20 months, in the presumptive range, for Habitual Misdemeanor Assault; to be served consecutively in the custody of the North Carolina Department of Adult Correction. Defendant appeals.

Issues

The dispositive issues raised by Defendant in this case are: (I) Whether there was sufficient evidence of a "serious bodily injury" to submit the charge of Assault Inflicting Serious Bodily Injury to the jury; and (II) Whether the trial court erred in entering judgment on the Habitual Misdemeanor Assault conviction, predicated on the Defendant's conviction for misdemeanor Assault Inflicting Serious Injury, in light of Defendant's conviction for felony Assault Inflicting Serious Bodily Injury arising from the same conduct.

Analysis

I. Assault Inflicting Serious Bodily Injury

[1] In his first argument, Defendant contends the trial court erred in failing to dismiss the charge of Assault Inflicting Serious Bodily Injury. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Serious Bodily Injury

Our General Statutes define the offense of Assault Inflicting Serious Bodily Injury as follows:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who

> assaults another person and inflicts serious bodily injury is guilty of a Class F felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (2017). Thus, the offense requires the State to show (1) an assault, and (2) the assault inflicted "serious bodily injury," as defined above. On appeal, as at trial, Defendant contends the State's evidence failed to establish this second element–whether Defendant's conduct resulted in "serious bodily injury."

The evidence at trial tended to show after the assault, A.R. had a long rip in her genitals; A.R. required 15 stitches and pain medication; A.R. remained out of work for two weeks and upon return to work was placed on modified duties; A.R. continued to suffer pain for three months, and it was six months before the pain completely abated. A.R. has a large, jagged scar from the assault. Additionally, A.R.'s doctor testified an injury like A.R.'s "would be significantly painful[.]" However, Defendant contends A.R. suffered no serious, permanent disfigurement and no protracted condition causing her extreme pain.

Our courts have consistently recognized whether a serious bodily injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. Indeed, this Court has held a trial court properly denied a defendant's motion to dismiss under similar facts on numerous occasions. For example, we have held the State presented evidence of "serious bodily injury" sufficient for a jury to decide (1) where the victim testified his injuries were "very painful[,]" he suffered pain in his mouth for about a month, and a doctor testified those injuries caused "severe" and "extreme" pain, *State v. Brown*, 177 N.C. App. 177, 188, 628 S.E.2d 787, 794 (2006); (2) where the victim suffered a broken jaw which was wired shut for two months, along with damage to his teeth, broken ribs, and back spasms requiring emergency room visits, and a doctor testified the victim's broken jaw could cause "quite a bit" of pain and discomfort, *State v. Williams*, 150 N.C. App. 497, 503-04, 563 S.E.2d 616, 620 (2002); and (3) where the victim suffered broken bones in her face, a broken hand, a cracked knee, and an eye bruised so badly it was still problematic at trial, as well as pain lasting five to six weeks after the attack, *State v. Jamison*, 234 N.C. App. 231, 235-36, 758 S.E.2d 666, 670 (2014).

In the instant case, A.R.'s injury required stitches, pain medication, time off from work, and modified duties once she resumed work. Her pain lasted for as much as six months, and her doctor described it as "significantly painful." This evidence, taken together and giving the State the benefit of every reasonable inference, tends to show a "permanent or protracted condition that causes extreme pain." Moreover, the assault left A.R. with a significant, jagged scar, which would support a finding of "serious permanent disfigurement." Thus there is substantial evidence supporting a finding of "serious bodily injury" as defined by statute. N.C. Gen. Stat. § 14-32.4(a). Accordingly, we hold the trial court did not err in denying Defendant's motion to dismiss.

II. Habitual Misdemeanor Assault

[2] In his second argument, Defendant contends there was insufficient evidence to submit the predicate misdemeanor of Assault Inflicting Serious Injury to the jury. Alternatively, Defendant contends once the jury returned its verdict, including finding Defendant guilty of the Class F felony of Assault Inflicting Serious Bodily Injury, the trial court was required to arrest judgment on misdemeanor Assault Inflicting Serious Injury and to not enter judgment on Habitual Misdemeanor Assault. Specifically, Defendant argues N.C. Gen. Stat. § 14-33(c) statutorily mandates he could not be convicted and sentenced for misdemeanor Assault Inflicting Serious Injury because he was convicted and sentenced for felony Assault Inflicting Serious Bodily Injury, which imposes greater punishment, for the same conduct.

We summarily conclude, for the essential reasons stated in Section I, above, the evidence was sufficient to submit the issue of Assault Inflicting Serious Injury to the jury. We are, however, constrained to agree that once Defendant was convicted of a Class F felony assault, the trial court was required to arrest judgment on the misdemeanor assault conviction and not enter judgment on the charge of Habitual Misdemeanor Assault arising from the same assault.

A. Preservation and Standard of Review

Although Defendant did not object at trial to the trial court's entry of two separate assault judgments, "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000). We apply *de novo* review to Defendant's argument. *State v. Jones*, 237 N.C. App. 526, 532, 767 S.E.2d 341, 345 (2014).

B. Multiple Assaults Arising from the Same Conduct

Our General Statutes codify Habitual Misdemeanor Assault as follows: "A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation." N.C. Gen. Stat. § 14-33.2 (2017). Habitual Misdemeanor Assault is a Class H felony. *Id.*

The indictment charging Defendant with Habitual Misdemeanor Assault alleged: (I) Defendant assaulted A.R. inflicting serious injury to A.R.'s scrotum causing physical injury; and (II) Defendant had been convicted of two or more felony or misdemeanor assault offenses. Based on Defendant's stipulation to the two prior assault offenses, the only question for the jury on the Habitual Misdemeanor Assault charge was whether Defendant committed Assault Inflicting Serious Injury under N.C. Gen. Stat. § 14-33(c)(1). N.C. Gen. Stat. § 14-33(c)(1) provides, in relevant part:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault . . . is guilty of a Class A1 misdemeanor if, in the course of the assault . . ., he or she:
>
> (1) Inflicts serious injury upon another person . . .

N.C. Gen. Stat. § 14-33(c)(1) (2017).

The jury found Defendant guilty of Assault Inflicting Serious Injury. In addition, however, the jury returned a guilty verdict on Assault Inflicting Serious Bodily Injury, a Class F felony, for his assault on A.R. resulting in the same injury. *See* N.C. Gen. Stat. § 14-32.4(a).

In *State v. Jamison*, this Court addressed the question of whether a defendant could be convicted and sentenced for both Assault Inflicting Serious Bodily Injury and a misdemeanor assault under N.C. Gen. Stat. § 14-33(c). This Court reviewed the statutory mandate of N.C. Gen. Stat. § 14-33(c) and, in particular, the prefatory clause: "Unless the conduct is covered under some other provision of law providing greater punishment . . . ." *Jamison*, 234 N.C. App. at 238, 758 S.E.2d at 671. This Court held the prefatory language "unambiguously bars punishment for [a lesser class of assault] when the conduct at issue is punished by a higher class of assault." *Id.* at 239, 758 S.E.2d at 671. Thus, this Court concluded the statute mandated a defendant could not be convicted

and sentenced for both felony Assault Inflicting Serious Bodily Injury under N.C. Gen. Stat. § 14-32.4(a) and misdemeanor Assault on a Female under N.C. Gen. Stat. § 14-33(c)(2) for the same conduct. Because the trial court entered judgment on both felony and misdemeanor assault for the same conduct, this Court arrested judgment on the misdemeanor assault charge.

Applying *Jamison* to this case, where the jury returned its verdict finding Defendant guilty of Assault Inflicting Serious Bodily Injury, a higher class of assault providing for punishment as a Class F felony, under the plain language of N.C. Gen. Stat. § 14-33(c), the trial court could not impose judgment or sentence for Assault Inflicting Serious Injury, a lesser class of assault arising from the same conduct. Thus, the trial court was required to arrest judgment on Assault Inflicting Serious Injury and instead enter judgment solely on the higher Class F felony. *See Jamison*, 234 N.C. App. at 239, 758 S.E.2d at 672. As such, it follows, the trial court was then precluded from entering judgment on the Habitual Misdemeanor Assault charge expressly predicated on the misdemeanor assault charge. Rather, the statutory mandate of N.C. Gen. Stat. § 14-33(c), governing the predicate misdemeanor assault, requires Defendant be sentenced only for the assault conviction imposing greater punishment for the same conduct, here felony Assault Inflicting Serious Bodily Injury.

The State contends, however, the jury's finding on misdemeanor Assault Inflicting Serious Injury was used only for the purpose of establishing one element of the separate offense of Habitual Misdemeanor Assault. The State draws comparisons to habitual felon status, suggesting Habitual Misdemeanor Assault is simply intended to enhance punishment and thus may be imposed in addition to another assault charge arising from the same conduct.

However, "[u]nlike habitual felon status, habitual misdemeanor assault is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense." *State v. Sydnor*, 246 N.C. App. 353, 356, 782 S.E.2d 910, 913 (2016) (citations and quotation marks omitted); *compare State v. Priddy*, 115 N.C. App. 547, 549, 445 S.E.2d 610, 612 (1994) (holding Habitual Impaired Driving, unlike Habitual Felon status, is "a separate felony offense," and not "solely a punishment enhancement status"). In essence, the offense of Habitual Misdemeanor Assault replaces the underlying predicate misdemeanor, elevating the same conduct to a felony based on a defendant's prior assault convictions. Thus, for example, in *State v. Jones*, this Court recognized "the trial court could not administer punishment for both habitual misdemeanor assault, a

Class H felony, and assault on a female, a class A1 misdemeanor" resulting from the same conduct. 237 N.C. App. at 533, 767 S.E.2d at 345. The rationale in *Jones* was again premised on "the unambiguous phrase '[u]nless the conduct is covered under some other provision of law providing greater punishment[,]' in G.S. 14-33(c)." *Id.* We therefore vacated the conviction for Assault on a Female and remanded for resentencing on Habitual Misdemeanor Assault.

This is consistent with longstanding precedent holding a defendant may not be charged with multiple classes, or multiple charges of the same class, of assault arising from a single assault. For example, in *State v. Dilldine*, this Court noted it was improper for a defendant to be separately charged with Assault with Intent to Kill and Assault with Intent to Kill Inflicting Serious Injury arising from a single assault. 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974); *see also State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) ("In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults").

It follows, therefore, a defendant may not be convicted and sentenced for two substantive assault charges arising from a single assault. In this case, the indictments cited only one assault resulting in the same injury. Likewise, the trial court's instructions to the jury for both offenses relied upon whether Defendant "assaulted the victim by intentionally causing a tear in the alleged victim's scrotum[.]" Thus, in this case, Defendant could not be convicted and sentenced for both the substantive assault charge of Habitual Misdemeanor Assault, predicated on misdemeanor Assault Inflicting Serious Injury, and the higher Class F felony Assault Inflicting Serious Bodily Injury, both arising from the assault on A.R. leading to the same injury. *See Jones*, 237 N.C. App. at 533, 767 S.E.2d at 345; *Jamison*, 234 N.C. App. at 239, 758 S.E.2d at 671. Consequently, we must hold, because the jury returned its verdict finding Defendant guilty of felony Assault Inflicting Serious Bodily Injury, the trial court erred in entering judgment and sentencing Defendant for Habitual Misdemeanor Assault predicated on misdemeanor Assault Inflicting Serious Injury arising from the same conduct. Accordingly, we vacate the trial court's judgment as to Habitual Misdemeanor Assault (17 CRS 444).[2]

2. We do not remand for resentencing because the trial court imposed the sentence for Habitual Misdemeanor Assault to run consecutively from the separate judgment and sentence for the higher Class F felony Assault Inflicting Serious Bodily Injury.

Conclusion

We conclude there was no error in the trial court's judgment on the charge of Assault Inflicting Serious Bodily Injury (15 CRS 59893) but vacate the trial court's judgment on the charge of Habitual Misdemeanor Assault (17 CRS 444).

NO ERROR IN PART, VACATED IN PART.

Judge ZACHARY concurs.

Judge BERGER concurs in part and dissents in part in a separate opinion.

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

I concur with the majority that there was substantial evidence to support submission to the jury of the charge of assault inflicting serious bodily injury. I respectfully dissent from the remainder of the majority opinion because the trial court did not err.

Judgment was entered against Defendant for assault inflicting serious bodily injury and habitual misdemeanor assault. Defendant argues that the trial court erred by (1) punishing him for assault inflicting serious injury and assault inflicting serious bodily injury arising out of the same conduct, (2) failing to arrest judgment on "one of the assault convictions," and (3) convicting Defendant of a principle offense and lesser-included offense arising out of the same conduct. Defendant essentially is attacking his conviction on double jeopardy grounds from three different directions.

"[H]abitual misdemeanor assault is a substantive offense *and* a punishment enhancement (or recidivist, or repeat-offender) offense." *State v. Carpenter*, 155 N.C. App. 35, 49, 573 S.E.2d 668, 677 (2002) (citation and quotation marks omitted); *see also State v. Smith*, 139 N.C. App. 209, 212-14, 533 S.E.2d 518, 519-20 (2000). In relevant part, an individual may be found guilty of habitual misdemeanor assault if that person commits an assault set forth in N.C. Gen. Stat. § 14-33 which causes physical injury, and that individual "has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation." N.C. Gen. Stat. § 14-33.2 (2017). Assault inflicting serious injury is an offense set forth in Section 14-33(c)(1), and thus, an element of habitual misdemeanor assault.

The majority correctly notes that the prefatory clause to Section 14-33 states "[u]nless the conduct is covered under some other provision of law providing greater punishment," N.C. Gen. Stat. § 14-33(c) (2017), and that this language precludes punishment for lower class assaults when the conduct at issue "is punished by a higher class of assault." (Citation omitted.) The majority would be correct if Defendant here were being punished for assault inflicting serious bodily injury and the A1 misdemeanor of assault inflicting serious injury pursuant to Section 14-33.

However, Defendant here was convicted and punished pursuant to Section 14-33.2, which contains no such prefatory language, and thus, does not preclude punishment for conduct "covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-33(c). As the majority correctly points out "the offense of Habitual Misdemeanor Assault replaces the underlying predicate misdemeanor." Thus, the prefatory language which supports the majority's reasoning is inapplicable.

Assault inflicting serious bodily injury is a substantive offense defined as an assault in which an individual inflicts "bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-32.4(a) (2017).

No person may be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Constitution, Amend. V. In *Blockburger v. United States*, the Supreme Court stated that

> the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

State v. Artis, 174 N.C. App. 668, 674, 622 S.E.2d 204, 209 (2005) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

"North Carolina has adopted and applied the *Blockburger* test" to determine if double jeopardy concerns are implicated in the punishment

of multiple offenses. *Id.* The North Carolina Supreme Court has stated that

> even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Id. (quoting *State v. Murray*, 310 N.C. 540, 548, 313 S.E.2d 523, 529 (1984)).

In *State v. Artis*, the defendant was charged with malicious conduct by a prisoner and habitual misdemeanor assault arising from the same conduct. The conduct alleged in both indictments read:

> the defendant named above unlawfully, willfully, and feloniously did assault S.E. McKinney, a government officer at the Pitt County Detention Center, Greenville, North Carolina ... by throwing bodily fluid on S.E. McKinney. At the time of the assault S.E. McKinney was performing a duty of his office by supervising the dispensing of food to the defendant.

Id. This Court stated that "[c]onvictions arising from the same incident or similar conduct for both do not violate the double jeopardy clause." *Id.* at 676, 622 S.E.2d at 210.

Such is the case here. Defendant was indicted for assault inflicting serious bodily injury and habitual misdemeanor assault. The allegations in both indictments were that Defendant assaulted the victim and caused tearing to victim's scrotum.[1] Even though the allegations in the indictments concerning the assault and resulting injury were identical, the two substantive offenses required proof of different facts. Assault inflicting serious bodily injury required the State to prove beyond a reasonable doubt that the Defendant committed an assault upon the victim which inflicted serious bodily injury. Even though habitual misdemeanor assault has as an element the lesser included offense of assault inflicting serious injury, it is a substantive offense which also required proof of physical injury and "two or more prior convictions for either

1. The indictment for assault inflicting serious bodily injury alleged that the tear to the victim's scrotum was serious bodily injury, while the indictment for habitual misdemeanor assault alleged that the Defendant inflicted serious injury and physical injury as a result of the tear in his scrotum.

misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation." N.C. Gen. Stat. § 14-33.2.

Because habitual misdemeanor assault is a substantive offense which required proof of additional facts and elements beyond that necessary for conviction of assault inflicting serious bodily injury, I would find that the trial court did not err.

STATE OF NORTH CAROLINA
v.
BRIAN KEITH HUGHES, DEFENDANT

No. COA18-967

Filed 16 April 2019

Sentencing—grossly aggravating factors—notice to defendant — prejudice

In an impaired driving case where the State failed to notify defendant of its intent to prove grossly aggravating factors at sentencing—as required under N.C.G.S. § 20-179(a1)(1)—the superior court committed prejudicial error by applying those factors when determining defendant's sentencing level. The State could not fulfill its notice obligation in the superior court proceeding by relying on the notice it gave during an earlier district court proceeding in the case.

Appeal by Defendant from judgment entered 18 April 2018 by Judge Marvin P. Pope, Jr. in Transylvania County Superior Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Ricci, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

INMAN, Judge.

When the State fails to give notice of its intent to use aggravating sentencing factors as required by N.C. Gen. Stat. § 20-179(a1)(1), the trial court's use of those factors in determining a defendant's sentencing level is reversible error.

Defendant Brian Keith Hughes ("Defendant") appeals from a judgment finding him guilty of impaired driving and imposing a level one punishment based upon two grossly aggravating sentencing factors. Because the State failed to notify Defendant of its intent to seek an enhanced sentence based on those factors we vacate the judgment and remand to the trial court to resentence Defendant.

FACTUAL AND PROCEDURAL HISTORY

On 2 May 2017, Brevard Police Department Officer Timothy Reinhart ("Officer Reinhart") observed Defendant's vehicle roll through a stop sign and then come to an abrupt stop when it appeared Defendant noticed the officer's patrol car. Officer Reinhart ran the vehicle's license plate, verified that Defendant's driving privileges had been suspended, and initiated a traffic stop. During this stop, Officer Reinhart and another officer performed standard field sobriety tests on Defendant. The officers concluded that Defendant had consumed a sufficient amount of alcohol to impair his mental and physical faculties and arrested him for driving while impaired.

Defendant was tried for impaired driving in Transylvania County District Court. The district court found Defendant guilty, and determined that the State had proven the existence of two grossly aggravating sentencing factors: (1) that Defendant "drove, at the time of the current offense, while [his] drivers license was revoked" and (2) that Defendant had "been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense." Accordingly, the district court imposed level one punishment.

Defendant then appealed to the Transylvania County Superior Court. Defendant was tried by jury, and the jury returned a verdict of guilty of driving while impaired. The jury was discharged, and the superior court proceeded to a sentencing hearing. During the sentencing hearing, the State introduced evidence of Defendant's driving record over Defendant's objection that the State had failed to provide notice of its intent to seek an aggravated sentence. The superior court again imposed a level one punishment, based on the same factors applied in Defendant's district court sentencing. Defendant appeals.

ANALYSIS

Defendant argues that the State failed to notify him, as required by Section 20-179(a1)(1) of our General Statutes, of its intent to prove aggravating factors for sentencing in the superior court proceeding. Alleged statutory errors are questions of law and, as such, are reviewed

de novo. *State v. Mackey*, 209 N.C. App 116, 120, 708 S.E.2d 719, 721 (2011) (internal citations omitted). Under *de novo* review, the appellate court considers the matter anew and freely substitutes its own judgment for that of the lower court. *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999).

If the State intends to provide evidence of aggravating factors at an impaired driving sentencing hearing, it must provide notice of that intent to the defendant:

> If the defendant appeals to superior court, and the State intends to use one or more aggravating factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

N.C. Gen. Stat. § 20-179(a1)(1) (2017).

Although we are aware of no binding precedent addressing the effect of the State's failure to give notice under this particular statute,[1] decisions addressing the analogous notice provision contained in our felony sentencing statute are instructive. The State's failure to provide notice under N.C. Gen. Stat. § 15A-1340.16(a6) renders the trial court's application of aggravated sentencing factors reversible error. *See*, *e.g.*, *State v. Crook*, 247 N.C. App. 784, 798, 785 S.E.2d 771, 781 (2016) (holding use of prior record level point for commission of offense while on probation improper without notice); *Mackey*, 209 N.C. App. at 121, 708 S.E.2d at 722 (State's listing of aggravating factors and prior record level on plea offer was ineffective notice and aggravated sentencing by trial court was therefore in error). We likewise hold that the State's failure to provide notice of its intent to use aggravating factors defined in Section 20-179 prevents the trial court from considering those factors at sentencing for impaired driving.

---

1. This Court is aware of, and the parties have cited, only unpublished decisions directly addressing the effect of the State's failure to provide notice under Section 20-179(a1)(1). *See State v. Wilcox*, No. COA16-91, ___ N.C. App. ___, 791 S.E.2d 665, 2016 WL 4608203, 2016 N.C. App. LEXIS 910 (Sept. 6, 2016) (unpublished); *State v. Broyles*, No. COA16-853, ___ N.C. App. ___, 797 S.E.2d 382, 2017 WL 1056309, 2017 N.C. App. LEXIS 212 (Mar. 21, 2017) (unpublished).

In this case, the State does not argue that it gave notice to Defendant prior to the superior court proceeding. Instead, it argues that Defendant was not prejudiced: that he received constructive notice of the aggravating factors because they were used at the earlier district court proceeding, and, as Defendant does not contest the existence of the aggravating factors themselves, any additional notice would not have changed the result at sentencing. We reject this argument.

Allowing the State to fulfill its notice obligation under Section 20-179(a1)(1) by relying on district court proceedings would render the statute effectively meaningless. A statute must be construed, if possible, to give "meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990) (citations omitted). This statute requires the State to provide notice of its intent to use aggravating factors only "*[i]f the defendant appeals to superior court.*" N.C. Gen. Stat. § 20-179(a1)(1) (emphasis added).

The language of Section 20-179(a1)(1) requires notice of the State's intent to use aggravating sentencing factors in impaired driving cases appealed to superior court, even if evidence supporting those factors was presented in district court. It is not enough that Defendant simply be made aware of the existence of such evidence. For example, in *Crook*, the State provided the defendant with a prior record level worksheet more than 30 days prior to trial. 247 N.C. App. at 796, 785 S.E.2d at 780. There, as in this case, the defendant did not contest the aggravating factor itself. In fact, the defendant in *Crook* stipulated to his prior record level for sentencing. *Id.* at 797, 785 S.E.2d at 781. The defendant was aware of the aggravating factor and did not argue that additional notice would have allowed him to present a defense, but this Court held that providing the record level worksheet did not constitute notice of the State's *intent* to prove the existence of a prior record level point under Section 15A-1340.16(a6), our felony sentencing statute. *Id.*

While use of sentencing factors in district court may notify a defendant of the existence of evidence supporting those factors, it does not give adequate notice of the State's intent to use those factors in a subsequent *de novo* proceeding, in a separate forum, potentially tried by a different prosecutor. The State must provide explicit notice of its intent to use aggravating factors in the superior court proceeding.

Defendant was prejudiced by the use of grossly aggravating factors at his sentencing, because this raised the level of punishment imposed. The State's argument that proper provision of notice would not have

changed the result at sentencing stems from a misapprehension of the error committed in this case. Error that is subject to review on appeal is not committed by parties, but by courts. The error in this case that we review for prejudice is, therefore, not the State's failure to provide notice of its intent to use aggravating sentencing factors but the trial court's use of those factors at sentencing. If the trial court had properly refused to apply factors for which statutory notice was not given, it could not have imposed level one punishment. Applying those factors prejudiced Defendant.

Our prior decisions addressing the analogous notice requirement for felony sentencing are consistent with this analysis. In *Crook*, the defendant stipulated to his status as a prior record level II offender, of which status he was made aware 30 days prior to trial—notice would not have allowed him to prepare any additional defense to that aggravating factor. 247 N.C. App. at 797, 785 S.E.2d at 781. In *State v. Snelling*, the defendant admitted to having been on probation at the time of his offenses, but this Court held that the State's failure to provide notice of its intent to use this factor at sentencing was prejudicial because it raised the defendant's prior record level. 231 N.C. App. 676, 681-82, 752 S.E.2d 739, 744 (2014).

As there is no evidence in the record to show that the State provided Defendant with sufficient notice of its intent to use aggravating factors at sentencing, and the record does not indicate that Defendant waived his right to receive such notice, we hold that the trial court committed prejudicial error by applying these aggravating factors. Accordingly, we vacate Defendant's sentence and remand to the trial court for resentencing in accordance with this opinion.

VACATED AND REMANDED.

Judges STROUD and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DARREN LYNN JOHNSON

No. COA18-966

Filed 16 April 2019

Sentencing—within statutory limit—consideration of improper or unrelated matters—prejudice

When sentencing defendant for multiple drug offenses, the trial judge improperly considered her personal knowledge of a heroin-related homicide charge in her community, which was neither related to defendant's case nor mentioned in the record. Defendant was prejudiced because, even though the trial court properly sentenced defendant within the statutorily-mandated limits or presumptive ranges for each offense, the record raised a clear inference that the trial judge's improper considerations led her to impose a greater overall sentence.

Judge TYSON dissenting.

Appeal by defendant from judgments entered 14 February 2018 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 27 February 2019.

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

Mary McCullers Reece for defendant.

ARROWOOD, Judge.

Darren Lynn Johnson ("defendant") appeals from judgments entered on various drug related offenses. For the following reasons, we vacate the judgments and remand for resentencing.

I. Background

During an undercover narcotics operation conducted by the Rowan County Sheriff's Department, officers purchased what they believed to be narcotics from defendant during controlled buys on 7, 12, and 28 April 2016 and on 11 May 2016. Following the exchange on 11 May 2016, officers initiated a traffic stop and pulled defendant over,

searched the occupants of the vehicle, recovered what was believed to be additional narcotics from defendant, and arrested defendant. On 12 September 2016, a Rowan County Grand Jury returned indictments charging defendant with two counts of possession with intent to sell or distribute ("PWISD") heroin, two counts of selling heroin, two counts of trafficking in heroin by possession, two counts of trafficking in heroin by transport, two counts of trafficking in heroin by selling, one count of PWISD a schedule II controlled substance (methylphenidate hydrochloride), one count of PWISD cocaine, and one count of PWISD a schedule IV controlled substance (alprazolam).

Defendant's case was tried in Rowan County Superior Court before the Honorable Lori I. Hamilton beginning on 13 February 2018. On 14 February 2018, the jury returned verdicts finding defendant guilty on one count of PWISD heroin, two counts of selling heroin, one count of trafficking in heroin more than 4 grams but less than 14 grams by possession, one count of trafficking in heroin more than 4 grams but less than 14 grams by transportation, one count of trafficking in heroin more than 4 grams but less than 14 grams by selling, and one count of PWISD a schedule II controlled substance (methylphenidate hydrochloride). The trial court dismissed the other indicted offenses either because of an error in the indictment or because the lab results showed no controlled substances were discovered during testing of the substances believed to be controlled substances.

Upon return of the jury verdicts, the trial court consolidated some offenses and entered four judgments as follows: the trial court (1) consolidated the convictions for PWISD heroin with the two counts of selling heroin and sentenced defendant at the top of the presumptive range to a term of 14 to 26 months; (2) sentenced defendant for trafficking in heroin by possession to a consecutive mandatory term of 70 to 93 months; (3) consolidated the convictions for trafficking in heroin by transport and trafficking in heroin by selling and sentenced defendant to a second consecutive mandatory term of 70 to 93 months; and (4) sentenced defendant for PWISD schedule II controlled substance (methylphenidate hydrochloride) at the top of the presumptive range to a concurrent term of 8 to 19 months. Defendant filed notice of appeal on 26 February 2018.[1]

1. Defendant filed a conditional petition for *writ of certiorari* with this Court on 25 September 2018 because of deficiencies in the notice of appeal. We allow the petition and address the merits of defendant's appeal.

II. Discussion

On appeal, defendant raises issue with his sentencing and does not otherwise challenge the validity of his convictions. Thus, we review only the sentencing.

As specified above, the trial court sentenced defendant at the top of the presumptive range to concurrent terms for the non-trafficking offenses, and consolidated two of the three trafficking offenses and sentenced defendant to two consecutive terms for the trafficking offenses, the length of which is mandated in N.C. Gen. Stat. § 90-95(h)(4), to begin upon completion of the non-trafficking sentences. Defendant acknowledges that the trial court has great discretion in imposing sentences, both in terms of length and how multiple sentences are structured, and does not assert the sentences imposed in this case are in and of themselves improper. However, defendant argues "[t]he error arose not from any specific term chosen by the trial court, but by the court's clear indication that she chose [defendant's] sentence based on her improper consideration of matters unrelated to his charges." Specifically, defendant contends "[t]he trial court improperly considered her personal knowledge of unrelated charges arising from a heroin-related death in her home community when sentencing defendant."

It is well established that "[a] sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). However, our Supreme Court long ago recognized that "such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *Id.* "The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 494, 697 S.E.2d 1, 4 (2010), *rev'd on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

N.C. Gen. Stat. § 15A-1340.12 provides that "[t]he primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior." N.C. Gen. Stat. § 15A-1340.12 (2017). To that end, "[t]his Court has held that in determining the sentence to be imposed, the trial judge may consider

such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant." *State v. Morris*, 60 N.C. App. 750, 754-55, 300 S.E.2d 46, 49 (1983). The trial judge may also take into account the seriousness of a particular offense when exercising its discretion to decide the minimum term to impose within the presumptive range. *State v. Oaks*, 219 N.C. App. 490, 497-98, 724 S.E.2d 132, 137-38 (2012).

On the other hand, our Courts have held it is improper during sentencing for a trial judge to consider a defendant's refusal to accept a plea offer, *Boone*, 293 N.C. at 712, 239 S.E.2d at 465, the financial status of a defendant, *State v. Massenburg*, 234 N.C. App. 609, 615, 759 S.E.2d 703, 707-708 (2014), the religious beliefs of either a defendant or the judge, *State v. Earls*, 234 N.C. App. 186, 194, 758 S.E.2d 654, 659, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 643 (2014), and conduct not included in the indictment, *State v. Swinney*, 271 N.C. 130, 133, 155 S.E.2d 545, 548 (1967).

In the present case, defendant contends it is clear from the trial judge's remarks during sentencing that the trial judge improperly considered her personal knowledge of matters not included in the record when sentencing him. Those remarks appear in the transcript of the sentencing hearing as follows:

> Okay. Even more importantly to me, at least one of the people that was mentioned during the debriefing interview was a person that I happened to know was charged with a homicide in providing heroin to a person in Davie County who died. I'm concerned that those of you who are dealing in heroin in my community are causing the deaths of people in my community.
>
> So it is not just, "Oh, well, you know, I was just maybe dealing a little drugs." It is actually a link in the chain that is leading to the deaths of tens of thousands of people in our country. It is a big deal to me. A big deal.

The trial court made these statements after hearing arguments from the defense and the State, and just before announcing defendant's sentence.

Upon review of the record, we find no mention in the evidence of the homicide referenced by the trial judge before it is brought up during sentencing. As defendant points out, the trial judge's statement appears to refer to the judge's personal knowledge that a person named by defendant during an interview with police on 11 May 2016, which was

introduced into evidence at trial, is charged for a drug related homicide in her community.

The State does not dispute that there was no evidence of the homicide charge in the record; nor does the State contend the homicide charge was relevant to defendant's sentencing. Instead, the State contends the trial judge's statement must be considered in context, *see State v. Shaw*, 207 N.C. App. 369, 372, 700 S.E.2d 62, 64, *disc. review denied*, 364 N.C. 621, 705 S.E.2d 357 (2010), and frames the trial judge's statement solely a reflection on the seriousness of the drug offenses, which is an appropriate consideration under *Oaks*, 219 N.C. App. at 497-98, 724 S.E.2d at 137-38. The State contends the trial judge's reference to a personal anecdote does not diminish the trial court's consideration of the seriousness of drug offenses, which is widely acknowledged and accepted. The State also asserts defendant cannot cite any case law that it was improper for the judge to consider her personal knowledge of the community.

We agree with the State that the trial judge's remarks must be considered in context and that the seriousness of drug crimes is well recognized and a valid consideration. If the trial court had only addressed the severity of the offenses by reference to the effects of the drug epidemic in her community or nationwide, there would be no issue in this case. In *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991), the Court noted that "[t]o a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage" and recognized "that a sentencing court can consider the impact a defendant's crimes have had on a community and can vindicate that community's interests in justice." *Bakker*, 925 F.2d at 740 (citation omitted). Nevertheless, the Court in *Bakker* held the sentencing judge exceeded the boundaries of due process when the judge impermissibly took his own religious characteristics into account in sentencing the defendant. *Id.* at 740-41.

Here, however, the trial judge did not just consider the impact of defendant's drug offenses on the community, but clearly indicated in her remarks that she was considering a specific offense in her community for which defendant was not charged. We now reiterate that, upon hearing sentencing arguments by the defense and the State, the trial judge stated, "[e]ven more importantly to me, at least one of the people that was mentioned during the debriefing interview was a person that I happened to know was charged with a homicide in providing heroin to a person in Davie County who died." It is hard to imagine how the trial court could have been any more clear that the unrelated homicide charge was a significant consideration.

Both parties acknowledge that it is improper for the trial judge to consider matters not charged in the indictments. Here the trial judge did just that. Instead of attempting to draw a bright line as to when matters within the personal knowledge of the trial judge cross the bounds of impropriety, we simply hold the trial judge crossed the line in this case by considering her personal knowledge that a person mentioned by defendant was charged with a drug related homicide in her community when there is no mention of the charge in the indictments or the evidence at trial.

The prejudice resulting from the trial judge's improper consideration is harder to pinpoint than the impropriety itself because, as defendant acknowledges, the terms imposed for the offenses are not improper. The length of the sentences imposed for the trafficking offenses were mandated by statute. *See* N.C. Gen. Stat. § 90-95(h)(4) (2017). For the non-trafficking offenses, the trial judge had discretion to choose any minimum term within the presumptive range authorized by N.C. Gen. Stat. § 15A-1430.17, and did so, albeit at the top of the presumptive range. *See State v. Parker*, 143 N.C. App. 680, 685-86, 550 S.E.2d 174, 177 (2001) ("The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range."). Any prejudice in defendant's sentencing resulted from the exercise of the trial judge's discretion concerning which offenses to consolidate for judgment and how to run the multiple sentences; there were many possibilities from which the trial judge could choose.

Given that the sentences imposed were not impermissible, both parties agreed at oral arguments that if defendant is granted a new sentencing hearing and receives the same sentence, the sentence would be proper. Nevertheless, when confronted with a question about prejudice at oral argument, the State conceded that if the trial judge's comment was improper, the case should be remanded for resentencing.

While we cannot ascertain from the record the precise impact the improper consideration had on the sentences handed down by the trial judge, it is evident from the judge's statement that the improper consideration was important in sentencing. Similar to the Court's holding in *Boone*, although the trial judge may have sentenced defendant fairly in this case, because there is a clear inference based on the judge's statement during sentencing that a greater sentence was imposed because of her personal knowledge of a drug related homicide charge in her community not charged in this case, the case must be remanded for resentencing without consideration of matters outside the indictments and record. *See Boone* 293 N.C. at 712-13, 239 S.E.2d at 465.

III. Conclusion

For the above reasons, we vacate the judgment and remand the matter for resentencing.

VACATED AND REMANDED FOR RESENTENCING.

Judge STROUD concurs.

Judge TYSON respectfully dissents by separate opinion.

TYSON, Judge, dissenting.

Defendant argues the trial court erred by improperly considering matters outside the record when deciding to sentence him. Defendant bases his argument upon purportedly extraneous statements made by the trial court during the sentencing hearing. The majority opinion vacates the trial court's judgments and remands for resentencing. I respectfully dissent.

I. Proper Consideration

1. *Standard of Review*

Our standard of review of a trial court's sentencing is well established. "A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "[A] trial court should . . . be able to take into account the seriousness of the particular offense when exercising its discretion to decide which minimum term within the presumptive range for that class of offense and prior record level to impose." *State v. Oakes*, 219 N.C. App. 490, 498, 724 S.E.2d 132, 138 (2012). "The imposition of the minimum sentence under the sentencing guidelines is within the discretion of the trial court." *Id.*

"The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review." *State v. Pinkerton*, 205 N.C. App. 490, 494, 697 S.E.2d 1, 4 (2010) (citation omitted), *rev'd on other grounds*, 365 N.C. 6, 708 S.E.2d 72 (2011).

2. *Analysis*

A trial court's comments, stated during a sentencing hearing, should be reviewed in the context in which they were made. *See State v. Shaw*, 207 N.C. App. 369, 370-72, 700 S.E.2d 62, 63-4 (rejecting a defendant's argument "that the trial court took into account a non-statutory

aggravating factor that was neither stipulated to nor found" by the jury where the defendant took the trial court's comments out of context), *disc. review denied*, 364 N.C. 621, 705 S.E.2d 357 (2010). "This Court has held that in determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant." *State v. Morris*, 60 N.C. App. 750, 754-55, 300 S.E.2d 46, 49 (1983) (citation omitted).

"If the record discloses that the court considered *irrelevant and improper* matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (emphasis supplied) (citation and quotation omitted).

The trial court, during the sentencing hearing, stated:

> Okay. *Even more importantly to me, at least one of the people that was mentioned during the debriefing interview was a person that I happened to know was charged with a homicide in providing heroin to a person in Davie County who died.* I'm concerned that those of you who are dealing in heroin in my community are causing the deaths of people in my community.
>
> So it is not just, "Oh, well, you know, I was just maybe dealing a little drugs." *It is actually a link in the chain that is leading to the deaths of tens of thousands of people in our country.* It is a big deal to me. A big deal. (emphasis supplied).

Defendant contends he is entitled to a new sentencing hearing because these comments show the trial court improperly took into account a homicide charge against a drug dealer, whose nickname defendant had mentioned during his debriefing interview with detectives.

Defendant concedes in his reply brief that he "does not challenge the trial court's feelings about the seriousness of heroin use in society at large." When viewed as a whole and in context, the trial court's comments show it was taking into account the seriousness of heroin dealing and its effects on the community and society. *See Oakes*, 219 N.C. App. at 498, 724 S.E.2d at 138; *Shaw*, 207 N.C. App. 369, at 700 S.E.2d at 64.

The trial court's comments do not indicate it sentenced defendant more harshly because defendant mentioned the name of, and happened to know, another drug dealer who may have been charged with homicide

for dealing heroin to someone who had died in Davie County. Instead, the court's comment about the drug dealer charged with homicide was an anecdotal example of the larger, community and nation-wide problem and consequences of heroin dealing and use.

The court's statement beginning with "So," following the statement containing the trial court's comments about the drug dealer charged with homicide, explains the trial court's purpose behind the comments in its preceding statement. The trial court's use of "so" clearly expresses that it was using it in the sense of "for that reason" or "therefore." So, *The American Heritage Dictionary of the English Language, Fifth Edition*, https://ahdictionary.com/word/search.html?q=so (last visited on 3 April 2019). The trial court's comments, viewed as a whole and in context, indicates the court's proper consideration of the seriousness of defendant's offenses relating to heroin dealing and possession.

The United States Court of Appeals for the Fourth Circuit has stated:

> We recognize that a sentencing court can consider the impact a defendant's crimes have had on a community and can vindicate that community's interests in justice. To a considerable extent a sentencing judge is the embodiment of public condemnation and social outrage. As the community's spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others.

U.S. v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991).

When compared to other cases from our appellate courts where defendants have been granted new sentencing hearings, the trial court's comments here do not show it considered improper or irrelevant material in sentencing defendant. *See, e.g.*, *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (granting defendants a new sentencing hearing where trial court's comments show it imposed more severe sentences because defendants exercised their rights to a jury trial); *State v. Swinney*, 271 N.C. 130, 133-34, 155 S.E.2d 545, 548 (1967) (awarding new sentencing hearing on a defendant's conviction of involuntary manslaughter where trial judge stated he was punishing the defendant more severely for hosting a party where liquor was served).

The negative effects and costs imposed on individuals and society from the dealing of heroin are relevant and proper matters to consider when sentencing defendant. Defendant was convicted, in part, of possession with intent to sell or deliver heroin, two counts of selling heroin, and three counts of trafficking heroin.

We all agree there is no error in defendant's jury convictions and trial and that the same sentences could be imposed on remand. The trial court was properly exercising its role as "the embodiment of public condemnation and social outrage." *Bakker*, 925 F.2d at 740. Viewed in context, the trial court's comments do not show it considered an "irrelevant or improper matter in determining the severity of [defendant's] sentence." *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681. Defendant has failed to show he is entitled to a new sentencing hearing.

II. No Prejudice

Presuming, *arguendo*, the trial court improperly considered defendant's mention of the name of a drug dealer also charged with homicide in a different county, defendant is unable to show prejudice. Defendant's counsel conceded at oral argument that if he is granted a new sentencing hearing, the trial judge could impose the identical sentence already imposed.

It is also notable that defendant does not contend that, even if were to be granted a new sentencing hearing, another trial judge should be assigned. In view of defendant's concession and the majority's opinion, the trial court could still properly consider the seriousness of dealing heroin on remand, so long as the trial court does not mention its awareness of a drug dealer's name mentioned by defendant, who was purportedly charged with homicide. Defendant has failed and is unable to show any prejudice from the presumptively valid sentence imposed. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465. His argument is without merit and should be overruled.

III. Conclusion

The trial court's comments, made during the sentencing hearing, after the jury's verdicts had been received and entered and the jury dismissed, were proper. They indicate the trial court considered the permissible matter of the seriousness and potential impacts of defendant's offenses as a "community spokesperson." *Bakker*, 925 F.2d at 740. Alternatively, defendant was sentenced in the presumptive range and is unable to show any prejudice. Defendant is not entitled to a new sentencing hearing. There is no error in the jury's verdicts or in the judgments entered thereon. I respectfully dissent.

STATE v. SCHMIEDER

[265 N.C. App. 95 (2019)]

STATE OF NORTH CAROLINA
v.
MATTHEW JOSEPH SCHMIEDER

No. COA18-1027

Filed 16 April 2019

1. Evidence—other crimes—driving record—similarity and temporal proximity—clear and consistent pattern of criminality

In a prosecution for second-degree murder arising from a fatal car crash, the trial court properly admitted evidence of defendant's driving record under Rule 404(b) where there was sufficient similarity and temporal proximity between the charged crime and defendant's lengthy record of past driving offenses. The majority of defendant's prior convictions involved the same types of conduct he engaged in during the crash at issue—speeding, illegal passing, and driving with a suspended license—and the spread of the convictions over the entirety of his driving record showed a clear and consistent pattern of conduct that was highly probative of his mental state at the time of the crash.

2. Homicide—vehicular homicide—second-degree murder—sufficiency of the evidence—malice

The trial court properly denied defendant's motion to dismiss a second-degree murder charge based on vehicular homicide where his driving record—revealing a nearly two-decade-long history of prior convictions for multiple speeding charges, reckless driving, illegal passing, and driving with a suspended license—provided substantial evidence from which the jury could infer malice.

3. Indictment and Information—sufficiency—second-degree murder —essential elements—not misleading

Where defendant was acquitted of second-degree murder as a Class B1 felony but convicted of the Class B2 version of the offense, the indictment sufficiently charged defendant with second-degree murder under all available legal theories because it pleaded all the essential elements of the crime. Furthermore, defendant failed to show how he was misled by the indictment where the State did not check the box labeled "Inherently Dangerous Without Regard to Human Life" but did check the box labeled "Second Degree."

Appeal by defendant from judgment entered 26 March 2018 by Judge Julia Lynn Gullett in Henderson County Superior Court. Heard in the Court of Appeals 5 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

James R. Parish for defendant.

DIETZ, Judge.

Defendant Matthew Joseph Schmieder appeals his conviction for second degree murder following a fatal motor vehicle accident. Schmieder argues that the trial court erroneously admitted evidence of his past driving offenses and that, without that evidence, the trial court should have granted his motion to dismiss. He also argues that the trial court erred by entering judgment on the Class B2 second degree murder offense because the indictment only was sufficient to charge the Class B1 version of that offense.

As explained below, the trial court did not abuse its discretion in admitting Schmieder's driving record because the court properly found sufficient similarity and temporal proximity between the charged offense and a lengthy pattern of past driving offenses. As a result, the trial court also did not err in denying Schmieder's motions to dismiss because the driving record provided substantial evidence from which the jury could infer the element of malice. Finally, the indictment in this case was sufficient to charge second degree murder under all theories permitted by law and Schmieder was not misled by the indictment. We therefore find no error in the trial court's judgment.

Facts and Procedural History

On 22 December 2016 around 7:30 p.m., Evelyn Argueta was driving along Kanuga Road in Henderson County. It was dark and the road was two lanes with a double yellow line down the middle and narrow shoulders. The road has turns and inclines and a posted speed limit of 40 mph. Argueta noticed a white BMW behind her and became "a little scared" when the BMW passed her across the double yellow line without using turn signals. Argueta estimated that the BMW was travelling at 45 to 50 mph.

After passing Argueta, the BMW increased its speed and caught up to a Silverado pickup truck. The BMW started to pass the Silverado without using any turn signals, and Argueta thought that the BMW was

following too close behind the Silverado to see around it. When the BMW entered the left lane to pass, it became apparent that there was an oncoming red pickup truck in that lane. The BMW hit the brakes and attempted to get back into the right lane, but it was too late. The BMW collided head-on with the oncoming red truck and then hit the Silverado. Argueta estimated that the BMW was going 55 to 60 mph at the time of the attempted pass.

First responders arrived on the scene in response to a 911 call. They observed that there had been a head-on collision with a heavy impact, a distance of about 100 feet between the vehicles, and substantial debris in the roadway and on the side of the road. They heard a voice calling for help from the white BMW. The red pickup truck had to be opened with hydraulic spreaders. The driver of the red pickup truck, 17-year-old Derek Miller, had no pulse and was crushed between the steering wheel and the backseat of his vehicle. A paramedic was able to crawl into the vehicle and determined that Miller had injuries "inconsistent with life" and was deceased.

After determining that Miller was deceased, paramedics began work on the white BMW. Defendant Matthew Schmieder, the driver of the BMW, was pinned inside. First responders extracted him from the vehicle and transported him to the hospital. Schmieder told paramedics, "I know I caused this," and asked about the other driver's injuries. Paramedics smelled an odor of alcohol coming from Schmieder and asked him how much he had to drink. Schmieder responded that he did not know.

On 15 May 2017, the State indicted Schmieder for second degree murder. The body of the indictment alleged that Schmieder "unlawfully, willfully and feloniously and of malice aforethought did kill and murder Derek Lane Miller." In the murder indictment's header, which included form boxes, the State checked the box labeled "Second Degree," but did not check either of the two additional boxes beneath that one, which were labeled "Inherently Dangerous Without Regard to Human Life" and "Unlawful Distribution of Substance."

Before trial, Schmieder moved to exclude his record of prior driving convictions. The trial court later denied Schmieder's motion to exclude his driving record, finding that Schmieder's prior driving convictions "are similar" and "that there is not much of a gap in time between convictions over the years." The court allowed Schmieder's motion to exclude evidence of four prior accidents that did not result in charges as well as Schmieder's motion to exclude some of the letters he had received from

the DMV regarding the status of his driver's license. The court determined that, under Rule 403, the danger of unfair prejudice from this evidence substantially outweighed its probative value.

The State's evidence from Schmieder's driving record showed that on 23 November 2016, Schmieder was stopped for an expired plate and was issued a citation for driving with a suspended license. At the time of the December 2016 accident, Schmieder's license had been suspended since 22 May 2014 for failure to appear for a 2013 infraction of failure to reduce speed. Since Schmieder's driver's license was originally issued in September 1997, he had multiple driving convictions including the following: failure to stop for siren or red light, illegal passing, speeding 80 in a 50, and reckless driving in March 1998; speeding 64 in a 55 in September 2000; speeding 64 in a 55 in October 2000; speeding 70 in a 50 in August 2003; driving while license revoked and speeding 54 in a 45 in January 2005; speeding 54 in a 45 in December 2006; failure to reduce speed resulting in accident and injury in February 2007; a South Carolina conviction for speeding 34 in a 25 in March 2011; speeding 44 in a 35 in January 2012; speeding 84 in a 65 in May 2013; and failure to reduce speed in February 2017 (the conviction corresponding to the 2013 charge on which Schmieder failed to appear). Six of these prior convictions resulted in suspension of Schmieder's license.

At the close of the State's evidence and again at the close of all of the evidence, Schmieder moved to dismiss the charges. The trial court denied both motions. After deliberations, the jury acquitted Schmieder of Class B1 second degree murder and convicted him of Class B2 second degree murder. The trial court sentenced Schmieder to 157 to 201 months in prison. Schmieder timely appealed.

Analysis

I. Admission of Driving Record

[1] Schmieder first argues that the trial court erred in admitting his prior driving record under Rule 404(b) of the Rules of Evidence without sufficient evidence establishing temporal proximity and factual similarity between the past driving convictions and the present offense. We disagree.

Rule 404(b) permits the admission of evidence of "other crimes, wrongs, or acts" for purposes other than to show the defendant "acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). Such evidence may be admitted under this rule "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake,

entrapment or accident." *Id.* "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

There is no question that Schmieder's prior driving record was admissible to show his intent—malice—under Rule 404(b). "This Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide." *State v. Maready*, 362 N.C. 614, 620, 669 S.E.2d 564, 568 (2008); *see also State v. Rich*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000). Likewise, "[w]hether defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice." *State v. Lloyd*, 187 N.C. App. 174, 178, 652 S.E.2d 299, 301 (2007). But Schmieder argues that his driving record should have been excluded because there was insufficient evidence that the prior convictions were factually similar, because some of the prior driving convictions were too far removed in time, and because there were significant gaps in time between the convictions and the present offense.

"[R]emoteness in time *generally* affects only the weight to be given [404(b)] evidence, not its admissibility. This is especially true when, as here, the prior conduct tends to show a defendant's state of mind, as opposed to establishing that the present conduct and prior actions are part of a common scheme or plan." *Maready*, 362 N.C. at 624, 669 S.E.2d at 570 (2008) (citations omitted). Where "the evidence [is] fundamental to proving that defendant acted with malice," it is "clearly highly probative." *Lloyd*, 187 N.C. App. at 178, 652 S.E.2d at 301. And "the danger of unfair prejudice" can be "mitigated by the trial court's limiting instruction." *Id.*; *see also State v. Grice*, 131 N.C. App. 48, 54, 505 S.E.2d 166, 169–70 (1998).

"The relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely upon the amount of

time that has passed since the conviction took place. Rather, the extent of its probative value depends largely on intervening circumstances." *Maready*, 362 N.C. at 624, 669 S.E.2d at 570. A defendant's older convictions can "constitute part of a clear and consistent pattern of criminality that is highly probative of his mental state at the time of his actions at issue here." *Id.* There is no bright-line rule for the maximum amount of time before a prior driving conviction is inadmissible, or maximum gap in time between convictions before a series of convictions is inadmissible. *See id.* at 625, 669 S.E.2d at 571.

Here, the court explicitly found that the prior convictions on Schmieder's driving record were "similar" to the present offense and that "there was not much of a gap in time between convictions over the years." The court's finding of similarity is supported by the fact that the vast majority of the charges in the driving record involved the same types of conduct Schmieder was alleged to have engaged in here—namely speeding, illegal passing, and driving while his license was revoked. Although the State did not present evidence of the specific circumstances surrounding the prior convictions, the similarity was evident from the nature of the charges.

The court's finding of temporal proximity is supported by the spread of the convictions over the entirety of Schmieder's driving record, from the year his license was issued up until the year of the accident at issue in this case, showing a consistent pattern of conduct including speeding, illegal passing, and driving with a revoked license. The gaps in time between charges, never greater than three or four years, were not significant. Moreover, many of the gaps in time between charges occurred during periods when Schmieder's license was suspended and he could not legally have been driving. The trial court properly determined that the time gaps in this pattern of conduct were less significant in light of the likely cause for the gaps—Schmieder's inability legally to drive during those times.

Additionally, after the jury heard evidence of the driving record, the trial court gave a limiting instruction to the jury that the driving record was "received solely for the purpose of showing malice" and that the jury could consider it "only for the limited purpose for which it was received," thus limiting the risk of unfair prejudice. Simply put, the trial court properly determined that this evidence was admissible under Rule 404(b) and was well within its sound discretion to conclude that it was not unfairly prejudicial under Rule 403.

Schmieder also contends that the trial court should have excluded the evidence because of the ten-year time limit on the admission of prior

convictions under N.C. Gen. Stat. § 8C-1, Rule 609. But Rule 609 only applies to evidence used to impeach a witness's credibility, which is not the case here, and we find no legal basis to apply this inapplicable time limit from Rule 609 to non-impeachment evidence otherwise admissible under Rule 404(b). Accordingly, we hold that the trial court did not err in admitting evidence of Schmieder's prior driving offenses.

II. Sufficiency of Evidence of Malice

[2] Schmieder next argues that the trial court erred in denying his motion to dismiss the second degree murder charge because the State presented insufficient evidence of malice. Because, as discussed above, the trial court properly admitted Schmieder's prior driving record, we reject this argument as well.

"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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

"Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *Grice*, 131 N.C. App. at 53, 505 S.E.2d at 169. "Our courts have specifically recognized three kinds of malice:" (1) "a positive concept of express hatred, ill-will or spite, sometimes called actual, express or particular malice"; (2) "when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; and (3) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *Id.*

As noted above, "[t]his Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide."

Maready, 362 N.C. at 620, 669 S.E.2d at 568. Here, the State presented evidence that Schmieder knew his license was revoked at the time of the December 2016 accident and that he had a nearly two-decade-long history of prior driving convictions including multiple speeding charges, reckless driving, illegal passing, and failure to reduce speed. In addition to the evidence from his driving record, two witnesses to the accident testified that Schmieder was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals. This evidence, considered together, was sufficient for a reasonable jury to infer that Schmieder acted with malice. We therefore hold that the trial court did not err in denying Schmieder's motions to dismiss the second degree murder charge.

III. Sufficiency of Indictment

[3] Finally, Schmieder argues that the indictment only charged him with second degree murder as a Class B1 felony, a charge for which he was acquitted, and that the indictment failed to charge him with the Class B2 version of second degree murder, for which he was convicted. As explained below, we reject this argument.

"On appeal, this Court reviews the sufficiency of an indictment *de novo*." *State v. Wilson*, 236 N.C. App. 472, 474, 762 S.E.2d 894, 895 (2014). "[T]he failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division." *State v. Anderson*, 177 N.C. App. 54, 59, 627 S.E.2d 501, 503–04 (2006).

As an initial matter, the indictment contained all the necessary elements of the offense of second degree murder as a B2 felony. "Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *Grice*, 131 N.C. App. at 53, 505 S.E.2d at 169. As explained above, there are several legal bases on which the State can rely to prove malice. But there is no requirement that the State identify in the indictment the particular theory of malice on which it will rely. Under N.C. Gen. Stat. § 15-144, "it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed)." Here, the indictment alleged that Schmieder "unlawfully, willfully, and feloniously and of malice aforethought did kill and murder Derek Lane Miller." This is sufficient to charge Schmieder with second degree murder as a B2 felony.

Schmieder nevertheless contends that the indictment was insufficient because, by only checking the box labeled "Second Degree" and not checking the box beneath it labeled "Inherently Dangerous Without Regard to Human Life," Schmieder was misled into believing he was not being charged with that form of second degree murder. But by checking the box indicating that the State was charging "Second Degree" murder, and including in the body of the indictment the necessary elements of second degree murder, the State did everything necessary to inform Schmieder that the State will seek to prove second degree murder through any of the legal theories the law allows. Moreover, Schmieder has not shown that he actually was misled because only the "Second Degree" box was checked, and not the "Inherently Dangerous Without Regard to Human Life" box beneath it. The record indicates that, throughout this proceeding, Schmieder understood that the State would seek to introduce his prior driving record and argue that his pattern of repeated unlawful and dangerous driving demonstrated that he engaged in "an act which is inherently dangerous to human life" that was "done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Grice*, 131 N.C. App. at 53, 505 S.E.2d at 169. Accordingly, we find no error in the trial court's judgment.

Conclusion

For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Judges TYSON and BERGER concur.

SWINT v. DOE

[265 N.C. App. 104 (2019)]

CHINA LASHAE SWINT, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, SUSANNAH L. BROWN, PLAINTIFFS
v.
JOHN DOE, ADMINISTRATOR OF THE ESTATE OF ARON JOHNSON, JR.; LYDIA WILLIAMS, TERRIE COVINGTON; VERDIE MAE DEGREE; SARAH JASCSON; SELMA PHILLIPS; KATIE SARRATT; AND DEEGEE HERNDON, DEFENDANTS

No. COA18-964

Filed 16 April 2019

1. Paternity—after death—estate proceeding commenced—section 49-14—procedural requirements

In a paternity action, a minor child met the procedural requirements in N.C.G.S. § 49-14 where the special proceeding to administer the estate of the putative father was brought within a year of his death and the minor commenced her action to establish paternity within the time mandated by statute.

2. Paternity—after death—estate proceeding commenced—section 49-14—sufficiency of evidence

In an action to establish paternity after the death of the putative father—for the purpose of obtaining inheritance rights—the trial court properly granted summary judgment to the minor child after she presented unopposed evidence consisting of a DNA test, her mother's affidavit (attesting to the relationship she had with the putative father), and an affidavit of the putative father's domestic partner (attesting to the putative father's beliefs and actions in treating the minor child as his daughter).

3. Paternity—after death—estate proceeding commenced—declaration of right to inherit—authority of trial court

In a paternity action, after finding that paternity was established, the trial court erred by declaring that the minor child was entitled to inherit from her father's estate, because the issue of inheritance was within the exclusive jurisdiction of the clerk of court in the pending special proceeding to administer the father's estate.

Judge COLLINS concurring in result by separate opinion.

Appeal by Defendants from order entered 8 June 2018 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 27 February 2019.

Morgan Law, PLLC, by William E. Morgan, for Plaintiffs.

The Law Firm of John C. Hensley, Jr. P.C., by Michael J. Greer, for Defendants.

DILLON, Judge.

Defendants Lydia Williams, Verdie Mae Degree, Sarah Jackson, Selma Phillips, and Katie Sarratt (the "Defendants") appeal from an order granting Plaintiffs' motion for summary judgment.

I. Background

Plaintiff China Swint, a minor child, commenced this action to establish that Aron Johnson, Jr., now deceased, was her father. Ms. Swint seeks to establish the paternity of Mr. Johnson in this action so that she can assert a right of inheritance in a pending special proceeding, docket number 15-E-734, regarding the administration of Mr. Johnson's estate.

In December 2014, Mr. Johnson passed away, leaving no will. In 2015, within a year of Mr. Johnson's death, the special proceeding for the administration of his estate referenced above was commenced. Over the course of the next year, relatives of Mr. Johnson litigated issues concerning the proper administration of his estate.

At the time of Mr. Johnson's death, Ms. Swint was an adolescent minor. In June 2016, Ms. Swint, through her guardian ad litem, commenced this present action seeking a judgment establishing Mr. Johnson's paternity and a declaration that she is, therefore, entitled to rights of inheritance under our Intestate Succession Act.

Defendants, all relatives of Mr. Johnson, answered, denying Ms. Swint's paternity claim.

Ms. Swint and one of the Defendants filed cross-motions for summary judgment. After a hearing on the matter, Ms. Swint's motion for summary judgment was granted and the Defendant's motion for summary judgment was denied. Defendants timely appealed.

II. Analysis

Defendants argue that the trial court erred in granting Ms. Swint's motion for summary judgment.

We review a trial court's ruling on a motion for summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d

674, 693 (2004). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018).

In her complaint, Ms. Swint essentially sought (1) an order establishing Mr. Johnson's paternity and (2) a declaration that Ms. Swint has the right to inherit from Mr. Johnson's estate. For the following reasons, we conclude that the trial court did not err in granting summary judgment for Ms. Swint on her claim to establish paternity: the evidence before the trial court established Mr. Johnson's paternity as a matter of law. However, we further conclude that the trial court erred in granting Ms. Swint summary judgment on her claim for a declaration that she is entitled to inherit from Mr. Johnson, as that issue must be resolved by the clerk in the special proceeding regarding Mr. Johnson's estate.

A child born out of wedlock may be entitled to rights of inheritance from her putative father if she establishes his paternity. Specifically, N.C. Gen. Stat. § 29-19 provides that "a child born out of wedlock shall be entitled to take by, through and from . . . [a]ny person who has been finally adjudged to be the father of the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16[.]" N.C. Gen. Stat. § 29-19(b)(1) (2016).

[1] Chapter 49-14 allows for a child to bring an action to establish paternity even where the putative father has already died and an estate proceeding has been commenced. Specifically, Section 49-14 provides that where a proceeding for the administration of the estate of the putative father has been commenced within a year of his death, a separate action to establish paternity may be maintained if commenced "[w]ithin the period specified in [Section] 28A-19-3(a) for presentation of claims against an estate[.]" N.C. Gen. Stat. § 49-14(c)(3) (2016). Here, the special proceeding was brought within a year of Mr. Johnson's death *and* Ms. Swint commenced this present action to establish Mr. Johnson's paternity within the time required for the presentation of claims against Mr. Johnson's estate.[1] Therefore, we conclude that Ms. Swint has followed the proper procedure to establish Mr. Johnson's paternity and in a timely fashion.

---

1. Section 28A-19-1(b) allows for claims against an estate to be presented simply *by filing an action against the decedent's personal representative*, as was done here by the filing of this present action. N.C. Gen. Stat. § 28A-19-1(b) (2016). We note that Defendants have never asserted that Ms. Swint's claim was untimely and that it does appear from the record that Ms. Swint's claim was timely filed.

[2] We further conclude that Ms. Swint was entitled to summary judgment on her claim establishing Mr. Johnson as her father. Section 49-14 requires that "[i]f the action to establish paternity is brought more than three years after birth of a child or is brought after the death of the putative father, paternity shall not be established in a contested case without evidence from a blood or genetic marker test." N.C. Gen. Stat. § 49-14(d) (2016). Here, Ms. Swint complied with Section 49-14(d) by presenting a DNA test, establishing Mr. Johnson's paternity at a probability of 99.99%. Further, Ms. Swint offered the affidavit of her mother in which her mother stated that she had sexual relations with Mr. Johnson nine months before Ms. Swint's birth and that she did not have sexual relations with anyone else within a year of Ms. Swint's birth. And Ms. Swint offered the affidavit of a woman who was Mr. Johnson's domestic partner for a time after Ms. Swint's birth who essentially stated that Mr. Johnson considered Ms. Swint to be his daughter and acted consistently with this belief.

There is no evidence in the record contradicting the evidence offered by Ms. Swint. Therefore, the trial court did not err in granting summary judgment on Ms. Swint's claim establishing Mr. Johnson's paternity.

[3] We, however, reverse the portion of the summary judgment order which declares that Ms. Swint is entitled to take from Mr. Johnson's estate. A trial court is only entitled to declare rights on matters within its jurisdiction. N.C. Gen. Stat. § 1-253 (2018) ("Courts of record within their respective jurisdictions shall have the power to declare rights . . .[.]"). And it is within the exclusive jurisdiction of the clerk in a special proceeding to administer estates. *See* N.C. Gen. Stat. § 28A-1-3 (2018) (providing the clerk with jurisdiction to administer estates); *Morris v. Morris*, 245 N.C. 30, 32, 95 S.E.2d 110, 112 (1956) (stating that the clerk's original jurisdiction over the administration of estates is exclusive). The issue of Ms. Swint's right to inherit is more properly one to be decided by the clerk in the pending special proceeding. We note that the clerk must treat Ms. Swint as Mr. Johnson's legitimate child, as his paternity has now been established in this present action. *See* N.C. Gen. Stat. § 29-19 (2018). However, it is an issue for the clerk presiding in the special proceeding to determine whether Ms. Swint is not otherwise disqualified to inherit from Mr. Johnson's estate.[2]

2. A clerk may determine that an otherwise lawful heir is disqualified from inheriting. For example, if it is determined that the heir caused the death of the deceased, the heir may be disqualified. *See* N.C. Gen. Stat. § 31A-4 (2018). We note that there is no evidence before us that Ms. Swint is in any way disqualified from inheriting from Mr. Johnson's estate, but that determination must be made by the clerk based on the evidence presented in the special proceeding.

AFFIRMED IN PART, REVERSED IN PART.

Judge INMAN concurs.

Judge COLLINS concurs in result by separate opinion.

COLLINS, Judge, concurring.

I concur in the majority opinion, but write separately to explain how the Complaint, which does not specifically cite N.C. Gen. Stat. § 49-14 as a basis for Plaintiff's paternity claim, is legally sufficient to bring the claim to the court's attention.

Plaintiff's Complaint specifically mentions N.C. Gen. Stat. §§ 29-18 and 29-19 as the legal bases for her paternity and inheritance claims. Section 29-18, which concerns the inheritance rights of legitimated children, is not available to Plaintiff, as the record nowhere reflects that she is a legitimated child. The record does reflect that Plaintiff is a child born out of wedlock, however, and as mentioned, a child born out of wedlock may take from a decedent under section 29-19 if the child gets a judgment that the decedent was the child's parent.

As Defendant Williams noted in her motion for summary judgment, posthumous determination of paternity may only be effected by N.C. Gen. Stat. § 49-14. The Complaint does not specifically cite section 49-14 as a basis for Plaintiff's paternity claim, but courts have held that a plaintiff's failure to cite the correct statutory basis for a claim is not fatal to the claim so long as the claim brought is legally sufficient and brought to the court's attention. *See Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987) ("The failure to state a particular rule number as a basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the opponent of the motion is not prejudiced thereby.").

Defendants can claim no surprise here, since (1) Plaintiff expressly sought a determination of paternity in her prayer for judgment, (2) the Complaint mentions section 49-14 as a possible basis for Plaintiff's section 29-19 claim, and (3) Defendant Williams discussed section 49-14 in her motion for summary judgment to the trial court. Because Plaintiff's paternity claim is legally sufficient, the correct statutory basis for Plaintiff's paternity claim was before the trial court, and Defendants were aware of the proper statute (and therefore capable of contesting

the claim),[1] I agree that we may construe the Complaint as having sought—and the trial court as having granted—a declaratory judgment under section 49-14 that Mr. Johnson was Plaintiff's father.

1. In contesting Plaintiff's motion for summary judgment, Defendants could have provided the trial court with sworn evidence controverting the DNA test report as contemplated by Rule 56(e), or petitioned the trial court to allow them to take depositions or discovery in order to seek evidence they might use to controvert the DNA test report as contemplated by Rule 56(f), but did neither.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2019)

BRUNSON v. OFFICE OF THE GOVERNOR OF N.C. No. 18-836	N.C. Industrial Commission (TA-26020)	Affirmed
BRUNSON v. OFFICE OF THE TWELFTH JUDICIARY No. 18-838	N.C. Industrial Commission (TA-25986)	Affirmed
BUCHANAN v. N.C. FARM BUREAU MUT. INS. CO., INC. No. 18-347	Mitchell (16CVS229)	Dismissed
IN RE A.A.H. No. 18-779	Yadkin (16JT52)	Affirmed
IN RE C.N.B. No. 18-1104	New Hanover (16JT117)	Dismissed in part; Affirmed in part.
IN RE D.V.G. No. 18-878	Guilford (16JT223)	Dismissed in Part; Affirmed in Part.
IN RE F.M.C. No. 18-1168	Mecklenburg (16JT184)	Affirmed
IN RE J.F. No. 18-1165	Durham (18JB70)	Dismissed
IN RE S.H.J. No. 18-655	Cumberland (13JT584)	Affirmed
IN RE T.O. No. 18-1110	Wake (18JA102) (18JA103)	Affirmed
JONES v. JONES No. 18-991	Rowan (09CVD725)	Affirmed
LYON v. SERV. TEAM OF PROF'LS (E. CAROLINA), LLC No. 18-627	Pamlico (15CVS32)	Affirmed
MANN v. UNION CTY. CLERK OF COURT No. 18-1116	N.C. Industrial Commission (TA-26061)	Dismissed

PENDER CTY. v. SULLIVAN No. 18-774	Pender (16CVS790)	Affirmed and Remanded
REED v. CAROLINA HOLDINGS No. 18-376	Wake (15CVS5806)	Vacated and Remanded
REED v. CAROLINA HOLDINGS No. 18-597	N.C. Industrial Commission (845311)	Dismissed
SCROGGS v. TRACTORS ON THE CREEK, LLC No. 18-1024	Buncombe (17CVD5275)	AFFIRMED IN PART AND REVERSED IN PART
SLOK, LLC v. COURTSIDE CONDO. OWNERS ASS'N, INC. No. 18-736	Mecklenburg (17CVS8935)	Affirmed in part; Vacated in part and remanded.
STATE v. ANGRAM No. 18-993	Henderson (17CRS52120) (17CRS52477)	NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. BEST No. 18-563	Johnston (16CRS51969-70)	No Error
STATE v. CARTER No. 18-901	Iredell (14CRS50435)	No Error
STATE v. EUBANKS No. 18-876	Randolph (15CRS53534) (15CRS53636) (16CRS77)	No Error
STATE v. GADDY No. 18-621	Buncombe (15CRS91363-64) (15CRS92141) (15CRS93092-94) (15CRS93096) (15CRS93098-99)	No Error
STATE v. GREEN No. 18-691	Mecklenburg (15CRS28429)	Dismissed in part; vacated and remanded in part.
STATE v. HENRY No. 18-693	Bladen (15CRS50819-20)	Affirmed
STATE v. MATTHEWS No. 18-663	Moore (17CRS51448)	No Error

STATE v. MIRANDA No. 18-626	Wake (16CRS216192)	No Error
STATE v. MORGAN No. 18-803	Haywood (17CRS51077) (17CRS51506)	Affirmed
STATE v. MORRIS No. 18-724	Pitt (16CRS52599-600)	Affirmed; remanded for correction of error in 16 CRS 52600.
STATE v. NEWKIRK No. 18-670	Duplin (14CRS52588)	No prejudicial error.
STATE v. PULLEY No. 18-797	Mecklenburg (16CRS218286-87) (16CRS218290) (16CRS218296)	No Error
STATE v. SMALLWOOD No. 18-578	Martin (16CRS357) (16CRS359)	Dismissed
STATE v. WATTS No. 18-686	Mecklenburg (16CRS225711) (16CRS225712) (16CRS225719)	No Error
STATE v. WHITE No. 18-704	Moore (13CRS52419)	No Error
STATE v. WILLIAMSON No. 18-521	Wake (17CRS729755)	No Error
STATE v. WOODY No. 18-1001	Guilford (17CRS24702) (17CRS87036)	No Error
STOWERS v. PARKER No. 18-737	Davie (14CVS32)	Affirmed
WOODARD v. GOODYEAR TIRE & RUBBER CO. No. 18-865	N.C. Industrial Commission (15-036839) (16-012878)	Affirmed

CLEMONS v. CLEMONS

[265 N.C. App. 113 (2019)]

BARBARA CORRIHER CLEMONS, PLAINTIFF
v.
GEORGE BELL CLEMONS, DEFENDANT

No. COA18-433

Filed 7 May 2019

Divorce—equitable distribution—property classification—stipulation of separate property—binding on court

The trial court erred by classifying part of the value of a townhouse as marital where the parties stipulated in a pretrial order that the townhouse was the wife's separate property. Discussion in court regarding a "marital component" referred to the debt on the townhouse but not the townhouse itself. Nothing in the court hearing transcript indicated any intent by the parties to set aside any of the stipulations, nor could the trial court have set aside the stipulation without notice to allow the parties to present evidence to value the marital component.

Judge BERGER dissenting.

Appeal by plaintiff from judgment entered 1 December 2017 by Judge Donna H. Johnson in District Court, Cabarrus County. Heard in the Court of Appeals 31 October 2018.

Ferguson, Hayes, Hawkins & Demay, PLLC, by Edwin H. Ferguson, Jr., for plaintiff-appellant.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Lori P. Jones and Hope Derby Carmichael, for defendant-appellee.

STROUD, Judge.

Wife appeals from an equitable distribution order valuing the "marital portion" of a townhome she owned prior to marriage at $90,000.00 and distributing it to Wife and distributing $90,000.00 of marital debt on the same property to her. Because the parties stipulated in the pretrial order that the townhome was Wife's separate property, the trial court erred by classifying part of its value as marital property and making its distribution based upon this classification and valuation. We reverse and remand.

I. Background

Husband and Wife were married on 6 September 2003 and separated on 21 March 2015. On 2 July 2015, Wife filed a complaint against Husband with claims for equitable distribution with an unequal division in her favor, postseparation support, and alimony.[1] Husband answered and joined in Wife's request for equitable distribution but requested an unequal division in his favor. A pretrial order was entered on 13 November 2017 with detailed schedules of property and issues in contention. In this order, as relevant to the issues on appeal, Husband and Wife stipulated that the "Townhome" with a "Net Value" of "186,000.00" was the separate property of Wife.[2] At trial, the parties agreed that the balance of the debt secured by the townhome as of the date of separation was $90,000.00, all of which was incurred during the marriage, but they did not stipulate to the classification and distribution of this debt. Wife contended the debt was marital, and Husband contended that at least some portion of the debt was Wife's separate debt.

On 1 December 2017, the trial court entered the equitable distribution order. The trial court considered the parties' contentions for unequal distribution but determined that an equal distribution was equitable. The trial court determined that the "marital component" of the townhome was $90,000.00 and distributed it as marital property to Wife and distributed the $90,000.00 mortgage debt to Wife. The trial court calculated that the value of the gross marital estate including this "marital" value of the townhome and thus calculated the net value of the marital estate as "(-)$8,566.62" and awarded an equal division of the marital property and debt. As a result, Wife owed Husband a distributive award of $539.31. Wife timely appealed.

II. Jurisdiction

This Court has jurisdiction to review this equitable distribution order under North Carolina General Statute § 50-19.1:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce

1. Our record does not indicate the status of the postseparation and alimony claims, but those are not relevant to this appeal.

2. It appears that $186,000.00 was actually the *gross* value of the townhome, since the parties agreed that the $90,000.00 debt was secured by the townhome, so the *net* value would therefore be $96,000.00, but the exact value does not change our analysis on appeal.

> from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. § 50-19.1 (2017).

III. Standard of Review

> The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Clark v. Dyer, 236 N.C. App. 9, 13, 762 S.E.2d 838, 839 (2014).

IV. Classification and Valuation of "Marital Component" of the Townhome

On appeal, Wife challenges several of the trial court's findings of fact and related conclusions of law, all relating to the classification of the townhome.

> Upon application of a party for an equitable distribution, the trial court shall determine what is the marital property and shall provide for an equitable distribution of the marital property in accordance with the provisions of N.C. Gen. Stat. § 50-20. In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Chafin v. Chafin, ___ N.C. App. ___, ___, 791 S.E.2d 693, 698 (2016) (quotation marks, brackets, and ellipsis omitted).

Wife challenges portions of the following findings and related conclusions of law:

> [4. b.] 7) Around 2000, Ms. Clemons purchased a townhome located [in] Concord for about $160,000.00. Just prior to the marriage, Ms. Clemons mortgaged the property. The mortgage was paid off, but the source of the funds are unknown. The parties mortgaged the property during the marriage. The parties agreed that the mortgage on the property at the date of separation was $90,000.00. The tax value on the townhome was $161,190.00 on March 20, 2006. There was no appraisal done on the home at or near the date of separation. Therefore, the marital portion is at least equal the marital debt of $90,000.
>
> . . . .
>
> [4.] g. On Schedule L, the parties agreed that those items, which includes the former marital residence, is the separate property of Ms. Clemons with the exception of the marital component noted above.
>
> . . . .
>
> [5. e.] 1) The former marital residence was owned by Ms. Clemons prior to the marriage. She mortgaged the property prior to the marriage to invest in Mr. Clemon's [sic] business. Later the home was mortgaged at least once more for $90,000.00. Limited documentation was available regarding the marital component.

Wife challenges portions of these findings as unsupported by the evidence or contrary to the stipulations in the pretrial order.

Finding of fact 4 (g) noting "the exception of the marital component noted above" is not supported by competent evidence in the record and is contrary to the parties' stipulation. The pretrial order does not include any mention of a "marital component" of the townhome or any issue of valuation of a "marital component" or valuation of an increase in value of the townhome during the marriage. And there was no evidence which could support classification or valuation of a "marital component." The parties stipulated only that the townhome was Wife's separate property, with a date of separation value of $186,000.00. Neither party introduced

evidence needed to value a "marital component" of the townhome, most likely because they had stipulated that it was entirely separate.

It is well-established that stipulations in a pretrial order are binding upon the parties and upon the trial court. *See Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) ("[S]tipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge."). "Accordingly, the effect of a stipulation by the parties withdraws a particular fact from the realm of dispute." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012) (brackets and quotation marks omitted).

In equitable distribution cases, stipulations in the pretrial order are intended to limit the evidence needed and to define the issues the trial court must decide. *See id.* at 106-07, 730 S.E.2d at 792 ("We also note that this is an equitable distribution case, where a pre-trial order including stipulations such as those in this case is required by N.C. Gen. Stat. § 50-21(d) and Local Rule 31.9. In equitable distribution cases, because of the requirements of statute and local rules, the stipulations are frequently quite extensive and precise and are specifically intended to limit the issues to be tried, and the same is true in this case. Neither party has cited, and we cannot find, any prior opinion by our Court in which a trial court has *ex mero motu* set aside a pre-trial order or a party's stipulations *after* completion of the trial upon the issues which the stipulations addressed." (citation omitted)). And as noted by the dissent, although it is possible for either the trial court or parties to set aside stipulations under certain conditions, none of those conditions are present here.

The dissent takes Wife's counsel's brief comment about a "marital component" out of context and construes it as an agreement to assign a "marital component" to the value of the townhome, but this was not what her counsel was saying. Wife's counsel was actually arguing that the $90,000.00 *debt* was entirely marital or had a marital component, not the townhome. At trial, Husband took the position that the $90,000.00 debt was *not* marital; Wife contended that it was marital.

The "marital component" comment occurred during Husband's cross examination testimony about the $90,000.00 debt. Wife's counsel asked Husband:

> [Mr. Ferguson:] And this $90,000 loan or $90,000 debt various times was used to make improvements on the property.

[Husband:] Well, --

[Mr. Ferguson:] Yes or no?

[Husband:] *No*, and I'll say -- the only reason I say that is that that was the balance on the mortgage at the time. The original mortgage that had been paid down at that time was, I think, 102,000 and the -- 'cause we'd been paying an accelerated amount on the principal. We were down to about 90,000.

[Mr. Ferguson:] *Well, whatever balance was owed on the town home on the date that you separated, the 90,000, no dispute as to marital debt?*

[Husband:] That is correct.

[Mr. Ferguson:] And I believe your testimony was that the --

> MS. CAIN: Your Honor, I'm going to object to that question. That draws a legal conclusion, whether or not it's marital.
>
> THE COURT: Well, the whole pretrial order is based on that contention, stuff like marital and not marital and separate and --
>
> MS. CAIN: *Well, yes, but that debt actually is on a schedule. We don't agree that it's marital.*
>
> THE COURT: Okay. Well, I don't know how else you're going to ask him what he thinks the debt is on the date of separation to resolve the difference, then. He either agrees to it or he has an estimate of what it was.
>
> MS. CAIN: I don't --
>
> THE COURT: On the date of separation, what do you think the debt was on the home, the town home?
>
> [Husband]: I believe it was about 90,000.
>
> MS. CAIN: *We're not disputing that; we're disputing that it's marital.*
>
> MR. FERGUSON: The debt was --

> THE COURT: Well, they've agreed that the debt was incurred during the marriage and that it was paid down during the marriage to 90,000. That's the testimony thus far.
>
> MS. CAIN: Yes. I understand that. But it's also for property, assets and property, that she is keeping. Normally, the debt goes with the asset.
>
> THE COURT: I don't know that she's keeping it. I'll have to decide how the property's going to be divided *unless she put that on A where they've agreed to that.*

(Emphasis added.)

Neither the townhome nor the $90,000.00 debt was on Schedule A of the Pretrial order, which was "a list of marital property upon which there is an agreement by and between the parties hereto as to both value and distribution." The townhome was on Schedule L, "a list of the separate property, if any, of the [Wife] upon which there is an agreement and stipulation by and between the parties hereto as to both value and distribution." The townhome is listed on Schedule L as Wife's separate property, to be distributed to Wife. Wife's attorney then pointed this out:

> MR. FERGUSON: Her separate property, I believe it's listed under Schedule L.
>
> THE COURT: There's still a marital portion of it that's subject to be distributed.
>
> MR. FERGUSON: It's a marital component. No dispute.
>
> THE COURT: Uh-huh.
>
> MR. FERGUSON: *That's what I'm trying to establish here.*

(Emphasis added.)

Going back to the beginning of the line of questioning, Wife's attorney attempted to get Husband to agree that the $90,000.00 *debt* was marital; Husband's counsel objected to the characterization of the debt as marital and noted that Husband did *not* agree that the debt was marital. Wife's counsel was certainly not trying to establish that the townhome or any portion of its value was marital, since this classification would be entirely opposed to Wife's interests. Instead, he pointed out to the trial court that the townhome was listed on Schedule L, as Wife's separate property, to be distributed to her. Thus, the "marital component" comment, read in context of the testimony and discussion in the trial

court, is not a reference to classification of any portion of the value of the townhome. During the same discussion, Wife's counsel points out the stipulation in Schedule L of the pretrial order; he does not "invite error" or waive the stipulation. Nothing in the testimony, counsel's other statements to the court, or arguments indicates any intention to set aside any of the stipulations.[3] Nor can the trial court set aside a stipulation *ex mero motu* without prior notice to the parties:

> Just as a party requesting to set aside a stipulation would have to give notice to the opposing parties, and the opposing parties would have an opportunity for hearing upon the request, the trial court cannot own its own motion set aside a pre-trial order containing the parties' stipulations after the case has been tried in reliance upon that pre-trial order, "without giving the parties notice and an opportunity to be heard."

Id. at 108, 730 S.E.2d at 793 (citation omitted).

Here, even if the trial court intended to set aside the stipulation based upon Wife's counsel's comment about a "marital component" of the $90,000.00 debt, the parties would have needed notice so they could present additional evidence to value the "marital component." Counsel for both parties specifically noted the stipulations of the pretrial order and the trial court never gave any indication of an intent to set aside any of the stipulations. The trial court cannot value the "marital component" of an asset without competent evidence to support marital contribution to the value, and no such evidence was presented.

In *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E.2d 186 (1985), cited by the dissent, this Court noted that the marital component of separate property is valued based upon the *active appreciation during the marriage*:

---

3. Our dissenting colleague notes that "[t]he trial court certainly could have found that failure to include a $90,000 asset provided sufficient cause to modify the stipulation." But the $90,000.00 is the balance of the debt owed *on the date of separation* and will be paid by Wife after the marriage; it is not a "marital asset." Nor did the parties overlook the $90,000.00 on the pretrial order. Both attorneys pointed out the pretrial order's stipulations to the trial court during the colloquy during Husband's testimony. It was characterized as a debt, the parties agreed on the value, and they disagreed on its classification as a marital or separate debt. The trial court classified it as marital debt, and this classification is not challenged on appeal.

> The Court held that increase in value of separate property due to active appreciation, which otherwise would have augmented the marital estate, is marital property.
>
> We conclude that the real property concerned herein must be characterized as part separate and part marital. It is clear the marital estate invested substantial labor and funds in improving the real property, therefore the marital estate is entitled to a proportionate return of its investment. That part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions, alterations and repairs provided during marriage should be considered marital in nature. As the marital estate is entitled to a return of its investment, defendant because of her contribution of separate property is entitled to a return of, or reimbursement or credit for, that contribution.

Id. at 595-96, 331 S.E.2d at 188 (citations omitted).

The $90,000.00 balance of the debt secured by the townhome cannot equate to a "marital component" because it does not represent active appreciation from "additions, alterations and repairs provided *during marriage*." *Id.* at 595, 331 S.E.2d at 188 (emphasis added). In fact, the $90,000.00 debt balance is just the opposite; this is the principal balance that Wife will be required to pay *after* the marriage, not a contribution *during* the marriage. Only the portion of debt paid *during* the marriage or funds expended on repairs or improvements to the townhome during the marriage could possibly be relevant to a "marital component" of the townhome. Neither party presented any evidence of the initial amount of the loans, payments made during the marriage, reduction of principal during the marriage, or any other factors which may be relevant to a "marital component."[4]

Because the parties had stipulated that the townhome was Wife's separate property and that its value was $186,000.00, the trial court erred by classifying a portion of it as marital and attempting to value it based only upon the balance of a marital debt as of the date of separation. " 'Separate property' of a spouse as defined by G.S. 50-20(b)(2) is not subject to equitable distribution." *Crumbley v. Crumbley*, 70 N.C. App. 143, 145, 318 S.E.2d 525, 526 (1984). In addition, on Schedule H

4. Husband testified only to the amounts of monthly payments and that the loan was refinanced several times.

of the pretrial order, Husband did not make any contention that there was "[a]ny direct contribution to an increase in the value of separate property which occurs during the course of the marriage." In fact, as discussed above, Husband contended the $90,000.00 debt was *not* marital and although he testified to some improvements to the property during the marriage, he also denied that this debt was used to improve the property:

> [Mr. Ferguson:] And this $90,000 loan or $90,000 debt various times was used to make improvements on the property.
>
> [Husband:] Well, –
>
> [Mr. Ferguson:] Yes or no?
>
> [Husband:] *No*, and I'll say -- *the only reason I say that is that that was the balance on the mortgage at the time.* The original mortgage that had been paid down at that time was,I think, 102,000 and the – 'cause we'd been paying an accelerated amount on the principal. We were down to about 90,000.

(Emphasis added.)

The trial court ignored the stipulations and attempted to rely on numbers in the record to create a "marital component" of the townhome. The trial court found, "The tax value on the townhome was $161,190.00 on March 20, 2006. There was no appraisal done on the home at or near the date of separation." These facts are correct, but the tax value of the townhome seven years prior to the date of valuation is irrelevant, and there was no appraisal of the townhome because the parties had *stipulated* to the value. As the trial court also found in finding 5 (e)(1), "Limited documentation was available regarding the marital component." This finding is correct; in fact, there was *no* documentation of a marital component, because neither party contended there was a marital component. Therefore, the trial court's findings of fact regarding the classification of a "marital component" in the townhome and its valuation are not supported by competent evidence.

On appeal, Husband contends that he did present evidence of a "marital component" of the townhome based upon improvements made during the marriage. He acknowledges that the townhome was paid off when the parties married, but argues that during the marriage they incurred debt secured by the townhome and refinanced it more than once. But as noted above, his testimony on this point was contradictory

at best, and he did not present any evidence of the amount of principal paid toward the debt during the marriage or active appreciation in the townhome during the marriage; the only evidence was the debt balance as of the date of separation. He also contends on appeal that "[m]ost of the funds were used to make improvements to the Townhome." Husband did testify at trial about several improvements to the townhome, although he did not present any evidence of the costs of any of the improvements or the sources of funds for each improvement. In addition, there was no evidence of the value of the townhome on the date of the marriage and thus no way for the trial court to determine what portion of an increase in value, if any, was passive appreciation based simply upon the passage of time and increase in overall property values.

But more importantly, the trial court did not make any findings of fact that $90,000.00 debt was actually used to improve the townhome, and Husband did not cross-appeal. Therefore, the trial court's findings regarding the use of the funds are binding on this Court. The only finding regarding the use of a portion of the borrowed funds is:

> [4. d.] 1) . . . On April 10, 2003, Ms. Clemons borrowed $43,130.81 against the property to invest in the trucking business owned by Mr. Clemons before the marriage. The truck was sold in 2007 to purchase the T800 truck.

It was not disputed that the balance of the debt as of the date of separation, $90,000.00, was incurred during the marriage, and based upon the trial court's finding above, almost half of this amount was originally borrowed to invest in Husband's trucking business.[5] Beyond this finding, the trial court classified the $90,000.00 balance of the debt on the townhome as of the date of separation as marital debt. Wife did not challenge this finding on appeal, and Husband did not cross-appeal, so it is binding on this Court. *See Clark*, 236 N.C. App. at 14, 762 S.E.2d at 839.

In finding of fact 6, the trial court listed the valuation and distribution of the marital property. This finding included the townhome, with a marital value of $90,000.00, and distributed it to Wife. This distribution of the townhome is in error because the townhome was Wife's separate property, and there was no "marital component" to include in calculation of the marital estate value or distribution. In finding of fact 7, the trial court listed the amount and distribution of several marital debts.

---

5. By the time the parties separated, Husband's trucking business was defunct, so it was not an asset considered in equitable distribution.

The $90,000.00 debt on the townhome was distributed to Wife, and while Wife challenges this distribution in the heading of one of her arguments, she does not make any argument in her brief challenging this classification or distribution. This argument is deemed abandoned. *See* N.C. R. App. P. 28(a). Finding of fact 8 finds that "the gross marital estate is (-)$8,566.62" and divides the marital property and debt equally, resulting in a distributive award from Wife to Husband of $539.31, but this calculation erroneously includes the $90,000.00 value assigned to the "marital component" of the townhome.

In the findings of fact addressing the distributional factors under N.C. Gen. Stat. § 50-20(c)(10), the trial court included findings regarding "[t]he difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact, and free from any claim or interference by the other party." Under this factor, the trial court found:

> 1) The former marital residence was owned by Ms. Clemons prior to the marriage. She mortgaged the property just prior to the marriage to invest in Mr. Clemon's [sic] business. Later the home was mortgaged at least once more for $90,000.00. Limited documentation was available regarding the marital component.
>
> 2) Ms. Clemons resided in the former marital residence prior to the marriage. She continued to live in the home after the date of separation.

Therefore, as part of its determination that an equal division would be equitable, the trial court considered Wife's townhome, the $90,000.00 value of the "marital component" of the townhome, that she had mortgaged it to invest in Husband's business, and that she lived in the townhome both before marriage and after separation. Because we must reverse the trial court's classification and valuation of the "marital component" of the townhome, we also reverse the trial court's division and distribution of the marital property and remand for entry of a new order classifying the townhome as Wife's separate property and equitably distributing the marital property and debt.[6]

---

6. We note that the townhome was by far the largest "marital" asset, and the net value of the marital estate without the value of the townhome would be ($98,566.62). This would result in Husband being required to *pay* Wife $44,460.69 to equalize the distribution, a result the trial court may have deemed inequitable.

As in *Turner v. Turner*, by attempting to classify and value a "marital component" of the townhome contrary to the stipulations and evidence and then attempting an equitable result by dividing the net estate equally, "the court put the cart before the horse." 64 N.C. App. 342, 346, 307 S.E.2d 407, 409 (1983). The trial court may in its discretion do equity in the distribution, including an unequal distribution if supported by the factors under N.C. Gen. Stat § 50-20(c), but it may not use equity to classify or value marital property or debt. "Where the trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. A single distributional factor may support an unequal division." *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010) (citation omitted); *see also Watson v. Watson*, ___ N.C. App. ___, ___, 819 S.E.2d 595, 602 (2018).

V. Conclusion

For the foregoing reasons, we reverse and remand for the trial court to enter a new order classifying the townhome as Wife's separate property and distributing the marital property and debts. Since we have reversed the classification and valuation of the most valuable asset included in the marital estate, and the trial court considered this factor as part of its analysis of the distributional factors, we remand for the trial court to reconsider whether "an equal division is not equitable" considering the change in classification of the townhome and net value of the marital estate. N.C. Gen Stat. §50-20(c) (2017). The determination of whether an equal division is not equitable is in the trial court's discretion, and it must exercise its discretion to consider the division in light of this opinion, so the trial court should make additional findings of fact as it deems appropriate as to the distributional factors under N. C. Gen. Stat. §50-20(c). *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." (citations omitted)).

As the classification and valuation of only one asset was challenged on appeal, on remand the parties should not be permitted a "second bite at the apple" by presenting new evidence or argument as to the classification or valuation of marital or divisible property, but in the trial court's discretion, they may present additional evidence addressing the distributional factors under N.C. Gen. Stat. 50-20(c) since the trial court must consider those factors, including "[t]he income, property, and liabilities

of each party at the time the division of property is to become effective." N.C. Gen. Stat. § 50-20(c)(1).

REVERSED AND REMANDED.

Judge DILLON concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

For the reasons stated herein, I respectfully dissent.

The parties stipulated in the pretrial order that the townhome was entirely Wife's separate property, valued at $186,000. Nevertheless, the trial court classified the townhome partially as Wife's separate property and partially marital property because there was active appreciation in the townhome's value during the parties' marriage. The trial court found that the "marital portion" of the townhome was "at least equal to the marital debt of $90,000." Wife contends that the trial court erred by setting aside the parties' stipulation that the townhome was entirely Wife's separate property in order to find that the townhome was subject to a $90,000 "marital component."

However, Wife waived appellate review of this issue by inviting any alleged error. "A party may not complain of action which he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). Invited error is

> a legal error that is not a cause for complaint because the error occurred through the fault of the party now complaining. The evidentiary scholars have provided similar definitions; e.g., the party who induces an error can't take advantage of it on appeal, or more colloquially, you can't complain about a result you caused.

Romulus v. Romulus, 215 N.C. App. 495, 528, 715 S.E.2d 308, 329 (2011) (citation and quotation marks omitted).

Here, the trial court remarked during the trial that there was a "marital portion" of the townhome that was "subject to be distributed." The trial court was not, as the majority contends, addressing the marital debt, but clearly discussing the asset.

> THE COURT: I'll have to decide how the *property's* going to be divided unless she put that on [Schedule] A where they've agreed to that.
>
> [Wife's Attorney]: Her separate property, I believe it's listed under Schedule L.
>
> THE COURT: *There's still a marital portion of it that's subject to be distributed.*
>
> [Wife's Attorney]: *It's a marital component. No dispute.*
>
> THE COURT: Uh-huh.

(Emphasis added.)

By responding that "It's a marital component. No dispute," Wife invited the error, if any. Because any purported error that may have occurred at trial "occurred through the fault of [Wife]," *Romulus*, 215 N.C. App. at 528, 715 S.E.2d at 329, she has waived appellate review of this issue.

Even if Wife had not waived appellate review, the above exchange reflected Wife's consent for the trial court to set aside the parties' stipulation that the townhome was entirely Wife's separate property. Generally, "[a]dmissions in the pleadings and stipulations by the parties have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing else appearing, they are conclusive and binding upon the parties and the trial judge." *Crowder v. Jenkins*, 11 N.C. App. 57, 63, 180 S.E.2d 482, 486 (1971) (citation omitted). However, "[s]tipulations may be set aside in certain circumstances." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 106, 730 S.E.2d 784, 792 (2012).

> It is generally recognized that it is within the discretion of the court to set aside a stipulation of the parties relating to the conduct of a pending cause, where enforcement would result in injury to one of the parties and the other party would not be materially prejudiced by its being set aside. A stipulation entered into under a mistake as to a material fact concerning the ascertainment of which there has been reasonable diligence exercised is the proper subject for relief. Other proper justifications for setting aside a stipulation include: misrepresentations as to material facts, undue influence, collusion, duress, fraud, and inadvertence.

Lowery v. Locklear Const., 132 N.C. App. 510, 514, 512 S.E.2d 477, 479 (1999) (citations and quotation marks omitted).

> Although it may be appropriate for a trial court on its own motion to set aside a parties' stipulation for one of the reasons stated in *Lowery* or to prevent manifest injustice, there are limits to the court's discretion to set aside a stipulation. First, Rule 16(a)(7) [of the North Carolina Rules of Civil Procedure] itself states that a stipulation may be "modified *at the trial* to prevent manifest injustice." N.C. Gen. Stat. § 1A–1, Rule 16(a) (emphasis added). Modification of a stipulation *at the trial* gives all parties immediate notice of the modification and allows the parties the opportunity to present additional evidence which may be required based upon the elimination of the stipulation.

Plomaritis, 222 N.C. App. at 107, 730 S.E.2d at 793 (emphasis in original).

Here, the majority opinion implies that the trial court made an *ex mero motu* post-trial modification to the parties' stipulation. However, to the extent there was any modification, it was made *at trial* and with Wife's consent. The majority opinion's failure to make a distinction between stipulation modifications that occur during trial and post-trial is essential because it relates to the parties' right to notice and opportunity to be heard.

The trial court certainly could have found that failure to include a $90,000 asset provided sufficient cause to modify the stipulation.[1] Given the evidence in the record, the trial court correctly concluded that the townhome should have been classified and distributed as part separate and part marital property due to its active appreciation during the marriage. *See Lawrence v. Lawrence*, 75 N.C. App. 592, 595 331 S.E.2d 186, 188 (1985) ("Part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions,

1. The majority's footnote 3 is curious given the very straightforward language contained herein. The trial court found that the "marital portion" of the townhome was "at least equal to the marital debt of $90,000." The trial court valued this *asset*, the active appreciation of the townhome, at $90,000. While the trial court's valuation of both the marital debt on the townhome and the active appreciation in the townhome's value at $90,000 has apparently caused some confusion, this dissent does not address in any way, shape, or fashion the trial court's valuation or distribution of the $90,000 *debt* owed on that asset.

alterations and repairs provided during marriage should be considered marital in nature."). Moreover, the trial court immediately notified the parties during the trial that it believed the townhome was subject to a marital component of active appreciation.

In addition, one could argue that there was evidence that could support the trial court's valuation of the "marital portion" of the townhome. Prior to the marriage, Wife purchased and paid off the mortgage on the townhome. During the marriage, the parties lived in the townhome and took out multiple lines of credit against the equity on the townhome. Defendant testified that the parties spent most of the loan proceeds to remodel and make improvements to the townhome. Wife did not dispute this testimony.

Admittedly, the trial court's findings as to valuation of the townhome are limited. But, evidence in the record demonstrates that there was active appreciation of separate property. Additional findings of fact from the trial court could resolve this issue, as could additional evidence if the trial court deems necessary. This Court should not hamstring a trial court by simply instructing it to "get it over," instead of getting it right.

CRYSTAL COGDILL AND JACKSON'S GENERAL STORE, INC., PLAINTIFFS
v.
SYLVA SUPPLY COMPANY, INC., DUANE JAY BALL AND IRENE BALL, DEFENDANTS

No. COA18-845

Filed 7 May 2019

Landlord and Tenant—holdover tenancy—expired lease—right of first refusal

Where plaintiffs became holdover tenants on defendant's property after the parties' written lease expired, plaintiffs' year-to-year tenancy created by operation of law did not include the right of first refusal (to purchase the property, if defendant chose to sell it) contained in the expired lease. By its own terms, the written lease could not be extended beyond a certain date and, therefore, plaintiffs could not enforce their right of first refusal past that date. Moreover, nothing in the lease's language indicated that the parties intended the right of first refusal to remain in force beyond any extension or holdover period.

Judge TYSON dissenting.

Appeal by Plaintiffs from order entered 16 April 2018 by Judge Mark E. Powell in Jackson County Superior Court. Heard in the Court of Appeals 31 January 2019.

The Law Firm of Diane E. Sherrill, PLLC, by Diane E. Sherrill, for Plaintiffs-Appellants.

Coward, Hicks, & Siler, P.A., by Andrew C. Buckner, for Defendants-Appellees.

COLLINS, Judge.

Plaintiffs appeal the trial court's order granting summary judgment in favor of Defendants as to Plaintiffs' action alleging seven claims, including breach of contract. Plaintiffs' claims all stem from their assertion that they possessed a valid and enforceable Right of First Refusal to purchase the property at issue at the time Defendant Sylva Supply Company, Inc., conveyed the property to Defendants Duane Jay and Irene Ball. Plaintiffs and Sylva had entered into a written lease agreement, which was subsequently assigned to Plaintiff Jackson's General Store, Inc., which contained a Right of First Refusal. However, the written lease had expired and, pursuant to this Court's opinion in *Ball v. Cogdill*, COA17-409, 2017 N.C. App. LEXIS 1074 (N.C. Ct. App. December 19, 2017) (unpublished), Plaintiffs were holdover tenants under a year-to-year tenancy created by operation of law. The question posed by this appeal is whether the year-to-year tenancy created by operation of law included the Right of First Refusal contained in the expired written lease. We hold that it did not.

I. Procedural History and Factual Background

On 19 May 1999, Crystal Cogdill[1] (Cogdill) and Sylva Supply Company, Inc. (Sylva), entered into a "Buy-Sell and Lease Agreement" (Original Lease) by which Sylva leased the building located at 582 West Main Street (Property) to Cogdill. The lease was for a period of five years and included an option to renew for a single, additional period of five years. To exercise the option to renew, Cogdill had to provide written notice to Sylva no later than thirty days before the expiration of the first, five-year period. The renewal terms were to be determined at

1. Then Crystal Cogdill Jones.

the time of renewal; however, the terms of the renewed lease were to be determined by the parties at least ninety days before the expiration of the first, five-year lease period.[2] The first, five-year period expired on 31 May 2004.

The Original Lease granted Cogdill a Right of First Refusal to purchase the Property, should Sylva wish to sell the Property. Sylva was required to notify Cogdill by certified mail of the option to purchase the Property at the lowest price and on the same terms and conditions Sylva was willing to accept from other purchasers. If, within fifteen days of receiving Sylva's offer, Cogdill did not mail Sylva notice that she intended to exercise her Right of First Refusal to purchase the Property, Sylva had the right to sell the Property to other purchasers.

On 1 June 1999, a "Memorandum of Lease and Right of First Refusal" memorializing the Original Lease was recorded in the Jackson County Public Registry. On 1 July 1999, Cogdill assigned the Original Lease to Jackson's General Store, Inc. (Jackson's), a business incorporated by Cogdill.

On 7 June 2001, Cogdill and Sylva executed an "Amendment to Lease Agreement" (Lease), which amended the original rental period from five years to seven years and, thus, extended the original rental period end date from 31 May 2004 to 31 May 2006. If Sylva opted to renew the Lease for an additional, seven-year period, the new rental period would run from 1 June 2006 to 31 May 2013. The amendment also modified the amount of rent to be paid. All other terms remained unmodified.

No written notice was given to renew the Lease beyond the expiration of the initial seven-year period, which ended 31 May 2006. However, Plaintiffs continuously remained in tenancy.

On 7 May 2015, without first giving Plaintiffs an option to the buy the Property, Sylva sold the Property to Duane Jay and Irene Ball (the Balls). In June 2016, the Balls instituted a summary ejectment action against Plaintiffs. Both the small claims court and district court ruled in favor of Plaintiffs and dismissed the action. The Balls appealed to the Court of Appeals.

While the appeal was pending, Plaintiffs filed the complaint in the present action. In the complaint, Plaintiffs alleged causes of action for breach of contract, fraud, constructive fraud, civil conspiracy, claim to set aside deed, tortious interference with contract, and unfair and

2. The apparent internal incongruency of this term has no significance in this appeal.

deceptive acts or practices. These claims were based on Plaintiffs' assertion that they were wrongfully denied the right to exercise their Right of First Refusal to purchase the Property. Plaintiffs also filed a notice of *lis pendens*.

On 8 September 2017, Defendants moved to dismiss the complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 19 December 2017, this Court issued *Ball v. Cogdill*,[3] holding as follows: "Where [Cogdill and Jackson's] remained in tenancy after the expiration of their lease, the lease became a year-to-year tenancy. Because [the Balls] failed to provide the necessary 30 days' notice, the trial court did not err in denying [the Balls'] summary ejectment complaint." *Id.* at *1.

On 24 January 2018, Defendants filed an amended motion to dismiss, citing this Court's opinion in *Ball* as further support for dismissal. On 19 February 2018, Plaintiffs filed a motion for partial summary judgment, also citing this Court's opinion in *Ball* as support for its motion.

The trial court heard Defendants' original motion to dismiss, but did not consider this Court's opinion in *Ball*, and entered an order on 12 March 2018 denying the motion. On 16 March 2018, Defendants filed an answer to Plaintiffs' motion for partial summary judgment and raised the doctrine of collateral estoppel as a defense to Plaintiffs' claims.

On 2 April 2018,[4] the trial court heard Plaintiffs' motion for partial summary judgment and Defendants' amended motion to dismiss. Defendants' motion was converted to a motion for summary judgment because the trial court considered the Court of Appeals' opinion in *Ball*, a matter outside the pleadings. On 16 April 2018, the trial court entered its order denying Plaintiffs' motion for partial summary judgment and granting Defendants' motion for summary judgment. From this order, Plaintiffs appeal.

II. Jurisdiction

The trial court's 16 April 2018 order granting Defendants' motion for summary judgment was a final judgment. Jurisdiction of this appeal

---

3. The Balls were the plaintiffs while Cogdill and Jackson's were the defendants in the summary ejectment action. The parties' roles are reversed on this appeal. Sylva was not a party.

4. The order states that this cause of action was "heard before the undersigned judge presiding over the March 26, 2018 civil session of the Superior Court of Haywood County[.]" However, both parties stipulated that the "Order appealed from was the result of a hearing held during the April 2, 2018 civil session of the Superior Court of Haywood County[.]"

is therefore proper under N.C. Gen. Stat. § 7A-27(b)(1) (2018) and N.C. Gen. Stat. § 1-271 (2018).

III. Discussion

A. Court of Appeals' opinion in Ball v. Cogdill

We begin this discussion with a summary of this Court's opinion in *Ball v. Cogdill*, which involved the same background facts and the same parties, except Sylva, as the case presently before us. In *Ball*, this Court rejected the Balls' argument that the trial court erred by denying their complaint for summary ejectment because the trial court erroneously concluded that Cogdill and Jackson's were under a lease when the Balls attempted to summarily evict them from the Property. This Court noted, and Cogdill and Jackson's conceded, that no written notice had been given to renew the Lease beyond the expiration of the first, seven-year period. *Id.* at *4. This Court explained, however, that the "failure to renew a lease does not automatically result in ejectment of a tenant." *Id.* The record reflected that Cogdill and Jackson's had "remained in tenancy" after the expiration of the Lease and paid rent every month to the Balls, and the Balls had accepted the payment. *Id.* at *5-6. Citing our Supreme Court's opinion in *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966), this Court concluded the Lease had thus become a year-to-year tenancy created by operation of law, terminable by either party upon giving the other thirty days' notice directed to the end of the year of such new tenancy. *Id.* at *5. As the Balls had failed to give Cogdill and Jackson's the requisite thirty days' notice before demanding they vacate the Property, the Balls could not summarily eject Cogdill and Jackson's after they refused to vacate. *Id.* at *6.

B. Present Appeal

The parties agree that, pursuant to *Ball*, Plaintiffs were under a year-to-year tenancy created by operation of law when Sylva sold the Property to the Balls.[5] The parties disagree, however, as to the legal import of the *Ball* decision regarding the Right of First Refusal contained in the written Lease. Plaintiffs argue that all of their rights and duties under the Lease, including their Right of First Refusal, continued in effect after the Lease expired and became a year-to-year tenancy created by operation of law. Defendants argue that following the expiration of the written Lease, the Right of First Refusal did not become part of the new year-to-year tenancy created by operation of law. Thus, the issue before us is

5. The parties each argue the doctrine of collateral estoppel to support this shared conclusion.

whether the year-to-year tenancy created by operation of law included the Right of First Refusal contained in the written Lease. We hold that it did not.

C. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018). The 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).

D. Analysis

When a lease for a fixed term of a year, or more, expires, a tenant holds over, and "the lessor elects to treat him as a tenant, a new tenancy relationship is created as of the end of the former term." *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 638 (1965). "This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease in so far as they are applicable . . . ." *Id.* Our appellate courts have not squarely addressed whether a right of first refusal, which "creates in its holder . . . the right to buy land before other parties if the seller decides to convey it[,]" *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980), is a term "applicable" to a year-to-year tenancy created by operation of law after the expiration of a written lease. Our appellate courts have, however, addressed this issue in the context of an option to purchase property in a written lease agreement. *Id.* (explaining that a right of first refusal is analogous to an option to purchase, which creates in its holder the power to compel sale of land).

This Court concluded in *Vernon v. Kennedy*, 50 N.C. App. 302, 273 S.E.2d 31 (1981), that an option in the written lease to purchase the leased property could not be construed as "applicable" to the tenancy from year to year created by operation of law. *Id.* at 304, 273 S.E.2d at 32. The one-year lease in *Vernon* included an option to extend the lease for an additional, one-year period. The lease thus provided, "at an absolute maximum, for a term of two years" and could not remain "in force after 30 April 1973." *Id.* at 303, 273 S.E.2d at 32. The lease also included an option for plaintiffs to purchase the property "at any time during the term of this lease or extended period thereof . . . ." *Id.*

On 21 November 1979, plaintiffs in *Vernon* brought an action for specific performance of the option to purchase contained in the written lease. This Court explained that upon the expiration of the written lease, a new tenancy relationship had been created by operation of law, and thus, plaintiffs "were at best tenants from year to year under the applicable terms of the expired lease." *Id.* This Court held that the option to purchase could not be construed as "applicable" to the tenancy from year to year because by its own terms, the option was "limited to 'the term of this lease or the extended period thereof.' " *Id.* at 304, 273 S.E.2d at 32 (quoting the contract at issue). "Since the lease, again by its own terms, could not be extended beyond 30 April 1973, an attempt to exercise the option in 1979 would come outside the extended term of the lease." *Id.*

A similar result was reached in *Hannah v. Hannah*, 21 N.C. App. 265, 204 S.E.2d 212 (1974), where this Court held that defendant's obligation under a written lease to purchase plaintiff's stock and equipment at the end of the lease did not remain in effect throughout the period the plaintiff was permitted to hold over after the expiration of the lease. *Id.* at 267, 204 S.E.2d at 214. By written agreement, defendant leased his filling station to the plaintiff for a five-year period and agreed that " '[i]f at the end of five years, [defendant] should want possession of said filling station,' he would 'purchase all stock and equipment at 20% discount . . . .' " *Id.* Defendant did not want possession at the end of five years, but permitted plaintiff to hold over and remain in possession as his tenant for more than fifteen additional years. *Id.* When defendant proposed to raise plaintiff's rent, plaintiff demanded that defendant comply with the provisions of the lease agreement to purchase the stock and equipment. Defendant refused.

On appeal, this Court looked at the "express language of the original lease [which] brought the purchase agreement into play only if 'at the end of five years,' the landlord should want possession." *Id.* at 267-68, 204 S.E.2d at 214. As the original lease term was also for a period of five years, "obviously the parties contemplated the possibility that there might be a holding over or an extension after the initial five-year term, but nothing in the language indicate[d] that the parties intended the purchase obligation to remain in effect throughout whatever holdover or extended period might occur." *Id.* Accordingly, this Court held "that defendant's obligation to purchase as contained in the . . . written agreement was no longer in effect when, more than twenty years thereafter, he was called upon to fulfill it." *Id.* at 268, 204 S.E.2d at 214.

In a slightly different factual scenario, the Court in *Davis v. McRee*, 299 N.C. 498, 263 S.E.2d 604 (1980), concluded that an option to purchase

was incorporated into an express extension of an original lease. The parties entered into a written, one-year lease agreement, which contained an option for defendants to purchase the property during the lease period. When the agreement expired on 31 January 1974, defendants continued in tenancy and continued to make rental payments until 13 August 1974. On that date, the parties met and added the following language to the end of the original lease agreement: "The term of this lease shall be from Jan. 31, 1974 through Jan. 31, 1976." *Id.* at 500, 263 S.E.2d at 605.

In the fall of 1975, defendants indicated their intention to exercise the option to purchase. They arranged to borrow the purchase money, and plaintiffs executed a deed to the property. The parties ultimately disagreed on the sale price, and plaintiffs instituted an action to cancel the deed. In court, plaintiffs argued that the option to purchase had died with the expiration of the term of the original lease and that the new agreement was not effective to revive the option. *Id.* at 501, 263 S.E.2d at 606. Our Supreme Court noted, "Where the parties have made a separate agreement extending the lease, the agreement must be examined in light of all the circumstances in order to ascertain the meaning of its language, with the guide of established principles for the construction of contracts, and in the light of any reasonable construction placed on it by the parties themselves." *Id.* at 502, 263 S.E.2d at 606-07 (quotation marks and citation omitted). The Court held it was "evident from the conduct of the parties here that they intended to incorporate the option to purchase in their August agreement to extend the lease." *Id.* at 503, 263 S.E.2d at 607.

As in *Vernon* and *Hannah*, Defendants' obligation to offer Plaintiffs the Right of First Refusal to purchase the Property was not applicable to the year-to-year tenancy created by operation of law, and did not remain in effect throughout the period in which Plaintiffs were permitted to hold over after the expiration of the Lease. By written agreement, the Lease expired by its express terms on 31 May 2006, unless timely renewed for a second, seven-year period. Prior to the expiration of the Lease on 31 May 2006, Plaintiffs failed to timely exercise their option to renew the Lease for a second, seven-year period. Additionally, prior to the expiration of the Lease on 31 May 2006, Plaintiffs did not exercise their Right of First Refusal as Defendants did not desire to sell the Property. Moreover, even if timely notice to renew had been given, the Lease provided, at an absolute maximum, for a period of fourteen years and could not remain in force after 31 May 2013.

As in *Vernon*, upon the expiration of the written Lease, a new tenancy relationship was created by operation of law, and thus, Plaintiffs

were tenants from year to year under the applicable terms of the expired lease. *Ball* at *5. Although the Right of First Refusal clause itself does not specifically reference the Lease expiration dates, the Lease by its own terms could not be extended beyond 31 May 2013. Thus, an attempt to enforce the Right of First Refusal in 2015 "would come outside the extended term of the lease." *Vernon*, 50 N.C. App. at 304, 273 S.E.2d at 32.

Moreover, unlike in *Davis*, the parties in this case did not expressly extend the Lease after its expiration and Plaintiffs' attempt to exercise their Right of First Refusal was not made during such extended term, but was made nine years after the Lease's expiration. Furthermore, while the parties' conduct in *Davis* evidenced an intent to incorporate the purchase option into the express extension of the lease agreement, the parties' conduct in entering into the Lease in this case did not. The terms of the Lease specifically did not provide for incorporation of the Right of First Refusal as the renewal terms were to be determined by the parties at least ninety days before the expiration of the first, seven-year lease period. *See Hannah*, 21 N.C. App. at 268, 204 S.E.2d at 214 ("nothing in the language indicate[d] that the parties intended the purchase obligation to remain in effect throughout whatever holdover or extended period might occur").[6] Accordingly, Defendants' obligation to offer Plaintiffs the Right of First Refusal contained in the written Lease was no longer in effect when, approximately nine years thereafter, they were called upon to do so. *See Vernon*, 50 N.C. App. at 304, 273 S.E.2d at 32; *Hannah*, 21 N.C. App. at 268, 204 S.E.2d at 214; *see also Atlantic Product Co. v. Dunn*, 142 N.C. 471, 471, 55 S.E. 299, 300 (1906) (holding that an option to renew a lease or purchase property contained in a written lease can "be exercised only while the lease was in force"); *Smyth v. Berman*, 242 Cal. Rptr. 3d 336 (Cal. App. 5th 2019) (holding that a right of first refusal contained in an expired written lease was not an essential term which carried over into the holdover tenancy); *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1185 (Del. Ch. 2005) (holding that a right of first refusal in a lease agreement does not presumptively carry over into a holdover tenancy).

This result is supported by the public policy purposes that statutory and common law holdover tenancies were generally created to

---

6. The dissent's analysis relies upon testimonial evidence contained in a transcript from a prior case, concerning a different issue, before this Court. That transcript is not part of this record on appeal. Our "review is solely upon the record on appeal, the verbatim transcript of proceedings . . ., and any other items filed pursuant to this Rule 9." N.C. R. App. P. 9(a) (2018).

address, as explained by Vice Chancellor Strine of the Court of Chancery of Delaware:

> Historically, in our legal tradition, when tenants continued to occupy property beyond the expiration of a lease, landlords were entitled to treat holdover tenants as trespassers, or to summarily evict them. The doctrine of 'self-help' arose in the interest of landlords and incoming tenants, allowing landlords to promptly recover possession of leased property from tenants who held it improperly. Not surprisingly, widespread use of 'self-help' remedies led to concerns for the endangerment of persons and property, and breaches of the peace. Statutory [and common law] holdover tenancies emerged as a means of protecting tenants from self-help by landlords who were legally entitled to treat them as trespassers -- that is, to keep people from being dumped out on the street. [Holdover tenancies] attempt to maintain the status quo of a tenant's occupancy and use of leased property for a short period of time during which a landlord can pursue summary eviction. This approach balances the policy objectives of permitting landlords and incoming tenants to recover possession of property in a timely fashion and permitting outgoing tenants to move out in an orderly manner, thereby 'improving the prospects for preserving the public peace.'

Bateman, 878 A.2d at 1182-83. "Holdover tenancies are therefore not intended to prolong the existence of legal rights between the landlord and tenant, such as rights of first refusal, that are otherwise unrelated to occupancy and use of property." *Id.* at 1183. Moreover, "[u]nlike an option to purchase property, which an option holder can proactively exercise, a right of first refusal can be exercised only when the holder of property entertains an offer from a third party to purchase the property." *Id*. at 1183-84. Thus, "the extension of a right of first refusal beyond the termination of the contract that conveyed that right makes little sense, given the ease with which the exercise of such a right could be frustrated." *Id*. at 1184.

> If a right of first refusal presumptively carried forward into a holdover tenancy, a landlord wishing to nullify that right could easily do so by evicting the holdover tenant and selling the property one day later, both of which would be within its rights as the landlord of a holdover tenant. This creates an incentive for landlords to evict holdover

> tenants as soon as possible [], a result at odds with the stability of commercial tenancies. The contrary rule that carries such purchase options forward only if the parties so specify avoids this result, thereby making holdover tenancies more stable.

Smyth, 242 Cal. Rptr. 3d at 345 (internal quotation marks and citation omitted).

Plaintiffs cite no authority for their assertion that the Right of First Refusal provided under the Lease continued in effect when Plaintiffs failed to renew the Lease and continued to inhabit the Property as holdover tenants on a year-to-year basis, beyond *Ball's* inclusion of this quote from *Coulter v. Capitol Fin. Co.*:

> "Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, *having the same rights and duties as under the original lease*, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy."

Ball at *4-5 (quoting *Coulter*, 266 N.C. at 217, 146 S.E.2d at 100) (emphasis added). However, *Coulter* relied on *Kearney v. Hare*, cited above, which more precisely explains that when a lease for a fixed term of a year, or more, expires, a tenant holds over, and "the lessor elects to treat him as a tenant, a new tenancy relationship is created as of the end of the former term." *Kearney*, 265 N.C. at 573, 144 S.E.2d at 638. "This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease in so far as they are applicable . . . ." *Id.*

To be sure, there is precedent from several states holding that rights of first refusal (or other purchase options) presumptively carry forward into holdover tenancies. *See Smyth*, 242 Cal. Rptr. 3d at 345 (listing cases discussing presumptive rights and options in holdover tenancies). However, the majority rule is the rule supported by our case law and general policy that we apply today. *See id.* The Right of First Refusal in this case was not "applicable" to the year-to-year tenancy created by operation of law after the expiration of the Lease.

IV. Conclusion

For the reasons stated above, the Right of First Refusal in the written Lease was not a term applicable to the year-to-year tenancy created by operation of law upon the expiration of the written Lease. Accordingly, Plaintiffs were not entitled to be given the Right of First Refusal to purchase the Property prior to Sylva's sale of the Property to the Balls. Because of our holding, we need not reach Plaintiffs' argument that the Right of First Refusal did not violate the rule against perpetuities. As there was no genuine issue of material fact and Defendants were entitled to judgment as a matter of law, the trial court's order granting summary judgment in favor of Defendants is affirmed.

AFFIRMED.

Judge ZACHARY concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously concludes as a matter of law the tenant's right of first refusal to purchase the property, included in the original lease between Plaintiffs and Defendant Sylva Supply Co. Inc., is not a term or provision that is applicable to or enforceable by Plaintiffs' during their year-to-year tenancy. The trial court's grant of summary judgment in favor of Defendants is error. Whether the Plaintiffs' right of first refusal in this case applies to the year-to-year tenancy or is a wholly independent, stand-alone agreement between the parties, rests upon the intent of the parties and raises genuine issues of material fact. Summary judgment is inappropriate in this circumstance. I vote to reverse the trial court's order and remand for a trial on the merits. I respectfully dissent.

I. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003) (citation omitted).

> 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.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and internal quotation marks omitted). Defendants cannot meet this standard.

II. Right of First Refusal

The parties are operating under a year-to-year tenancy, pursuant to this Court's holding in *Ball v. Cogdill*, __ N.C. App. __, 808 S.E.2d 617, 2017 N.C. App. LEXIS 1074 (2017) (unpublished). Our Supreme Court has stated that when a landlord continues to accept rent from a tenant after the express term of the lease expires, a tenancy from year-to-year is created, "the terms of which are the same as those of the former lease in so far as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption." *Kearney v. Hare*, 265 N.C. 570, 573, 144 S.E.2d 636, 638 (1965).

The majority's opinion concludes a right of first refusal is not an "applicable" term of the lease as a matter of law to affirm summary judgment. Based upon controlling North Carolina contract law and cases involving option and first refusal contracts, the intent of the parties is a question of fact and summary judgment is inappropriate in this case. On the merits and as a question of law, a review of jurisdictions which have ruled on this issue supports a conclusion that a right of first refusal survives and applies in year-to-year tenancies.

A. North Carolina Law

A right of first refusal is a preemptive right, which "creates in its holder only the right to buy land before other parties if the seller decides to convey it." *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980). Though distinguishable from a unilateral option contract, our Supreme Court has held review of preemptive rights and options can be analogous. *Id.* at 63, 269 S.E.2d at 612 ("Just as the commercial device of the option is upheld, if it is reasonable, so too the provisions of a preemptive right should be upheld if reasonable, particularly here where

the preemptive right appears to be part of a commercial exchange, bargained for at arm's length."). The right of first refusal can be an express, unitary agreement or can be contained within a lease, option, covenant, or other agreement.

"[T]he same principles of construction applicable to all contracts apply to option contracts." *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001). If the terms of the contract are clear, the contract "must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics, Inc. v. Newton Car Wash, Inc.*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981). "Where the language of a contract is ambiguous, courts consider other relevant and material extrinsic evidence to ascertain the parties' intent[.]" *Lagies*, 142 N.C. App. at 247, 542 S.E.2d at 342.

Ambiguous terms are conditions or provisions that are "fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). In reviewing and construing contracts, ambiguous terms are to be "construed against the drafting party." *Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342.

The majority's opinion erroneously purports to base the outcome of this case on *Vernon v. Kennedy*, 50 N.C. App. 302, 273 S.E.2d 31 (1981), and *Hannah v. Hannah*, 21 N.C. App. 265, 204 S.E.2d 212 (1974). Neither of those cases are applicable to the facts before us nor are controlling to the outcome of this case.

Vernon construed an option to purchase, as opposed to a right of first refusal, whose express and explicit terms stated the right could not be construed to survive expiration of the lease term or be "applicable" to the subsequent year-to-year tenancy:

> The option term in paragraph 7 of the lease cannot be construed as "applicable" to the tenancy from year to year *for the reason that by its own terms, paragraph 7 is limited to 'the term of this lease or the extended period thereof*.' Since the lease, again by its own terms, could not be extended beyond 30 April 1973, an attempt to exercise the option in 1979 would come outside the extended term of the lease.

Vernon, 50 N.C. App. at 304, 273 S.E.2d 32 (emphasis supplied).

The issue presented in *Hannah* was similar. A lease of a filling station included the provision: "If at the *end of five years*, [the tenant] should

want possession of said filling station, he would purchase all stock and equipment at 20% discount, and not over 2 years bills." *Hannah*, 21 N.C. App. at 267, 204 S.E.2d at 214 (internal quotation marks omitted) (emphasis supplied). The tenant remained in possession of the premises for over *fifteen years after* the lease expired. *Id.* at 267, 204 S.E.2d at 214. This Court held that the express term "at the end of five years" could not be construed to include the end of any renewal or extension, and the obligation to purchase was extinguished. *Id.* at 268, 204 S.E.2d at 214.

Unlike in *Vernon* and *Hannah*, neither the right of first refusal paragraph in Plaintiffs' lease nor the "Memorandum of Lease and Right of First Refusal" ("Memorandum") contain any express limitation restricting the right to a specific term or event. Paragraph XI states that if the landlord desires to sell the property "it shall offer" the option to purchase to the tenant. The majority's opinion asserts the terms of the lease restrict the right of first refusal to the dates of the lease and one additional seven year extension. Without express language limiting the applicability of the right of first refusal upon the expiration of the lease as in *Vernon* or to a specific time as in *Hannah*, the applicability of the right is, at minimum, ambiguous.

The Memorandum states:

> The undersigned hereby declare that they have entered into a Lease *and* Right of First Refusal Agreement dated May 19, 1999, which contains a right of first refusal conveyed by Sylva Supply Company, Inc. to Crystal Cogdill Jones, upon the property located at 582 West Main Street, Sylva, North Carolina, known as the Sylva Supply Company Building.
>
> The undersigned further state that the written instrument of lease *and* right of first refusal and any amendments thereto will be kept for safekeeping at the office of Sylva Supply Company, Inc. . . .

(Emphasis supplied). This written Memorandum is express in its terms and meets all the requirements of the Statute of Frauds for "the party to be charged." N.C. Gen. Stat. § 22-2 (2017). At minimum, genuine issues of material fact exist on the intent of the parties of the provisions and Memorandum.

The majority's opinion purports to distinguish our Supreme Court's holding in *Davis v. McRee*, 299 N.C. 498, 263 S.E.2d 604 (1980), though

the facts of that case are clearly more applicable here than either *Vernon* or *Hannah*. The majority opinion's analysis hinges upon the parties in *Davis* having retroactively extended their lease beyond the original term after a holdover, and attempted to exercise their option to purchase during that retroactively extended renewal term. However, the terms of the lease in *Davis* were deemed to be ambiguous, and our Supreme Court's analysis of how to construe ambiguous option terms is instructive and controlling here:

> *[T]he ultimate test in construing any written agreement is to ascertain the parties' intentions in light of all the relevant circumstances and not merely in terms of the actual language used.*
>
> . . .
>
> The parties are presumed to know the intent and meaning of their contract better than strangers, and where the parties have placed a particular interpretation on their contract after executing it, the courts ordinarily will not ignore that construction which the parties themselves have given it prior to the differences between them.

Davis, 299 N.C. at 502, 263 S.E.2d at 606-07 (emphasis supplied).

Our Supreme Court in *Davis* looked to the actions of the parties because the Court deemed the language and applicability of the lease extension to be ambiguous. *Id.* at 502-03, 263 S.E.2d 607. The subsequent actions of both parties indicated their intention to abide by and extend the option: the defendants exercised their option and the plaintiffs had the deed of purchase drawn up. *Id.*

Here, the terms of the lease and the signed and recorded Memorandum, viewed in the light most favorable to Plaintiffs, are ambiguous, as there is no expressed limitation on or termination of the right of first refusal. We also take judicial notice of subsequent behavior by parties, which also suggests the recorded right of first refusal survived the expiration of the lease, with or without the year-to-year tenancy, and shows ambiguity. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2017) (a fact that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" can be judicially noticed "at any stage of the proceeding"); *see also West v. Reddick, Inc.*, 302 N.C. 201, 202-03, 274 S.E.2d 221, 223 (1981) ("This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the

issues are the same and the interrelated case is referred to in the case under consideration . . . . on any occasion where the existence of a particular fact is important, as in determining the sufficiency of a pleading").

As noted in the record when this case was previously before this Court, Sylva Supply Company, Inc., provided Ms. Cogdill with an opportunity to purchase the property during the year-to-year tenancy in 2012, though the transaction did not close. This proffer indicates the owner/landlord's recognition of the continued viability and its intent to continue honoring the tenant's express right of first refusal, either as stated in the lease or the recorded Memorandum. However, the 2015 sale of the property that is before us, closed without seller-landlord offering Plaintiffs the first refusal to exercise their right to purchase the property, which injects ambiguity into the intent and actions of the parties.

Further, W. Paul Holt, Jr., the attorney who drafted the original lease, amendment, and recorded Memorandum, and maintained possession of the lease in his office, was also the closing attorney and drafted the 2015 deed for the sale of the property to the Balls. This deed warrants the premises were free from all encumbrances on 7 May 2016. Not only are ambiguous terms construed against the drafter, *see Lagies*, 142 N.C. App. at 248, 542 S.E.2d at 342, the lease is also construed against the original drafter's successor-in-interest. *See Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 97 N.C. App. 511, 525, 389 S.E.2d 576, 584 (1990).

The ambiguity present in the language of the contract, in the express language contained in the Memorandum, and in the subsequent actions of the parties presents and shows genuine issues of material fact exist, which precludes disposition of this case by summary judgment. *See Pacheco*, 157 N.C. App. at 447, 579 S.E.2d at 507. The trial court's order is properly reversed.

B. Other Jurisdictions

The genuine issues of material facts of the parties' intent existing in this case do not require a determination on whether rights of first refusal are "applicable" terms under a year-to-year lease. The express terms and provisions of the signed and recorded Memorandum preclude summary judgment for Defendants. I also disagree with the majority opinion's analysis of how North Carolina law determines this issue.

The majority's opinion cites a purported "majority" rule, which holds the right of first refusal presumptively does not carry forward, as the rule that is supported by North Carolina case law and general public policy. A closer reading of states which have decided this issue indicates North Carolina does not agree with nor follow their decisions.

The majority's opinion cites *Smyth v. Berman*, 242 Cal. Rptr. 3d 336 (Ct. App. 2 Dist. 2019), which provides a survey of states that have ruled on the issue of whether rights of first refusal carry forward into holdover tenancies after the lease term expires. *Id.* at 345-46. The opinion in *Smyth* characterizes North Carolina as part of the "majority" rule, based upon the ruling in *Vernon*. As discussed above and in other jurisdictions, *Vernon* is distinguishable "based on . . . [the court's] interpretation of the particular [and express] lease terms presented." *Kutkowski v. Princeville Prince Golf Course, LLC*, 289 P.3d 980, 992 (Haw. Ct. App. 2012), *rev'd on other grounds*, 300 P.3d 1009 (Haw. 2013); *see also Peter-Michael, Inc. v. Sea Shell Assocs.*, 709 A.2d 558, 563 & n.6 (Conn. 1998).

Kutkowski held that "[w]hen a lease for a specified term is not extended or renewed, and the lessee holds over after the expiration of the lease, *unless otherwise agreed*, the law implies that the parties' rights and obligations with respect to that holdover tenancy continue as set forth in the expired lease agreement." *Id.* at 994 (emphasis supplied). This principle "states the common law followed in Hawai'i and most every other jurisdiction surveyed, and sets forth the common understanding and rules applicable to the dealings of landlord and tenant after the termination of their express agreement, but effectuates, as the law must, the parties' right to agree to the contrary." *Id.* This analysis and conclusion follows the common law of our state. *See Kearney*, 265 N.C. at 573, 144 S.E.2d at 638; *see also Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 217, 146 S.E.2d 97, 100 (1966).

The majority's opinion from this "error correcting court" cites *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1183 (Del. Ch. 2005), to explain the purported "public policy" reasons behind its holding. The Chancery Court of Delaware noted that

> Statutory holdover tenancies emerged as a means of protecting tenants from self-help by landlords who were legally entitled to treat them as trespassers – that is, to keep people from being dumped out on the street. Statutes such as § 5108 attempt to maintain the status quo of a tenant's occupancy and use of leased property for a short period of time during which a landlord can pursue summary eviction. This approach balances the policy objectives of permitting landlords and incoming tenants to recover possession of property in a timely fashion and permitting outgoing tenants to move out in an orderly manner, thereby "improving the prospects for preserving the public peace." Holdover tenancies are therefore not

> intended to prolong the existence of legal rights between the landlord and tenant, such as rights of first refusal, that are otherwise unrelated to occupancy and use of property.

Id. at 1183. For lease terms of a year or more in Delaware, the holdover "term shall be month-to-month, and all other terms of the rental agreement shall continue in full force and effect." Del. Code Ann. tit. 25, § 5108 (2009).

Similarly, California courts also declined to presumptively extend the right of first refusal into the holdover period in order to make "holdover tenancies more stable." *Smyth*, 242 Cal. Rptr. 3d at 345. Like Delaware, California prescribes an express month-to-month term for a holdover period, generally. Cal. Civ. Code § 1945 (West 2010).

Delaware and California's rule, and thus their "public policy" support for this rule, is inapplicable to North Carolina. As stated by our Supreme Court, the "common understanding and rules applicable to the dealings of landlord and tenant after the termination" of a lease agreement in North Carolina is:

> Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, *or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year* and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy.
>
> The parties to the lease may, of course, agree upon a different relationship.

Coulter, 266 N.C. at 217, 146 S.E.2d at 100 (citations omitted) (emphasis supplied). The parties can also reach an express, independent agreement irrespective of the lease for a right of first refusal as is contained in the signed and recorded Memorandum. Further, in *Spinks v. Taylor*, our Supreme Court held that a landlord maintains the right of peaceful self-help to evict a holdover tenant and to regain possession of the premises, at least in a non-residential lease. *Spinks v. Taylor*, 303 N.C. 256, 262, 278 S.E.2d 501, 504 (1981). The lease before us is a commercial lease between parties of relatively equal bargaining power.

In deciding the applicability of rights of first refusal to holdover tenancies, if the agreement before us is wholly dependent upon the lease, North Carolina should consider persuasive authority from states with similar holdover tenancy structures. Wisconsin enacted a statute which "gives the landlord the election to treat the holdover tenant as a tenant from year to year under the lease and gives both the landlord and the tenant the right to terminate such lease at the end of any year upon 30-days-written notice." *Last v. Puehler*, 120 N.W.2d 120, 122 (Wis. 1963). In its consideration of rights of first refusal, the Wisconsin Supreme Court stated:

> We consider an option to purchase or right of a first refusal to be an integral part of the lease and one of its terms within the meaning of this section. It is not an uncommon practice to insert an option to purchase or a right of first refusal in a lease. In many cases no lease would be entered into by the tenant without such protection.
>
> The interpretation commanded by the language of this section is both logical and fair. Upon the expiration of the written lease the tenant has the duty to surrender the property. If he holds over, he runs the risk of being considered a holdover tenant with all the burdens of the lease. The pinpointed question in this case is whether he also runs the risk, if it is one, of acquiring all the benefits which the lease might provide. Conversely, the landlord may eject the tenant, make a new agreement mutually satisfactory to him and the tenant, or elect under sec. 234.07, Stats. By such an election the landlord receives the benefits of the lease from year to year but likewise incurs its obligations and the tenant is then bound from year to year both as to the advantages and disadvantages to him of the lease. It is logical to believe the legislature intended by the operation of this section to *leave the parties as they were under the original lease after the landlord elected to come under the section. We cannot construe the statute to mean that by the election of the landlord a common law tenancy is created free and clear from some terms of the lease but not from others.*

Id. at 122-23 (emphasis supplied).

This analysis and logic presumes a right of first refusal or other option to purchase carries forward into a holdover tenancy unless a

contrary intent appears. Unlike in both *Vernon* and *Hannah*, the lease in this case contained no language indicating the right of first refusal did not carry into the year-to-year tenancy. The applicable law to these facts should be applied under this analysis.

III. Conclusion

The Defendants failed to meet their burden to be awarded summary judgment, as factual questions of intent of the parties remain. I disagree with the majority opinion's holding and with its application of policies from states with disparate holdover tenancy rules. Also, the recorded Memorandum contains an express right of first refusal agreement between the parties, which is not tied to nor dependent upon the lease.

Genuine issues of material facts exist of the parties' intent and actions. I vote to reverse summary judgment and remand to the trial court for a hearing on the merits. I respectfully dissent.

CUMBERLAND COUNTY EX REL: STATE OF ALABAMA O. B. O.: ALISHA LEE, PLAINTIFF
v.
CLIFFORD LEE, DEFENDANT

No. COA18-754

Filed 7 May 2019

Contempt—civil—child support—burden of proof—ability to comply

Even though defendant did not meet his burden of proof to show cause why he should not be held in civil contempt for his failure to comply with a child support order, plaintiff child support enforcement agency nonetheless was required to present sufficient evidence to support a finding that defendant had the ability to comply with the previous order and to purge himself by making regular payments. Because the agency presented no such evidence, the order was vacated and remanded.

Appeal by defendant from order entered 11 January 2018 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 11 April 2019.

Cumberland County Child Support Department, by Ben Logan Roberts and Roxanne C. Garner, for plaintiff-appellee.

C. Leon Lee, II, pro se, for defendant-appellant.

ARROWOOD, Judge.

Clifford Lee ("defendant" or "C. Leon Lee, II") appeals from an order holding him in civil contempt. For the reasons stated herein, we vacate and remand.

I. Background

On 3 July 2002, a Cumberland County District Court entered an order whereby defendant was ordered to pay $350.00 per month, beginning 1 August 2002, for the support of his minor child. The Cumberland County Child Support Enforcement Agency ("plaintiff" or "the agency") filed a motion to intervene on behalf of the custodial parent of the minor child, Alisha Blackmon Lee ("relator"), to provide child support enforcement services. The motion came on for hearing on 1 November 2007 before the Honorable A. Elizabeth Keever in Cumberland County District Court. On 10 March 2008, the trial court entered an order allowing plaintiff to intervene and ordering defendant to pay the ongoing child support obligation into the North Carolina Child Support Centralized Collections.

Plaintiff filed a motion to terminate ongoing child support and to establish arrears with repayment on 18 January 2011. The motion and a notice of hearing for 17 February 2011 was served on defendant by first class mail on 21 January 2011. Defendant moved for a continuance on 4 February 2011. The trial court denied defendant's motion for a continuance at the 17 February 2011 hearing, the Honorable Kimbrell Kelly-Tucker presiding. That same day, the trial court entered an order terminating ongoing child support, effective 30 June 2010, establishing defendant's arrears at $9,839.30 and setting repayment at $385.00 per month, beginning 1 March 2011.

On 12 April 2017, the trial court entered an order to appear and show cause for defendant's failure to comply with the 17 February 2011 order. Defendant was served personally with the order to show cause on 11 May 2017. Defendant moved to continue the hearing on 15 May 2017. The trial court granted the motion and continued the hearing to 29 June 2017. The matter was continued four additional times.

The order to appear and show cause came on for hearing on 22 November 2017 in Cumberland County District Court, the Honorable Robert J. Stiehl, III presiding. However, during the hearing, defendant claimed an order existed that was not in the file, so the trial court continued the matter. The hearing continued from the previous setting on

20 December 2017. Defendant made various arguments, but did not testify and offered no other evidence. On 11 January 2018, the trial court entered an order for contempt, finding, *inter alia*:

> 1. That on July 19, 2002 an Order was entered in this case whereby the Defendant was ordered to pay $350.00 per month for the support and maintenance of the minor child . . . beginning August 1, 2002.
>
> . . . .
>
> 4. It was established that the Defendant owed $9,839.30 in outstanding arrears as of February 16, 2011.
>
> 5. In addition, the Defendant was ordered to pay the sum of $385.00 per month to be applied to the outstanding arrears beginning March 1, 2011 until paid in full. That said Order remains in full force and effect.
>
> 6. That since the entry of the February 17, 2011 Order, the Defendant has made a total of $5,070.28 in payments toward the outstanding arrears.
>
> . . . .
>
> 14. That since the entry of the Order, the Defendant has failed to comply with the payment terms of the aforesaid Order and as of November 30, 2017 the Defendant owes a total outstanding arrears of $4,769.12 and compliance arrears of $4,769.12 based on the records of North Carolina.
>
> 15. That since the entry of the Order, the Defendant has not been under any physical or mental disability that would prevent him/her from working.
>
> . . . .
>
> 18. That the Defendant had the ability to comply with the previous Order and has the ability to purge himself/herself as ordered.

Based on the foregoing findings of fact, the trial court concluded "[t]hat the Defendant is in willful contempt of this Court for his[/her] failure to comply with the terms and conditions of the Order previously entered in this case." The trial court ordered defendant's purge condition is to make regular payments.

Defendant appeals.

II. Discussion

Defendant argues the trial court committed reversible error by finding him in willful contempt because: (1) the record contains no evidence of his ability to pay the outstanding arrears as ordered, and (2) the agency made accounting errors. We agree that there is no evidence of defendant's ability to pay in the record. Therefore, we vacate the order and remand. We do not reach the second issue on appeal.

"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." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted), *disc. rev. denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). Findings of fact made by the trial court during 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." *Cumberland Cty. ex rel. Mitchell v. Manning*, 262 N.C. App. 383, 386, 822 S.E.2d 305, 307-308 (2018) (quoting *Watson*, 187 N.C. App. at 64, 652 S.E.2d at 317).

> 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."

Id. at 387, 822 S.E.2d at 308 (quoting N.C. Gen. Stat. § 5A-21(a) (2017)).

Proceedings for civil contempt 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."

Id. at 388, 822 S.E.2d at 308-309 (quoting *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204-205 (2012); N.C. Gen. Stat. § 5A-23 (2017)). An alleged contemnor has the burden of proof under the first two methods used to initiate a show cause proceeding. *Id.* (citation omitted). However, if an aggrieved party initiates a show cause proceeding instead of a judicial official, the burden of proof is on the aggrieved party instead, "because there has not been a judicial finding of probable cause." *Id.* (quoting *Moss*, 222 N.C. App. at 77, 730 S.E.2d at 205).

In *Cumberland Cty. ex rel. Mitchell v. Manning*, our Court reviewed an order for contempt that resulted from the agency filing a show cause for the defendant's failure to comply with a child support order. *Id.* at 384-85, 822 S.E.2d at 306-307. The defendant argued, *inter alia*, that the trial court's findings on willfulness and present ability to pay were not supported by competent evidence and did not support the trial court's conclusions. *Id.* at 384, 822 S.E.2d at 306. Our Court held that although the defendant had the burden of proof under N.C. Gen. Stat. § 5A-23 and failed to present any evidence at the hearing,

> 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 defendant had the ability to pay, in addition to all other required findings to support contempt."

Id. at 388-89, 822 S.E.2d at 309 (quoting *Cty. of Durham v. Hodges*, 257 N.C. App. 288, 297, 809 S.E.2d 317, 324 (2018)) (citations omitted). Accordingly, because "[t]he record [was] devoid of evidence of [d]efendant's ability to pay the child support amount or purge amount at the time of the hearing[,]" "the trial court's finding on [d]efendant's ability to pay the child support amount owed and the purge amount [was] not supported by competent evidence." *Id.* at 390, 822 S.E.2d at 310. As the trial court's determination of willfulness was predicated upon defendant's ability to pay, our Court vacated the order and remanded for proceedings not inconsistent with the opinion. *Id.* at 391, 822 S.E. 2d at 310.

Similarly, in the case at bar, defendant had the burden of proof under N.C. Gen. Stat. § 5A-23, and failed to present any evidence at the hearing. His argument now raises the same issue decided in *Cumberland Cty. ex rel. Mitchell*: whether the agency must put forth sufficient evidence to support a factual finding that the defendant had the ability to pay when a defendant fails to meet his or her burden of proof to show cause why he or she should not be held in civil contempt.

Although our Court answered this question in *Cumberland Cty. ex rel. Mitchell*, the agency argues that our Court is not bound by *Cumberland Cty. ex rel. Mitchell* because it misinterpreted North Carolina law. We disagree. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citations omitted). Accordingly, we are bound by the precedent set out in *Cumberland Cty. ex rel. Mitchell*.

Furthermore, we note that the plaintiff-appellee agency in the instant case was also the plaintiff-appellee agency in *Cumberland Cty. ex rel. Mitchell*. However, the agency never sought review of *Cumberland Cty. ex rel. Mitchell* in our Supreme Court, which would have been the proper course to argue the case was decided inconsistently with North Carolina law, instead of attempting to relitigate *Cumberland Cty. ex rel. Mitchell* in the case now before us.

Because we remain bound by the decision set out in *Cumberland Cty. ex rel. Mitchell*, defendant's failure to meet his burden of proof to show cause did not divest the agency of its burden to put forth "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." *Cumberland Cty. ex rel. Mitchell*, 262 N.C. App. at 388-89, 822 S.E.2d at 309. The agency did not meet this burden, as it put forth no evidence to support the finding of fact "[t]hat the Defendant had the ability to comply with the previous Order and has the ability to purge himself[/herself] as ordered[,]" which is required to support contempt in civil contempt proceedings to enforce orders for child support. *See Plott v. Plott*, 74 N.C. App. 82, 84-85, 327 S.E.2d 273, 275 (1985) ("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.") (citations omitted).

Therefore, as in *Cumberland Cty. ex rel. Mitchell*, we vacate the contempt order and remand for proceedings not inconsistent with this holding.

III. Conclusion

For the forgoing reasons, we vacate the contempt order and remand for proceedings not inconsistent with this holding.

VACATED AND REMANDED.

Judges DIETZ and ZACHARY concur.

DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
HUTCHINSONS, LLC, Defendant

No. COA18-675

Filed 7 May 2019

1. Eminent Domain—interlocutory appeal—Section 108 motion—trial court's authority to proceed

In a condemnation action, defendant-landowner's alleged notice of appeal from the trial court's dismissal of its Section 108 motion did not divest the trial court of authority to enter further orders in the case, for several reasons: (1) the trial court reasonably believed that its dismissal of the Section 108 motion did not affect a substantial right because the motion was not made with 10 days' notice, as required by N.C.G.S. § 136-108; (2) the trial court may have reasonably believed that the dismissal of the Section 108 motion did not affect a substantial right that would otherwise be lost and therefore was not immediately appealable, because the motion involved an additional, later taking that could be addressed through a separate inverse condemnation action; and (3) defendant's notice of appeal appeared to be from two other motions and not the Section 108 motion, despite defendant's argument to the contrary.

2. Eminent Domain—subsequent takings—Section 108 motion—untimely—trial court's authority to rule on motion—prejudice

In a condemnation action, the trial court erred by determining that it lacked authority to rule on defendant-landowner's motion for a Section 108 hearing where defendant failed to make the motion

with 10 days' notice, as required by N.C.G.S. § 136-108. However, any error in dismissing the motion based on untimely notice was not prejudicial because defendant remained able to seek compensation for the alleged subsequent taking in a separate inverse condemnation action.

3. Eminent Domain—motion for continuance—based on untimely filing of plat—delay in filing motion

In a condemnation action, the trial court did not abuse its discretion by refusing to grant defendant-landowner's motion for a continuance where the reason for defendant's motion was the Department of Transportation's untimely filing of the plat—3 months before the scheduled trial date—and defendant waited until the week before the scheduled trial date to file the motion.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgment entered 14 December 2017 by Judge Susan E. Bray in Wilkes County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the Plaintiff-Appellee.

Sever-Storey, LLP, by Shiloh Daum, for the Defendant-Appellant.

DILLON, Judge.

This is a condemnation action brought by Plaintiff Department of Transportation ("DOT") for the partial taking of land owned by Defendant Hutchinsons, LLC ("Hutchinsons"). On the day the trial in the matter had been scheduled, the trial court heard various motions filed by Hutchinsons, primarily concerning Hutchinsons' position that DOT took more interests in its property than DOT had claimed. The trial court denied or dismissed those motions. The trial court proceeded, and subsequently entered judgment awarding Hutchinsons no further damages than the amount of DOT's deposit. Hutchinsons appeals from various orders considered the day of trial and from the final judgment. After careful review, we affirm.

I. Background

This action concerns certain property in Wilkes County which straddles North Carolina Highway 268 (the "Property") owned by Hutchinsons.

In September 2015, DOT commenced this action against Hutchinsons, condemning part of the Property for the widening of Highway 268.

Approximately eleven (11) months later, in August 2016, Hutchinsons filed its Answer.

The matter was eventually assigned a trial date of 21 August 2017. However, about a month before the scheduled trial date, Hutchinsons requested a continuance. The trial court granted the request, setting 4 December 2017 as the new trial date.

A few days before the scheduled 4 December 2017 trial, Hutchinsons filed three motions. These motions were based primarily on its belief that, during the course of the highway widening project, DOT had taken additional interests in the Property, that is, interests outside of the interests indicated in DOT's complaint. Specifically, Hutchinsons moved: (1) to amend its pleading to add an inverse condemnation claim for the alleged additional taking; (2) for a Section 108 hearing[1] to determine the actual areas/interests in the Property taken (the "Section 108 motion"); and (3) for a continuance of the trial.

On 4 December 2017, the date the matter was scheduled for trial, the trial court heard Hutchinsons' three motions. During the hearing, the trial court orally dismissed the Section 108 motion and denied the two other motions. The trial court then reduced its ruling on the two denied motions to written orders but did not immediately reduce its dismissal of the Section 108 hearing motion to writing. Hutchinsons then submitted a written notice of appeal of "the Order entered" and a motion for a stay of any further proceedings pending the appeal. The trial court denied Hutchinsons' motion for a stay and proceeded to consider the issue of damages.

The next day, on 5 December 2017, the trial court entered a written order dismissing Hutchinsons' motion for a Section 108 hearing. The trial court also entered a written order striking Hutchinsons' original Answer as a sanction for certain discovery violations.

The following week, on 14 December 2017, the trial court entered a final judgment for DOT in the amount of its initial deposit, thereby awarding Hutchinsons no further damages for the taking described in

---

1. A "Section 108" hearing is a hearing authorized pursuant to Section 136-108 of our General Statutes wherein the trial court is to resolve issues concerning the taking *other than* the issue of damages before submitting damages to a jury. N.C. Gen. Stat. § 136-108 (2017).

DOT's Complaint, based on the fact that Hutchinsons' Answer challenging the amount of the deposit had been stricken. Hutchinsons timely filed s second notice of appeal, an appeal from this final judgment.

II. Analysis

Hutchinsons makes three arguments on appeal. We address each of Hutchinsons' arguments in turn.

A. Trial Court's Jurisdiction to Enter Orders After December 4

[1] Hutchinsons argues that the trial court lacked the authority to enter *any* orders after Hutchinsons filed its first notice its appeal on the day of trial, December 4, from the dismissal of its Section 108 motion. For the reasons stated below, we conclude that the trial court retained authority to enter further orders, including the final judgment favorable to DOT entered December 14, even after Hutchinsons noticed an appeal on December 4 from an interlocutory order.

The trial court's orders entered on December 4 and 5, denying two of Hutchinsons' motions and dismissing Hutchinsons' Section 108 motion were interlocutory. Generally, interlocutory orders are not immediately appealable, and an appeal from a nonappealable interlocutory order does not divest the trial court of jurisdiction. *See Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 382-83 (1950) ("[A] litigant can not deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the [appellate] Court from a nonappealable interlocutory order of the Superior Court.").

But some interlocutory orders are immediately appealable, such as those which may affect a substantial right. N.C. Gen. Stat. § 1-277 (2017). And the general rule is that a *valid* appeal from an interlocutory order does generally divest the trial court of jurisdiction in a matter, at least with respect with to any matter "embraced" within the order. N.C. Gen. Stat. § 1-294 (2017); *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) ("The well-established rule of law is that an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal." (internal quotation omitted)). Therefore, any order entered by the trial judge after a valid appeal from an interlocutory order affecting a substantive right has been properly noticed is generally treated as void for want of jurisdiction. *See France v. France*, 209 N.C. App. 406, 410-11, 705 S.E.2d 399, 404 (2011).

But we have also held that a trial court's orders entered following a validly noticed appeal of an interlocutory order *may still be valid* if

(1) the trial court continued to exercise jurisdiction under a *reasonable* belief that the interlocutory order was not immediately appealable and (2) the appealing party was not prejudiced by the trial court's continued exercise of jurisdiction. *RPR & Assoc., Inc., v. University of N.C.-Chapel Hill*, 153 N.C. App. 342, 347-49, 570 S.E.2d 510, 514-15 (2002); *see also Plasman v. Decca Furniture, Inc.*, ___ N.C. App. ___, ___, 800 S.E.2d 761, 767-71 (2017).

Here, Hutchinsons argues in its appellate brief that the trial court's "ruling on [Hutchinsons'] § 108 Motion for determination of issues other than damages affected a substantial right" and, therefore, its notice of appeal therefrom filed the day of trial divested the trial court of jurisdiction to do anything further. The trial court, nonetheless, proceeded *believing* that it still had jurisdiction to act.[2]

Without deciding whether the trial court's ruling on Hutchinsons' Section 108 motion affected a substantial right, we conclude that the trial court had the authority to proceed for a number of reasons.

First, the trial court reasonably believed that its dismissal of a Section 108 motion did not affect a substantial right based on its conclusion that the motion was not made with ten (10) days' notice as required by Section 136-108. Specifically, as shown in our analysis of the issue in Subsection B. of this opinion below, the trial court reasonably believed that Hutchinsons had no right to have its Section 108 hearing heard.[3] And, as admitted in Hutchinsons' motion, Hutchinsons was not

---

2. We note, as DOT points out, that the copy of Hutchinsons' December 4 notice of appeal in the record does not contain a stamp showing that it was ever filed with the clerk in the courtroom. N.C. R. App. P. 3(a) (stating that an appeal is taken "by filing notice of appeal with the clerk of superior court and serving copies thereof upon all parties . . . "). Indeed, that there are notations on the copies in the record of orders entered on December 4 indicating that they were filed with the clerk in the courtroom. But no such notation appears on the notice of appeal purportedly filed on 4 December. However, Hutchinsons filed a motion to supplement the record on appeal with a copy of the notice of appeal marked with a notation by the clerk that it was filed on December 4. We allow Hutchinsons' motion.

3. Assuming the trial court was correct in its reasoning in dismissing the Section 108 motion based on inadequate notice, it may be argued that Hutchinsons' appeal was still valid, based on a view that "we do not reach the *merits* of an appellant's claim to that substantial right in answering the threshold [appellate] jurisdictional question." *See Neusoft Med. Systems, USA, Inc., v. Neuisys, LLC*, 242 N.C. App. 102, 107, 774 S.E.2d 851, 855 n.1 (2015). But there is other authority which suggests that our Court does consider the merits of the claim in considering the threshold jurisdictional question. *See, e.g., Knighten v. Barnhill Contracting Co.*, 122 N.C. App. 109, 112, 468 S.E.2d 564, 566 (1996) (considering merits of the defendant's claim of immunity in dismissing appeal). Therefore, it was reasonable for the trial court to conclude that its order dismissing Hutchinsons' Section 108 motion was not appealable.

prejudiced as Hutchinsons was not deprived of its right to pursue its inverse condemnation claims in a separate action.

Second, the trial court may have reasonably believed that its order dismissing the Section 108 motion did not affect a substantial right that would otherwise be lost and, therefore, was not immediately appealable. Our Supreme Court has held that *certain* orders from a Section 108 hearing determining the extent of the initial taking may be immediately appealable. *See e.g.*, *DOT v. Rowe*, 351 N.C. 172, 176-77, 521 S.E.2d 707, 710 (1999). But, here, Hutchinsons was not arguing in its Section 108 motion that the initial taking covered more of the Property than indicated by DOT. Rather, Hutchinsons was contending that the DOT engaged in a further taking *subsequent* to the filing DOT's complaint. Indeed, Hutchinsons states in its motion that DOT engaged in activities, *e.g.*, storing construction materials, *during* the highway construction on the Property outside of the area originally taken where highway construction on the Property did not begin until after DOT filed its Complaint. Further, Hutchinsons acknowledges in its motion that it would not lose the right to bring a claim for the additional taking it was alleging but could do so through a separate inverse condemnation action.[4]

Third, it appears that Hutchinsons' notice of appeal filed on December 4 was not from the dismissal of the Section 108 motion, as the dismissal was not entered until the next day, but rather from the denial of one of the other two motions heard that day. Indeed, the notice of appeal states that it is from "the Order *entered* . . . and filed on December 4, 2017 . . . [a] copy of the Order from which Defendant undertakes this appeal is attached" (emphasis added). Though our Rules of Appellate Procedure do allow for a notice to be taken from a rendered (oral) order, N.C. R. App. P. 3(a) (stating that a party may appeal from an order "rendered in a civil action"), the language of Hutchinsons' notice of appeal expressly indicates that Hutchinsons was appealing from an order "entered" on December 4 and that the ordered appealed from was physically attached to the notice. It would have been impossible for Hutchinsons to have attached the order dismissing its Section 108

4. Based on Supreme Court precedent, Hutchinsons had the right to have any pending inverse condemnation counterclaim be tried in this action brought by DOT. *See DOT v. Bragg*, 308 N.C. 367, 371, 302 S.E.2d 227, 230 n.1 (1983). But, assuming such right to have it tried in this action is a substantial right, there was not an inverse condemnation yet pending before the trial court, as none had been pleaded in Hutchinsons' Answer. Hutchinsons was attempting to amend its Answer through a motion filed just days before trial to add an inverse condemnation claim. But the trial court, in an exercise of its discretion, denied Hutchinsons' motion to do so.

motion to the December 4 notice of appeal, as that dismissal order was not even entered until the next day.

The two orders which the trial court did enter on December 4 were (1) the order denying Hutchinsons' motion for leave to amend its pleading and (2) the order denying Hutchinsons' motion for a continuance. But Hutchinsons has made no argument on appeal concerning how either December 4 order affected a substantial right such that the trial court was divested of jurisdiction to proceed to trial and enter further orders. *See Hoots v. Pryor*, 106 N.C. App. 397, 403, 417 S.E.2d 269, 273 (1992) (noting that "[a]n appeal from the *denial of a motion to amend* a pleading is ordinarily interlocutory and not immediately appealable" (emphasis in original)).

The trial court has now entered a final judgment in this matter, and we therefore have jurisdiction to consider Hutchinsons' other arguments, which we do so below.

B. Timeliness of Section 108 Hearings

[2] Hutchinsons argues that the trial court erred in dismissing its motion for a Section 108 hearing. We disagree.

Hutchinsons contends that on 29 November 2017, five days before trial, it first discovered that DOT was using a portion of the Property outside of that described in DOT's complaint and that on 1 December 2017 it filed a motion for a Section 108 hearing to determine exactly what other portions of the Property DOT was using to facilitate the widening of Highway 268. The trial court dismissed the motion because Hutchinsons filed it less than ten (10) days before trial was to begin.

Section 136-108 of the North Carolina General Statutes states that the trial court shall determine all issues other than just compensation following a party's motion *and ten (10) days' notice*:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

N.C. Gen. Stat. § 136-108 (2017). Pursuant to this Section, questions of ownership, title to property, and what amounts to the "entire area" affected are determined by the trial court prior to a jury trial, while the

issue of just compensation is left to the jury. *See Rowe*, 351 N.C. at 175, 521 S.E.2d at 709.

Hutchinsons contends that failure to provide ten (10) days' notice, though required by the statute, is not fatal to its motion for a Section 108 hearing.

In an excellent, thorough opinion authored by Justice Samuel Ervin, Jr., almost seven decades ago, our Supreme Court stated that notice of a motion is not required where the matter is already pending in a session of court, *unless actual notice is required by some particular statute*:

> The law manifests its practicality in determining "When notice of a motion is necessary". When a civil action . . . is regularly docketed for hearing at a term of court, notice of a motion need not be given to an adversary party, *unless actual notice is required in the particular cause by some statute.*

Collins v. N.C. State Highway, 237 N.C. 277, 282, 74 S.E.2d 709, 714 (1953) (concerning a condemnation action brought under Chapter 40 of our General Statutes) (emphasis added).

It could be strongly argued that the ten (10) days' notice required in Section 108 is "actual notice" that "is required in the particular cause by some statute," even where the motion is brought up during a regular session in which the matter is already pending. Indeed, Section 108 expressly states that the 10-day notice provision applies whether the Section 108 motion is filed "either in or out of term[.]" However, a panel of our Court held half a century ago that a trial court may hear a Section 108 hearing without ten (10) days' notice, where the matter is already before the trial court:

> Appellants contend that [Section 136-108] requires notice of ten days before the court can hear the matter to determine issues and that because this notice was not given, the court was without jurisdiction to hear the matter. This contention is without merit. . . . [Our] Supreme Court and this Court have said repeatedly that parties are fixed with notice of all motions or orders made during the session of court in causes pending therein, and the statutory provisions for notice of motions are not applicable in such instances.

State Highway Comm'n v. Stokes, 3 N.C. App. 541, 545, 165 S.E.2d 550, 552-53 (1969). The S*tokes* panel, though, did not cite Justice Ervin's

opinion in *Collins*. Rather, it cited *Harris v. Board of Education*, in which our Supreme Court states the general rule that "[p]arties to actions are fixed with notice of all motions or orders made during the term of court in causes pending therein[,]" without stating the exception to this rule for those motions where notice is required in the particular cause by some statute. *Harris v. Bd. of Educ. of Vance Cty.*, 217 N.C. 281, 283, 7 S.E.2d 538, 538 (1940). We note that Justice Ervin, too, cited *Harris*, along with other cases from our Supreme Court, for the proposition that notice *is still required* for motions heard on the day of trial, where notice is required in the particular cause by some statute.

Be that as it may, our Supreme Court has never expressly ruled on the notice provision in Section 108. We are, therefore, bound by *Stokes*, and we must conclude that the trial court erred in determining that it lacked the authority to rule on Hutchinsons' motion for a Section 108 hearing on the scheduled trial date.[5]

In any event, we hold that any error by the trial court in dismissing Hutchinsons' Section 108 motion based on untimely notice was not prejudicial. Indeed, Hutchinsons conceded in its motion that it did not lose the right to seek compensation for any subsequent taking by DOT in a separate inverse condemnation action. *Bragg*, 308 N.C. at 371, 302 S.E.2d at 230 n. 1.

C. Motion to Continue

[3] Hutchinsons argues that the trial court erred in denying its motion to continue the trial. (This was one of the two orders denied on the day of the scheduled trial.) "Denial of a motion for a continuance is [generally] reviewable on appeal only for abuse of discretion." *In re Will of Yelverton*, 178 N.C. App. 267, 274, 631 S.E.2d 180, 184 (2006). "If, however, a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Smith*, 310 N.C. 108, 112, 310 S.E.2d 320, 323 (1984).

This appeal involves Hutchinsons' rights under the constitutional doctrine of eminent domain. Specifically, Hutchinsons asserts that the trial court should have granted its request for a continuance because DOT did not file the plat until September 2017 – three months before the scheduled trial – and, therefore, it was impossible, or at least ineffectual,

---

5. A trial court may, of course, *deny* a Section 108 motion to add property interests based on the fact that the landowner waits until the day of trial to bring the motion. But, based on *Stokes*, the trial court always has the authority to hear the motion.

for Hutchinsons to ascertain how much of the Property was being taken until that point. Though it is true that DOT did not make timely delivery of its plat, we note that Hutchinsons' also failed to timely comply with discovery requests.

Based on our review of the record, we conclude that the trial court did not abuse its discretion by refusing to grant Hutchinsons' motion for a continuance, a motion which was not filed until the week before the scheduled trial date, over two months after DOT filed the plat.

III. Conclusion

Hutchinsons makes no arguments challenging the trial court's decision to strike its answer and enter final judgment, apart from its argument that the trial court did not have jurisdiction to enter those orders. Therefore, based on the our review of the arguments before us, we find no prejudicial error in the trial court's decision to dismiss and deny Hutchinsons' motions and affirm the final judgment of the trial court.

AFFIRMED.

Judge MURPHY concurs.

Judge ARROWOOD concurs in result only.

MILTON DRAUGHON, SR., Plaintiff
v.
EVENING STAR HOLINESS CHURCH OF DUNN, Defendant/Third-Party Plaintiff
v.
DAFFORD FUNERAL HOME, INC., Third-Party Defendant

No. COA18-887

Filed 7 May 2019

1. Negligence—premises liability—hazardous condition—duty to warn—genuine issue of material fact

In a negligence suit against a church—where plaintiff ascended the church steps while carrying a casket during a funeral, tripped on the top step, and injured his knees—the trial court erred in granting the church's summary judgment motion because plaintiff introduced evidence that he was unaware of the hazardous condition (caused by the top step's irregular height) despite having descended

the stairs just moments before he tripped. This evidence created two genuine issues of material fact—whether the hazard was hidden or open and obvious, and whether plaintiff had equal or superior knowledge of the hazard—precluding a decision as a matter of law that the church did not owe plaintiff a duty to warn of the hazardous condition.

2. Negligence—premises liability—contributory negligence—choice between a safe and dangerous way

In a negligence suit against a church—where plaintiff tripped and injured his knees while carrying a casket up the church stairs during a funeral—plaintiff was not contributorily negligent in taking the stairs rather than an adjacent ramp, in traversing the stairs sidestep, or in relying on three other strong men to help him carry the casket. Plaintiff presented evidence that he had no trouble safely carrying the casket and that he fell because of an imperceptible hazard caused by the top step of the staircase. Taking this evidence in the light most favorable to plaintiff, a reasonably prudent person in plaintiff's situation would not have believed that extra precautions were necessary.

Judge DILLON dissenting.

Appeal by Plaintiff from order entered 4 June 2018 by Judge Beecher R. Gray in Harnett County Superior Court. Heard in the Court of Appeals 13 February 2019.

Brent Adams & Associates, by Gregory A. Posch and Brenton D. Adams, for Plaintiff-Appellant.

Yates, McLamb & Weyher, by Sean T. Partrick and John W. Graebe, for Defendant/Third-Party Plaintiff-Appellee.

No brief filed by Third-Party Defendant.

INMAN, Judge.

Plaintiff Milton Draughon, Sr., ("Plaintiff") appeals from an order granting summary judgment in favor of Defendant/Third-Party Plaintiff Evening Star Holiness Church of Dunn (the "Church") on Plaintiff's negligence claims. Plaintiff argues that summary judgment was improper, asserting a genuine issue of material fact existed as to: (1) the presence

of a legal duty owed to him by the Church; and (2) his contributory negligence in falling on a set of stairs leading into the Church while carrying a casket. After careful review, we reverse the ruling of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

The record below indicates the following:

Plaintiff attended a funeral at the Church, located at Sampson Avenue in Dunn, North Carolina, on a sunny day in February of 2015. Before the service started, Plaintiff entered the Church sanctuary through an entrance facing Sampson Avenue. As Plaintiff and a church deacon were speaking, the minister who would be conducting the service approached and asked Plaintiff if he would be willing to help carry the deceased's casket into the sanctuary. Plaintiff declined. Some time later, an employee of the funeral home, Third-Party Defendant Dafford Funeral Home, Inc. ("Dafford"),[1] asked Plaintiff to help carry the casket. Plaintiff reconsidered and agreed to help, as he felt physically capable of assisting and Dafford did not have enough employees on hand to carry the casket into the building.

Plaintiff followed the Dafford employee out of the sanctuary through a door facing U.S. Route 421, different than the door Plaintiff had entered earlier, and descended a set of concrete and brick stairs. Once outside, Plaintiff walked approximately 25 to 30 feet to the hearse containing the casket. Plaintiff joined three other men at the hearse, and the group carried the casket, without any apparent difficulty, to the bottom of the stairs Plaintiff had navigated moments earlier. They then began ascending the stairs, unhindered by the casket. Before reaching the entryway, Plaintiff, who was positioned on the front left side of the casket, tripped on the top step and injured his knees. The top step was approximately two-and-a-half inches taller than the preceding steps.

Plaintiff filed suit against the Church on 22 August 2017, alleging negligence, negligence *per se*, and *res ipsa loquitur* arising out of the stair's defective and dangerous condition, *i.e.*, the difference in height between the top step and the ones below it. In response, the Church filed a combined answer and third-party complaint against Dafford for contribution and indemnification, asserting by affirmative defense that Plaintiff was contributorily negligent in failing to use reasonable care. Plaintiff, with leave of the trial court, filed an amended complaint on 5 March 2018.

---

1. Counsel for Dafford has not entered an appearance in this appeal, so we limit our discussion of Dafford to the factual and procedural history.

The Church moved for summary judgment on Plaintiff's claims. The Church's motion argued, among other things, that Plaintiff possessed equal or superior knowledge of the alleged defective condition, having descended the stairs without issue moments before tripping. Plaintiff filed an affidavit in opposition; he also filed an affidavit from an engineering expert attesting to the defect in the stairs. Following a hearing, the trial court granted the Church's summary judgment motion on the grounds that Plaintiff had equal or superior knowledge of the open and obvious hazard and failed to exercise due care in navigating the steps. Plaintiff appeals.

II. ANALYSIS

Plaintiff argues that because he introduced sufficient evidence demonstrating genuine issues of material fact, his negligence claim should have survived summary judgment. The Church disagrees, asserting that: (1) Plaintiff had equal or superior knowledge of the alleged defect so the Church did not owe him a duty of care; and (2) Plaintiff's contributory negligence caused him to trip. Reviewing the evidence and applicable law, we agree with Plaintiff and reverse the trial court.

A. Standard of Review

"[The] 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). The party moving for summary judgment holds the burden of showing "there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law." *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972) (citation omitted). We must construe the evidence introduced at summary judgment "in the light most favorable to the nonmoving party and with the benefit of all reasonable inferences." *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997).

"Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 388 S.E.2d 129, 131 (1986) (citation omitted). "Issues of contributory negligence, like those of ordinary negligence are rarely appropriate for summary judgment. Only where plaintiff's own negligence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted." *Jenkins*, 125 N.C. App. at 104, 479 S.E.2d at 261 (citations omitted).

B. Duty to Warn

[1] The parties dispute whether Plaintiff's evidence discloses a duty owed to him by the Church. Landowners "have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604 (2002) (citing *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001)). This "reasonable care" requires landowners to "warn[a lawful visitor] of hidden conditions and dangers of which the landowner has express or implied notice." *Barber*, 147 N.C. App. at 89, 555 S.E.2d at 306. That said, "a landowner need not warn of any 'apparent hazards or circumstances of which the invitee has equal or superior knowledge.' " *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000) (quoting *Jenkins*, 125 N.C. App. at 105, 479 S.E.2d at 262).

The Church argues that Plaintiff had equal or superior knowledge of the stairs' condition because he had descended them without issue before later tripping on ascent, noting that this Court has upheld entry of summary judgment on premises liability claims where the plaintiffs had previously avoided or successfully navigated the hazards that later caused injury. *Bolick*, 150 N.C. App. at 429, 562 S.E.2d at 603; *Von Viczay*, 140 N.C. App. at 740, 538 S.E.2d at 631. Those cases are distinguishable.

In *Bolick*, a customer asked to use a store's bathroom. 150 N.C. App. at 428-29, 562 S.E.2d at 603. A store employee directed the customer to several steps leading to a slightly raised bathroom door. *Id.* The customer successfully traversed the stairs, which were lit by several light sources, and used the bathroom. *Id.* at 429, 562 S.E.2d at 603. When she exited, the customer fell down the stairs and injured herself; she later filed suit, averring that the step-down from the bathroom door constituted a hazardous condition. *Id.* On these facts, we held that summary judgment for the defendant store was proper, as "plaintiff had full knowledge of the condition of the doorway to the bathroom by virtue of having safely negotiated her way inside the bathroom moments before she fell." *Id.* at 431, 562 S.E.2d at 604.

Similarly, in *Von Viczay*, the plaintiff walked down an icy path to the front door of a home to attend a party. 140 N.C. App. at 737-78, 538 S.E.2d at 630. The plaintiff was able to observe the ice and snow that covered the ground and walkway, as they were well lit. *Id.* When the plaintiff later exited the home, she slipped and fell on the ice; because the plaintiff had seen the ice and already successfully navigated the hazardous condition once before, we held she had failed to demonstrate the defendant owed her any duty. *Id.* at 740, 538 S.E.2d at 632.

Unlike the plaintiffs in *Bolick* and *Von Viczay*, Plaintiff has introduced evidence that he did not have knowledge of the hazardous condition caused by the irregular height of the top step despite descending the stairs just moments earlier. In his affidavit, Plaintiff stated that this defect could not "be perceived by the naked eye at a reasonable distance while climbing those stairs . . . [or] while walking down the stairs or while walking up the stairs." By contrast, in *Bolick* and *Von Viczay* it was undisputed that the hazards were known to the plaintiffs. *Bolick*, 150 N.C. App. at 431, 562 S.E.2d at 604; *Von Viczay* 140 N.C. App. at 737-78, 538 S.E.2d at 630. Those decisions, therefore, are inapplicable to the situation, presented here, in which a plaintiff introduces evidence showing he was unaware of and unable to discern the hazardous condition despite prior exposure. As a result, we hold that there exists a genuine issue of material fact as to whether Plaintiff had equal or superior knowledge of the hazard at issue, and summary judgment on this ground was improper.

Having held that a genuine issue of material fact exists concerning Plaintiff's knowledge of the hazard, we believe this case is more similar to *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), than the precedents cited by the Church. In *Lamm*, the plaintiff exited a building by descending a set of steps that terminated in an asphalt ramp leading to a parking lot. *Id.* at 414, 395 S.E.2d at 114. The top two steps were six and one-half inches high; the final step, because of the manner in which the ramp was constructed, had "the effective height of . . . eight and one-half inches." *Id.* The plaintiff slipped and fell as she was stepping off the bottom step and later brought suit to recover for her injuries. *Id.* at 414-15, 395 S.E.2d at 114. The trial court entered summary judgment for the defendants and we reversed; on appeal to the Supreme Court, our decision was modified and affirmed. *Id.* at 418, 395 S.E.2d at 116. In its opinion, the Supreme Court determined from the plaintiff's evidence that:

> [T]he fact that the last step down is some two inches deeper than the other two steps, partly as a result of this sloping, is not so obvious to someone descending the stairs. The combination of the slope and the variation of the height cannot be said as a matter of law to be an open and obvious defect of which plaintiff . . . should have been aware.

Id. at 416-17, 395 S.E.2d at 115. Summary judgment was therefore improper, as "[a] jury could find that this variation in riser height, in part caused by the slope of the asphalt, was a hidden defect which

defendants should have known about and that defendants had a duty to warn plaintiff[.]" *Id.* at 417, 395 S.E.2d at 115.

The Church argues that *Lamm* is inapposite, asserting it: (1) involved a plaintiff with no prior experience with the hazard, and therefore does not concern a plaintiff with equal or superior knowledge; and (2) addresses hidden, and not open and obvious, defects. These arguments are misplaced. First, as set forth *supra*, there exists a genuine issue of material fact as to Plaintiff's knowledge of the hazard at issue.[2] Second, as set forth *infra*, Plaintiff's forecast of the evidence discloses a genuine issue of fact concerning whether the defect was hidden or open and obvious, just as in *Lamm*.

Plaintiff's affidavit states that the defect in question—the variation in height between the top step and the preceding ones—was not observable from a reasonable distance or while descending or ascending the stairs. Taken in the light most favorable to him, this evidence creates a disputed issue of material fact concerning whether the defect was hidden or open and obvious. The same evidence creates a disputed factual issue regarding whether Plaintiff had equal or superior knowledge of the danger after descending the stairs and while approaching with the casket. These factual disputes preclude a decision as a matter of law that the Church did not owe Plaintiff a duty to warn of the alleged defect.

As noted by the dissent, the Church points out that Plaintiff testified at his deposition that he tripped on both the top of the fourth step *and* the brick riser of the top step; he also acknowledged he made contact with the top of the fourth step first. But Plaintiff also testified that "I tripped on the top step and fell into the church." This testimony concerning the cause of Plaintiff's fall and the role of the fourth step and defective top riser in it raises a factual question for the jury to resolve.

In *Lamm*, the defendants attempted a similar argument, "contend[ing] that plaintiff's forecast of evidence shows only that the sloping of the asphalt ramp and not the riser height was the cause of her accident, and therefore the accident was caused by an open and obvious condition of which defendants had no duty to warn plaintiff." *Lamm*, 327 N.C. at 417, 395 S.E.2d at 115-16. Our Supreme Court reasoned that "[w]hile in her deposition plaintiff kept referring to the 'slope' as the

---

2. As a factual matter, the Church appears to be incorrect in claiming the plaintiff in *Lamm* had never before traversed the steps on which she was injured. *Lamm v. Bissette Realty*, 94 N.C. App. 145, 148-49, 379 S.E.2d 719, 722 (1989) (Lewis, J., dissenting) ("The evidence also shows that plaintiff had walked up and down the same place approximately 30 days earlier and again only 15 minutes before she fell.").

cause of her fall, plaintiff never denied that the variation in the riser height contributed to her fall. This ostensible conflict regarding causation is not properly settled by summary judgment; it is a question for the jury." *Id.* at 417, 395 S.E.2d at 116.

Consistent with *Lamm*, we hold that summary judgment was improper and that a jury should have the opportunity to resolve the factual questions discussed above. *See also Kiser v. Snyder*, 17 N.C. App. 445, 450, 194 S.E.2d 638, 641 (1973) (holding that when the plaintiff's own evidence presented conflicts internal to both his deposition and affidavits concerning negligence, contributory negligence, and damages, summary judgment was improper).

C. Contributory Negligence

[2] The Church argues an alternative basis for affirming the trial court's order, asserting that "Plaintiff was contributorily negligent because he walked into a danger that was open and obvious." Having held that there is a genuine issue of material fact concerning the openness and obviousness of the hazard at issue, we need not address this argument. The Church also asserts that, even if the defect was hidden, Plaintiff was contributorily negligent in electing to use the stairs rather than taking an adjacent ramp. The cases cited by the Church for this proposition, however, are not applicable here.

The Church first sites *Kelly v. Regency Centers Corp.*, 203 N.C. App. 339, 691 S.E.2d 92 (2010), in which this Court held a plaintiff was contributorily negligent as a matter of law in failing to avoid an openly and obviously dangerous condition. 203 N.C. App. at 343-44, 691 S.E.2d at 95-96. In the present case, and as detailed *supra*, the openness and obviousness of the defect that led to Plaintiff's injury is an issue of fact raised by the evidence; as a result, *Kelly*'s holding is of no import. In the other case cited by the Church, *Dunnevant v. Southern Railway Co.*, 167 N.C. 232, 83 S.E. 347 (1914),[3] our Supreme Court held that a plaintiff was contributorily negligent when he elected to leave a train platform via a darkened set of stairs he knew to be dangerous rather than descending a well-lit alternative available and known to him. 167 N.C. at 233, 83 S.E. at 348. The Supreme Court premised its holding on the maxim that "[i]f two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, *with knowledge of the danger*, constitutes contributory negligence." *Id.* (citations omitted) (emphasis added). Here, Plaintiff introduced evidence showing he did not have

3. This decision was reprinted in 1953 at 167 N.C. 272.

knowledge of the defect that he contends led to his injury and that the defect was undiscoverable by the means available to him at the time; as a result, *Dunnevant* is distinguishable.

Notwithstanding these differences, the Church contends that no reasonably prudent person would elect to carry a casket by hand up the stairs under the circumstances faced by Plaintiff independent of his subjective knowledge of any danger. *See*, *e.g.*, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (noting a plaintiff "may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety" (citation omitted)). However, under this rule, "[t]he standard of care required differs with the exigencies of the situation." *O'Neal v. Kellett*, 55 N.C. App. 225, 229, 284 S.E.2d 707, 710 (1981) (citation omitted).

The Church asserts Plaintiff was contributorily negligent in: (1) failing to use a nearby ramp; (2) failing to ask for additional assistance in carrying the casket or suggesting the use of a trolley; and (3) ascending the stairs sideways while carrying the casket. These conclusory assertions of fact, however, are disputed by Plaintiff's evidence. Plaintiff's deposition testimony and affidavit assert that the danger in this case was not the act of carrying a casket up a flight of stairs, but was instead a hazardous difference in height between the top step and the ones below it; indeed, Plaintiff stated in his affidavit that his "fall occurred solely because [he] tripped on the top stair of the staircase" and expressly disclaimed any effect the casket had on his ability to climb the steps. He also testified in deposition that he had no concerns carrying the casket with just four people and reiterated in his affidavit that he is "a strong man and had no difficulty lifting the casket or carrying the casket[.]" Nor, per his affidavit, did he have a "reason to think that four strong adults could not safely carry a casket up a flight of stairs." As for the danger itself, Plaintiff's affidavit states that "the defect in the stairs . . . cannot be perceived by the naked eye at a reasonable distance while climbing those stairs" or "while walking down . . . or . . . up the stairs[,]" and he testified at deposition that he "didn't recognize" the defect at the time he descended the steps.

Taking this evidence in the light most favorable to Plaintiff, a reasonable and prudent person would not know to take any precautions against this apparently imperceptible danger, whether carrying a casket or not. Thus, that same reasonable and prudent person would not believe taking the adjacent ramp to be necessary, nor feel the need to seek additional help or use a trolley, and we do not believe that carrying

a casket up the church steps into the sanctuary for a funeral is an indisputably negligent act. *Cf. O'Neal*, 55 N.C. App. at 228-29, 284 S.E.2d at 710 ("When she was injured, plaintiff was where she had a privilege to be: using a common area of defendants' premises intended for use by defendants' tenants. Under these circumstances, it cannot be said as a matter of law that plaintiff was required to avoid the use of the stairs or to use them at her peril, or that she was required to use an alternate route." (citations omitted)). So we cannot conclude that, as a matter of law, Plaintiff was contributorily negligent in electing to utilize the apparently safe stairs rather than taking the casket up the adjacent ramp. Nor can we conclude he was contributorily negligent as a matter of law in traversing the stairs side-step with a casket in hand or in relying on three other "strong men" to assist him where Plaintiff's evidence, taken in the light most favorable to him, demonstrates no additional help was needed to carry the casket.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's entry of summary judgment for the Church and remand for further proceedings.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that the evidence establishes, as a matter of law, that Plaintiff was contributorily negligent when he tripped walking up steps leading from the sidewalk into the Church building. Specifically, the evidence conclusively establishes that Plaintiff began his fall when he tripped over a step which was properly constructed. And, the evidence also conclusively establishes that Plaintiff was negligent as he stumbled over the next step whose defective design was obvious. I believe that Judge Gray ruled correctly and, therefore, I dissent.

Here, Plaintiff's own expert described the stairs essentially as follows: There are five concrete steps leading from the sidewalk to the Church's entry door. But there is also a rise from the top (fifth) concrete step into the Church building itself. The rises between the five concrete steps (that is, between the first and second, the second and third, the third and fourth, and the fourth and fifth) are all concrete and are

uniform in height, about 6.5 inches each. However, the rise between the fifth concrete step and the interior of the Church building, composed of mostly red brick (part of the Church building) and a white-painted, wooden threshold, is over 10.5 inches.

I agree with the majority that Plaintiff's evidence is sufficient to reach the jury on the question of whether the Church's negligence was a proximate cause of Plaintiff's fall; Plaintiff stated that he tripped as he was stepping from the top concrete step into the Church building; Section 1115.3(b) of the our State Building Code requires that "risers [shall be] of uniform height in any one flight of stairs[;]" and our Supreme Court has indicated that a violation of the Building Code may constitute negligence *per se*. *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990); *see Pasour v. Pierce*, 76 N.C. App. 364, 368, 333 S.E.2d 314, 317 (1985) ("[A] violation of the Building Code in North Carolina is negligence *per se*.").

But I also conclude that the evidence establishes, as a matter of law, that Plaintiff's own negligence, too, was a proximate cause in his fall and subsequent injury. Specifically, Plaintiff admitted in his deposition that he began his fall when he tripped as he was stepping from the fourth concrete step to the fifth concrete step, before attempting to make the last step into the Church building:

> Q: Are you tripping on concrete or brick?
>
> A: Both of them, really.
>
> Q: Which one do you trip on first?
>
> A: Well, it would have to be that one first because it comes first.
>
> Q: Which one? The concrete?
>
> A: Yeah, it would have to be that.
>
> Q: Would it be the front of the concrete you trip on, that step of concrete?
>
> A: No, it would have been *the front of it*.

(Emphasis added.) Through this testimony, Plaintiff clearly states that he first tripped on the top of the concrete rise between the fourth and fifth step. Any doubt as to what Plaintiff was saying was cleared up with his response to the following question, which clearly assumes that Plaintiff began tripping as he was stepping on the fifth concrete step:

> Q: From the area you started tripping, which you say [is] the front of this concrete step, would you draw a line from that point over to this part of the picture and put a 1 on it.

Plaintiff then marked on a photo of the steps that he began tripping on the *top front corner* of the fifth concrete step; he did not initially trip on the 10.5 inch rise from the fifth step into the Church building. This picture marked by Plaintiff was before Judge Gray and is part of the record on appeal. And Plaintiff's own evidence, through the affidavit of his expert, is uncontradicted that this step between the fourth and fifth concrete step was not in violation of the Building Code, as it was uniform with the other steps that Plaintiff had just ascended.

I am guided by our Supreme Court that "if [a] step is properly constructed and well lighted so that it can be seen by one entering or leaving the [building], by the exercise of reasonable care, then there is no liability." *Garner v. Atlantic Greyhound Corp.*, 250 N.C. 151, 159, 108 S.E.2d 461, 467 (1959) (reversing the trial court's denial of the defendant's motion for nonsuit, holding that the defendant was not liable *as a matter of law*). Based on *Garner*, I conclude that the Church was not liable with respect to Plaintiff's stumble as he stepped from the fourth concrete step to the fifth. The beginning of Plaintiff's fall was clearly due *entirely* to Plaintiff's own negligence, which makes this present case distinguishable from *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 395 S.E.2d 112 (1990), cited by the majority.

I further conclude that Plaintiff was contributorily negligent, as a matter of law, as he as he took his final, off-balanced step into the Church building itself. Assuming, the Church may have been negligent as to this final step because of the height differential, Plaintiff was also negligent for not taking due care in taking this final step. Plaintiff's own expert described the rise between the concrete steps as being concrete, but that the rise between the last concrete step into the church consisted of some concrete, then brick, and then a wooden threshold, a difference which I believe was open and obvious. The picture of the steps in the record shows obvious differences between the other step rises and the rise leading into the building, such as the rise into the building consisting of some concrete, then mostly dark red brick, and then a white threshold, whereas the other rises were uniformly gray concrete. Further, Plaintiff had walked down these same steps just minutes prior to the fall, surely noticing the height differential as he stepped from the Church building to the top step. And the evidence shows that it was daytime when he fell. *See Stoltz v. Burton*, 69 N.C. App. 231, 236, 316

S.E.2d 646, 649 (1984) (affirming summary judgment for the defendant and citing *Garner*, stating that an injured plaintiff "behaved negligently by not exercising due care to protect herself" when walking down a step of which she had an unobstructed view in broad daylight).

IN THE MATTER OF B.C.T., J.B.B.

No. COA18-929

Filed 7 May 2019

1. Child Abuse, Dependency, and Neglect—voluntary placement—review hearing—incomplete record on appeal

In a juvenile case, where the mother voluntarily placed her two children with a family friend pursuant to an agreement with the Department of Social Services (DSS), it was impossible to review the mother's argument on appeal that the trial court should have held a hearing to review the placement, as required under N.C.G.S. § 7B-910. Neither the agreement with DSS nor any documentation of its terms were included in the record on appeal, so it was impossible to determine whether section 7B-910 even applied to the case.

2. Child Abuse, Dependency, and Neglect—disposition—findings of fact—sufficiency

On appeal from the initial disposition in a juvenile case, in which the trial court placed the mother's two children with a family friend, the disposition orders were reversed and remanded because they contained multiple findings of fact that were conclusory and unsupported by competent evidence. Notably, the record lacked any substantive evidence regarding the family friend, her home, or care of the children, but contained ample evidence that the mother had fully complied with her family services agreement and with all recommendations from the Department of Social Services.

3. Child Custody and Support—custody granted to a non-parent—findings of fact—basis in competent evidence

In a juvenile case, a civil order granting full custody of a mother's minor child to a family friend was reversed and remanded because the trial court's findings of fact—including its findings that the family friend was a "fit and proper person" to have custody and that the mother acted inconsistently with her constitutionally protected status as a parent—were not based on any competent evidence.

4. Appeal and Error—swapping horses on appeal—disposition order in a juvenile case

On appeal from a disposition order in a juvenile case, in which the trial court placed the mother's child in the legal custody of the Department of Social Services (DSS) and the physical custody of a family friend, DSS could not argue that the disposition order should be affirmed when its position at trial was that the child should be returned to the mother. Simply put, DSS could not "swap horses" on appeal in this way.

Appeal by respondent from orders entered 23 April 2018 by Judge William B. Sutton, Jr. and 27 June 2018 by Judge Carol A. Jones in District Court, Sampson County. Heard in the Court of Appeals 27 February 2019.

Warrick, Bradshaw and Lockamy, P.A., by Frank L. Bradshaw, for petitioner-appellee Sampson County Department of Social Services.

Forrest Firm, P.C., by Patrick S. Lineberry, for respondent-appellant mother.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

STROUD, Judge.

Respondent-Mother appeals from disposition orders for her minor children, B.C.T. ("Benjamin") and J.B.B. ("Jeffrey")[1] and a related civil custody order for Jeffrey. Because there is no competent evidence to support many of the trial court's findings, and the conclusions of law are not supported by the findings, we reverse and remand.

I. Background

Sampson County Department of Social Services ("DSS") became involved with Mother in March of 2017 after receiving a report of physical injury and injurious environment in Mother's home.[2] DSS had received a report that Mother's boyfriend, Travis Matthis, who lived with Mother, had punched Benjamin, age seven in the stomach. Mother had

1. Pseudonyms are used for ease of reading and to protect the juveniles' identities.

2. Benjamin and Jeffrey have different fathers. Benjamin's father did not participate in the trial, but Jeffrey's did. Neither father is a party to this appeal.

previously allowed her other son, Jeffrey, age twelve, to live with a family friend, Kristen Mitchell, because Jeffrey did not like Mr. Matthis.[3] After the report to DSS regarding Benjamin, Mother voluntarily agreed to place Benjamin with Ms. Mitchell as well. After an assessment, DSS determined that Mother and Mr. Matthis needed to address emotional and mental health issues, family relationships, and parenting skills. In May 2017, DSS developed a home services agreement with Mother and in June 2017 did the same for Mr. Matthis. Neither agreement is in our record on appeal. According to the reports and testimony in the record, Mother's family services agreement required her to attend individual therapy, take all medications as prescribed, attend couple's counseling with Mr. Matthis and follow any recommendations, and participate in a parenting education curriculum. There is no indication in our record that DSS ever requested that Mr. Matthis move out of Mother's home. Throughout the investigation and until entry of the order on appeal, Mother had unsupervised and unlimited visitation with both children, but Mr. Matthis saw Benjamin only during therapy sessions.

DSS filed a separate petition for each child on 6 November 2017 alleging that they were abused and neglected juveniles; the allegations of the two petitions are substantially identical. The petitions note they were filed only because Mr. Matthis had not completed his family services agreement, although Mother had. Several court dates were set for a pre-adjudication hearing but were continued for various reasons. On 20 February 2018, the trial court entered pre-adjudication orders for Jeffrey and Benjamin.

On 15 March 2018, Mother entered into a "consent to findings of fact" related to an adjudication of neglect only. These stipulations were:

> 1. That on or about March 14, 2017, the Sampson County Department of Social Services received a report of Injurious Environment.
>
> 2. That the Juveniles resided in the home of his mother and his mother's boyfriend Travis Matthis.
>
> 3. That the Juvenile [Jeffrey] the older sibling made allegations of physical abuse against Mr. Matthis. Later, the Juvenile [Benjamin] made similar allegations.
>
> 4. That those allegations were denied by Respondent Mother and Mr. Matthis.

3. There is no indication in our record that DSS had any involvement in Mother's previous voluntary placement of Jeffrey with Ms. Mitchell.

5. That neither Juvenile required medical treatment for any such physical abuse and that there were no marks on the juveniles to substantiate said claims.

6. That Respondent Mother voluntarily placed the Juvenile [Jeffrey] with a family friend Hope Mitchell as [Jeffrey] did not want to be in the home with Mr. Matthis.

7. That the Respondent Mother admitted to domestic violence in the home which included Mr. Matthis holding a gun to her head when she was previously pregnant.

8. That Mr. Matthis was previously diagnosed with bipolar disorder and admitted to not taking his medication.

9. That Respondent Mother admitted to leaving the child with Mr. Matthis even though she admitted she had concerns of her own personal safety with Mr. Matthis.

10. On April 19, 2017, DSS substantiated injurious environment.

11. On or about May 29, 2017, In Home Services were put into place for Respondent Mother to include individual therapy, medication compliance, couple's counseling with Mr. Matthis and parenting education.

12. On June 9, 2017 DSS developed In Home Services plan with Mr. Matthis was developed whereby Mr. Matthis agreed to complete a mental health evaluation and follow and [sic] recommendations as well as attend individual therapy to include domestic violence counseling.

13. That prior to the filing of the petition, Respondent Mother had completed most of Service Agreement but Mr. Matthis had not made substantial progress with his Service Agreement.

On 23 April 2018, the trial court entered an order apparently based entirely upon the stipulated facts adjudicating Benjamin and Jeffrey as neglected within the meaning of N.C. Gen. Stat. § 7B-101(15); there was no adjudication of abuse or dependency.[4] Neither the trial court's order nor Mother's stipulations addressed the fitness of Ms. Mitchell as a caregiver or the appropriateness of placement in her home.

4. The stipulated facts are not attached to or incorporated into the order but the order does refer to them.

Mother complied with all of the requirements of the family services agreement, and DSS noted that "[t]hroughout the CPS Investigation and In-Home Services cases, Respondent Mother has exceeded the department's recommendations and has been cooperative."

Mr. Matthis also agreed to a family services agreement which included completing a mental health evaluation and following any recommendations. The mental health evaluation recommended that Mr. Matthis attend outpatient therapy and complete a psychological evaluation. Mr. Matthis completed the psychological evaluation, but that evaluation recommended no further treatment or therapy.[5] DSS noted that Mr. Matthis' attendance to couples therapy was inconsistent, but that he "began cooperating once petitions were filed in the case."

The disposition hearings for each child were held simultaneously on 10 May 2018. DSS's report recommended that Benjamin—the child Mr. Matthis had allegedly punched—be returned to Mother, but that legal and physical custody of Jeffrey be granted to Ms. Mitchell. At the disposition hearing, a social worker testified that Mother had complied with her family services agreement and she was satisfied with Mother's efforts, but that she remained in a relationship with Mr. Matthis. She recommended that custody of Benjamin be granted to Mother and that DSS be released from his case. She recommended that custody of Jeffrey be granted to Ms. Mitchell due to the length of time he had already been with her and his stated desire to stay with her, and that DSS be released from his case and a Chapter 50 custody order be entered. Although Mother had previously had unlimited visitation, DSS recommended unsupervised visitation of at least one hour every other week.

The only other witness who testified was a therapist who had provided individual therapy to the children and family counseling to Mother and Mr. Matthis. One issue raised at the hearing was whether Mother or Ms. Mitchell had been coaching the children; the therapist testified that the children had reported that Ms. Mitchell said things such as, "Travis [Matthis] is never going to change, he's never going to be nice to you." The only evidence in the record regarding Ms. Mitchell's home was from the DSS court report that her home was in the same school district as Mother's home and all of Benjamin's needs were met. The only testimony regarding Ms. Mitchell's home at the disposition hearing was:

---

5. The evaluation is not in our record, but the DSS reports and testimony show that Mr. Matthis had completed everything DSS had asked him to do.

Q. Now, the home that [Jeffrey's] staying in, you've had an opportunity to see that home. Is that correct?

A. Yes ma'am.

Q. And, the home he has there, I believe he has a four wheeler or an ATV, is that correct?

A. Correct.

Q. He has video games. Is that right?

A. As far as I know. I've been told of that.

Q So, he has pretty much whatever a child desires as it relates to toys and those kind of things. Is that right?

A. Yes ma'am.

On 27 June 2018, the trial court entered a disposition order for each child. As to Benjamin, age seven, the trial court did not adopt DSS's recommendation that he be returned to Mother's custody since Mr. Matthis was still in the home, and entered a disposition order providing that: (1) legal custody remain with DSS and that he continue placement with Ms. Mitchell; (2) the permanent plan shall be reunification with Mother and a concurrent secondary plan of custody to a "relative or other suitable person"; (3) DSS make reasonable effort to "effectuate the current plan" for Benjamin; (4) Benjamin have no contact with Mr. Matthis; and (5) Mother have supervised visitation of at least one hour every other week.

The trial court followed DSS's recommendations as to Jeffrey, and the disposition order for Jeffrey included findings of fact regarding Mother's compliance with the family services agreement and the following:

14. That the Juvenile has been adamant that he does not desire to be returned to his mother's home and expressly desires to remain in his current placement.

15. That it is not likely that the Juvenile will be returned home within the next six (6) months and placement with a parent is not in the Juvenile's best interests.

16. That the Respondent Mother is not making adequate progress within a reasonable period of time under the current permanent plan.

17. That the Respondent Mother is not actively participating in or cooperating with the plan, the Department

of Social Services, and the Guardian ad Litem for the Juvenile.

. . . .

19. That the Respondent Mother is not acting in a manner consistent with the health or safety of the Juvenile.

. . . .

24. That the best plan of care to achieve a safe, permanent home for the Juvenile within a reasonable period of time is custody to a relative or other suitable person.

25. That the Department has made reasonable efforts in this matter to develop and implement a permanent plan for the Juvenile.

26. That the Court finds that the conditions which led to the removal of the Juvenile from the Juvenile's home still exists and that a return of the Juvenile to said home would be contrary to the welfare of the Juvenile.

27. That there is no longer a need for continued State intervention on behalf of the Juvenile through a juvenile court proceeding.

28. That the Juvenile was residing with Kristen "Hope" Mitchell at the time of the filing of the Petition.

. . . .

30. That, by clear and convincing evidence, the Respondent Mother is not a fit and proper person to have the care, custody, and control of the Juvenile and has acted inconsistently with her constitutionally protected status as a parent to the Juvenile.

The disposition orders provided for Mother to have one hour of supervised visitation a week. A related civil custody order was also entered on the same day granting physical and legal custody of Jeffrey to Ms. Mitchell, with Mother to have one hour of supervised visitation every other week. Mother timely appealed the disposition orders for Benjamin and Jeffrey, but her notice of appeal failed to include the related civil custody order.

II. Petition for Writ of Certiorari

Mother asks this Court to issue a writ of certiorari to address the civil custody order which was not included in her notice of appeal for Jeffrey.

> Pursuant to N.C. Gen. Stat. § 7B-1001 (2013), notice of appeal and notice to preserve the right to appeal shall be given in writing within 30 days after entry and service of the order. An appellant's failure to give timely notice of appeal is jurisdictional, and an untimely attempt to appeal must be dismissed. However, writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals. This Court has held that an appropriate circumstance to issue writ of certiorari occurs when an appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal.

In re J.C.B., 233 N.C. App. 641, 645, 757 S.E.2d 487, 490 (2014) (citations, brackets, ellipsis, and quotation marks omitted).

Mother's notice of appeal for each case refers to the "Order of Adjudication signed by the Honorable William Sutton, Jr. on March 15, 2018 and Order of Disposition signed by the Honorable Carol Jones on May 10, 2018."[6] Mother acknowledges that her "notice of appeal, however, did not reference the civil custody order entered pursuant to N.C. Gen. Stat. § 7B-911." In our discretion, we grant Mother's petition for writ of certiorari and review the civil custody order along with the disposition orders.

III. N.C. Gen. Stat. § 7B-910 Hearing

[1] The trial court entered a disposition order as to each child, and portions of the two orders are identical and Mother raises the same legal issues for those portions. We will address the portions of the two orders which are the same together. But the two orders decree a different disposition for each child and include some different conclusions of law, so we will address the portions of the order which differ separately for each child. The first issue, which applies to both children, is whether the trial court erred by failing to hold a hearing as required by N.C. Gen. Stat. § 7B-910 to review the voluntary placements of the children within

6. We note that even though Mother's notice of appeal references the adjudication orders, she makes no argument in her brief challenging the adjudication orders.

90 days of the placement under her agreement with DSS. *See* N.C. Gen. Stat. § 7B-910 (2017).

Mother argues that the trial court violated the review requirements of N.C. Gen. Stat. § 7B-910, and since no hearing occurred, both children should have been returned to her since an "adjudication petition was not filed after [they were] in Ms. Mitchell's custody for six months." We review statutory errors *de novo*. *In re K.M.M.*, 242 N.C. App. 25, 28, 774 S.E.2d 430, 432 (2015).

N.C. Gen. Stat. § 7B-910 states:

> (a) The court *shall* review the placement of any juvenile in foster care made pursuant to a voluntary agreement between the juvenile's parents or guardian and a county department of social services and shall make findings from evidence presented at a review hearing with regard to:
>
> (1) The voluntariness of the placement;
>
> (2) The appropriateness of the placement;
>
> (3) Whether the placement is in the best interests of the juvenile; and
>
> (4) The services that have been or should be provided to the parents, guardian, foster parents, and juvenile, as the case may be, either (i) to improve the placement or (ii) to eliminate the need for the placement.
>
> (b) The court may approve the continued placement of the juvenile in foster care on a voluntary agreement basis, disapprove the continuation of the voluntary placement, or direct the department of social services to petition the court for legal custody if the placement is to continue.
>
> (c) An initial review hearing shall be held not more than 90 days after the juvenile's placement and shall be calendared by the clerk for hearing within such period upon timely request by the director of social services.

N.C. Gen. Stat. § 7B-910 (emphasis added).

In response to Mother's argument that a hearing within 90 days of the voluntary placement was required, DSS contends that "[i]t is not apparent that N.C.G.S. § 7B-910, titled 'Review of voluntary foster care placements,' is applicable to the present case; placement of Benjamin with Ms. Mitchell in March 2017 did not involve DSS placement or the

foster care system." The guardian *ad litem* similarly argues, "since the Mother placed Benjamin with Ms. Mitchell without any agreement involving or with DSS, the requirement of a review hearing was not triggered." But although Mother placed Benjamin with Ms. Mitchell prior to DSS's involvement, she placed Jeffrey with Ms. Mitchell based upon some sort of agreement with DSS due to the investigation.

Our record is not sufficient to consider Mother's argument on N.C. Gen. Stat. § 7B-910 because her agreement with DSS, if any, is not in our record. The requirements of N.C. Gen. Stat. § 7B-910 apply to a "voluntary placement agreement," but not a "temporary parental safety agreement." *See* N.C. Gen. Stat. § 7B-910.[7]

It is the appellant's duty to include any information necessary for review of the issues raised on appeal. *See* N.C. R. App. P. 9(a). Since our record does not include documentation of the terms of the agreement with DSS, we cannot review Mother's argument regarding applicability of N.C. Gen. Stat. § 7B-910. But, as discussed below, we must reverse the orders on appeal based upon other issues with the trial court's actions.

IV. Findings of Fact

[2] "The standard of review that applies to an assignment of error challenging a dispositional finding is whether the finding is supported by competent evidence. A finding based upon competent evidence is binding on appeal, even if there is evidence which would support a finding to the contrary. *In re B.W.*, 190 N.C. App. 328, 332, 665 S.E.2d 462, 465 (2008) (citation, quotation marks, and brackets omitted). For challenged conclusions of law, we determine whether the trial court's facts support the challenged conclusion. *Id.* at 335, 665 S.E.2d at 467. "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007).

A. Finding of Dependency

Mother challenges finding of fact 1 from both orders which are identical in substance:

---

7. In either type of agreement, both parties to the agreement have the right at any time to unilaterally revoke the agreement, and custody does not transfer with the agreement. *See* N.C. Dep't of Health and Human Svcs., Voluntary Placement Agreement (DSS-1789, rev 10/2010), https://www2.ncdhhs.gov/info/olm/forms/dss/dss-1789-ia.pdf; N.C. Dep't of Health and Human Svcs., Temporary Parental Safety Agreement (DSS-5231, rev. 01/2017), https://www2.ncdhhs.gov/info/olm/forms/dss/dss-5231-ia.pdf. A required component of both types of agreements is that they are voluntary in both the execution and their duration. *Id.*

> 1. That pursuant to a N.C. Gen. Stat. §7B-901, this matter comes on for a Dispositional Hearing following an adjudication of neglect and dependency which was made on March 15, 2018.

Mother argues that the children were never adjudicated dependent. In the trial court's orders on adjudication, Mother stipulated to certain facts and to an adjudication of neglect, but the trial court did not adjudicate Jeffrey or Benjamin as dependent. Therefore, the finding by the trial court that Jeffrey and Benjamin were adjudicated as dependent is not supported by competent evidence or by the adjudication orders.

B. Finding of Fact 4

Mother next challenges findings related to Ms. Mitchell. These findings are in both orders.[8] The first finding is:

> 4. That the home of Kristen "Hope" Mitchell is safe, suitable, and appropriate for the Juvenile.

Mother argues that there was no evidence regarding Ms. Mitchell's home and no findings of fact to demonstrate why her home is "safe, suitable, and appropriate." She contends that "[t]he trial court should have considered the availability of relative placements and should have verified whether Ms. Mitchell was an appropriate placement[,]" and "[t]he trial court's order should have contained more than conclusory determinations regarding Ms. Mitchell." Although a trial court need not include detailed findings as to all of the evidence presented, we agree this conclusory finding is not supported by the evidence or any other findings of fact. At the hearing, the only specific evidence regarding Ms. Mitchell or her home was that she had provided "pretty much whatever a child desires as it relates to toys and those kind of things," including a "four-wheeler or ATV" and video games. The only other evidence about Ms. Mitchell was from the children's therapist:

> Q. Okay. Now, if you could, if you know the relationship between Ms. Mitchell and the boys or how that - what that relationship is can you explain that? Is she just a family friend? Is she a distant cousin? Do you know?
>
> A. My understanding is that she is a family friend and that she has been a part of their lives for at least the majority of [Jeffrey's] life.

---

8. The challenged finding is finding of fact number 4 in Jeffrey's order and 6 in Benjamin's order.

Neither DSS's reports nor the evidence and testimony at trial provided any substantive information about Ms. Mitchell, her home or her care of the children. Having "pretty much whatever a child desires as it relates to toys and those kinds of things" is not necessarily in a child's best interest. This testimony could also tend to support Mother's argument that Ms. Mitchell was seeking to alienate the children from her - many children would prefer to stay where they have "whatever a child desires as it relates to toys and those kinds of things." In any event, this evidence provides no basis for findings of fact regarding Ms. Mitchell's suitability as a custodian for the children. There is no competent evidence to support any of the trial court's findings regarding Ms. Mitchell, and the trial court's findings cannot support the related conclusions of law.

C. Findings of fact 29 and 32

Mother challenges findings of fact 29 and 32 in Jeffrey's order:

> 29. That Kristen "Hope" Mitchell is a fit and proper person to have the care, custody, and control of the Juvenile.
>
> . . . .
>
> 32. That it is in the best interests of the Juvenile for Kristen Hope Mitchell to be granted the care, custody, and control of the Juvenile.

Mother also challenges conclusion of law 5, which is identical to finding of fact 29:

> 5. That Kristen Hope Mitchell is a fit and proper person to have the care, custody, and control of the Juvenile.

We first note that finding 32 is actually a conclusion of law, which we review *de novo*:

> The determination of what will best promote the interest and welfare of the child, that is, what is in the best interest of the child, is a conclusion of law, and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody. These findings may concern the physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. These findings cannot, however, be mere conclusions.

Hunt v. Hunt, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993) (citations and quotation marks omitted).

A "conclusory recitation" of the best interests standard, without supporting findings of fact, is not sufficient. *See Lamond v. Mahoney*, 159 N.C. App. 400, 406, 583 S.E.2d 656, 660 (2003) ("Finding of fact 11, as a mere conclusory recitation of the standard, cannot support the order."). As discussed above, there was almost no evidence regarding Ms. Mitchell, her home, or her care of the children, so finding of fact 29 that she was a fit and proper person to have custody of the children is not supported by the evidence.

We have previously noted that the trial court need not use "magic words" in its findings of fact or conclusions of law, if the evidence and findings overall make the trial court's basis for its order clear. *See Davis v. Davis*, 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013). Here, we have disposition orders with "magic words" but no evidence to support some of the crucial findings of fact and thus no support for the related conclusions of law.

D. Finding of Fact 15

Mother next challenges finding of fact 15 in Jeffrey's order:

> 15. That it is not likely that the Juvenile will be returned home within the next six (6) months and placement with a parent is not in the Juvenile's best interests.

The basis for this finding is entirely unclear, since DSS reported, and the trial court found, that Mother had complied with everything required of her by the family services agreement. It is true that *Jeffrey*—age 12—had refused to participate in person with family therapy, but Mother did everything required of her by the family services agreement. It is noteworthy there was no prior court order requiring either her or Mr. Matthis to do anything, and no prior order that Mr. Matthis not be in the presence of the children. Mr. Matthis also complied with his family services agreement. The first and only substantive hearing in this case was the disposition hearing, where the trial court removed both children from Mother even though there had never been even an allegation she was unfit to care for the children, nor had the trial court entered any orders directing Mother, or Mr. Matthis to take any specific actions for the children to be returned to Mother. The only requirements placed upon Mother were those under the family services agreement. The social worker's recommendation that Jeffrey remain with Ms. Mitchell was based *only* on the length of time Jeffrey had lived with Ms. Mitchell and his desire to stay with her, not any concern about his safety with Mother or Mr. Matthis. This finding is not supported by the evidence.

E. Finding of Fact 26

Mother next challenges finding of fact 26[9] from both orders:

> 26. That the Court finds that the conditions which led to the removal of the Juvenile from the Juvenile's home still exists and that a return of the Juvenile to said home would be contrary to the welfare of the Juvenile.

According to the stipulations in the adjudication order, the "conditions which led to the removal" were allegations of one incident of Mr. Matthis punching Benjamin (which Mother and Mr. Matthis denied and was never established as fact by any order), reports of domestic violence between Mother and Mr. Matthis "when she was previously pregnant," and a report that in the past Mr. Matthis had been diagnosed with and needed treatment for bipolar disorder.[10] Based upon these concerns, DSS entered into family services agreements with both Mother and Mr. Matthis, and by the time of the disposition hearing, both had fully complied with DSS's recommendations to remedy the concerns regarding domestic violence, parenting skills, and mental health. There was no evidence that the conditions which led to removal still existed. The only condition which still existed was Jeffrey's desire to live with Ms. Mitchell. While Jeffrey had stated that his preference was to remain with Ms. Mitchell—perhaps because of the toys at her home or because he dislikes Mr. Matthis—custody cannot be granted to a third party unless the parent is unfit or has acted inconsistently with her constitutionally protected rights as a parent. *See Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). As long as the parent is fit to care for her child, the court cannot award custody of a child to a third party based only upon the child's preference or the fact that the third party "may offer more material advantages in life for the child." *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994); *see also Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978) ("When the child has reached the age of discretion, the court may consider the preference or wishes of the child to live with a particular person. A child has attained an age of discretion when it is of an age and capacity to form an intelligent or rational view on the matter. The expressed wish of a child of

---

9. Finding of Fact 17 in Benjamin's order.

10. There is no indication of when this pregnancy occurred. Based upon our record, Mother has only these two children and there is no mention of any pregnancy since Benjamin, so her most recent pregnancy would presumably have been over seven years prior to the petition.

discretion is, however, never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference. . . . The preference of the child should be based upon a considered and rational judgment, and not made because of some temporary dissatisfaction or passing whim or some present lure." (alteration in original)).

At trial, the social worker testified about the reasons DSS recommended custody be granted to Ms. Mitchell:

> We are recommending that the temporary safety provider receive full custody of [Jeffrey]. *That is mainly due to the fact that he does not want to return to respondent mother's home at this time. And, he has been living with Ms. Mitchell for quite some time before DSS involvement.*

(Emphasis added.) All of DSS's evidence showed that Mother and Mr. Matthis had followed their family service agreements. DSS had recommended that Benjamin return to the home and would not have made this recommendation if concerns regarding his safety still existed. There is no evidence in the record that DSS or the trial court ever recommended or requested that Mr. Matthis be required to leave Mother's home. Finding of fact 26 is not supported by competent evidence.

F. Findings of Fact 16, 17, and 19

Mother challenges findings related to her progress with her "permanent plan":

> 16. That the Respondent mother is not making adequate progress within a reasonable period of time under the current permanent plan.
>
> 17. That the Respondent Mother is not actively participating in or cooperating with the plan, the Department of Social Services, and the Guardian ad Litem for the Juvenile.
>
> . . . .
>
> 19. That the Respondent Mother is not acting in a manner consistent with the health or safety of the Juvenile.

We first note that the trial court had adopted no "permanent plan" for either child, since no permanency planning hearing or review hearings of any sort were held. The only prior order was the adjudication of neglect based upon the stipulated facts. As has been noted, the social

worker's report and testimony show that DSS was fully satisfied with Mother's efforts. Indeed, it is not clear how Mother could have done anything else to participate in or cooperate with a plan, since DSS had no other recommendations or requirements for her. These findings are not supported by competent evidence.

G. Findings of Fact 24, 25, 27 and 30

Mother next challenges findings 24 through 27 and finding 30:

> 24. That the best plan of care to achieve a safe, permanent home for the Juvenile within a reasonable period of time is custody to a relative or other suitable person.
>
> 25. That the Department has made reasonable efforts in this matter to develop and implement a permanent plan for the Juvenile.
>
> . . . .
>
> 27. That there is no longer a need for continued State intervention on behalf of the Juvenile through a juvenile court proceeding.
>
> . . . .
>
> 30. That, by clear and convincing evidence, The Respondent Mother is not a fit and proper person to have the care, custody, and control of the Juvenile and has acted inconsistently with her constitutionally protected status as a parent to the Juvenile.

Once again, these findings are in part conclusions of law and are conclusory recitations of standards with no findings to support them. For all the reasons noted above regarding the other findings, these findings are also not supported by competent evidence. DSS's 10 May 2018 reports noted that [t]hroughout the CPS Investigation and In-Home Services cases, Respondent Mother has exceeded the department's recommendations and has been cooperative." The evidence presented at trial only supported DSS's statement, and we find no evidence at all—much less clear, cogent and convincing evidence—that Mother "has acted inconsistently with her constitutionally protected status as a parent." There was never any allegation that Mother had done *anything* to harm either child, and throughout the case, until entry of the disposition orders on appeal, she had unlimited, unsupervised visitation with no problems.

The social worker testified that she had visited Mother's home and it was sufficient to care for Jeffrey and Benjamin.

H. Civil Custody Order

[3] Mother also challenges findings of fact 5, and 7 through 11 of Jeffrey's civil custody order:

> 5. Pursuant to subsequent orders of this Court the Juvenile/Juveniles was/were placed with the Plaintiff herein.
>
> . . . .
>
> 7. No further review or judicial oversight is required pursuant to North Carolina Chapter 7B regarding the minor child(ren).
>
> 8. The Plaintiff is a fit and proper person to have the care, custody, and control of the minor child(ren).
>
> 9. That, upon clear and convincing evidence, the Defendant(s) have acted inconsistent with their constitutionally protected status as parents to the child(ren).
>
> 10. That, upon clear and convincing evidence, [Mother] is not fit and proper person to have the care, custody, and control of the minor child(ren).
>
> 11. That it is in the best interests of the minor child(ren) that the Plaintiff be granted the care, custody, and control of the minor child(ren).

No additional evidence was presented before the trial court for the civil custody order. As discussed above, the trial court's findings related to Ms. Mitchell are not based on competent evidence, the findings regarding Mother's failure to make progress on her plan are not supported by any evidence, and there was no evidence that Mother was unfit or had acted inconsistently with her constitutionally protected status as a parent. The trial court's conclusions of law as discussed above were not supported by the findings of fact.

V. Benjamin's Disposition Order

[4] One issue unique to Benjamin's case is that DSS recommended that Benjamin be returned to Mother's custody and that DSS be released

from the case. The trial court did not adopt this recommendation but instead placed him in the legal custody of DSS and allowed him to remain with Ms. Mitchell. Certainly the trial court does not have to follow DSS's recommendations, but it must make findings of fact based upon competent evidence to support its disposition. And this Court has previously held that parties are not allowed to make different arguments on appeal than before the trial court to "swap horses between courts in order to get a better mount." *In re I.K.*, 227 N.C. App. 264, 266, 742 S.E.2d 588, 590 (2013). DSS is not exempt from this rule. As in *In re I.K.*, DSS did not acknowledge that its position at trial was that Benjamin should be returned to Mother, and instead argued on appeal that the disposition order should be affirmed. Unsurprisingly, DSS cannot direct us to any evidence to support its arguments regarding Benjamin, since it did not seek to prove that Benjamin should remain in DSS's custody and the only reason it recommended that Jeffrey stay with Ms. Mitchell was his stated preference and the length of time Jeffrey had been with Ms. Mitchell. DSS's argument has changed on appeal, although the facts have not, and "[t]his is of particular concern because the primary goal of the Juvenile Code, which includes DSS's duties, is to seek to protect the best interests of abused, neglected, or dependent children. *Id.* at 266, 742 S.E.2d at 590-91. DSS is not obligated to adopt a different position on appeal just to oppose the appealing parent if it has previously determined that a parent has a safe and appropriate home and the child should be returned to the parent.

VI. Conclusion

We reverse and remand the trial court's disposition orders for Benjamin and Jeffrey and Jeffrey's civil custody order and instruct the trial court to hold a new hearing and enter orders with findings of facts supported by competent evidence that support its conclusions of law. To grant custody of a child to a third party, we note that the evidence must establish "that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent." *See Moriggia v. Castelo*, ___ N.C. App. ___, ___, 805 S.E.2d 378, 385 (2017). So far, no evidence has been presented which could support such a conclusion, and DSS did not take this position before the trial court. Although DSS recommended that Jeffrey remain in Ms. Mitchell's custody, this recommendation was apparently based *only* upon the child's wishes and the fact that he had been there "for quite some time before DSS involvement" and not upon Mother's unfitness. "Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court."

In re I.K., 227 N.C. App. at 276, 742 S.E.2d at 596. But based upon the evidence of record as of 10 May 2018, there is no factual support for a conclusion that Mother is unfit to have custody of her children, much less to limit her to an hour of supervised visitation every other week.

REVERSED AND REMANDED.

Judges TYSON and ARROWOOD concur.

IN THE MATTER OF WILLIE REGGIE HARRIS, PETITIONER

No. COA18-1026

Filed 7 May 2019

Child Abuse, Dependency, and Neglect—Responsible Individuals List—due process-notice

Petitioner's name could not be added to the Responsible Individuals List (RIL) where the county department of social services waited nearly four years to notify petitioner of its intent to place him on the RIL—well beyond the statutory timeframe for giving such notice (N.C.G.S. § 7B-320)—and thereby prejudiced Petitioner's ability to prepare a defense.

Appeal by respondent from order entered 25 April 2018 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 9 April 2019.

No brief for petitioner-appellee.

Mecklenburg County Department of Social Services Senior Associate Attorney Kathleen Arundell Jackson, for respondent-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

TYSON, Judge.

Mecklenburg County Department of Social Services ("Respondent") appeals from the trial court's order, which determined Respondent had failed to provide Petitioner with timely notice and prevented Petitioner's name from being included on the Responsible Individuals List. We affirm.

I. Background

Mecklenburg County Child Protective Services completed an investigative assessment and substantiated a report alleging abuse. Petitioner was identified as the individual responsible on 13 December 2013. Criminal charges arising from the incident were dismissed.

Nearly four years later, Respondent mailed a letter to notify Petitioner of its intent to place him on the Responsible Individuals List ("RIL") on 18 August 2017. Petitioner filed a petition for judicial review on 7 September 2017.

At the hearing on 27 February 2018, Respondent presented testimony of the purported incident, which had occurred between 10 December 2013 and 13 December 2013. A.D., the alleged victim, testified that Petitioner was a family friend, who was living with her and her mother when A.D. was thirteen years old. On the day in question, Petitioner took the trash outside and upon his return, called out to A.D. to come "warm him up." A.D. hugged him, and they went into her mother's bedroom. A.D. told Petitioner her shoulders were hurting. Petitioner gave her a massage.

While lying together on the bed, Petitioner placed his hand on A.D.'s back, under her clothes, and placed her hand on his genitals and told her to "squeeze." He then requested she get on top of him. A.D. left the bedroom, went upstairs, and dressed for school. Petitioner told her not to tell her mother.

A.D. called her mother once she returned home from school and told her what had happened. A.D.'s mother made Petitioner move out and obtained a domestic violence protective order. The incident was reported to the police and charges were taken out against Petitioner, but were ultimately dismissed.

After the close of Respondent's evidence, Petitioner's counsel argued Respondent providing notice "[t]hree-and-a-half years later . . . is substantially too late for [Petitioner] to adequately prepare a defense . . . with the preponderance of the evidence standard. It makes it very difficult for him to present a defense at this late date."

Respondent argued N.C. Gen. Stat. § 7B-320 contained no consequences for its failure to provide the statutorily required notice to an identified Responsible Individual within five days of the completion of the investigation. When questioned by the trial court to explain why it took so long for Petitioner to be noticed, Respondent acknowledged the State had "determined that Mecklenburg County did not properly

handle a whole group of RIL cases, and they were all pulled at one time . . . the State of North Carolina directed Mecklenburg [County] that [it] needed to provide notice to all the individuals and schedule any hearings requested."

The trial court filed a written order concluding Petitioner's name should not be included on the RIL due to Respondent's multi-year failure to comply with the requirements of N.C. Gen. Stat. § 7B-320. Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7B-323(f) and 7A-27(b)(2) (2017).

III. Issue

Respondent argues the trial court erred in concluding Petitioner's name should not be added to the RIL, due to Respondent's failure to comply with the statute and serve notice within five days.

IV. Standard of Review

On appeal from a non-jury trial, this Court reviews a trial court's order to determine "whether there is competent evidence to support the trial court's findings of fact." *Sessler v. Marsh*, 144 N.C App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted). "Findings of fact are binding on appeal if there is competent evidence to support them." *Id.* This Court reviews a trial court's conclusions of law *de novo*. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001).

V. Analysis

This Court concluded that being listed on an RIL "deprives an individual of the liberty interests guaranteed under our State Constitution." *In re W.B.M.*, 202 N.C. App. 606, 617, 690 S.E.2d 41, 49 (2010). In order to guarantee an individual the right to due process, "an individual has a right to notice and an opportunity to be heard before being placed on the RIL." *Id.* at 621, 690 S.E.2d at 52.

Our General Statutes require that:

> (a) *Within five working days* after the completion of an investigative assessment response that results in a determination of abuse or serious neglect and the identification of a responsible individual, the director *shall personally deliver written notice* of the determination to the identified individual.

> (b) If personal written notice *is not made within 15 days of* the determination and the director has made diligent efforts to locate the identified individual, the director *shall send the notice* to the individual by registered or certified mail, return receipt requested, and addressed to the individual at the individual's last known address.

N.C. Gen. Stat. § 7B-320 (2017) (emphasis supplied).

This statute sets forth the specific time limits within which the DSS director must comply to initiate inclusion of an individual's name on the list. Petitioner's notice was not provided within either of the statutory timelines nor within the statute of limitations for a misdemeanor crime. *See* N.C. Gen. Stat. § 15-1 (2017) (two-year statute of limitations). While no appellate case involving this issue has been brought previously, we review other cases under Chapter 7B involving jurisdiction.

This Court considered statutory timelines concerning a petition to terminate parental rights. *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005). The parents argued the trial court lacked *jurisdiction*, because DSS had failed to file the petition seeking termination within the time specified by statute. *Id.* at 353, 607 S.E.2d 700. The statute mandated that DSS:

> shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing *unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.*

Id. at 353, 607 S.E.2d at 701 (citing N.C. Gen. Stat. § 7B-907(e) (2004)) (emphasis supplied). DSS did not file its petition in the case of *In re B.M.* until almost eleven months after the permanency planning hearing, and the trial court made no written findings. *Id.* at 354, 607 S.E.2d at 701. This Court held:

> Mandatory provisions are jurisdictional, while directory provisions are not. Whether the time provision of N.C. Gen. Stat. § 7B-907(e) is jurisdictional in nature depends on whether the legislature intended the language of that provision to be mandatory or directory. Generally, statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a

> consequence for failure to comply within the time period. Here, none of the statutes in Chapter 7B address the consequences that would flow from the untimely filing of a petition to terminate parental rights. Significantly, N.C. Gen. Stat. § 7B-907(e) fails to provide a consequence for DSS's failure to comply with the sixty-day filing period. As a result, we conclude that the time limitation specified in N.C. Gen. Stat. § 7B-907(e) is directory rather than mandatory and thus, not jurisdictional.

Id. (citations omitted).

Subsequently, our Supreme Court applied this Court's holding in *In re B.M.* to a case concerning the statutory timelines for filing a petition for juvenile delinquency. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010). The statute at issue provided:

> The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.

Id. (citing N.C. Gen. Stat. § 7B-1703(a) (2007)). In addition to holding the juvenile court counselor complied with the statute, *id.* at 188, 694 S.E.2d at 760, the Supreme Court "conclude[d] that our legislature did not intend the timing requirements of section 7B-1703 to be jurisdictional." *Id.* at 193, 694 S.E.2d at 763.

Here, the Petitioner did not argue nor did the trial court find or conclude that DSS' multi- year delay resulted in a lack of jurisdiction under the statute. This Court previously concluded that being listed on an RIL deprives an individual of a protected liberty interest. *In re W.B.M.*, 202 N.C. App. at 617, 690 S.E.2d at 49. The multi- year delay by DSS, even well beyond the statute of limitations to prosecute for a misdemeanor criminal charge, deprived Petitioner of his ability to mount a defense to preserve his protected liberty interest. *See id.* Here, the delay was nearly four years. Petitioner's arguments are overruled.

VI. Conclusion

Petitioner correctly argued the Respondent's multi-year delay was prejudicial and made "it very difficult for him to present a defense." It is unnecessary on the facts before us to decide whether the timelines

required in section 7B-320 are jurisdictional. The trial court correctly concluded Petitioner's name could not be added to the RIL, due to the prejudice to Petitioner's protected liberty interest from Respondent's long, multi-year delay and failure to timely comply with the specific mandates placed in the statute by the General Assembly. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge BERGER concur.

J. S. & ASSOCIATES, INC., PLAINTIFF
v.
MARIA STEVENSON, DEFENDANT/COUNTERCLAIM PLAINTIFF
v.
J. S. & ASSOCIATES, INC., COUNTERCLAIM DEFENDANT

No. COA18-1065

Filed 7 May 2019

Small Claims—prevailing party—appeal to district court—to bring counterclaims exceeding $10,000—standing

The party that prevailed in a small claims action lacked standing to appeal the judgment to district court in order to bring counterclaims that exceeded the $10,000 amount-in-controversy "ceiling" for small claims courts. The prevailing party's inability to bring her counterclaims in small claims court did not render her an aggrieved party with standing to appeal. Rather, the appropriate avenue to bring her counterclaims was a new, separate action in district court (N.C.G.S. § 7A-219).

Appeal by Defendant from order entered 30 April 2018 by Judge Rebecca Thorne Tin in Mecklenburg County District Court. Heard in the Court of Appeals 27 March 2019.

Dixon Law Firm, PLLC, by Malik Dixon, for the Plaintiff/Counterclaim Defendant-Appellee.

Moore & Van Allen PLLC, by Nathan A. White, for the Defendant/Counterclaim Plaintiff-Appellant.

DILLON, Judge.

This case presents a novel circumstance in which the prevailing party appealed from a small claims court decision in her favor in order to assert related counterclaims in the district court above. Maria Stevenson, Defendant and Counterclaim Plaintiff, appeals from the district court's order dismissing her appeal and its accompanying counterclaims, which were brought for the first time on appeal. Stevenson contends that her appeal rests in a gap between jurisdictional amount in controversy thresholds and the pleading requirements of compulsory counterclaims. After careful review, we find that Stevenson's circumstance is governed by existing law and, therefore, affirm.

I. Background

Beginning in February 2015, Stevenson was a tenant in a home owned by J.S. & Associates, Inc. (hereafter, "JSA"), in Charlotte. The parties' relationship decayed over time due to issues concerning the maintenance of the property.

In November 2017, JSA filed a summary ejectment motion against Stevenson in small claims court.

In December 2017, the trial court entered judgment in Stevenson's favor, denying JSA's request for summary ejectment. Nevertheless, Stevenson appealed the small claims court's judgment to the district court in order to assert counterclaims against JSA, arising from JSA's alleged failure to maintain the rental property. JSA moved to dismiss Stevenson's appeal.

In April 2018, the district court granted JSA's motion to dismiss Stevenson's appeal, holding that Stevenson was not an aggrieved party and, therefore, had no right to appeal the small claims court judgment. Stevenson timely appealed.

II. Analysis

This case presents our Court with a specific issue which we have not been asked to decide before: Where a defendant prevails in an action in small claims court, may she nonetheless bring compulsory counterclaims that exceed the jurisdictional limit of small claims court in an appeal to district court? We hold that this particular circumstance need not be directly provided for, as a proper avenue for redress presently exists.

In North Carolina, small claims courts have jurisdiction over claims for summary ejectment of a tenant, in addition to claims for monetary

damages. N.C. Gen. Stat. § 7A-210(2) (2017). The amount in controversy in an action in small claims court may not exceed ten thousand dollars ($10,000). N.C. Gen. Stat. § 7A-210(1). This amount in controversy "ceiling" is a jurisdictional limitation, *Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000), which extends to all counterclaims, cross claims, and third-party claims brought in small claims court, *see* N.C. Gen. Stat. § 7A-219 (2017). That is, a defendant in a small claims action is not allowed to bring forth any counterclaim against the plaintiff, cross claim against another defendant, or third-party claim if the defendant's claim "would make the amount in controversy exceed the jurisdictional amount[.]" *Id.*

Appeal to the district court for trial *de novo* is the sole remedy available to an "aggrieved party" in a small claims court action. N.C. Gen. Stat. § 7A-228 (2017); *see 4U Homes & Sales, Inc., v. McCoy*, 235 N.C. App. 427, 436, 762 S.E.2d 308, 314 (2014) (stating that "the only party entitled to invoke the District Court's jurisdiction following a decision by the magistrate in small claims court is an 'aggrieved party' "). And "[o]n appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims[.]" N.C. Gen. Stat. § 7A-220 (2017). That is, when an *aggrieved party* properly brings an appeal from small claims court to district court pursuant to Section 7A-228, the parties may also bring their counterclaims, cross-claims, and third-party claims pursuant to Section 7A-220.

This procedure admittedly leaves open the circumstance before us in this case: What if a party prevails in small claims court, is therefore not an aggrieved party on appeal, but wishes to bring compulsory counterclaims that could not be brought in small claims court because they exceed the jurisdictional limit for amount in controversy? Generally, under Rule 13 of our Rules of Civil Procedure, counterclaims that "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim" are compulsory. N.C. R. Civ. P. 13. And compulsory counterclaims must be brought in the same action, or they are lost. *Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P.*, 359 N.C. 593, 597, 614 S.E.2d 268, 271 (2005) ("[I]t is well settled that *absent a specific statutory or judicially determined exception*, a party's failure to interpose a compulsory counterclaim in an action that has been fully litigated bars assertion of that claim in any subsequent action." (emphasis added)).

However, Section 7A-219 makes it clear that counterclaims, even those ordinarily considered compulsory, may be brought in a subsequent,

separate action in district court if and when they would exceed the amount in controversy allowed in small claims court:

> No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate. . . . *Notwithstanding [N.C. R. Civ. P. 13]*, failure by a defendant to file a counterclaim in a small claims action assigned to a magistrate, or failure by a defendant to appeal a judgment in a small claims action to district court, *shall not bar* such claims in a separate action.

N.C. Gen. Stat. § 7A-219 (emphasis added). "As a result, a defendant in a summary ejection action who wishes to assert counterclaims that have a value greater than the jurisdictional amount applicable in small claims court may either [1] assert their claims on appeal to the District Court from an *adverse decision* by the magistrate or [2] assert those claims in an entirely separate action." *4U Homes*, 235 N.C. App. at 435, 762 S.E.2d at 314 (2014) (emphasis added).

Here, Stevenson attempted to pursue the first option by appealing the small claims magistrate's decision in her favor. The district court dismissed the appeal, concluding that Stevenson had no right to appeal from a favorable small claims court judgment. We hold that the district court properly identified Stevenson's appropriate avenue for redress.

Stevenson contends that the district court erred in concluding that she was not an aggrieved party, as she was unable to bring her compulsory counterclaims in small claims court below. Stevenson's counterclaims are arguably compulsory and certainly exceed the ten thousand dollar ($10,000) threshold for an action in small claims court. *See Cloer v. Smith*, 132 N.C. App. 569, 574-5, 512 S.E.2d 779, 782 (1999).

We conclude that Stevenson's inability to bring her counterclaims does not render her an aggrieved party where she prevailed in small claims court. Our Supreme Court has generally defined a "person aggrieved" as a party "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963). Here, Stevenson is not an aggrieved party because she is still free to seek appropriate redress for her claims against JSA by bringing a separate action. *4U Homes*, 235 N.C. App. at 436-7, 762 S.E.2d at 314-5 (holding that the defendant was not an aggrieved party and could not appeal to district court from

a small claims court decision in her favor where she could still seek additional damages by bringing her counterclaims in a separate action).

Further, Section 7A-219 specifically provides that counterclaims which exceed the statutory amount in controversy threshold of small claims court may be brought in a separate action in district court "*notwithstanding [Rule 13]*."[1] Therefore, if Stevenson brings her claims in a separate action in district court, any motion made by JSA to dismiss Stevenson's counterclaims as compulsory pursuant to Rule 13 would be properly denied.

We hold that the district court did not err in dismissing Stevenson's appeal. Stevenson is not an aggrieved party and therefore does not have standing to bring an appeal to the district court from the small claims court's order in her favor. Stevenson's proper course of action is to bring her counterclaims in a new action.

AFFIRMED.

Judges BRYANT and ARROWOOD concur.

1. We note a decision from our Court which suggests that a defendant who is an aggrieved party in a small claims court action *must* bring an appeal to assert counterclaims rather than through a separate action. *Fickley v. Greystone*, 140 N.C. App. 258, 261, 536 S.E.2d 331, 333 (2000) (dismissing separate action where plaintiff should have brought claims by asserting counterclaims in an appeal from a prior small claims court action). But *Fickley* does not apply in the present case as Stevenson was not an aggrieved party.

K4C6R, LLC v. ELMORE

[265 N.C. App. 204 (2019)]

K4C6R, LLC, PORTERS NECK PLANTATION, INC. AND
FOREST CREEK PLANTATION, INC., PLAINTIFFS
v.
JOHN A. ELMORE, II, PORTERS NECK COMPANY, INC., AND
FOREST CREEK VENTURES, INC., DEFENDANTS

No. COA18-1008

Filed 7 May 2019

1. Contracts—right of first refusal—triggering conditions—interpretation

The trial court erred in an action for declaratory judgment and breach of contract by interpreting a right of first refusal (ROFR) clause regarding third-party offers for undeveloped land as triggering a party's ROFR only if an offer for both developed and undeveloped land specified what amount of the offer price was allocated to the undeveloped land. Such an interpretation was inconsistent with the plain language and purpose of the agreement as a whole and contradicted another of the court's conclusions.

2. Contracts—right of first refusal—limitations—cash-only sales—plain language of agreement

The trial court correctly concluded that a right of first refusal clause in a real estate agreement applied only to cash-only sales based on the plain language of the agreement.

3. Contracts—right of first refusal—limitations—offers involving seller-financing—plain language of agreement

The trial court correctly concluded that a right of first refusal clause in a real estate agreement did not apply to offers involving seller-financing based on the plain language of the agreement.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendants from order entered 29 December 2017 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 27 March 2019.

Murchison, Taylor & Gibson PLLC, by Andrew K. McVey, for plaintiff-appellees.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for defendant-appellants.

ARROWOOD, Judge.

John A. Elmore, II ("Mr. Elmore"), Porters Neck Company, Inc. ("PNC"), and Forest Creek Ventures, Inc. ("FCV") (collectively, "defendants") appeal from an order denying their motion for summary judgment in part, and granting it in part. For the reasons stated herein, we affirm in part, and reverse in part.

I. Background

Mr. Elmore and Mr. Lionel L. Yow, Jr. ("Mr. Yow") formed PNC in or about 1991 to own and develop residential real property in Porters Neck. Thereafter, Mr. Elmore and Mr. Yow formed FCV to own and develop residential real property in Forest Creek. Mr. Yow filed for bankruptcy in 2011. During the administration of the bankruptcy, K4C6R, LLC ("K4C6R") successfully bid on Mr. Yow's interest in PNC and FCV, resulting in Mr. Elmore and K4C6R each owning fifty percent (50%) of PNC and FCV.

Due to disputes between the two owners, the parties executed a written contract (the "division agreement") the intent of which was to distribute half of the real estate assets each to Mr. Elmore and to K4C6R respectively. To that end, the division agreement distributed fifty percent (50%) of PNC and FCV's assets to K4C6R in exchange for its shares of stock in the PNC and FCV companies. Porters Neck Plantation, Inc. ("PNP") was established as K4C6R's successor entity with respect to the properties in Porters Neck that K4C6R received in the division, and Forest Creek Plantation, Inc. ("FCP") was established as K4C6R's successor entity with respect to its properties in Forest Creek. The division agreement contained a right of first refusal ("ROFR"), which provides:

> K4C6R, on the one hand, and PNC and FCV, on the other, each grants the other a right of first refusal with respect to the sale of the undeveloped Forest Creek property, to be triggered by a bona fide third[-]party offer to purchase the undeveloped property, provided, however, that this right of first refusal shall apply only to cash-only sales.

On or about 30 September 2015, FCP received an offer to purchase all of FCP's developed and undeveloped property ("the third-party offer" or "the offer"). Although the ROFR is only for undeveloped Forest Creek property, the third-party offer did not allocate the amount being offered for the undeveloped property. FCP forwarded the offer to defendants, who inquired what portion of the offer was allocated to undeveloped

property. FCP did not provide this information, and defendants did not waive the ROFR rights or make an offer. Eventually, the offer expired.

On 2 May 2016, K4C6R, FCP, and PNP (collectively, "plaintiffs") filed a complaint against defendants seeking declaratory judgment as to the parties' rights under the division agreement and injunctive relief, and to recover damages for breach of contract.

Defendants answered the complaint and filed counterclaims on or about 9 September 2016. Plaintiffs answered the counterclaims on 10 November 2016. On 20 November 2016, defendants moved for summary judgment. The matter came on for hearing before the Honorable Charles H. Henry on 6 December 2017, in New Hanover Superior Court.

The trial court entered an order on 29 December 2017 granting summary judgment in part and denying it in part. Conclusion of law 5 of the order interprets the division agreement's ROFR as follows.

> a. That the right of first refusal possessed by Porters Neck Company Inc. and Forest Creek Ventures, Inc. is limited to offers that contemplate the cash sale of undeveloped property within the Forest Creek subdivision or the cash sale of developed property and undeveloped property within the Forest Creek subdivision where the offer delineates the amount of the offer that pertains to the undeveloped property. This same interpretation applies to K4C6R's right of first refusal as well.
>
> b. The Division Agreement requires that in order to entertain any "cash only" offers that contemplate the sale of any undeveloped property, the offeror must allocate the amount being offered for the undeveloped property so a party can decide whether to exercise its right of first refusal.
>
> c. If presented with a cash offer to purchase undeveloped property within the Forest Creek subdivision by a bona fide third[-]party, Porters Neck Company Inc. and Forest Creek Ventures, Inc. will have thirty days to exercise their right of first refusal. This same time limitation applies to K4C6R's right of first refusal as well.
>
> d. There exists no right of first refusal in which the seller finances all of the purchase price of the undeveloped land.

The 29 December 2017 order did not determine all of the claims involved in the action. The remaining claims came on for trial before the Honorable Anna Mills Wagoner at the 19 March 2018 civil jury term in New Hanover Superior Court. The trial court entered an order concluding all claims in dispute between the parties on 5 April 2018.

Defendants filed notice of appeal from the Honorable Judge Charles H. Henry's order on 4 May 2018.

II. Discussion

On appeal, defendants argue the trial court erroneously interpreted the ROFR in its 29 December 2017 order because: (1) conclusion of law 5(a) could be read to hold the ROFR applies to offers to purchase both developed and undeveloped land *only if* the offer specifies the amount designated to purchase the undeveloped property; (2) the parties' ROFR is not limited to cash payment offers; and (3) the division agreement does not state that there is no ROFR if the seller finances all of the purchase price of the undeveloped land. We address each argument in turn.

"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)).

"The construction of a contract is a matter of law for the courts when the language is plain and unambiguous." *Gillespie v. DeWitt*, 53 N.C. App. 252, 266, 280 S.E.2d 736, 746 (citations omitted), *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981). Where, as here, the parties "differ as to the interpretation of language[,]" the language can still be unambiguous. *Walton v. City of Raleigh*, 342 N.C. 879, 881-82, 467 S.E.2d 410, 412 (1996).

The parties do not dispute that the division agreement's provision for a ROFR is unambiguous. We agree. The division agreement provides:

> K4C6R, on the one hand, and PNC and FCV, on the other, each grants the other a right of first refusal with respect to the sale of the undeveloped Forest Creek property, to be triggered by a bona fide third[-]party offer to purchase the undeveloped property, provided, however, that this right of first refusal shall apply only to cash-only sales.

In other words, this provision grants each party a ROFR with respect to the sale of undeveloped Forest Creek property that is triggered by

a bona fide third-party offer to purchase the undeveloped property. It does not limit the ROFR to situations where the third-party only offers to purchase undeveloped property. Therefore, a party is not deprived of its ROFR when a third-party offers for both undeveloped and developed Forest Creek property in the same offer. Further, if a third-party does offer for both undeveloped and developed Forest Creek property, that third-party must specify which portion of its offer is allocated for the undeveloped property so that K4C6R on the one hand, and PNC and FCV on the other, have the opportunity to exercise its ROFR as to the undeveloped Forest Creek property. The division agreement then limits this right by utilizing the limiting language "provided, however," explaining that the ROFR is only triggered by cash only sales.

A. Third-Party Offers for Both Developed and Undeveloped Land

[1] As defendants' first issue on appeal, they contend conclusion of law 5(a) is in error because it could be read to hold the ROFR applies to offers to purchase both developed and undeveloped land *only* if the offer allocates the amount of the offer offered to purchase the undeveloped property, even though the division agreement does not contain this limitation. We agree.

According to conclusion of law 5(a),

> the right of first refusal possessed by Porters Neck Company Inc. and Forest Creek Ventures, Inc. is limited to offers that contemplate the cash sale of undeveloped property within the Forest Creek subdivision or the cash sale of developed property and undeveloped property within the Forest Creek subdivision *where the offer delineates the amount of the offer that pertains to the undeveloped property*. This same interpretation applies to K4C6R's right of first refusal as well.

(Emphasis added). Because this conclusion states that the ROFR is limited to: (1) a third-party offer only for undeveloped land; or (2) a third-party offer for both undeveloped and developed land where the offer allocates the amount offered to purchase the undeveloped property, the conclusion erroneously suggests that the division agreement does not provide a ROFR if a third-party offer for both undeveloped and developed land fails to delineate the amount of the offer that pertains to the undeveloped property. This interpretation of the ROFR would go against the purpose of the ROFR, contradict the plain language of the division agreement, and conflict with conclusion of law 5(b).

The purpose of the ROFR in the division agreement is to give either party the right to purchase undeveloped property before it can be sold to a third-party. The plain language of the division agreement supports this purpose, and does not limit offers for both undeveloped and developed land to those offers that allocate the amount of the offer intended to purchase the undeveloped property. Such a limitation cannot be read into the division agreement. Otherwise, a party could be deprived of their ROFR simply by the third-party offeror offering for both undeveloped and developed land, and failing to allocate the funds offered between the two types of land. This result would create a loophole in conflict with conclusion of law 5(b), which concludes: "The Division Agreement requires that in order to entertain any 'cash only' offers that contemplate the sale of any undeveloped property, the offeror must allocate the amount being offered for the undeveloped property so a party can decide whether to exercise its right of first refusal."

Therefore, because we agree with defendant that there is a potential for conclusion of law 5(a) to be read as causing the order to be inconsistent both with the agreement's purpose, plain language, and conclusion of law 5(b), we hold that to the extent conclusion of law 5(a) could be read to say the ROFR applies to offers to purchase both developed and undeveloped land only if the offer delineates the amount designated to the undeveloped property, it is reversed. In all other respects, it is affirmed.

B. Cash Sales

[2] Next, defendants argue the trial court's conclusion of law 5(a) that the parties' ROFR is limited to third-party offeror's cash payment offers is erroneous because the division agreement's provision that the "right of first refusal shall apply only to cash-only sales" should be interpreted to mean that the party exercising the ROFR must pay cash to purchase the property at issue. We disagree.

The plain language of the division agreement's requirement that the "right of first refusal shall apply only to cash-only sales" clearly provides that the parties' ROFR only applies when a third-party offeror makes a cash offer to purchase undeveloped property. Defendants' argument that this plain language interpretation undermines the parties' intent is without merit. "The intent of the parties is determined by examining the plain language of the contract[,]" *Brown v. Ginn*, 181 N.C. App. 563, 567, 640 S.E.2d 787, 790, *disc. rev. denied*, 361 N.C. 350, 645 S.E.2d 766 (2007), which, here, plainly limits the ROFR's applicability to cash only sales. Accordingly, defendants' argument is without merit.

C. Seller-Financing

[3] Because the trial court did not err in concluding that the division agreement limits the parties' ROFR to third-party offers of cash payment, it follows that defendants' third argument, that the trial court erred by limiting the parties' right of first refusal to offers not involving seller-financing, as described by conclusion of law 5(d), is without merit. The agreement explicitly limits the ROFR's applicability to cash only sales; thus, there exists no right of first refusal in which the seller finances all of the purchase price of the undeveloped land.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order in part, and reverse in part to the extent that conclusion of law 5(a) could be read to hold that the division agreement's ROFR only applies to offers to purchase *both* developed and undeveloped property *only if* the offer delineates the amount designated to the undeveloped property.

AFFIRMED IN PART, REVERSED IN PART.

Judge BRYANT concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

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

Plaintiff and Defendant were partners in a partially-developed subdivision, known as Forest Creek.[1] Because of a dispute, the parties entered into a division agreement which provided, in relevant part, that each would receive about half of the developed and undeveloped properties in Forest Creek. The division agreement contained a right of first refusal ("ROFR"), to apply to "cash-only sales" of the "undeveloped Forest Creek property." That is, the ROFR granted each party the first right to purchase the other party's undeveloped property in Forest Creek should the other party ever decide to sell it. The ROFR did not apply to any of the developed property. Sometime later, Plaintiff received an offer from a third party to purchase both its *developed and undeveloped* Forest Creek property. A question presented is whether such an offer triggers the ROFR.

1. They were also partners in another subdivision, which is not the subject of this present dispute.

The majority holds that the ROFR is triggered where Plaintiff agrees to sell its undeveloped property (burdened by the ROFR) along with its developed property (unburdened by the ROFR) to a third party; that, to exercise the ROFR, Defendant is only required to purchase Plaintiff's undeveloped property; and that, to accommodate Defendant's purchase, should Defendant exercise its ROFR, Plaintiff and the third party must delineate what portion of the purchase price in their contract is attributable to the undeveloped property.

I agree that the ROFR is triggered where Plaintiff agrees to sell its undeveloped property as part of a package deal to a third party, but I disagree with the remedy fashioned by the majority. For the reasons stated below, I conclude that, to exercise the ROFR, Defendant must generally match the third-party offer, by agreeing to purchase both Plaintiff's developed and undeveloped properties, for the price agreed to in the third-party offer. But if Defendant can show that the packaging of the properties was done by Plaintiff in bad faith, the Defendant may exercise its ROFR by purchasing the undeveloped property alone for its fair market value.

The majority further holds that the ROFR is *never* triggered where the third-party offer involves any amount of seller financing, based on the "cash-only" language. Though I generally agree with the majority on this point, for the reasons stated in section II. below, I conclude that the ROFR may *also* be triggered where a financing provision is included by Plaintiff in a deal with a third-party in bad faith.

I. Right of First Refusal

North Carolina allows ROFR's, also known as preemptive rights. *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610-11 (1980). However, to be enforceable, the ROFR must be "reasonable," as a ROFR is a restraint on alienation, which are generally disfavored in the law. *Id.* at 62, 269 S.E.2d at 611.

North Carolina has yet to opine as to whether and how a ROFR is triggered when "the owner of the property attempts to sell [the property burdened by the ROFR] as part of a larger package of properties and the preemptive right agreement is silent on this matter." 1 Webster's Real Estate Law in North Carolina § 9.04 (2017). Nationally, "[c]ourts have chosen from among five different forms of relief in resolving [this] problem." Bernard Daskal, *NOTE: RIGHTS OF FIRST REFUSAL AND THE PACKAGE DEAL*, 22 Fordham Urb. L.J. 461, *469 (1995).

One approach, followed most notably by the Nevada Supreme Court, holds that the ROFR is not triggered at all where the owner of land burdened by a ROFR contracts to sell the land with other land: the right-holder precludes himself from exercising such a right by failing to account for this situation in the agreement which grants him the ROFR. *See Crow-Spieker v. Helms Constr.*, 731 P.2d 348 (Nev. 1987). One criticism with this approach is that a seller of burdened property could avoid triggering the ROFR when selling burdened property by simply including some nominal, unburdened property as part of the deal with the third-party offeror, thereby bypassing the obligation of having to offer the property first to the right-holder.

A second approach also holds that the ROFR is not triggered *but that* the right-holder does have the right to enjoin the sale to the third-party. *See*, *e.g.*, *Manella v. Brown Co.*, 537 F. Supp. 1226, 1229 (D. Mass. 1982); *see also Chapman v. Mutual Life Ins. Co.*, 800 P.2d 1147, 1152 (Wyo. 1990); *Myers v. Lovetinsky*, 189 N.W.2d 571, 576 (Iowa 1971). That is, under this approach, the ROFR right-holder would have no right to purchase the burdened land; but he could seek an injunction to prevent the seller from selling to a third party. This approach, though, heightens the restraint on alienation. It may be that the seller *wants* to sell all his property, not just the burdened portion, or may have a difficult time selling all his property if it must be broken up. Further there may be an economic benefit of selling the burdened property with the unburdened property that would be lost if the seller was not able to sell all his property to a single buyer.

The third approach recognizes that the ROFR is triggered and that the right-holder's remedy is to seek specific performance to purchase the burdened property *without having any obligation to purchase the unburdened property*. *See*, *e.g.*, *Pantry Pride Enters. v. Stop & Shop Cos.*, 806 F.2d 1227, 1229 (4th Cir. 1986); *see also Berry-Iverson Co. v. Johnson*, 242 N.W.2d 126, 134 (N.D. 1976). However, jurisdictions following this approach differ on *how* to establish the price for the burdened land alone, since triggering offers from third parties often do not break down the price between the burdened and unburdened properties. *Id.* For instance, a California court has held that, to exercise his ROFR in the burdened property, the price to be paid by the right-holder is its fair market value, irrespective of whether the third party offered a fair market value for the entire package. *See Maron v. Howard*, 258 Cal App. 2d 473, 488 (1968). The Michigan Supreme Court, though, has held that the right-holder must pay the pro rata portion attributable to

the burdened property of the price offered by the third party for the entire package.[2]

It is this third approach which the majority follows in the present case. However, I have not found a case which follows the approach the majority takes in *establishing the price* Defendant must pay for the burdened property to exercise its ROFR. Specifically, the majority directs Plaintiff and the third-party offeror to determine which portion of the purchase price in the triggering offer is attributable to the burdened property. This approach is problematic, in my view, for a number of reasons. First, Plaintiff could easily thwart Defendant's right simply by attributing an unreasonably greater portion of the purchase price to the burdened property. On the other hand, even if Plaintiff made an "honest" pro rata delineation, this approach fails to recognize the possibility that Plaintiff was willing to sell multiple properties at a discount if sold together. *See, e.g.*, *Smith v. Troxler*, 90 S.E.2d 482, 488 (S.C. 1955) (stating that a seller should "not be compelled to sell one of these lots if he only desired to sell them as a whole").

The fourth approach[3] is similar to the third approach, recognizing that the ROFR provision is triggered, but that the right-holder must agree to purchase the *entire package of properties*, even those not burdened by the ROFR. *See Capalongo v. Giles*, 425 N.Y.S.2d 225, 228 (N.Y. Sup. Ct. 1980), *rev'd on other grounds* 425 N.Y.S.2d 225 (1981); *see also First Nat'l Exch. Bank v. Roanoke Oil Co., Inc.*, 192 S.E. 764 (Va. 1937) (recognizing the right-holder's right to purchase the burdened and unburdened lands where a third party has offered to purchase both as a package). This approach, in essence, applies a "mirror image" rule. *See Bramble v. Thomas*, 914 A.2d 136, 144 (Md. Ct. App. 2007) (applying "mirror image

---

2. Suppose that a third party offered the seller $3 million for burdened and unburdened property and suppose that the unburdened property was worth twice as much as the burdened property. Under the California approach, the right-holder would have the right to purchase the burdened property for its fair market value, taking no account of the $3 million offer. Under the Michigan approach, the right-holder would have the right to purchase the burdened property for $2 million, as this assumes that $2 million of the purchase price is attributable to the burdened property and $1 million is attributable to the unburdened property.

3. The law review article cites this fourth approach as its fifth approach. The article describes as its fourth approach the remedy generally available in any contract claim, the right to seek monetary damages rather than specific performance, citing a Kansas Supreme Court opinion. *Anderson v. Armour & Co.*, 473 P.2d 84, 89 (Kan. 1970). I believe that this remedy is available in lieu of specific performance, where a ROFR provision as been breached.

rule" to the exercise of a ROFR); *Miller v. LeSea Broad*, 87 F.3d 224, 226 (7th Cir. 1996) (endorsing a mirror image rule in the context of a ROFR).

For the following reasons, I believe that this fourth approach is more in harmony with North Carolina law. To be sure, this issue is one of first impression in North Carolina. And in fashioning a rule, we must remember that ROFR's are restraints against alienation, which are generally disfavored in our State. *See Smith*, 301 N.C. at 62, 269 S.E.2d at 611. We must also remember that any seller who attempts to sell land burdened by a ROFR to a third party has a duty of good faith and fair dealing to the right-holder. *See, e.g.*, *Blondell v. Ahmed*, 247 N.C. App. 480, 484, 786 S.E.2d 405, ___ (2016), *aff'd per curiam*, 370 N.C. 82, 804 S.E.2d 183 (2017) (recognizing that every contract includes an implied covenant of good faith and fair dealing).

I conclude that a right-holder must match *all* of the terms of the third-party offer, applying a "mirror image" rule, *unless* the landowner packages the burdened property with unburdened property in bad faith. *See Weber v. Wilde*, 575 P.2d 1053, 1055 (Utah 1978) (implying that when terms are added in good faith to a triggering offer, and not with the ulterior purpose of defeating a ROFR, the terms of the triggering offer must be matched exactly); *Brownies Creek v. Asher Coal*, 417 S.W.2d 249, 252 (Ky. 1967) (holding that the "defeat of the [ROFR] should not be allowed by use of special, peculiar terms or conditions not made in good faith"). This approach recognizes our policy that ROFR's should be construed as to provide the least impediment on a seller's right to alienate property. Also, this approach is harmonious with the general contract principle that a "meeting of the minds [] requires an offer and acceptance in the exact terms[.]" *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985). And, at the same time, this approach recognizes that any contract provision contains an implied duty of good faith and fair dealing.

Therefore, I conclude that in the present case, where the ROFR provision is silent on package sales, there is a strong presumption that Defendant may only exercise its ROFR by matching the terms of the triggering offer. 1 Webster's Real Estate Law in North Carolina § 9.04 (2017) (defining a preemptive right as the right-holder having the right "*to match* bona fide offers" (emphasis added)). But I also conclude that this presumption may be overcome by Defendant—whereby Defendant may be allowed to exercise the ROFR by purchasing *only* the burdened property – if it shows that Plaintiff packaged the burdened property with the unburdened property in bad faith.

II. "Cash-Only"/Seller Financing

The majority concludes that the ROFR is only triggered by third-party offers that are for cash; i.e., offers that do not require a trade or any amount of seller financing. It could be argued that the "cash-only" provision in the ROFR at issue does not prevent the ROFR from triggering where a triggering offer includes seller financing, but that the "cash-only" language only requires that Defendant make a cash tender of equal value to properly exercise the ROFR. But it could also be argued that the parties meant for the ROFR to be triggered only where Plaintiff has accepted a "cash-only" offer because there may be situations where Plaintiff may want to employ seller financing for a portion of the price for tax reasons or other reasons. This ambiguity should be resolved by strictly construing the provision against creating a restraint on alienation. As such, I *generally* agree with the majority that the ROFR is only triggered where the third-party offer is a cash-only offer. But I conclude that the ROFR may *also* be triggered even where a third-party offer is not for all cash *if* the alternate form of payment in the triggering offer is included in bad faith. In such case, Defendant should be allowed to purchase the property for an equivalent value in cash.

I do note that the trial court's conclusions are inconsistent. Specifically, while paragraph 5(a) of the order concludes that only cash sales trigger the ROFR, 5(d) concludes that the ROFR fails to trigger only where "the seller finances *all of the purchase price*[.]" That is, 5(a) restricts the right of first refusal to cash-only deals, but 5(d) seems to allow for the ROFR to be triggered even where the seller agrees to finance a portion (but not all) of the purchase price. I would reverse these inconsistent conclusions based on my view that only cash sales trigger the ROFR, except where a non-cash tender provision is included in a triggering offer in bad faith.

McCULLERS v. LEWIS

[265 N.C. App. 216 (2019)]

BRITTNEY McCULLERS; AND RACHEL GOODLING, AS GUARDIAN AD LITEM FOR THE MINOR CHILD BRI'NAJASHA McCULLERS, PLAINTIFFS
v.
TAYLORIA LEWIS, IN HER INDIVIDUAL CAPACITY, AND MICHAEL AYODELE, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. COA18-825

Filed 7 May 2019

1. Appeal and Error—interlocutory appeal—motions to dismiss—Rule 28—substantial right

In a torts action against two public housing managers—who appealed the denial of their motions to dismiss on estoppel grounds and under Rules 12(b)(1), 12(b)(2), and 12(b)(6)—only the denial of the managers' Rule 12(b)(2) motion was immediately appealable because it was the only one mentioned in their statement of the grounds for appellate review (N.C. R. App. P. 28(b)). Moreover, the denial of their Rule 12(b)(2) motion premised on public official immunity constituted an adverse ruling on personal jurisdiction, thereby affecting a substantial right.

2. Immunity—public official immunity—motion to dismiss—intentional tort claim—punitive damages

In a torts action against two public housing managers asserting public official immunity, the trial court properly denied the managers' motion to dismiss plaintiffs' cause of action for intentional infliction of emotional distress (IIED)—an intentional tort—because public official immunity may only insulate public officials from allegations of mere negligence. Additionally, because plaintiffs could establish a right to punitive damages if they succeeded in litigating their IIED claim, the managers' motion to dismiss plaintiffs' claim for punitive damages was also properly denied.

3. Immunity—public housing managers—public official immunity

In a torts action against two public housing managers with the Raleigh Housing Authority (RHA), the managers were "public officials" for immunity purposes where the RHA clearly delegated its statutory duties to the managers, and where the managers exercised a portion of the RHA's sovereign powers under N.C.G.S. § 157-9 and performed discretionary duties when overseeing housing projects. Therefore, public official immunity shielded the managers from plaintiffs' claims based in negligence where the managers acted

neither outside the scope of their official authority nor with malice when they declined to move plaintiffs to another apartment.

Appeal by Defendants from order entered 10 May 2018 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 March 2019.

Legal Aid of North Carolina, Inc., by Thomas Holderness, Hannah Guerrier, and Janet McIlwain, for Plaintiffs-Appellees.

The Francis Law Firm, PLLC, by Charles T. Francis and Ruth A. Sheehan, for Defendants-Appellants.

COLLINS, Judge.

Defendants Tayloria Lewis and Michael Ayodele appeal from an order denying their motions to dismiss Plaintiffs' complaint under North Carolina Rule of Civil Procedure 12 and on estoppel grounds. Defendants contend that the trial court erred by failing to conclude that (1) Defendants were shielded from suit by the doctrines of sovereign immunity and governmental immunity and (2) this lawsuit is an improper collateral attack on the decision of another trial court judge not to allow Defendants to be joined in a separate proceeding. We dismiss in part, affirm in part, and reverse in part.

I. Background

On 29 November 2017, Plaintiffs filed their complaint in Wake County Superior Court against Defendants, who both work for the Raleigh Housing Authority ("RHA"). In their complaint, Plaintiffs seek damages in connection with Defendants' alleged failure to transfer Plaintiffs to another apartment following various issues Plaintiffs allege to have experienced at their RHA-administered apartment, and bring causes of action for (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, and (3) negligence, as well as a claim for (4) punitive damages.

On 19 February 2018, Defendants filed motions to dismiss the complaint under N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) (2017), and on estoppel grounds, as well as an answer to the complaint. Defendants' motions were heard on 26 April 2018, and on 10 May 2018 the trial court denied Defendants' motions in full. Defendants timely appealed to this Court on 8 June 2018.

II. Appellate Jurisdiction

[1] We first address whether this Court has jurisdiction to hear Defendants' appeal from the trial court's denials of their motions to dismiss.

The trial court's denials of Defendants' motions to dismiss are interlocutory orders from which there is generally no right of immediate appeal. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, the North Carolina General Statutes set forth certain circumstances in which litigants like Defendants who are subject to an interlocutory order may immediately appeal, including when an interlocutory order "[a]ffects a substantial right," N.C. Gen. Stat. §§ 1-277(a) (2017), 7A-27(b)(3)(a) (2017), or makes an adverse ruling as to personal jurisdiction, N.C. Gen. Stat. § 1-277(b) (2017). North Carolina Rule of Appellate Procedure 28(b) sets forth the required contents for an appellant's brief, including the requirement of stating the grounds for appellate review, and specifically sets forth that "[w]hen an appeal is interlocutory, the statement [of grounds for appellate review] must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (2018).

Defendants made motions to dismiss the complaint under Rules 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(6) (failure to state a claim upon which relief can be granted), as well as on estoppel grounds, all of which were denied by the trial court in its interlocutory order. But as a threshold matter, the statement of the grounds for appellate review in Defendants' brief only argues that the trial court's denial of its Rule 12(b)(2) motion affects a substantial right. Defendants thus fail to satisfy their burden under Appellate Rule 28(b) as to all but their Rule 12(b)(2) argument, which renders Defendants' appeal of the denial of their Rule 12(b)(1), Rule 12(b)(6), and estoppel motions all subject to dismissal. *See Bezzek v. Bezzek*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2019 N.C. App. LEXIS 121, *3 (2019) ("When an appeal is interlocutory and not certified for appellate review pursuant to Rule 54(b), the appellant must include in the statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. Otherwise, the appeal is subject to dismissal.").

Even had Defendants' brief complied with Appellate Rule 28(b), their appeal of the denial of their Rule 12(b)(1), 12(b)(6), and estoppel

motions would still be dismissed. Regarding the estoppel motion, the denial of a motion to dismiss affects a substantial right when the motion to dismiss "makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Fox v. Johnson*, 243 N.C. App. 274, 281, 777 S.E.2d 314, 321 (2015). Here, Defendants nowhere asserted that the prior action upon which they base their estoppel motion has reached final judgment on the merits, and as such, Defendants failed to make the colorable assertion necessary to claim that the denial of their estoppel motion affects a substantial right. *See Bishop v. Cty. of Macon*, 250 N.C. App. 519, 523, 794 S.E.2d 542, 547 (2016) (elements of collateral estoppel, including "a prior suit resulting in a final judgment on the merits"). The trial court's denial of Defendants' estoppel motion is therefore interlocutory and not appealable, and Defendants' appeal thereof is accordingly dismissed.

This Court's decision in *Can Am South, LLC v. State*, 234 N.C. App. 119, 759 S.E.2d 304 (2014), is instructive regarding the Rule 12 motions. In *Can Am*, as here, the defendants moved to dismiss the plaintiff's claims under Rules 12(b)(1) and (2), but not under Rule 12(b)(6), "based on the defense of sovereign immunity," and moved to dismiss under Rule 12(b)(6) "for failure of the complaint to adequately plead." *Id.* at 122, 759 S.E.2d at 307. The *Can Am* Court dismissed the appeal because the denial of the defendants' Rule 12(b)(6) motion "involve[d] neither a substantial right under section 1-277(a) nor an adverse ruling as to personal jurisdiction under section 1-277(b), and thus is not immediately appealable[.]" *Id.* at 124, 759 S.E.2d at 308. Concerning the sovereign-immunity-based motions, the *Can Am* Court said that "[a] denial of a Rule 12(b)(1) motion based on sovereign immunity does not affect a substantial right [and is] not immediately appealable under section 1-277(a)," but that "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* at 122-24, 759 S.E.2d at 307-08 (citations omitted).

Here, following *Can Am*, Defendants' appeal of the denials of their Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss are not immediately appealable and thus not properly before us, and are dismissed. However, as Defendants correctly argue, the denial of their Rule 12(b)(2) motion to dismiss is an adverse ruling on personal jurisdiction. Thus Defendants' appeal thereof is properly before us pursuant to N.C. Gen. Stat. § 1-277(b) and we will determine whether the trial court erred in denying that motion.

III. Standard of Review

"The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (discussing various procedural contexts). "[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) (internal citation omitted). Where, as here, the defendant "supplements his motion to dismiss with an affidavit or other supporting evidence,"[1] the plaintiff cannot rest on the unverified allegations in the complaint; rather, the plaintiff "must respond by affidavit or otherwise . . . setting forth specific facts showing that the court has [personal] jurisdiction." *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83; *Bauer*, 207 N.C. App. at 69, 698 S.E.2d at 761 (internal quotation marks, brackets, and citation omitted). If the plaintiff offers no evidence in response, the court considers (1) any allegations in the complaint that are not controverted by the defendant's evidence and (2) all facts in the defendant's evidence, which are uncontroverted because of the plaintiff's failure to offer evidence in response (here, the "Trial Record"). *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 183.

Generally, when this Court reviews a trial court's denial of a Rule 12(b)(2) motion to dismiss, it considers whether the trial court's findings of fact are supported by competent evidence in the record; if so, the findings of fact are conclusive on appeal. *Inspirational Network*, 131 N.C. App. at 235, 506 S.E.2d at 758. Under N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2017), however, the trial court is not required to make specific findings of fact unless a party so requests. *Banc of Am.*, 169 N.C. App. at 694, 611 S.E.2d at 183. Where, as here, the record contains no indication that the parties requested that the trial court make specific findings of fact, and the order appealed from contains no findings, we presume

1. Defendants' memorandum in support of their motions to dismiss appended a number of exhibits, most notably "job description[s]" describing the duties of those who hold the positions at RHA that Defendants allegedly held. The record does not reflect any objection by Plaintiffs to Defendants' submission of these documents, or to any use thereof, and Plaintiffs themselves cite to these documents in their appellate brief in describing Defendants' duties at RHA. As such, any argument that these documents do not accurately describe Defendants' duties at RHA is waived, *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 238-39, 506 S.E.2d 754, 759-60 (1998), and we presume that the trial court considered these documents as accurately describing Defendants' duties.

that the trial court made factual findings sufficient to support its ruling, and it is this Court's task to review the record to determine whether it contains evidence that would support the trial court's legal conclusions, *Banc of Am.*, 169 N.C. App. at 695, 611 S.E.2d at 183, and to review the trial court's legal conclusions *de novo*, *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 278, 646 S.E.2d 129, 133 (2007).

III. Analysis

[2] In their Rule 12(b)(2) motion to dismiss, Defendants state, in relevant part, that the trial court "lacks . . . personal jurisdiction over them on the basis that they are or were public employees or public officials at all times pertinent to this action and [were] therefore cloaked with sovereign or governmental immunity." By denying this motion, the trial court implicitly found facts supporting its implicit general conclusion that Defendants were subject to personal jurisdiction, and its implicit specific conclusion that Defendants could not shield themselves from suit via the doctrines of sovereign or governmental immunity.

As a technical matter, neither doctrine can itself protect Defendants, since sovereign immunity and governmental immunity only apply in actions brought against state and local governments, respectively, and not in actions brought against individuals like Defendants. *See Wray v. City of Greensboro*, 370 N.C. 41, 47-48, 802 S.E.2d 894, 898-99 (2017) (describing sovereign and governmental immunity). But Defendants' Rule 12(b)(2) motion claims they are immune by virtue of their claimed status as "public officials," which refers to a related doctrine known as public official immunity.[2]

Public official immunity is a " 'derivative form' of governmental immunity" that insulates a public official from personal liability for mere negligence in the performance of his duties unless his alleged actions were malicious or corrupt or fell outside and beyond the scope of his duties. *Fullwood v. Barnes*, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016) (citation omitted); *Schlossberg v. Goins*, 141 N.C. App. 436, 445, 540 S.E.2d 49, 56 (2000).

---

2. Given the close relationship between the governmental immunity doctrine and the public official immunity doctrine, *Fullwood*, 250 N.C. App. at 38, 792 S.E.2d at 550 ("The defense of public official immunity is a 'derivative form' of governmental immunity" (citation omitted)), the fact that Defendants alleged their status as "public officials" in the text of the motion, and the fact that Plaintiffs raised no objection in their brief, N.C. R. App. P. 28(a), we consider Defendants' Rule 12(b)(2) motion to have stated a defense under the public official immunity doctrine.

This definition is dispositive as to one aspect of this case. Since public official immunity may only insulate public officials from allegations of mere negligence, only those of Plaintiffs' causes of action sounding in negligence come within the doctrine's reach. Accordingly, we affirm the trial court's denial of Defendants' motion to dismiss Plaintiffs' first cause of action for intentional infliction of emotional distress, which is an intentional tort claim. *See Hawkins v. State*, 117 N.C. App. 615, 630, 453 S.E.2d 233, 242 (1995) (affirming trial court's denial of motion to dismiss intentional infliction of emotional distress claim on public official immunity grounds). Moreover, we also affirm the trial court's denial of the motion to dismiss Plaintiffs' fourth cause of action for punitive damages, because if Plaintiffs are successful with their intentional infliction of emotional distress claim, they may also establish a right to punitive damages. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 656-57, 543 S.E.2d 901, 905-06 (2001) (affirming denial of summary judgment motion claim seeking relief from punitive damages cause of action brought by public official sued in his individual capacity who raised public official immunity as a defense).

Regarding Plaintiffs' second and third causes of action, for negligent infliction of emotional distress and negligence respectively, we must review the Trial Record to determine whether it supports a conclusion that Defendants (1) were not public officials (i.e., were mere public employees), (2) acted outside and beyond the scope of their official authority, or (3) acted with malice or corruption.

We address each element in turn.

a. Public Officials

[3] Although public officials may not be held individually liable for mere negligence in actions taken without malice or corruption and within the scope of their duties, public employees may be held individually liable for such actions. *Isenhour v. Hutto*, 350 N.C. 601, 608-10, 517 S.E.2d 121, 127 (1999) (quotation marks and citation omitted).

Our Supreme Court has "recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Id.* at 610, 517 S.E.2d at 127. Courts applying this framework have recently held that a defendant seeking to establish public official immunity must demonstrate that all three of the *Isenhour* factors are present. *Leonard v. Bell*, ___ N.C. App. ___,

___, 803 S.E.2d 445, 453 (2017) ("Because we hold that defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that defendants are not public officials entitled to immunity.").

We have also noted that, in addition to the *Isenhour* factors, public officials also are often required to take an oath of office, while a public employee is not required to do so. *Fraley v. Griffin*, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011). But courts considering claims of public official immunity have made clear that, unlike the *Isenhour* factors, an oath of office is not "absolutely necessary[.]" *Baker v. Smith*, 224 N.C. App. 423, 431 n.5, 737 S.E.2d 144, 149 n.5 (2012).

1. Position Created by Constitution or Statute

"A position is considered created by statute when the officer's position ha[s] a clear statutory basis or the officer ha[s] been delegated a statutory duty by a person or organization created by statute or the Constitution." *Id.* at 428, 737 S.E.2d at 148 (internal quotation marks, citations, and emphasis omitted).

Defendants argue that their positions are "created by" N.C. Gen. Stat. § 157 (2017), but point to no language in our Constitution or any statute expressly creating their positions. Defendants also argue that they have been delegated statutory duties by RHA,[3] which is statutorily authorized to (1) "employ . . . such other officers, agents, and employees, permanent and temporary, as it may require" and (2) "delegate to one or more of its agents or employees such powers or duties as it may deem proper." N.C. Gen. Stat. § 157-5(e); *see also* N.C. Gen. Stat. § 157-9(a) (authorizing RHA to "exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, though or by an agent or agents which it may designate").

Our case law makes clear that where a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vests the authority to delegate passes the first the *Isenhour* factor. *Baker*, 224 N.C. App. at 428-30, 737 S.E.2d at 148-49 (holding that where the relevant statute (1) gave the constitutionally-created sheriff the duty to take "care and custody of the jail" and (2) provided the sheriff with authority to "appoint a deputy or employ others to assist him in performing his official duties[,]" an assistant jailer's "position [was]

3. Plaintiffs concede that RHA is an organization created by statute.

created by [the North Carolina] Constitution" (emphasis omitted)); *Hobbs v. N.C. Dep't of Hum. Res.*, 135 N.C. App. 412, 421, 520 S.E.2d 595, 602 (1999) (holding that because the relevant statute gave the director of social services the authority "to delegate to one or more members of his staff the authority to act as his representative," social workers were acting as public officials for public official immunity purposes (citation omitted)). In their brief, Plaintiffs concede that N.C. Gen. Stat. § 157-5(e) "allows a housing authority to delegate its powers and duties to one or more of its agents," but argue that "it does not require that all employees . . . actually receive any delegated duties."

The Trial Record shows that many of Defendants' duties were created by N.C. Gen. Stat. § 157, and must therefore have been delegated them by RHA. For example, N.C. Gen. Stat. § 157-9 empowers the RHA to "prepare, carry out and operate housing projects"[4] and to "manage as agent of any city or municipality . . . any housing project constructed or owned by such city." N.C. Gen. Stat. § 157-9(a). Exhibit 3 to Defendants' memorandum in support of their motion to dismiss describes Lewis' duties as including, *inter alia*, "[p]lann[ing], direct[ing], and coordinat[ing] the work of [subordinates] in facilitating the orderly management and operations of all housing units" and "[d]evelop[ing] and implement[ing] management plans," and Exhibit 4 describes Ayodele's duties as including, *inter alia*, "managing one or more public housing and/or affordable market rate communities" and "overall management of [a public housing and/or affordable market rate community] including planning, budgeting, marketing, and fiscal management." Such job descriptions parrot the duties expressly granted to RHA to operate and manage housing projects, which Plaintiffs concede RHA was authorized to delegate by statute.

The significant overlap between RHA's delegable duties and Defendants' duties as described in Exhibits 3 and 4—which Plaintiffs did not contest with their own proffer of evidence, and which the uncontroverted allegations of Plaintiffs' complaint do not call into question—leads us to conclude that Defendants held positions created by statute.

2. Exercise of a Portion of the Sovereign Power

While the contours of what the sovereign power includes are not clearly defined by our case law, it is evident that a defendant claiming themself a public official for immunity purposes must show that they

4. "Housing project" is statutorily defined as including "all real and personal property" and "buildings" "constructed [*inter alia*] [t]o provide safe and sanitary dwelling accommodations" for persons of modest incomes. N.C. Gen. Stat. § 157-3(12).

have exercised a portion of some power that only the sovereign may exercise, as granted to the sovereign by either the Constitution or a statute. *Compare Baker*, 224 N.C. App. at 430, 737 S.E.2d at 149 (holding that an assistant jailer exercises a portion of the sovereign power "by detaining misdemeanants and those awaiting trial in the jail"), *with Mullis v. Sechrest*, 126 N.C. App. 91, 98, 484 S.E.2d 423, 427 (1997) (denying a public school teacher immunity "because his duties at the time the alleged negligence occurred are not considered in the eyes of the law to involve the exercise of the sovereign power"), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998); *see also Leonard*, ___ N.C. App. at ___, 803 S.E.2d at 453 (noting that "there is nothing uniquely sovereign about the health services provided by [the defendant, a physician,] to plaintiff in this case, except that plaintiff was an inmate" in a state prison).

Plaintiffs concede that the "sovereign powers associated with housing authorities are set forth in N.C. Gen. Stat. § 157-9." *See* N.C. Gen. Stat. § 157-9 (listing the "public powers" of housing authorities like RHA). As noted above, the Trial Record demonstrates significant overlap between the N.C. Gen. Stat. § 157-9 sovereign powers and the duties delegated to Defendants. Plaintiffs' argument that "there is little overlap between the powers listed and Defendants' duties" is actually a concession regarding the second *Isenhour* factor, since *any* overlap between RHA's public powers and the delegable duties performed by Defendants on RHA's behalf compels a conclusion that Defendants exercised "*a portion* of the sovereign power." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (1999) (emphasis added); *see also State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) ("the incumbent of an office shall involve the exercise of *some portion* of the sovereign power") (emphasis added)).

We accordingly conclude that Defendants exercised a portion of the sovereign power.

3. Discretion

Our Supreme Court has said that public officials "exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Meyer v. Walls*, 347 N.C. 97, 113, 489 S.E.2d 880, 889 (1997) (internal quotation marks and citations omitted). The decision making involved must be substantial, as "a mere employee doing a mechanical job, . . . must exercise some sort of judgment in plying his shovel or driving his truck -- but he is in no sense invested with

a discretion which attends a public officer in the discharge of public or governmental duties, not ministerial in their character." *Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

The Trial Record shows that Defendants were tasked with, *inter alia*, "independently" (1) planning, directing, and coordinating the management of RHA housing units, (2) developing, implementing, and executing management plans, (3) formulating various policies and procedures, (4) evaluating overall program and employee performance, (5) recommending and preparing budgets, (6) inspecting properties for conformance with applicable regulations, (7) planning the work of and supervising staff, (8) analyzing rents, (9) counseling residents, and (10) resolving disputes involving residents, duties which led RHA to seek applicants with experience in "management" and "decision making."

Plaintiffs list certain of Defendants' duties that arguably require little judgment, and argue that Defendants "executed ministerial tasks[.]" But as Plaintiffs note, we cannot single out a handful of Defendants' duties in deciding whether they require discretion, but must consider Defendants' duties as a whole. *Baker*, 224 N.C. App. at 431, 737 S.E.2d. at 150. Moreover, Plaintiffs' argument conflicts with the fact that their complaint, distilled to its essence, alleges that Defendants harmed Plaintiffs by refusing or failing to exercise their discretionary authority to move Plaintiffs to another apartment: Plaintiffs allege therein that Defendants "refused," "ignored," or "denied" Plaintiffs' requests for accommodation. Such allegations speak the language of discretion. The Trial Record contains nothing tending to show that Defendants had any specific, fixed duty to transfer Plaintiffs such that Defendants' denials of Plaintiffs' requests constituted refusals or failures to execute already-made decisions, and any effort to hold Defendants liable for refusing or failing to make a decision that was not theirs to make clearly must fail.

We accordingly conclude that Defendants' positions were discretionary in nature, and that Defendants were public officials in the meaning of *Isenhour*.[5]

b. Scope of Authority

Even as public officials, sovereign immunity will not shield Defendants from suit for actions they took that fell outside and beyond the scope of their official authority.

---

5. The Trial Record contains no clear indication of whether Defendants took an oath of office or not. But since this consideration is not dispositive to the *Isenhour* public-official analysis, *see Baker*, 224 N.C. App. at 431 n.5, 737 S.E.2d at 149 n.5, and we find the other *Isenhour* factors support our conclusion, we need not analyze this consideration.

But the Trial Record contains no evidence that Defendants exceeded their authority in this case. Plaintiffs' conclusory allegation that "[u]pon information and belief, [Defendants] also exceeded their authority" is insufficient as a matter of pleading to withstand Defendants' motion to dismiss. *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890 (noting that conclusory allegations are insufficient to withstand a motion to dismiss, and that "[t]he facts alleged in the complaint must support such a conclusion"). The complaint elsewhere alleges that Defendants were public housing managers at RHA, and as discussed above, the thrust of Plaintiffs' argument is that Defendants harmed Plaintiffs by refusing or failing to exercise the discretionary authority Defendants had, as RHA public housing managers, to move Plaintiffs to another apartment. Without a clear duty to exercise that authority, which the Trial Record does not reflect, the trial court lacked evidence to conclude that Defendants acted outside and beyond the scope of their authority by not moving Plaintiffs to another apartment. *See Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994) ("the law is such that mere inaction does not constitute negligence in the absence of a duty to act" (internal quotation marks and citations omitted)).

We accordingly conclude that the Trial Record does not support a conclusion that Defendants acted outside and beyond the scope of their official authority.

c. Malice or Corruption

Finally, even as public officials acting within the scope of their official authority, sovereign immunity will not shield Defendants from suit for actions they took which were malicious or corrupt. Plaintiffs make no allegation that Defendants' actions or inactions were corrupt, and we accordingly analyze only whether the Trial Record contains evidence that Defendants' actions or inactions were malicious.

"A malicious act is one which is: (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Fullwood*, 250 N.C. App. at 38, 792 S.E.2d at 550 (internal quotation marks and citations omitted). This Court has said that public officials are presumed to have executed their duties in good faith, absent substantial evidence to the contrary:

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging

> the validity of public officials actions to overcome this presumption by competent and substantial evidence. Moreover, [e]vidence offered to meet or rebut the presumption of good faith must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise.

Strickland v. Hedrick, 194 N.C. App. 1, 10-11, 669 S.E.2d 61, 68 (2008) (internal quotation marks and citations omitted).

Beyond a conclusory allegation that Defendants "acted with malice," which is insufficient standing alone to withstand Defendants' motion to dismiss, *Meyer*, 347 N.C. at 114, 489 S.E.2d at 890, the complaint alleges only that Defendants (1) "acted with . . . reckless indifference to the [Plaintiffs'] rights" and (2) refused or failed to exercise their discretionary authority to transfer Plaintiffs to another apartment, which Plaintiffs allege was "intended . . . to cause [Plaintiffs] extreme emotional distress." This Court has made clear that a plaintiff may not satisfy its burden of pleading malice by alleging the defendant was recklessly indifferent. *Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000) (citations omitted). And Plaintiffs' other conclusory allegations that Defendants' actions or inactions were intended to cause them harm are insufficient to overcome the presumption that public officials act in good faith. *See Mitchell v. Pruden*, 251 N.C. App. 554, 561-62, 796 S.E.2d 77, 83 (2017) (noting the plaintiffs' "bare, conclusory allegations that defendant acted with malice" in holding that, "[b]ecause we presume that defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary, we hold that the [] complaint failed to allege facts which would support a legal conclusion that defendant acted with malice").

In sum, we conclude that the Trial Record does not support a conclusion that Defendants acted with malice or corruption.

IV. Conclusion

Because we conclude that Defendants (1) were not mere public employees, (2) did not act outside and beyond the scope of their official authority, and (3) did not act with malice or corruption, we conclude that Defendants were shielded from Plaintiffs' causes of action sounding in negligence by the public official immunity doctrine, and the trial court erred in denying Defendants' Rule 12(b)(2) motion to dismiss Plaintiffs' second and third causes of action for lack of personal jurisdiction.

Defendants' appeal of the denial of their Rule 12(b)(1), 12(b)(6), and estoppel motions is dismissed, the denial of Defendants' Rule 12(b)(2) motion is affirmed as to Plaintiffs' first and fourth causes of action, and the denial of Defendants' Rule 12(b)(2) motion is reversed as to Plaintiffs' second and third causes of action. This case is remanded to the trial court for entry of an order dismissing Plaintiffs' second and third causes of action and for further proceedings consistent with this opinion.

DISMISSED IN PART, AFFIRMED IN PART, AND REVERSED IN PART.

Chief Judge McGEE and Judge DIETZ concur.

CHERYL CHRISTINE POAGE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT BATEMENT POAGE, PLAINTIFFS

v.

IRA COX; GAIL COX; AND SCHOENEN POOL AND SPA, LLC, DEFENDANTS

No. COA18-1066

Filed 7 May 2019

1. Pretrial Proceedings—motion for summary judgment—trial court decision—prior to end of discovery period—prejudice

Plaintiffs in a negligence action did not demonstrate they were prejudiced by the trial court's entry of summary judgment for defendants before the discovery period ended, because plaintiffs were not awaiting any responses to discovery requests, nor did they request additional discovery in order to defend against the summary judgment motions.

2. Appeal and Error—waiver—unsworn expert testimony—motion to strike denied—no cross-appeal or argument

Defendants' failure to cross-appeal from the denial of their motions to strike unsworn expert-prepared materials (which were submitted by plaintiffs in response to defendants' motions for summary judgment) or to argue on appeal that the trial court abused its discretion constituted a waiver of the argument that the materials should not be considered on appeal.

3. Negligence—duty of care—vacation rental—hot tub—fit and habitable condition

Owners of a vacation rental home, subject to the Vacation Rental Act, owed plaintiffs a duty of care to rent their property, including a hot tub located there, in a fit and habitable condition. Even assuming the owners could delegate any duty to a third-party company that serviced the property's hot tub (from which plaintiffs alleged they contracted Legionnaires' disease), contradictory evidence from the owners and the third-party company created a genuine issue of material fact precluding summary judgment.

4. Negligence—duty of care—breach—vacation rental—hot tub—inadequate maintenance

Sufficient evidence was presented to create a genuine issue of material fact that the owners of a vacation rental home breached their duty of care to renters to provide the property, including a hot tub located there (from which plaintiffs alleged they contracted Legionnaires' disease), in a fit and habitable condition. Expert analysis stated it was more likely than not that improper maintenance of the hot tub and adjacent waterfall feature created conditions in which bacteria could grow.

5. Negligence—proximate cause—vacation rental—hot tub—inadequate maintenance—Legionnaires' disease

Sufficient evidence was presented to create a genuine issue of material fact that improper maintenance of a hot tub and adjacent waterfall feature at a vacation rental home caused renters to contract Legionnaires' disease. Although samples of the water were negative for the bacteria that causes the disease, the tests were conducted over a month after plaintiffs rented the property and after the hot tub had been drained and cleaned.

6. Negligence—injury—vacation rental home—hot tub—Legionnaires' disease—pain and suffering—medical expenses

Sufficient evidence was presented to create a genuine issue of material fact regarding renters' injuries from contracting Legionnaires' disease from an improperly maintained hot tub at a vacation rental home, where they were diagnosed with the disease, hospitalized, incurred medical expenses, and experienced pain and suffering.

7. Appeal and Error—abandonment of issue—summary judgment—breach of contract

Plaintiffs failed to preserve for review any argument regarding their breach of contract claims by not addressing the issue on

appeal. Although the trial court's order granting summary judgment to defendants on plaintiffs' negligence claim did not specifically mention the breach of contract claim, plaintiffs' failure to make any argument other than to assert that the claim was not ripe for review constituted abandonment.

Appeal by plaintiffs from order entered 12 June 2018 by Judge Michael L. Robinson in Forsyth County Superior Court. Heard in the Court of Appeals 5 March 2019.

Fox Rothschild LLP, by Robert H. Edmunds, Jr., Kip David Nelson, and Jules Zacher, pro hac vice, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, for defendant-appellees Cox.

Robert B. Laws for defendant-appellee Schoenen Pool and Spa, LLC.

TYSON, Judge.

Cheryl Christine Poage appeals the trial court's order granting summary judgment to Ira and Gail Cox ("the Coxes") and Schoenen Pool and Spa, LLC, ("Schoenen"). We affirm in part, reverse in part, and remand.

I. Background

The Coxes owned a mountain cabin ("the Cabin") they rented to vacationers. In July 2009, they installed a hot tub and an adjacent waterfall on their property. The Coxes had hired Schoenen to maintain, clean, and perform routine service on the hot tub and waterfall.

Cheryl Poage reserved the Cabin on the Airbnb.com website. Cheryl Poage; her husband, Robert Poage; and Robert's two adult sons, Eric and Jason Poage; stayed at the Cabin from 24 August to 27 August 2015. During their visit, Cheryl and Robert Poage spent time in and around the hot tub and waterfall. On 29 August 2015, shortly after their visit to the Cabin, Cheryl Poage began experiencing weakness and fever. Robert Poage began experiencing fever, weakness, chills, and headache. Cheryl and Robert Poage ("the Poages") were allegedly diagnosed with *Legionella* pneumonia, more commonly known as Legionnaires' disease, and both allegedly required hospitalization.

On 10 August 2016, the Poages filed a complaint alleging they had contracted Legionnaires' disease after coming into contact with

Legionella bacteria in the Coxes hot tub and waterfall. The Poages asserted claims for negligence against the Coxes and Schoenen (collectively "Defendants"), and breach of contract against the Coxes. The Poages alleged, among other things:

> 15. Defendants Cox owed a duty to their rental customers, including plaintiffs, to exercise reasonable care in the operation and maintenance of the rental unit and to keep the facility in a reasonably safe condition.
>
> 16. Defendants Cox further owed a duty to their rental customers, including plaintiffs, to warn of hidden perils or unsafe conditions known by defendants or discoverable by reasonable inspection.
>
> . . .
>
> 24. It was the duty of Defendant Schoenen [to properly] maintain the said water feature in a reasonably safe manner so as not to subject guests and visitors to the premises, including plaintiffs, to unreasonable risks of harm.
>
> . . .
>
> 27. Plaintiffs contracted with Defendants Cox for the rental of defendants' property for occupancy by plaintiffs.
>
> 28. An implied term of the rental contract was that the rental property would be suitable and safe for normal occupancy, and that plaintiffs would have the quiet enjoyment of same.
>
> 29. Defendants Cox breached the contract by providing plaintiffs with a facility that included an unreasonably dangerous peril, namely the contaminated water feature described herein.
>
> 30. As a proximate result of said defendants' breach of their contract with plaintiffs, plaintiffs suffered the injuries and losses set forth above.

Robert Poage died on 16 December 2016, purportedly for reasons unrelated to Legionnaires' disease, and Plaintiff moved to substitute herself for him as executrix of his estate in the lawsuit. On 14 December 2017, the trial court entered a scheduling and discovery consent order, which required the completion of all discovery by 13 July 2018. The Coxes and Schoenen filed motions for summary judgment pursuant to

North Carolina Rule of Civil Procedure 56 in April 2018. The parties subsequently submitted briefs, exhibits and deposition transcripts.

A hearing was conducted on Defendants' motions on 11 June 2018 and the trial court issued an order granting Defendants' summary judgment.

The trial court's summary judgment order stated, in relevant part:

> 2. During the hearing on June 11, 2018, counsel for both Defendants made oral motions to strike the statements or affidavits of Carl Fliermans and Jonathan Kornreich. Defendants contend that the statements were not timely served, did not contain necessary attestations, were not sworn to, or were otherwise procedurally improper and inadmissible and are thus not properly considered as evidence with regard to the Motions. The Court in its discretion denies these motions to strike to the extent they are based on claimed procedural irregularities and determines that, for purposes of its consideration of the Motions, it will consider the statements made by Dr. Fliermans and Mr. Kornreich. Whether the testimony or statements within the documents are admissible and properly considered by the Court, or sufficient in and of themselves, when combined with other evidence brought forward by Plaintiffs, to permit Plaintiffs to avoid summary judgment, is an entirely different and is matter dealt with hereinbelow.
>
> 3. Notwithstanding the Court's denial of the oral motions to strike, and based on the Court's review of the Motions, its review of the Court file, including the statements brought forward by Plaintiffs, and its consideration of the arguments of counsel for the parties, the Court concludes that Defendants' motions for summary judgment should be granted and Plaintiffs' claims dismissed.
>
> . . .
>
> 5. It is undisputed as a factual matter that the water in the water treatment never tested positive for the presence of legionella bacteria, though the parties disagree as to the cause of this fact.
>
> . . .

8. The parties all agree that legionella bacteria is ubiquitous – it exists throughout nature in greater or lesser degrees. Notwithstanding this fact, Plaintiffs have come forward with no objective evidence that the water feature was contaminated with legionella bacteria at the time Plaintiffs stayed at the Coxes' home.

9. Following several years of discovery pursuant to a discovery scheduling order entered in the case, but before the deadline for Defendants to designate their expert witnesses. Defendants filed the Motions, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, seeking entry of summary judgment in their favor and dismissing Plaintiffs' action for a host of reasons. Defendants contend that Plaintiffs have failed to come forward with sufficient admissible evidence to prove either that Defendants breached a legal duty to Plaintiffs or (in the case of the Coxes) breached a contract between the Coxes and Plaintiffs. Defendants further contend that Plaintiffs have failed to come forward with sufficient admissible evidence to prove that, even assuming a breach of a duty or contract, that the alleged breach proximately resulted in Plaintiffs' illness. Defendants also contends [*sic*] that Plaintiffs assumed the risk of illness and were contributorily negligent by virtue of the fact that they were aware of irregularities in the water and they were warned not to use the spa until further notice but used it nonetheless.

. . .

13. Having carefully considered the record in this matter, and having also considered the arguments of counsel for the parties, the Court concludes that Defendants have made a sufficient initial showing to shift the burden to Plaintiffs to come forward with evidence to substantiate their claims. Further, while there may be in the Court's opinion sufficient evidence of negligence or breach of contract on Defendants' part, Plaintiffs have nonetheless failed to come forward with sufficient admissible evidence to support one or more of their required factual showings to proceed to trial: (a) that the water feature was contaminated with legionella bacteria at the time Plaintiffs stayed at the Coxes' house; or (b) that Plaintiffs contracted legionella pneumonia from being in the vicinity of the water feature.

14. With regard to both factual issues, Plaintiffs have relied on speculation and conjecture, as opposed to coming forward with admissible evidence to support their contentions in two critical regards, Michael L. Silverman's statement, dated June 6, 2018, states that:

> Based upon my training, experience and expertise and based upon my review of the records listed above, it is my medical opinion more likely than not that Mr. and Mrs. Poage developed Legionella pneumonia as a result of exposure to the hot tub and waterfall while staying at this rental property from August 24 to August 27, 2015 (Silverman Aff. ¶ 8.)

15. Putting aside the "more likely that not" standard utilized by Dr. Silverman, rather than "to a reasonable degree of medical certainty", the basis for this opinion is set forth in an earlier paragraph as follows:

> The simple fact that both Mr. and Mrs. Poage developed Legionella pneumonia at the same time in early September 2015, supports the Airbnb home they stayed as the source as [sic] the incubation of two to ten days is consistent with this fact. (Silverman Aff., ¶4, p. 5)

16. Dr. Silverman's statement is the only one put forward by Plaintiffs that purports to provide the vital and necessary proximate cause link between Defendants' alleged negligence and Plaintiffs' claims for illness and injuries. The Court believes that Dr. Silverman's statement does not provide a proper basis for an opinion satisfying the proof element of proximate causation. The above quoted language stands for nothing more than that the timeline in this case is "consistent with" the Poages having contracted legionella bacteria while at the Coxes' home. The Court concludes that such a statement does not satisfy Plaintiffs' obligation to come forward with admissible evidence of proximate causation.

17. Similarly, the "statement" by Jonathan Kornreich, another witness proferred by Plaintiffs as a purported

expert opinion witness, provides, in relevant part (at least as to the proximate cuase [*sic*] issue), that:

> In this instance, it is clearly more likely than not that the chain of failures and disregard of standard safety practices, both by Schoenen and Cox, observed at this property created a situation in which dangerous bacteria were permitted to propogate [*sic*] and infect an innocent member of the public. (Kornreich statement, p. 4)

18. While it is not at all clear to the Court, to the extent that "an innocent member of the public" is intended by Mr. Kornreich to refer to Mr. and/or Mrs. Poage, Mr[.] Kornreich's statement provides no information from which the Court can conclude that his opinion, at least as it relates to the issue of proximate causation, would be admissible before a jury. In fact, based on Mr. Kornreich's resume attached to his statement, the Court can amply conclude that he is not competent to render an opinion in this case with regard to medical causation.

19. In other words, having no objective evidence that legionella bacteria was present in the Coxes' water feature, or that the water in the water feature was the source of Plaintiffs' illness, as opposed to any number of other possible alternative sources, legionella bacteria being admitted by Plaintiffs to be ubiquitous, Plaintiffs extrapolate from (a) the fact that the Poages were allegedly later diagnosed with legionella pneumonia; into a factually unsupported conclusion that (b) the water feature must have been contaminated with legionella bacteria and must have been the source of Plaintiffs' illness. The Court does not believe the law of North Carolina permits such a "leap of faith". Plaintiffs' factual assertions are tantamount to the application of the doctrine of *res ipsa loquitur* which has, to the Court's knowledge, never been applied to a factual situation such as this. [footnote omitted].

20. Therefore, based on the record before the Court, the Court concludes that Plaintiffs have failed to come forward with sufficient admissible evidence to substantiate a claim that Plaintiffs were injured as a proximate

> result of Defendants' wrongful conduct. As a result of this fundamental evidentiary failure of proof, the Court concludes that Motions should be and are hereby granted and Summary Judgment is hereby entered in Defendants' favor and against Plaintiffs.

Cheryl Poage, individually and as executrix of the estate of Robert Poage ("Plaintiffs"), filed timely notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a 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* 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.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (Tyson, J.) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "Evidence presented by the parties is viewed in the light most favorable to the nonmovant." *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

Rule of Civil Procedure 56(e) provides in relevant part: "Supporting and opposing affidavits [submitted in connection with summary

judgment] shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2017) (emphasis supplied).

" 'Ordinarily, whether a witness qualifies as an expert is exclusively within the discretion of the trial judge.' " *FormyDuval v. Bunn*, 138 N.C. App. 381, 385, 530 S.E.2d 96, 99 (2000) (brackets omitted) (quoting *State v. Underwood*, 134 N.C. App. 533, 541, 518 S.E.2d 231, 238 (1999)). "The determination of the admissibility of expert testimony is within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion." *Braswell v. Braswell*, 330 N.C. 363, 377, 410 S.E.2d 897, 905 (1991). "[T]o survive defendants' motion for summary judgment . . . plaintiff must allege a *prima facie* case of negligence—defendants owed plaintiff a duty of care, defendants' conduct breached that duty, the breach was the actual and proximate cause of plaintiff's injury, and damages resulted from the injury." *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990) (citation omitted).

"Summary judgment is seldom appropriate in a negligence action." *Hamby v. Thurman Timber Co., LLC*, __ N.C. App. __, __, 818 S.E.2d 318, 323 (2018) (citation omitted). "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) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

IV. Discovery Period

[1] Plaintiffs argue the trial court prejudicially erred by considering and granting Defendants' motions for summary judgment before the discovery period had ended. We disagree.

> Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so. However, [a] trial court is not barred in every case from granting summary judgment before discovery is completed.

Patrick v. Wake Cty. Dep't of Human Servs., 188 N.C. App. 592, 597, 655 S.E.2d 920, 924 (2008) (citations and quotation marks omitted) (alteration in original). "A trial court's granting summary judgment before discovery is complete may not be reversible error if the party opposing summary judgment is not prejudiced." *Hamby v. Profile Prod., LLC*, 197 N.C. App. 99, 113, 676 S.E.2d 594, 603 (2009) (citations omitted).

Plaintiffs were not awaiting any responses to interrogatories or the production of any further evidence at the time the trial court heard the motions. Plaintiffs had not requested any additional depositions. Plaintiffs never argued before the trial court that additional discovery was needed to challenge or delay ruling upon Defendants' summary judgment motions.

Plaintiffs have failed to demonstrate they were prejudiced by the trial court considering and ruling upon Defendants' summary judgment motions before the discovery period had ended. *See id.* Plaintiffs' argument is without merit and overruled.

V. Plaintiffs' Experts

[2] Plaintiffs submitted expert-prepared materials in response to Defendants' motions for summary judgment. One was the affidavit of Dr. Carl Fliermans, Ph.D, and another was a report authored by Jonathan Kornreich. Defendants argue Dr. Fliermans's affidavit and Kornreich's report should not be considered in determining whether summary judgment is proper because they do not constitute sworn testimony.

Defendants made oral motions to strike Dr. Fliermans's affidavit and Kornreich's report at the trial court's hearing on their motions for summary judgment in part, on the basis these expert materials were not sworn testimony. The trial court's order granting summary judgment to Defendants states, in relevant part: "The Court in its discretion denies these motions to strike to the extent they are based on claimed procedural irregularities[.]" Defendants assert this Court should not consider Dr. Fliermans's affidavit and Kornreich's report because of procedural irregularities, but do not reference or cross-appeal the trial court's denial of their motions to strike.

"We review the trial court's ruling on [a] motion to strike [an] affidavit for abuse of discretion." *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002). Defendants do not argue the trial court abused its discretion or otherwise erred by denying their motions to strike. Based upon Defendants' failure to cross-appeal from or argue the trial court abused its discretion by denying their motions to strike, we find their purported arguments that this Court should not consider Dr. Fliermans's affidavit or Kornreich's report are waived and subject to dismissal. *See High Rock Lake Partners, LLC v. N. Carolina Dep't of Transp.*, 234 N.C. App. 336, 341, 760 S.E.2d 750, 754 (2014) (finding the appellants argument that the trial court erred by denying their motion for attorney's fees was waived when appellants failed to argue the trial court abused its discretion).

VI. Negligence

Plaintiffs next argues genuine issues of material fact on their negligence claim precludes summary judgment.

"To recover damages for actionable negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Petty v. Cranston Print Works*, 243 N.C. 292, 298, 90 S.E.2d 717, 721 (1956) (citation omitted). Our Supreme Court has held that negligence is the "failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992) (citation omitted).

A. *Duty*

[3] With regards to the Coxes, Plaintiffs have forecasted evidence to establish a genuine issue of material fact with respect to the element of duty of care.

Our Supreme Court has held that landowners owe a "duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). "Whether a landowner's care is reasonable is judged against the conduct of a reasonably prudent person under the circumstances." *Kelly v. Regency Ctrs. Corp.*, 203 N.C. App. 339, 343, 691 S.E.2d 92, 95 (2010). The Coxes' counsel conceded at the summary judgment hearing before the trial court that the Coxes, and their cabin, were subject to the Vacation Rental Act, N.C. Gen. Stat. §§ 42A-1 to 42A-40. Pursuant to the Vacation Rental Act, "A landlord of a residential property used for a vacation rental shall[,]" among other things:

> (2) Make all repairs and do whatever is reasonably necessary to *put and keep the property in a fit and habitable condition.*
>
> (3) Keep all common areas of the property in safe condition.
>
> (4) Maintain in good and safe working order and reasonably and promptly repair all electrical, plumbing, sanitary, heating, ventilating, and other facilities and major

> appliances supplied by him or her upon written notification from the tenant that repairs are needed.

N.C. Gen. Stat. § 42A-31 (2017) (emphasis supplied).

The Vacation Rental Act further provides that "[t]hese duties shall not be waived[.]" *Id.* Plaintiffs' forecast of evidence could support a conclusion that the Coxes leased their cabin as a vacation rental to the Poages; that the hot tub and waterfall were not safe for tenant occupancy; and that the Coxes breached their statutory duty to "do whatever is reasonably necessary to put and keep the property in a fit and habitable condition." *Id.*

"A violation of the duty to maintain the premises in a fit and habitable condition is evidence of negligence." *Brooks v. Francis*, 57 N.C. App. 556, 559, 291 S.E.2d 889, 891 (1982).

With regard to Schoenen owing the Poages a duty of care:

> Privity of contract is not required in order to recover against a person who negligently performs services for another and thus injures a third party. *There is a duty to protect third parties where a reasonable person would recognize that if he does not use ordinary care and skill in his own conduct, he will cause damages or injury to the person or property of the other.*

Westover Products, Inc. v. Gateway Roofing, Inc., 94 N.C. App. 63, 67, 380 S.E.2d 369, 372 (1989) (emphasis supplied).

Here, it is undisputed the Poages were invitees and renters of the Coxes who stayed at the cabin from the 25 to 27 August 2015.

The Coxes argue they delegated any duty they may have owed the Poages to Schoenen, by hiring them "as the experts to maintain" the hot tub and waterfall.

Amy Schoenen Avery ("Avery"), the owner of Schoenen, answered in her response to Plaintiffs' interrogatories that "she was never advised the Cox property was leased to tenants." Avery testified in her deposition that if she had known the cabin was being rented, Schoenen would have utilized the maintenance procedures that are suitable for a commercial hot tub. Gail Cox testified that from when she initially hired Schoenen to service the hot tub and waterfall, she let Avery know that they were renting the cabin.

Presuming *arguendo*, the Coxes could delegate their common law duty of reasonable care and their statutory duties under the Vacation Rental Act to Schoenen, genuine issues of material fact exist regarding whether the Coxes delegated their duties to Schoenen. The difference between Gail Cox and Avery's testimony with regards to whether Avery knew the Cabin was being rented to third-parties creates a genuine issue of material fact, which precludes summary judgment on this issue.

B. *Breach*

[4] Plaintiffs argue sufficient evidence creates a question of material fact of whether Defendants breached their duty of care. We agree.

The Division of Public Health of the North Carolina Department of Health and Human Services ("DHHS") conducted an investigation of the Coxes' Cabin, including the hot tub and waterfall, following notification that the Poages were hospitalized for Legionnaires' disease.

Following this investigation by DHHS, Drs. Jessica Rinsky and Zachary Moore prepared a final report dated 24 November 2015 ("the Rinsky Report").

The Rinsky Report stated, in relevant part:

> Division of Public Health and Burke County Environmental Health staff identified hot tub and waterfall maintenance practices that may have provided conditions conducive for *Legionella* growth, including a lack of continual disinfection of the spa; periods where the waterfall system did not continuously flow; water stagnation between rentals; and, a lack of continual disinfection of the waterfall system.
>
> . . . .
>
> [E]nvironmental health staff noted hot tub and waterfall maintenance practices that did not meet recommendations for *Legionella* control.

In addition to the Rinsky Report, Plaintiffs submitted the report of Jonathan Kornreich ("Kornreich Report"). Jonathan Kornreich previously owned a pool construction and maintenance company. Kornreich's report compared the maintenance practices performed at the Cabin to recommended industry standards and best practices. Kornreich's report states, in relevant part:

a. Equipment: The [hot tub] relied on an alternative sanitization device [Nature2 Sticks] which is not meant to be a primary and sole system. There was no provision made to create a sanitizer residual. This could have been accomplished easily and with very little cost through use of a chlorine or bromine floater, although the owner noted that renters were found to have removed the floater. In that case an inline feeder should have been installed. Had an inline feeder been installed, a sanitizer residual could have been automatically maintained. *A lack of residual sanitizer combined with warm spa water created conditions which were ideal for the propagation of bacteria, including legionella.*

b. Maintenance: Maintenance was provided by a professional swimming pool service company. According to their records, the chemical parameters were out of range on numerous occasions between June 2 and September 1, the dates for which we have records. Of the 14 service calls documented during that time, at no time were the water parameters within the "ideal range" as determined by the ANSI standard or within the range identified by the Nature2 manufacturer as correct operating parameters for their product. In one instance (July 8), the pH was at the maximum limit and the alkalinity was near the minimum limit. On that day a calculation of the Lanelier Saturation Index (as required when water is outside the ideal range) would have almost certainly found the water to be out of balance, although a failure to keep accurate records makes a retrospective calculation impossible.

When water chemistry parameters are outside the ideal range, the efficacy of sanitizers is diminished and pathogens are able to live and reproduce unhindered. Because of the lack of residual sanitizer, bacteria such as *Legionella* can become established in the water and create a biofilm. Biofilm bacteria may take a disinfectant level 100 times higher in concentration as well as vigorous scrubbing to remove.

. . .

Further, there is no record of the waterfall having been drained, cleaned, sanitized or scrubbed. *It is again more*

> *likely than not that a colony of Legionella would have been able to propagate in the waterfall* and infected anyone nearby through aerosolized droplets containing the bacteria.
>
> . . .
>
> *In this instance, it is clearly more likely than not that the chain of failures and disregard of standard safety practices, both by Schoenen and Cox, observed at this property created a situation in which dangerous bacteria were permitted to propagate*[.] [Emphasis supplied].

In addition to Kornreich's report, Plaintiffs also submitted the affidavit of their expert witness, Dr. Carl Fliermans, who possesses a Ph.D. in microbiology and has conducted ecological research on *Legionella* bacteria since 1977. Dr. Fliermans stated in his affidavit, in relevant part, that it was "more likely than not":

> The maintenance of this hot tub and water feature were not conducted in a proper way to prevent the growth, dissemination and infectivity of the *Legionella* bacterium to susceptible individuals2 [*sic*].
>
> . . .
>
> During the month of August, maintenance was performed on the spa and water feature on a weekly basis. Generally, two (2) ounces of granular chlorine were scattered into the spa pool area which contained 900 gallons of water. Such an addition is inadequate to affect the *Legionella* bacterium. *Legionella* is associated with biofilms in nature and those biofilms protect the bacterium from the action of the biocide. Doses of biocide need to exceed 10-30 ppm for shock chlorination to be effective.
>
> . . .
>
> The lack of a chlorine residual as specified by CDC, is to be between 2-4 ppm for a maintenance level of chlorine to provide a safe operation of a hot tub. *This level was never achieved in this facility with 2 ounces of chlorine granules. The absence of chlorine in a hot tub makes the hot tub with its warm waters and organic loading, a breeding ground for Legionella.* [Emphasis supplied]

With regard to the waterfall, Avery testified that there were periods where the waterfall system was not continuously circulating. According to Avery, the waterfall would occasionally run out of water from evaporation and remain stagnant for extended periods of time. Avery further testified "[M]y industry doesn't have standards for waterfalls. They're ornamental. They're not for swimming or bathing. *I didn't test the water in the waterfall*." (emphasis supplied). Avery agreed with the Rinsky Report's results that stagnant water in the waterfall may have been conducive to the growth of *Legionella* bacteria.

Viewed in the light most favorable to Plaintiffs, Plaintiffs have presented sufficient evidence showing genuine issues of material fact exist with regard to Defendants breaching their duty of care.

C. *Proximate Cause*

[5] Plaintiffs argue they have presented sufficient evidence to create a genuine issue of material fact of whether Defendants' negligence proximately caused them to contract Legionnaires' disease to overcome Defendants' motions for summary judgment. We agree.

"[T]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 431-32, 677 S.E.2d 485, 504 (2009) (citation omitted).

> [I]t is *only in exceptional cases*, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. *[P]roximate cause is ordinarily a question of fact for the jury*, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.

Williams v. Carolina Power & Light Co., 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (emphasis supplied) (citation and quotation marks omitted).

Defendants argue Plaintiffs are unable to establish any genuine issue of material fact to show causation, because tests of the hot tub and waterfall were negative for *Legionella* bacteria. Contrary to Defendants' arguments, it is well-settled that a plaintiff need not establish direct evidence of proximate causation. "Direct evidence of negligence is not required; it may be inferred from the attendant facts and circumstances." *Greene v. Nichols*, 274 N.C. 18, 22, 161 S.E.2d 521, 524 (1968).

"Actual causation may be proved by circumstantial evidence[.]" *Collins v. Caldwell Furniture Co.*, 16 N.C. App. 690, 694, 193 S.E.2d 284, 286 (1972) (citation omitted).

Ten samples were collected from the hot tub and waterfall on 30 September 2015 by the Burke County Health Department staff, over a month after the Poages visited the Cabin. These ten samples returned negative test results for *Legionella* bacteria. Following Plaintiffs' stay at the cabin, but before the Coxes were notified of Plaintiffs' diagnoses with Legionnaires' disease, Schoenen drained and cleaned the hot tub. Dr. Rinsky of DHHS testified in her deposition that Schoenen's draining and cleaning on 1 September 2015, irrespective of any chemical sanitation of the hot tub, would have affected the ability of a test to return positive results for *Legionella*.

After DHHS and the Burke County Health Department were notified of Plaintiffs' contracting Legionnaires' disease, Stacie Rhea of DHHS instructed the Coxes on 23 September 2015 to drain and disinfect the hot tub and waterfall and hyperchlorinate the hot tub. This sanitization of the hot tub and waterfall was conducted by Schoenen on an undetermined date before test samples were taken by the Burke County Health Department on 30 September 2015.

Dr. Zackary Moore, a medical doctor employed by DHHS, stated in his deposition that "The [Poages] were interviewed to look -- to inquire about other sources of air exposure or water exposure, and none were identified aside from the hot tub and waterfall at the rental house." He further stated that he "inquired about other sources of aerosolized water beyond the rental house, but none were identified so no other sources were considered further." "[T]he onset of illness in both cases meant that their time at the rental home would have been during . . . the likely exposure period."

Plaintiff's expert Dr. Fliermans testified in his affidavit, in relevant part:

> Schoenen Pool & Spa, LLC serviced the facility in question and has been shown by [the] John Kornreich Affidavit[] not to adequately treat the hot tub and water feature to prevent the *Legionella* bacterium from growing.
>
> . . .
>
> On August 25, the Schoenen Pool & Spa, LLC company according to the sparse records treated the hot tub with 4 ounces, of granular chlorine. No chlorine measurements

> were made in the field and none were recorded in the maintenance records. If this had been a shock chlorine treatment, then the Poage party would not have been able to enter the hot tub because of safety considerations. Thus, it was not a shock chlorination treatment that requires chlorine levels in excess of 20 ppm for an extended period of time. It is my opinion that the addition of 4 ounces of granular chlorines was effective in disturbing the biofilm in which the *Legionella* resided and may have exacerbated conditions to which the Poage's party were exposed. *If appropriate water samples had been taken and appropriately tested at that time, it is my opinion Legionella would have been detected to be present in the samples.*
>
> . . .
>
> Based upon my training and research on the ecology of *Legionella* it is my professional opinion that more likely than not the opinions rendered above are true and correct.

A genuine issue of material fact exists as to whether *Legionella* bacteria was present in the Coxes' hot tub or waterfall, and whether bacteria from the hot tub or waterfall caused Plaintiffs to contract Legionnaires' disease. This is based, in part, upon: (1) Dr. Fliermans's opinion *Legionella* bacteria would have been detected in the hot tub when Plaintiffs used it; (2) the proximity in time to Plaintiffs' use of the hot tub and their diagnoses with Legionnaires' disease; (3) both Plaintiffs contracting Legionnaires' disease within the exposure period; and (4) the expert opinions of Dr. Fliermans and Kornreich that the maintenance standards utilized by Schoenen were inadequate to have kept *Legionella* from contaminating the hot tub and waterfall. *See Williams*, 296 N.C. at 403, 250 S.E.2d at 258.

D. *Injury*

[6] Plaintiffs argue they have presented sufficient evidence to establish genuine issues of material fact with regard to the Poages' injuries. We agree.

Schoenen argues that Plaintiffs have failed to produce evidence to show Cheryl Poage was diagnosed with Legionnaires' disease. Neither Defendant challenges on appeal that Robert Poage was diagnosed with Legionnaires' disease.

Viewing the evidence in the light most favorable to Plaintiffs, sufficient evidence forecasts that Cheryl Poage was diagnosed with

Legionnaires' disease. Both Dr. Zachary Moore, and Dr. Michael Silverman, an infectious disease expert, testified that Cheryl Poage was diagnosed with Legionnaires' disease by means of a urine antigen test ordered by Novant Health Forsyth Medical Center, where she was hospitalized.

Plaintiffs met their burden to produce evidence showing a genuine issue of material fact exists with regard to the element of injury. Viewed in the light most favorable to Plaintiffs, their evidence tends to show the Poages were hospitalized for Legionnaires' disease, they incurred medical expenses, and they experienced pain and suffering as a result of the disease.

Plaintiffs' evidence establishes a genuine issue of material fact exists with respect to the Poages' injuries resulting from Legionnaires' disease.

VII. Breach of Contract

[7] In addition to negligence, Plaintiffs asserted a claim for breach of contract against the Coxes. The motion for summary judgment the Coxes filed with the trial court challenged all of Plaintiffs' claims, including breach of contract. The trial court's summary judgment order does not specifically address Plaintiffs' breach of contract claim, but the trial court granted summary judgment to Defendants on all of Plaintiffs' claims.

Plaintiffs do not specifically address their breach of contract claim in their appellate brief. The Coxes argue in their appellee brief that Plaintiffs have failed to forecast sufficient evidence of breach of contract. In their reply brief, Plaintiffs do not present an argument with respect to breach of contract, but assert the issue is "not ripe and should be remanded to the trial court for consideration in the first instance."

Although the trial court's summary judgment order does not specifically mention the breach of contract claim, the Coxes' motion for summary judgment requested summary judgment on all of Plaintiffs' claims, and the Coxes argued before the trial court that summary judgment on the breach of contract claim should be granted. The trial court's summary judgment order granted summary judgment to Defendants on all of Plaintiffs' claims. Based upon this Court's *de novo* standard of review of orders granting summary judgment, Plaintiffs' contention that the Coxes' arguments concerning breach of contract are not ripe is without merit. *See In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

Plaintiffs have failed to preserve or argue why the trial court's summary judgment order should be reversed with respect to their breach of contract claim. "Issues not presented in a party's brief, or in support

of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Plaintiffs have abandoned any arguments they may have asserted with respect to their breach of contract claim. *See id.* The trial court's summary judgment order is affirmed to the extent the trial court granted summary judgment to the Coxes on Plaintiffs' breach of contract claim.

VIII. Conclusion

Viewed in the light most favorable to Plaintiffs, Plaintiffs' forecast of evidence establishes genuine issues of material fact exist on all elements of their negligence claims against Defendants. Plaintiffs abandoned any argument that the trial court's order should be reversed to the extent the trial court granted summary judgment to the Coxes on Plaintiffs' breach of contract claim. The trial court's summary judgment order is affirmed with respect to Plaintiffs' breach of contract claim, reversed with respect to Plaintiffs' negligence claims against both Defendants, and is remanded for trial on Plaintiffs' negligence claims. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges DIETZ and BERGER concur.

RALEIGH RADIOLOGY LLC D/B/A RALEIGH RADIOLOGY CARY, PETITIONER,
v.
N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT, AND DUKE UNIVERSITY HEALTH SYSTEM, RESPONDENT-INTERVENOR

No. COA18-785

Filed 7 May 2019

Administrative Law—certificate of need—agency decision—appeal to administrative law judge—substitution of judgment

An administrative law judge (ALJ) improperly substituted his own judgment for that of the state agency (N.C. Department of Health and Human Services) in deciding which of two applicants would be granted a certificate of need for an MRI machine. Although the state agency had discretion to choose which factors it would consider in comparing applications, the ALJ deviated from the agency's analysis by considering additional factors.

Judge ARROWOOD concurring in result only.

Appeal by Respondents and cross-appeal by Petitioner from an amended final decision entered 16 March 2018 by Judge J. Randolph Ward in the Office of Administrative Hearings. Heard in the Court of Appeals 13 March 2019.

Brooks, Pierce, McLendon Humphrey & Leonard, L.L.P., by James C. Adams II, for Petitioner Raleigh Radiology LLC.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for Respondent N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need.

Poyner Spruill LLP, by Kenneth L. Burgess, William R. Shenton, and Matthew A. Fisher, for Respondent-Intervenor Duke University Health System.

DILLON, Judge.

Petitioner Raleigh Radiology LLC ("RRAD") and Respondents N.C. Department of Health and Human Services, Division of Health Care Regulation, Healthcare Planning and Certificate of Need (the "Agency"), and Duke University Health System ("Duke") all appeal an amended final decision of the Office of Administrative Hearings regarding a Certificate of Need ("CON") for an MRI machine.

I. Background

In early 2016, the State Medical Facilities Plan determined a need for one fixed MRI machine in Wake County and began fielding competitive requests from various applicants. Duke and RRAD each filed an application for a CON with the Agency in April 2016.

In September 2016, the Agency conditionally approved Duke for the CON and denied RRAD's application.

In October 2016, RRAD filed a Petition for Contested Case Hearing. Duke was permitted to intervene in the contested case.

In November 2014, a contested case hearing was held before an administrative law judge (the "ALJ").

On 16 March 2018, the ALJ issued its Final Decision, reversing the decision of the Agency and ordering that "[t]he Certificate of Need shall be awarded to [RRAD]."

Duke and the Agency timely appealed. RRAD also timely cross-appealed.

II. Standard of Review

We review a final decision from an ALJ for whether "substantial rights of the petitioners may have been prejudiced[.]" N.C. Gen. Stat. § 150B-51(b) (2018). We use a *de novo* standard if the petitioner appeals the final decision on grounds that it violates the constitution, exceeds statutory authority, was made upon unlawful procedure, or was affected by another error of law. N.C. Gen. Stat. § 150B-51(b)(1)-(4), (c) (2018). And we use the whole record test if the petitioner alleges that the final decision is unsupported by the evidence or is "[a]rbitrary, capricious, or an abuse of discretion." N.C. Gen. Stat. § 150B-51(b)(5)(6), (c) (2018).

III. Analysis

Duke and the Agency argue that the ALJ erred in conducting its own "comparative analysis review" of the two CON applications. We review this question of law *de novo*. *Cumberland Cty. Hosp. Sys. v. N.C. Dep't of Health & Human Servs.*, 242 N.C. App. 524, 527, 776 S.E.2d 329, 332 (2015).

Section 131E-183 of our General Statutes sets forth the procedure the Agency should use when reviewing applications for a CON. N.C. Gen. Stat. § 131E-183 (2016). Specifically, the Agency uses a two stage process.

First, the "the Agency must review each application independently against the criteria [set by its regulations] (without considering the competing applications) and determine whether it 'is either consistent with or not in conflict with these criteria.' " *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C. App. 379, 385, 455 S.E.2d 455, 460 (1995) (citing N.C. Gen. Stat. § 131E-183(a)). Each "applicant for the issuance of a CON has the burden of demonstrating compliance with the review criteria[.]" *E. Carolina Internal Med., P.A. v. N.C. Dep't of Health & Human Servs.*, 211 N.C. App. 397, 404, 710 S.E.2d 245, 251 (2011).

Second, where there are competing applications which have passed the first step, "the Agency must decide which of the competing [conforming] applications should be approved" based on various "comparative" factors. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 461. "There is no

statute or rule which requires the Agency to utilize certain comparative factors." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006). But, rather, the Agency has discretion to choose which factors by which it will compare competing applications. *Id.*

Where an unsuccessful applicant appeals the Agency decision in a CON case, the ALJ in a contested case does *not* engage in a *de novo* review, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a). *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252. In fact, "there is a presumption that 'an administrative agency has properly performed its official duties.' " *Id.* at 411, 710 S.E.2d at 255 (quoting *In re Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)).

In the present case, the Agency reviewed each application for the CON independently. *Britthaven*, 118 N.C. App. at 385, 455 S.E.2d at 460 (citing N.C. Gen. Stat. § 131E-183(a)). Such review revealed that Duke's application conformed with all criteria and that RRAD failed to conform with respect to certain criteria. At that point, assuming that RRAD's application indeed failed to conform to certain criteria, it would have been appropriate for the Agency to proceed with issuing the CON to Duke. Nevertheless, the Agency, as stated in its seventy-four (74) pages of findings, additionally "conducted a comparative analysis of [Duke's and RRAD's applications] to decide which [one] should be approved," assuming that RRAD's application did satisfy all of the criteria. *See id.* at 385, 455 S.E.2d at 461.

The Agency, in its discretion, used seven comparative factors in reviewing the CON applications: (1) geographic distribution, (2) demonstration of need, (3) access by underserved groups, (4) ownership of fixed MRI scanners in Wake County, (5) projected average gross revenue per procedure, (6) projected average net revenue per procedure, and (7) projected average operating expense per procedure. This comparative analysis led the Agency to approve and award the CON to Duke.

However, in the contested case hearing, the ALJ deviated from the above factors and used two additional factors: (1) the types of scanners proposed by each applicant, and (2) the timeline of each proposed project. Of note, there was evidence that RRAD's proposed MRI machine was superior to the machine which Duke would use. It is this deviation

and the reliance on additional comparative factors by the ALJ which we must conclude was error.

Indeed, adding two additional comparative factors is not affording deference to the Agency, but rather constitutes an impermissible *de novo* review of this part of the Agency's decision. Such a substitute of judgment by the ALJ is not allowed. *E. Carolina Internal Med.*, 211 N.C. App. at 405, 710 S.E.2d at 252.

Evidence was provided that the factors utilized by the Agency have been used in two previous MRI CON decisions and that the additional factors used by the ALJ have not been a part of the Agency's policies and procedures for many years. We note that information pertaining to RRAD's allegedly superior MRI machine was not included in RRAD's application, though it was otherwise presented at the Agency public hearing, but without an expert testifying as to the machine's medical efficacy. Even so, the Agency has the discretion to pick which factors it evaluates in conducting its own comparative analysis. *Craven Reg'l Med. Auth.*, 176 N.C. App. at 58, 625 S.E.2d at 845. Further, regarding the timeline factor used by the ALJ, there was testimony that the Agency puts little, if any, weight to this factor as the factor disadvantages new providers. The ALJ did not determine that the Agency acted arbitrarily and capriciously, but rather simply substituted his own judgment in weighing the factors. However, we cannot say that it was an abuse of discretion for the Agency to rely on the factors that it did.

Separately, RRAD argues that the Agency erred by concluding that its application was not conforming. But even assuming that the Agency incorrectly determined that RRAD's application did not conform to certain criteria, such error was harmless as the Agency proceeded with a comparative analysis of both applications as if RRAD's application did comply.

Therefore, we reverse the Final Decision and reinstate the decision of the Agency.[1]

---

1. We note that a number of additional arguments were made on appeal. Namely, Duke and the Agency also complain that RRAD did not establish substantial prejudice and that the Final Decision was incomplete and untimely by thirty-seven (37) minutes. And RRAD cross-appeals finding of fact number 24 as well as the ALJ's denial of its motion to apply adverse inference based on Duke's alleged spoliation of evidence. However, in light of the ALJ's comparative analysis error and our subsequent reversal of the Final Decision, we decline to address these arguments.

IV. Conclusion

The ALJ erred in disregarding the comparative analysis of the Agency and conducting its own comparative analysis. Thus, we reverse the Final Decision and reinstate and affirm the decision of the Agency awarding the CON to Duke.[2]

REVERSED.

Judge BRYANT concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
CHAD CAMERON COPLEY, DEFENDANT

No. COA18-895

Filed 7 May 2019

Criminal Law—prosecutor's closing argument—reasonableness of fear—based on race—propriety

In a first-degree murder trial, the prosecutor's closing argument impermissibly suggested that defendant, a white male, acted partly out of fear based on race when he shot the victim, a black male, even though there was no evidence that defendant had a racially motivated reason for his actions. The prosecutor's insinuation that defendant harbored racial bias because he called the party-goers outside his house 'hoodlums' and suspected some of them were gang members was not supported by evidence and constituted a gratuitous injection of race into the trial.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 23 February 2018 by Judge Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 13 February 2019.

---

2. We acknowledge RRAD's motion for leave to file a supplemental brief regarding the ALJ's authority to remand a contested case to the Agency. We deny this motion as our resolution has rendered such an issue moot.

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

Massengale & Ozer, by Marilyn G. Ozer, for defendant.

TYSON, Judge.

Chad Cameron Copley ("Defendant") appeals from a judgment entered following a jury's conviction for first-degree murder. We vacate Defendant's conviction and judgment and grant a new trial.

I. Background

On 22 August 2016, Defendant was indicted by a grand jury for first-degree murder. Defendant's trial began on 12 February 2018

A. *State's Evidence*

At trial, the State presented evidence tending to show the following: On 6 August 2016, Jalen Lewis ("Lewis") hosted a party at his parents' home, two or three houses down the street from Defendant's house. One of his guests, Chris Malone ("Malone"), and two companions, David Walker ("Walker"), and Kourey Thomas ("Thomas"), arrived at Lewis's party in Walker's car around midnight, and parked on the street. Malone was acquainted with Lewis. Walker and Thomas were not. Malone entered Lewis's house to ask permission for Walker and Thomas to enter. Walker and Thomas waited outside near the front steps of the house.

Sometime between midnight and 1:00 a.m., a group of approximately twenty people arrived separately from Thomas, Walker, and Malone. Lewis and his friends did not know the group of twenty people. After about ten minutes, the group was asked to leave. The group agreed to leave, and walked toward their cars, congregating near the curb in front of Defendant's house to discuss where to go next.

Defendant, who was inside his home and in his second-story bedroom, became disturbed by the group's noise outside. Defendant called 911 and told the operator he was "locked and loaded" and going to "secure the neighborhood." Defendant also stated, "I'm going to kill him." The operator attempted to obtain more information from Defendant, but the phone call was terminated.

At the same time these events were transpiring, a law enforcement officer was conducting a traffic stop nearby, which caused the lights of his police cruiser to reflect down the street. Thomas and Walker saw

the lights and became worried about the presence of law enforcement because Thomas possessed a marijuana grinder on his person.

Thomas decided to leave the party after seeing the police cruiser's lights. Thomas left the party first. He ran from Lewis's house, and cut across the yard, towards Walker's car. Before he could reach the car, Thomas was shot by Defendant, who fired one shot without warning, from inside the window of his dark, enclosed garage. EMS arrived and transported Thomas to the hospital, where he died as a result of the gunshot.

Wake County Sheriff's Deputy Barry Carroll ("Deputy Carroll") was one of the first investigators to arrive upon the scene. Deputy Carroll approached Defendant's house after observing broken glass in Defendant's driveway and a broken window in the garage. He shined a light through a garage window, and saw Defendant step through a door from the house into the garage. Deputy Carroll asked Defendant if he had shot someone. Defendant admitted shooting Thomas. Deputy Carroll requested Defendant to open the front door. Defendant complied and showed Deputy Carroll the shotgun he had used to fire at Thomas.

At the close of the State's evidence, Defendant moved to dismiss the case. The trial court denied the motion.

B. *Defendant's Evidence*

Defendant testified and presented evidence tending to show the following: Defendant had argued with his wife on the morning of 6 August 2016, and then spent the day at home drinking, sleeping, and "just hanging out in the garage." After going to sleep that evening in his upstairs bedroom, Defendant awoke at approximately 12:30 a.m. Defendant and his wife then had marital relations. Shortly thereafter, Defendant looked out of his bedroom window and saw a group of people in front of his house. Defendant described the group as "yelling and screaming" and "revving their engines."

Irritated at the noise the group made, Defendant yelled out the window, "You guys keep it the f[**]k down; I'm trying to sleep in here." Members of the group yelled back, "Shut the f[**]k up; f[**]k you; go inside, white boy,' things of that nature." Defendant saw "firearms in the crowd[,]" and two individuals "lifted their shirts up" to flash their weapons. He testified that he called 911 at 12:50 a.m. at his wife's request.

When Defendant called 911, he thought his son and his son's friends were outside, and stated his teenaged son was the "him" he referenced he was going to "kill" while on the 911 call. After ending the call with

911, he retrieved his shotgun, loaded it, and walked downstairs into his attached garage.

When he discovered his son was inside the garage and not part of the group outside, he told his son to go upstairs for safety and to get a rifle. He again yelled at the group outside, instructing them to leave the premises and informing them that he was armed. Defendant claimed Thomas began running towards Defendant's house and pulled out a gun. Defendant fired one shot from his shotgun towards Thomas through the window of his garage.

At the close of Defendant's evidence, he renewed his motion to dismiss, which the trial court denied. Following deliberation, the jury found Defendant guilty of first degree murder by premeditation and deliberation and by lying in wait. The trial court sentenced Defendant to life without parole. Defendant gave notice of appeal in open court.

II. Jurisdiction

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

III. Issues

Defendant argues three issues on appeal: (1) the trial court plainly erred by instructing the jury that the defense of habitation was not available if Defendant was the aggressor; (2) the trial court erred by allowing the prosecutor to make egregious, improper, and racially-charged arguments during its closing argument; and (3) the trial court erred by instructing the jury on the theory of lying in wait.

IV. Race-based Argument

We first address Defendant's argument that the trial court erred by overruling his objections to racially-charged statements made by the prosecutor during closing arguments.

During the State's rebuttal closing argument, the prosecutor stated, over Defendant's multiple objections:

> [PROSECUTOR]: And while we're at it . . . I have at every turn attempted not to make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? *The undercurrent that the defendant brought up to you in his closing argument is what did he mean by hoodlums? I never told you what*

he meant by hoodlums. I told you he meant the people outside. *They presented the evidence that* [*Defendant is*] *scared of these black males*. And let's call it what it is. Let's talk about the elephant in the room. [Emphasis supplied].

[DEFENSE COUNSEL]: Objection.

The Court: Overruled.

[PROSECUTOR]: *Let's talk about the elephant in the room*. If they want to go there, consider it. And is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. *Ask yourself if Kourey Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying* [*sic*] *dead bleeding in that yard*? [Emphasis supplied].

[DEFENSE COUNSEL]: Objection.

The COURT: Overruled.

[PROSECUTOR]: Think about it. I'm not saying that's why he shot him, *but it might've been a factor he was considering*. You can decide that for yourself. You've heard all the evidence. Is it reasonable that *he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence*. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, *a fear based out of hatred or a fear based out of race is not a reasonable fear*, I would submit to you. *That's just hatred*. And I'm not saying that's what it is here, but *you can consider that*. And if that's what you think it was, then maybe it's not a reasonable fear. [Emphasis supplied].

A. *Standard of Review*

The Supreme Court of North Carolina held that a defendant's objection made during closing argument should be reviewed as if the

defendant had objected to every instance of the challenged statements. *State v. Walters*, 357 N.C. 68, 104, 588 S.E.2d 344, 365, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). In *Walters*, the prosecutor made a closing argument comparing the defendant to Adolf Hitler. *Id.* The defendant's counsel objected, and the trial court overruled the objection. *Id.* The prosecutor then continued making allusions comparing the defendant to Hitler.

Our Supreme Court reasoned:

> Whereas it is customary to make objections during trial, counsel are more reluctant to make an objection during the course of closing arguments "for fear of incurring jury disfavor." Defendant should not be penalized twice (by the argument being allowed and by her proper objection being waived) because counsel does not want to incur jury disfavor. Therefore, defendant properly objected to the prosecutor's argument, and no waiver occurred by defendant's failure to object to later references to Hitler.

Id. (citation omitted).

When a defendant properly objects to closing argument, the Court must determine if "the trial court abused its discretion by failing to sustain the objection." *Id.* at 104, 588 S.E.2d at 366 (citation omitted). We "first determine if the remarks were improper. Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations and internal quotation marks omitted). Following *Walters*, Defendant's multiple objections at trial and arguments against the prosecutor's racial comments are preserved for appellate review. *See id.*

"When a court determines that an argument is improper, a defendant must prove that the statements were of such a magnitude that their inclusion prejudiced [the] defendant and that a reasonable possibility exists that a different result would have been reached had the error not occurred." *State v. Dalton*, 243 N.C. App. 124, 135, 776 S.E.2d 545, 553 (2015) (alteration in original) (internal quotation marks and citation omitted), *aff'd*, 369 N.C. 311, 794 S.E.2d 485 (2016).

B. *Closing Arguments*

This Court has recently decided a large number of appeals in which prosecutors made improper comments and statements during closing arguments. *See, e.g.*, *State v. Degraffenried*, __ N.C. App. __, __, 821 S.E.2d 887, 889 (2018) (holding that prosecutor made improper

reference to the defendant's exercise of his right to trial by jury); *State v. Phachoumphone*, __ N.C. App. __, __, 810 S.E.2d 748, 759 (holding that prosecutor inappropriately cited witnesses' out-of-court statements as substantive evidence), *review allowed*, __ N.C. __, 818 S.E.2d 111 (2018); *State v. Madonna*, __ N.C. App. __, __, 806 S.E.2d 356, 363 (2017) (holding that prosecutor improperly stated that the defendant had lied to the jury), *review denied*, 370 N.C. 696, 811 S.E.2d 161 (2018).

Our Supreme Court has stated: "The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of an accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978) (citations omitted).

The General Rules of Practice for the Superior and District Courts provide, in relevant part: "Counsel are at all times to conduct themselves with dignity and propriety[,]" and "[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness[.]" Gen. R. Pract. Super. and Dist. Ct. 12, 2019 Ann. R. N.C. 10-12.

The Preamble to the North Carolina Revised Rules of Professional Conduct states that "A lawyer, as a member of the legal profession, is . . . an officer of the legal system, and a public citizen having special responsibility for the quality of justice." Rule of Professional Conduct 3.4(e) states that "A lawyer shall not . . . in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence[.]" All licensed attorneys, whether representing the State or a defendant, must be ever mindful of their oaths and duties as officers of the court and the important roles they serve in the impartial administration of justice. *See id.*

C. *Injection of Race*

Long-standing precedents of the Supreme Courts of the United States and North Carolina prohibit superfluous injections of race into closing arguments. "The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30, 95 L. Ed. 2d 262, 289 n.30 (1987) (citation omitted). "[P]rosecutor[s] may not make statements calculated to engender prejudice or incite passion against the defendant. Thus, overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible. Nor may a prosecuting attorney emphasize race, even in neutral terms, gratuitously." *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994) (citations and internal quotation marks omitted), *disapproved of on other grounds by*

State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997). Gratuitous appeals to racial prejudice "tend to degrade the administration of justice." *Battle v. United States*, 209 U.S. 36, 39, 52 L. Ed. 670, 673 (1908).

Our Supreme Court has instructed: "Closing argument may properly be based upon the evidence and the inferences drawn from that evidence." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) (citing *State v. Oliver*, 309 N.C. 326, 357, 307 S.E.2d 304, 324 (1983)). "Although it is improper gratuitously to interject race into a jury argument where race is otherwise irrelevant to the case being tried, argument acknowledging race as a motive or factor in a crime may be entirely appropriate." *Id.* (emphasis supplied) (citing *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984)).

In *Moose*, our Supreme Court held a white defendant's reference to a black victim as a "damn ni[**]er" along with evidence that the victim was seen driving through a white residential community, was sufficient evidence to support a prosecutor's closing argument that the victim's murder was, in part, racially motivated. 310 N.C. at 492, 313 S.E.2d at 515. Unlike the facts in *Moose*, no evidence presented to the jury in this case tends to suggest Defendant had a racially motivated reason for shooting Thomas.

Here, the prosecutor prefaced his final argument by acknowledging the absence of any evidence of racial bias: "I have at every turn attempted not to make . . . [race] what this case is about." Despite the absence of evidence, he then argued that because Defendant's race is white, he was motivated to shoot and kill Thomas because he was black.

The prosecutor asserted in his closing argument: "They presented the evidence that he's scared of these black males." Nothing in the evidence presented to the jury tends to support this assertion in the prosecutor's argument that Defendant feared or bore racial hatred towards the individuals outside of his home because they were black. The only evidence submitted to the jury regarding race was Defendant's testimony that the members of the group outside his house had told him to "go inside, white boy," after he had raised his bedroom window and shouted at them to quiet down shortly before 12:50 a.m. Race was irrelevant to Defendant's case.

In the final argument, the prosecutor noted the evidence that Defendant claimed to be fearful of the group in the yard because he thought they may be in a gang: "They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang."

In its brief on appeal, the State attempts to find some evidentiary basis for the racial comments in the closing argument, but in this effort inadvertently acknowledges the complete absence of evidence regarding race. In short, the State equates gang membership to black males. The State specifically argues Defendant presented evidence that the "partygoers included suspected gang members" and "[t]heir affiliation was suspected based on their wearing gang colors, particularly red." The State includes a footnote noting "Red is worn by members of the Bloods, a *primarily African American street gang*. *See*, *e.g.*, *State v. Kirby*, 260 N.C. App. 446, 449, 697 S.E.2d 496, 499 (2010); *State v. Riley*, 159 N.C. App. 546, 549, 583 S.E.2d 379, 382 (2003)." (Emphasis supplied). In the *Kirby* and *Riley* cases, there was evidence that Bloods gang members wore red articles and clothing. *See Kirby*, 206 N.C. App. at 449, 697 S.E.2d at 499 ("Defendant also said that he felt disrespected by Dunn because he was wearing a "Scream" mask with red on it, like blood, because defendant was a member of the Blood gang and Dunn was a member of the Folk gang."); *Riley*, 159 N.C. App. at 549, 583 S.E.2d at 382 ("Officer Smith said that "Bloods" typically wear the color red and "Crips" wear the color blue, although at times, rival gang members will wear the other gang's colors to get closer in order to commit violent acts.").

There is no mention in either *Kirby* or *Riley* that the Bloods gang is "primarily African American" and no evidence was presented in this case of the race of members of any gang. Citations to other cases does not provide evidence in this case of any association between the color red, gangs, and black males. No evidence was presented to the jury in this case the Bloods are a "primarily African American" gang, and there was no evidence that Defendant was aware of the typical racial profile of any gang. The only evidence was that Defendant, as well as the hosts of the party, suspected gang activity, and that they were fearful, was because they knew that gang members may carry guns. Their fear was based upon their knowledge of the dangers posed by guns and gangs generally; the fear was not associated with the race of the group ejected from the party.

After its argument equating gang membership and black men, the State argues in its appellee brief that the prosecutor's racially-based argument was proper because:

> [T]he jury had to determine whether Defendant's fear was reasonable. Insofar as Defendant expressed a fear of gang members wearing gang colors, *the prosecutor aptly inquired whether a white male would elicit the same scrutiny*. As the prosecutor said, a fear based on race is

> not a reasonable fear. The prosecutor is permitted to argue the law, and these remarks were not improper. *See Diehl*, 353 N.C. at 436, 545 S.E.2d at 187. [Emphasis supplied].

The State's argument insinuates Defendant could have believed the individuals outside his house were gang members because they were black. No admitted evidence suggests Defendant might have thought the individuals were gang members because of their race. The State's argument that Defendant might have inferred the individuals were gang members because of their race is offensive, invalid, and not supported by any evidence before the jury.

No logical connection exists between Defendant recounting that he was referred to as "white boy" by those individuals outside his home and the prosecutor's invidious inference that Defendant held an irrational fear or exhibited hatred of Thomas and the other black partygoers to allow this closing argument. The prosecutor's comments are a wholly gratuitous injection of race into the trial and were improper. *See Williams*, 339 N.C. at 24, 452 S.E.2d at 259. The prosecutor's comments are especially egregious because he made them during the State's final rebuttal argument to the jury, which left defense counsel with no opportunity to respond, other than by objecting.

The prosecutor also asserted Defendant had referred to the individuals outside his house as "hoodlums." No evidence suggests Defendant's use of the word "hoodlums" bore any racial connotation. On direct examination, Defendant testified he had used the term "hoodlum" to mean "Like a juvenile delinquent, someone that will not listen to authority or listen to their parents and just kind of takes [*sic*] every day as that day and doesn't care about tomorrow. They're living in that day because that's all they care about." Defendant also described his own teen-aged son as a "hoodlum."

"Hoodlum" is defined as: "1. A gangster; a thug. 2. A tough, often aggressive or violent youth." Hoodlum, The American Heritage Dictionary of the English Language, Fifth Edition, https://ahdictionary.com/word/search.html?q=hoodlum (last visited on 4 April 2019). Nothing in either Defendant's use of the term nor the dictionary definition of "hoodlum," suggests any racial bias or animus on Defendant's part. No evidence presented at trial suggested the word "hoodlum" has a racial connotation. The prosecutor's injection of racially-based arguments were gratuitous and improper. *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*,

443 U.S. 545, 555, 61 L. Ed. 2d 739 (1979). The United States Court of Appeals for the Fourth Circuit reviewed a case from North Carolina, which involved a prosecutor's jury argument that a white woman would never have consensual intercourse with a black man. *Miller v. North Carolina*, 583 F.2d 701, 707 (1978). The Court held that the prosecutor's statements denied the defendants of their constitutional right to a fair trial and stated "an appeal to racial prejudice impugns the concept of equal protection of the laws. One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings." *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978).

The United States Court of Appeals for the Second Circuit persuasively stated in *McFarland v. Smith*, 611 F.2d 414, 416-17 (2nd Cir. 1979):

> Race is an impermissible basis for any adverse governmental action in the absence of compelling justification. . . . To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

The prosecutor's objected-to rebuttal jury arguments served to "draw the jury's attention" to Defendant's race being white and Thomas's race being black, inject prejudice, and unjustifiably suggested the jury could or should infer Defendant is racist. *See id.*

D. *Other Jurisdictions*

Courts of other federal and state jurisdictions have also granted new trials when prosecutors had gratuitously injected race into closing arguments. *See*, *e.g.*, *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (awarding a new trial where prosecutor twice called two "African–American Defendants 'bad people' and [called] attention to the fact that the Defendants were not locals."), *abrogated on other grounds by Watson v. United States*, 552 U.S. 74, 169 L. Ed. 2d 472 (2007); *Tate v. State*, 784 So. 2d 208, 216 (Miss. 2001) (holding prosecutor's comments regarding defendant's allegedly racist sentiments were improper and prejudicial where race was irrelevant to the defendant's assault charge).

In *State v. Cabrera*, 700 N.W.2d 469, 473 (Minn. 2005), the Supreme Court of Minnesota reviewed a prosecutor's race-based closing argument

made during a first-degree murder trial. During closing argument the prosecutor stated:

> Prosecutor: Now, the defense case in addition to the-in addition to just throwing mud on young black men and saying that they're-if they're young black men they must be in gangs-
>
> Defense: Objection, Your Honor. It was never our contention to be racist in this case.
>
> Court: Overruled. It's argument.

Id. at 474.

During the rebuttal portion of closing argument, the prosecutor also stated:

> Finally, the other thing you didn't hear in the courtroom, other than counsel who apparently is an expert on gangs, you heard nothing about gangs. You heard nothing about gangs other than what came from the State's witnesses telling about their past association and some wild and, I submit, racist speculation on the part of counsel here, that *because these men who happen to be black are in-have been in gangs in the past*, despite their testimony about trying to get on with their lives, that they are people to be feared, they're *rough characters*. Well, *we know what that's a code word for*. He's a big, strong black man, but he's a rough character.
>
> Members of the Jury, this is not about race.

Id. (emphasis supplied). The defense counsel also objected to this comment, which the trial court overruled. *Id.*

On appeal, the Supreme Court of Minnesota noted: "The defense never mentioned the race of a witness or even implied that race was a factor in this case during his examination of witnesses or in closing argument." *Id.* The Court reasoned "the defense properly objected to the prosecutor's improper statements, but was erroneously overruled. Working in tandem, the improper argument and the court's ruling may have led the jury to conclude that defense counsel himself was racist-an implication wholly unsupported by the record." *Id.* at 474-75. The Court concluded "that the prosecutor's statements injecting race into closing argument were serious prosecutorial misconduct." *Id.* at 475.

The Court ultimately held that the prosecutor's misconduct warranted a new trial, despite the strong evidence of guilt, because:

> Bias often surfaces indirectly or inadvertently and can be difficult to detect. We emphasize, nonetheless, that the improper injection of race can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible. Affirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled.

Id. (citation and quotation marks omitted). This reasoning of the Supreme Court of Minnesota, regarding the dangers of gratuitously injecting race into closing argument and to grant a new trial in that first-degree murder case, provides a persuasive and compelling basis for granting Defendant a new trial. *See id.*

E. *State v. Jones*

With regard to this State's precedents, Defendant cites our Supreme Court's opinion in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002). In *Jones*, the defendant was also charged with first-degree murder. *Id.* at 119, 558 S.E.2d at 99. The prosecutor referenced the Columbine school shooting and the Oklahoma City bombing during closing arguments and attempted to link those tragedies to the tragedy of the victim's death, even though they were wholly unrelated events. *Id.* at 132, 558 S.E.2d at 107.

Our Supreme Court held that this closing argument was improper because: "(1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice." *Id.*

Our Supreme Court held the statements were prejudicial because:

> The impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past. *See, e.g.*, *State v. Wyatt*, 254 N.C. 220, 222, 118 S.E.2d 420, 421 (1961) (holding that a prosecutor who described defendants as "two of the

> slickest confidence men" committed reversible error); *State v. Tucker*, 190 N.C. 708, 709, 130 S.E. 720, 720 (1925) (holding that it was prejudicial error for a prosecutor to say that the defendants "look[ed] like . . . (professional) bootleggers"); *State v. Davis*, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980) (holding that it was prejudicial for a prosecutor to call the defendant a "mean S.O.B."). As a result, we hold that the trial court abused its discretion[.]

Id. at 132-33, 558 S.E.2d at 107.

Here, no admitted evidence, including Defendant being told to "go inside, white boy," or his use of the word "hoodlum," tended to show or support any inference Defendant had shot Thomas for racially-prejudiced reasons. The prosecutor's comments improperly cast Defendant as a racist, and his comment implying race was "the elephant in the room" is a brazen and inflammatory attempt to interject race as a motive into the trial and present it for the jury's consideration. *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

As in *Jones*, the prosecutor's appeal to the jury's emotions "is too grave to be easily removed from the jury's consciousness." *Id.* at 132, 538 S.E.2d at 107. The offensive nature of the prosecutor's comments exceeded language that our Supreme Court in *Jones* noted was held to be prejudicial error warranting new trials in past cases. *See id.*

The trial court committed prejudicial error by overruling Defendant's repeated objections and by failing to instruct the jury to disregard the prosecutor's inflammatory comments or to declare a mistrial. Defendant is entitled to a new trial. *Id.* at 132-33, 558 S.E.2d at 107.

F. *Pattern Jury Instruction*

As we have determined Defendant must receive a new trial based upon the improper injection of race into the closing argument, we need not and will not address Defendant's remaining issues, which may not arise upon remand. We note that Defendant's other issues are based upon the jury instructions, and particularly the combination of theories of self-defense, defense of habitation, initial aggressor, and lying in wait. We recognize the difficulty of crafting jury instructions in a case with this combination of issues. For guidance on remand, we point out one potential problem with the pattern jury instructions.

The trial court gave jury instructions on both self-defense and defense of habitation. The recently revised defense of habitation statute defines "home" as "A building or conveyance of any kind, to include

its *curtilage*, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C. Gen. Stat. § 14-51.2(a)(1) (2017) (emphasis supplied).

The pattern instruction for the defense of habitation does not define the term "home." Footnote 1 of the pattern instruction references *State v. Blue*, 355 N.C. 79, 565 S.E.2d 133 (2002), for the principle that the

> defense of habitation can be applicable to the porch of a dwelling under certain circumstances and that the question of whether a porch, garage, or other appurtenance attached to a dwelling is within the home . . . for purposes of N.C. Gen. Stat. § 14-51.1 is a question best left to the jury.

N.C.P.I. Crim.-308.80, fn. 1 (2012).

N.C. Gen. Stat. § 14-51.1, referenced above, was the former defense of habitation statute, which was repealed upon the enactment of N.C. Gen. Stat. § 14-51.2. 2011 Sess. Laws 268, § 2. The now-repealed N.C. Gen. Stat. § 14-51.1 did not provide a definition for "home." N.C.P.I. Crim. 308.80's reference to *State v. Blue*, which interpreted a now-repealed statute, limited the reach and boundaries of "home."

Furthermore, the absence of any definition of "home" to correctly reflect the now-controlling definition in N.C. Gen. Stat. § 14-51.2(a)(1), which expands the definition and incorporates "curtilage" as part of the "home," is potentially prejudicial to a defendant. The term "curtilage" is not defined within N.C. Gen. Stat. § 14-51.2, but in other contexts, "curtilage" has been construed to mean "at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

A jury instruction given at a trial, based upon the current pattern instruction, could lead a jury to believe defense of habitation is only appropriate when an intruder has entered, or was attempting to enter a physical house or structure, and not the curtilage or other statutorily defined and included areas.

In the instant case, the trial court failed to provide a definition for "home" in the jury instructions. While not argued, a discrepancy exists between N.C.P.I. Crim. 308.80 and the controlling N.C. Gen. Stat. § 14-51.2. The jury could have potentially believed that Defendant could only have exercised his right of self-defense and to defend his habitation only if Thomas was attempting to enter the physical confines of Defendant's house, and not the curtilage or other areas.

The absence of a definition for "home" or "curtilage" in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of "home" as is now required by N.C. Gen. Stat. § 14-51.2.

V. Conclusion

The prosecutor's argument that Defendant shot Thomas because he was black is not supported by any admitted evidence and is wholly gratuitous and inflammatory.

The prosecutor's argument was an improper and prejudicial appeal to race and the jurors' "sense of passion and prejudice." *See Jones*, 355 N.C. at 132, 558 S.E.2d at 107; *see also McCleskey*, 481 U.S. at 309 n.30, 95 L. Ed. 2d at 289 n.30; *Williams*, 339 N.C. at 24, 452 S.E.2d at 259.

The trial court prejudicially erred by overruling Defendant's repeated objections and by failing to strike the prosecutor's inflammatory and improper statements. We vacate Defendant's conviction and the trial court's judgment, and remand for a new trial with proper instructions. *It is so ordered.*

NEW TRIAL.

Judge STROUD concurs.

Judge ARROWOOD dissents in a separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold the trial court did not abuse its discretion in overruling defendant's objection to the portion of the State's closing argument that defendant argues, and the majority agrees, violated defendant's constitutional rights by allowing the State to argue the victim would not have been shot if he had been white. During closing argument, the State argued:

> [THE STATE]: And while we're at it . . . I have at every turn attempted to not make this what this case is about. And at every turn, jury selection, arguments, evidence, closing argument, there's been this undercurrent, right? What's the undercurrent? The undercurrent that the defendant brought up to you in his closing argument is what did he

> mean by hoodlums? I never told you what he meant by hoodlums. I told you he meant the people outside. They presented the evidence that he's scared of these black males. And let's call it what it is. Let's talk about the elephant in the room.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Let's talk about the elephant in the room. If they want to go there, consider it. And why is it relevant for you? Because we talked about that self-defense issue, right, and reasonable fear. What is a reasonable fear? You get to determine what's reasonable. Ask yourself if Kourey Thomas and these people outside were a bunch of young, white males walking around wearing N.C. State hats, is he laying [*sic*] dead bleeding in that yard?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: Think about it. I'm not saying that's why he shot him, but it might've been a factor he was considering. You can decide that for yourself. You've heard all the evidence. Is it reasonable that he's afraid of them because they're a black male outside wearing a baseball cap that happens to be red? They want to make it a gang thing. The only evidence in this case about gangs is that nobody knows if anybody was in a gang. That's the evidence. They can paint it however they want to paint it, but you all swore and raised your hand when I asked you in jury selection if you would decide this case based on the evidence that you hear in the case, and that's the evidence. Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear.

Defendant contends these statements were improper because there was no evidence defendant was motivated by hatred or would have not shot the victim if he were white, and this argument is a ploy to encourage jurors to convict defendant based on passion.

Our Court reviews alleged "improper closing arguments that provoke timely objection from opposing counsel" for "whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "[T]o assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted).

"The Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30, 95 L. Ed. 2d 262, 289 n. 30 (1987) (citation omitted). Therefore, although parties are generally "given wide latitude in their closing arguments to the jury," *State v. Fletcher*, 370 N.C. 313, 319, 807 S.E.2d 528, 534 (2017) (citation and internal quotation marks omitted), prosecutors cannot "make statements calculated to engender prejudice or incite passion against the defendant. Thus, overt appeals to racial prejudice, such as the use of racial slurs, are clearly impermissible." *State v. Williams*, 339 N.C. 1, 24, 452 S.E.2d 245, 259 (1994) (citations and internal quotation marks omitted), *disapproved of on other grounds by State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997). Prosecutors also may not "emphasize race, even in neutral terms, gratuitously." *Id.* (citations omitted).

However, a prosecutor may make "[n]onderogatory references to race . . . if material to issues in the trial and sufficiently justified to warrant the risks inevitably taken when racial matters are injected into any important decision-making." *Id.* (citation and internal quotation marks omitted). As such, "argument acknowledging race as a motive or factor in a crime may be entirely appropriate." *State v. Diehl*, 353 N.C. 433, 436, 545 S.E.2d 185, 187 (2001) (citing *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (holding there was sufficient evidence to support jury argument that murder was, at least in part, racially motivated where a white defendant used an ignoble racial slur to refer to a black victim, and evidence showed the victim was seen driving through a white community)).

I would hold the court did not abuse its discretion in overruling defendant's objection to this portion of the State's closing argument.

Throughout defendant's trial, the State alleged defendant's motive was that defendant had a bad day and was "ticked off" and was not "going to take it anymore." The State brought up race for the first time in closing argument. These comments were brief, and not an appeal to racial animosity. Instead, the comments argued it would be unreasonable

to be afraid of the group outside the house because of race, and that race could have been a factor considered by defendant. Under the facts of this case, where the State's evidence showed a lone, agitated white defendant threatened a large group of black individuals, defendant alleged they referred to him as a "white boy," and then hid and waited, eventually shooting a young black man who entered the area along the curb of his yard, the trial court did not abuse its discretion in allowing the State's closing argument to acknowledge the potential for racial bias as a factor affecting the crime.

Although I disagree with the majority on this issue, I agree with its disapproval of the State's argument that equates gang membership with race. No evidence in the record supports this equivalency. I admonish the State to refrain from arguments that are unsupported by the evidence, but, rather, that play to offensive stereotypes.

Because I disagree with the majority's holding, I must discuss defendant's remaining arguments on appeal: (1) that the prosecutor misstated the law on the habitation defense twice during his closing argument; (2) that the trial court plainly erred by instructing the jury that the defense of habitation was not available if defendant was the aggressor; and (3) that the trial court erred by instructing the jury on the theory of lying in wait.

I. Closing Argument

Defendant argues the prosecutor misstated the law on the habitation defense twice during his closing argument. He did not object on this basis at trial. If opposing counsel fails to object to the closing argument at trial, we review alleged improper closing arguments for

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

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted).

First, defendant contends the State erred when it told the jury defendant could be found to be the aggressor if he left the second floor of

his house and went downstairs to the garage because this argument is contrary to *State v. Kuhns*, 260 N.C. App. 281, 817 S.E.2d 828 (2018) and grossly prejudicial.

Defendant does not quote the language he refers to as egregious, and only provides a citation to a page in the transcript where the prosecutor discusses the aggressor doctrine. Upon review of the transcript, it is clear the references to the aggressor by the prosecutor in this portion of the transcript arose in the context of self-defense, *not the habitation defense*:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> He doesn't have to retreat from his home, but if you're upstairs and somebody makes a show of force at you, it's not retreating to stay upstairs. It's, in fact, the opposite of that, right? But if you take your loaded shotgun and go down to the garage and if you buy him at his word, which I don't know that you can, you are not retreating. You are being aggressive. You're continuing your aggressive nature in that case.

(Emphasis added). Therefore, defendant's argument that the trial court erred by failing to intervene when the State misstated the law on the *habitation defense* is without merit.

Second, defendant argues the State incorrectly added exceptions to the habitation defense that our statutes only permit as exceptions to self-defense. Defendant maintains the State committed this error in the following portion of its argument:

> And I'm going to talk more about some of the things that he told you later, but what I want to get to is this excused killing by *self-defense*, okay?
>
> . . . .
>
> You can consider the size, age, strength of defendant as compared to the victim. . . . You've got somebody who's standing at this point in a yard and you've got somebody on a second floor window. How much danger is he to him at that point? Especially at that point, he's not even saying

> they're pointing a gun at him. All they've done is this – (indicating) – if you buy him at his word.
>
> . . . .
>
> Reputation for violence, if any, of the victim, you didn't hear that he was a violent guy. You didn't hear that he was a gangbanger. All you heard is that he was actually the opposite of that, right?

(Emphasis added). I disagree. As with defendant's first argument, this portion of the transcript refers to self-defense, not the habitation defense. I would hold defendant's argument is without merit.

II. Habitation Defense

Next, defendant argues the trial court plainly erred by instructing the jury that the habitation defense was not available if defendant was the aggressor.

Defendant alleges plain error because he did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4) (2019). To demonstrate the trial court plainly erred, defendant "must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. The error must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 531-32 (2004) (citations and internal quotation marks omitted).

Our statutes provide for the defense of habitation, in pertinent part, as follows:

> The lawful occupant of a home . . . is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home . . . or if that person had removed or was attempting to remove another against that person's will from the home. . . .
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible

> entry or unlawful and forcible act was occurring or had occurred.

N.C. Gen. Stat. § 14-51.2(b) (2017). Any "person who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." *Id.* § 14-51.2(d).

Distinct from the defense of habitation, the General Assembly set out the requirements for self-defense in N.C. Gen. Stat. § 14-51.3 (2017). Both the defense of habitation and self-defense are "not available to a person who used defensive force and who . . . [i]nitially *provokes* the use of force against himself or herself" unless either of the following occur:

> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

Id. § 14-51.4 (2017) (emphasis added).

Here, the trial court instructed the jury in conformity with Pattern Jury Instruction 308.80 of the North Carolina Pattern Jury Instructions, and included an instruction on provocation that conformed with N.C. Gen. Stat. § 14-51.4 as follows:

> The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of the defendant's home. The defendant is justified in using deadly force in this matter if, and there are four things. Number one, such force was being used to prevent the forcible entry into the defendant's home, and, two, the defendant reasonably believed that the intruder would kill or inflict serious bodily harm

> to the defendant or others in the home, or intended to commit a felony in the home, and, three, the defendant reasonably believed that the degree of force the defendant used was necessary to prevent a forcible entry into the defendant's home, and, *four*, *the defendant did not initially provoke the use of force against himself*, *or if the defendant did provoke the use of force*, *the force used by the person provoked was so serious that the defendant reasonably believed that he was in imminent danger of death or serious bodily harm*, *and the use of force likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger*.

(Emphasis added). Thus, the trial court did not reference defendant as an "aggressor" while instructing on the defense of habitation. However, once the trial court completed its instruction on the habitation defense, it referenced defendant as an "aggressor" when it gave the self-defense instruction.

> The defendant would not be guilty of any murder or manslaughter if the defendant acted in *self-defense* and *if the defendant was not the aggressor in provoking the fight* and did not use excessive force under the circumstances. One enters a fight voluntarily if one uses towards one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he decides to withdraw and terminate the use of force but the person who was provoked continues or resumes the use of force. . . .

(Emphasis added).

Defendant's brief fails to identify the direct quotation or contested instruction wherein the trial court instructed the *defense of habitation* is unavailable to an *aggressor*, and we have not found such an instruction. Instead, the trial court instructed that the defense of habitation is unavailable to a defendant who initially provokes the use of force

against himself, and that *self-defense* is unavailable when a defendant is an *aggressor in provoking the fight*. Thus, defendant's argument misconstrues the jury instructions.

Nonetheless, defendant argues the jury would not have understood the aggressor doctrine to be applicable to the habitation defense merely because the self-defense instruction occurred after the habitation defense.

I disagree and decline to conflate these defenses, as the statutory scheme of our General Assembly and the decisions of this Court have distinguished the defense of habitation and self-defense. *Compare* N.C. Gen. Stat. § 14-51.2 *with* N.C. Gen. Stat. § 14-51.3; *see State v. Roberson*, 90 N.C. App. 219, 222, 368 S.E.2d 3, 6 (1988) (distinguishing the rules of the defense of habitation from the rules of self-defense). Moreover, although N.C. Gen. Stat. § 14-51.4 states that neither defense may be utilized where a defendant provoked the use of force, our decisions have only referred to a defendant's status as an "aggressor" with regard to self-defense, and has never applied this language to the defense of habitation.

I also disagree that the jury would have confused these instructions, as our Court must presume the jury "attend[s] closely the particular language of the trial court's instructions in a criminal case and strive[s] to understand, make sense of, and follow the instructions given them." *State v. Wirt*, 263 N.C. App. 370, 379, 822 S.E.2d 668, 674, (2018) (citation and internal quotation marks omitted).

To the extent defendant argues the court plainly erred in determining there was sufficient evidence to instruct on provocation as an exception to the defense of the home, I disagree.

We review for plain error because defendant did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4). "Jury instructions must be supported by the evidence. Conversely, all essential issues arising from the evidence require jury instructions." *State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (citations and internal quotation marks omitted). Therefore, to support an instruction on provocation, the State must present evidence that the defendant provoked the use of force.

I would hold the State put forth sufficient evidence that defendant provoked any force used against him where defendant himself testified he "escalated the situation" by arming himself and yelling at the people who were "minding their own business out in the street area." Accordingly, I would hold defendant's argument that the jury instructions on the habitation defense constituted plain error is without merit.

III. Lying in Wait

Finally, defendant argues the trial court committed reversible error by instructing the jury on the theory of lying in wait because the evidence did not support the instruction.

"[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) (citations omitted). "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted). However, if "a request for instructions is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Thompson*, 328 N.C. 477, 489, 402 S.E.2d 386, 392 (1991).

Our Supreme Court defines "first-degree murder perpetrated by means of lying in wait" as "a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990) (citations and internal quotation marks omitted). The perpetrator must intentionally assault "the victim, proximately causing the victim's death." *State v. Grullon*, 240 N.C. App. 55, 60, 770 S.E.2d 379, 383 (2015) (citation and internal quotation marks omitted).

Defendant argues the evidence does not support an instruction on first degree murder by lying in wait because the evidence did not show he laid in wait to shoot a victim, but, rather, it shows he armed himself to protect his house from intruders until police arrived to disperse the individuals gathered in front of his house. I disagree.

The State put forth sufficient evidence to support an instruction on lying in wait, even assuming *arguendo* defendant offered evidence that suggests otherwise. The State's evidence shows defendant concealed himself in his darkened garage with a shotgun, equipped with a suppression device. Defendant shot the victim, firing the shotgun through the garage's window. The shot bewildered bystanders because it was unclear what happened, and defendant had not warned the crowd before firing his weapon.

This evidence supports the lying in wait instruction because it tends to show defendant stationed himself, concealed and waiting, to shoot the victim, and this action proximately caused the victim's death. Accordingly, I would hold the trial court did not err when it instructed the jury on murder by lying in wait.

IV. Conclusion

In conclusion, I must also note that, in addition to briefing an issue raised by defendant, the majority also undertakes review of an issue at trial that was not raised on appeal—whether the trial court erred because it used the pattern jury instruction for the defense of habitation, which the majority avers does not define "home" consistent with North Carolina law. Although the majority states that the pattern jury instruction should be reviewed and updated based on its analysis, I note that this conclusion is *dicta*.

For the forgoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ALEXANDER DEJESUS, AKA ALEXANDER SIGARU-ARGUETA

No. COA18-750

Filed 7 May 2019

1. Confessions and Incriminating Statements—corpus delicti rule—statutory rape—multiple counts—victim pregnant by defendant

There was substantial independent evidence to establish the trustworthiness of defendant's extrajudicial confession that he engaged in vaginal intercourse with the 12-year-old victim on at least three occasions to satisfy the corpus delicti rule where the victim became pregnant by defendant, defendant lived in the victim's home and thus had the opportunity to commit the crimes, and defendant's confession was knowing and voluntary.

2. Evidence—authentication—copy of birth certificate—prima facie showing

A copy of a victim's Honduran birth certificate was properly authenticated for admission into evidence where nothing indicated that the document was forged or inauthentic, the school social worker testified that the school would not have made a copy of the birth certificate unless it had the original, and the police detective testified that the school's incident report identified the victim's birth date by the same day, month, and year as the birth certificate copy.

3. Evidence—hearsay—exceptions—public records and reports —trustworthiness—birth date in copy of birth certificate

The statement of a victim's birth date contained in a photocopy of her birth certificate was sufficiently trustworthy to be admissible under the public record exception to the hearsay rule. Nothing indicated that the birth date on the document lacked trustworthiness, and other evidence—including the police detective's testimony that the victim appeared "10 or 11 years old" at the time he interviewed her and photographs taken during her pregnancy—supported the date in the document.

4. Appeal and Error—preservation of issues—failure to object at trial—failure to file notice of appeal—request for two extraordinary steps to reach merits

Where defendant failed to argue before the trial court that satellite-based monitoring (SBM) would constitute an unreasonable Fourth Amendment search and also failed to file a written notice of appeal from the order enrolling him in SBM, the Court of Appeals declined to take the two extraordinary steps of issuing a writ of certiorari to hear his appeal and of invoking Appellate Rule 2 to address his unpreserved constitutional argument.

Judge BERGER concurring in result only.

Appeal by defendant from judgment entered 3 April 2018 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil C. Dalton and Assistant Attorney General Kathryne E. Hathcock, for the State.

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

ZACHARY, Judge.

Defendant Alexander DeJesus, a.k.a. Alexander Sigaru-Argueta, appeals from a judgment entered upon a bench verdict finding him guilty of three counts of statutory rape of a child. Defendant argues that the trial court erred in (1) denying his motion to dismiss two counts of statutory rape based on the *corpus delicti* rule, (2) admitting a purported

copy of the victim's Honduran birth certificate, and (3) ordering that he enroll in lifetime satellite-based monitoring. We affirm the trial court's denial of Defendant's motion to dismiss, conclude that the trial court did not err in admitting the copy of the victim's Honduran birth certificate, and dismiss Defendant's appeal concerning the trial court's satellite-based monitoring order.

Background

Defendant was indicted on 23 January 2017 for three counts of statutory rape of a child, each with a listed offense date of "April 1, 2016 through May 31, 2016." Defendant waived his right to a jury trial, and a bench trial was thereafter held before the Honorable Carl R. Fox in Wake County Superior Court beginning on 2 April 2018.

The evidence tended to show that Defendant was in a relationship with the victim's mother, and that Defendant, the victim, and the victim's mother were living together during the time in question. Sometime during the fall of 2016, the victim's middle school social worker Megan Vaughan noticed that the victim was visibly pregnant. The victim was in seventh grade at the time. After speaking with the victim, Ms. Vaughan filed an incident report with the Raleigh Police Department.

When Detective Alex Doughty met with the victim on 1 December 2016, she identified Defendant as the father of her child. Detective Doughty took several photographs of the victim in order "to show her youth and the fact of her age being what it was. And, unfortunately, . . . because of the stage of which her stomach appeared to be."

Detective Doughty also interviewed Defendant on 1 December 2016. Detective Doughty testified that during the interview, he "confronted [Defendant] directly" about the paternity of the victim's child:

> [THE STATE:] What was his response to that?
>
> [DETECTIVE DOUGHTY:] I proposed it as an either/or question to him in regards to that I knew that he was the father of the child. What I was concerned about was whether or not that it was consensual or a forced event.
>
> . . . .
>
> Q. What did the defendant say to you about that?
>
> A. He had stated that he had never forced [the victim] and that everything that had occurred between the two of them was consensual.

Q. Now, . . . when he said everything that occurred, did you clarify with him what that meant?

A. He defined that as that they had consensual sex on at least three occasions that he could account for.

Q. And how, if at all, did he describe the type of sex that they had?

A. Just vaginal penile. I went into clarity with him about the several methods in which sex could occur as well as any potential sex offenses involving cunnilingus, fellatio. Again, he denied that there was anything other than just vaginal sex.

. . . .

Q. . . . You said that he said that it was three times?

A. That's correct.

Q. And do you recall anything that he said about those three different times?

A. No. He only indicated that there was three times.

Q. Did he—do you recall whether he said that they were separate three times?

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Sustained.

Q. How many different times did he confess to you?

A. Three independent times over the course of, I believe, a month or two. It was maybe several months.

The record indicates that the victim gave birth sometime between 21 January 2017 and 23 January 2017. Thereafter, DNA testing established that Defendant was indeed the father of her child.

Defendant was charged with three counts of statutory rape of a child on the basis of his confession. Pursuant to N.C. Gen. Stat. § 14-27.23, the State was required to establish that the victim was "under the age of 13" and that Defendant was "at least 18 years of age" at the time of the offenses. N.C. Gen. Stat. § 14-27.23(a) (2016). Included in the evidence at trial was Defendant's admission that he was born on 14 October 1994, and that he was therefore 21 years of age during the time alleged in the indictment. The State submitted a purported copy of the victim's

Honduran birth certificate in order to establish that the victim was 12 years old at the time of the incidents. Defendant objected to the admission of the copy of the victim's Honduran birth certificate on authentication and hearsay grounds, but the trial court overruled Defendant's objection and admitted the copy of the birth certificate into evidence.

Neither Defendant, the victim, nor her mother testified at trial, and Defendant presented no evidence. At the close of the evidence, Defendant moved the trial court to dismiss two of the statutory rape charges, arguing that "it only takes one time to get pregnant. So where is the rest of the evidence as it applies to [the remaining two] counts . . . . [T]hat knocks two of the counts out . . . just based on the evidence alone." Defendant noted that the only evidence supporting the remaining two charges was his extrajudicial confession, which Defendant maintained was insufficient under the *corpus delicti* rule.

The trial court denied Defendant's motion to dismiss and found Defendant guilty of three counts of statutory rape of a child. The trial court sentenced Defendant to 300-420 months in the custody of the North Carolina Division of Adult Correction and ordered that he be enrolled in lifetime satellite-based monitoring upon his release. Defendant gave oral notice of appeal from the trial court's judgment in open court. Defendant did not provide written notice of appeal from the trial court's order enrolling him in satellite-based monitoring. However, on 23 August 2018, Defendant filed a petition for writ of certiorari requesting that this Court also review the trial court's satellite-based monitoring order.

Discussion

On appeal, Defendant argues that (1) the trial court erred in denying his motion to dismiss two of his three counts of statutory rape of a child under the *corpus delicti* rule; (2) the trial court erred in admitting the copy of the victim's Honduran birth certificate because it was not properly authenticated and constituted inadmissible hearsay; and (3) the trial court's satellite-based monitoring order must be vacated because the State presented no evidence that Defendant's enrollment would satisfy the Fourth Amendment.

I. Motion to Dismiss

[1] Defendant first challenges the trial court's denial of his motion to dismiss two of his three statutory rape charges, which arose following Defendant's confession that he had vaginal intercourse with the victim on three separate occasions. Defendant recognizes that there was a "confirmatory circumstance to support one count of statutory rape,"

that is, the victim's pregnancy. However, Defendant argues that "[t]here was no evidence corroborating the other two charges" aside from his extrajudicial confession, and therefore his motion to dismiss two counts of statutory rape should have been granted on the basis of the *corpus delicti* rule. We disagree.

a. Standard of Review

We review *de novo* the trial court's denial of a motion to dismiss. *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

> Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The evidence is to be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

Id. at 150, 749 S.E.2d at 274 (internal citations and ellipses omitted).

Whether a defendant's extrajudicial confession may survive a motion to dismiss depends upon the satisfaction of the *corpus delicti* rule. *Id.* at 151, 749 S.E.2d at 275.

b. The *Corpus Delicti* Rule

It is well settled that "an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime." *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). Instead, where "the State relies solely on [a] defendant's confession, the State must meet the additional burden imposed by the *corpus delicti* rule," *State v. Sweat*, 366 N.C. 79, 85, 727 S.E.2d 691, 695 (2012), which requires some level of independent corroborative evidence in order "to ensure that a person is not convicted of a crime that was never committed." *Parker*, 315 N.C. at 229, 337 S.E.2d at 491 (quotation marks omitted). "Literally, the phrase '*corpus delicti*' means the 'body of the crime,' " *id.* at 231, 337 S.E.2d at 492 (citation omitted), and essentially "signifies merely the fact of the specific loss or injury sustained, e.g., death of a victim or burning of a house." *Corpus Delicti*, BLACK'S LAW DICTIONARY (10th ed. 2014).

"The foundation for the *corpus delicti* rule lies historically in the convergence of" the following three policy factors:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed, involuntarily made, mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual[;] and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

Parker, 315 N.C. at 233, 337 S.E.2d at 493 (citation and original alterations omitted).

Under the traditional *corpus delicti* rule, the State is required to "present corroborative evidence, independent of the defendant's confession, tending to show that . . . the injury or harm constituting the crime occurred." *Cox*, 367 N.C. at 151, 749 S.E.2d at 275 (quotation marks omitted). "This traditional approach requires that the independent evidence touch or concern the *corpus delicti*—literally, the body of the crime, such as the dead body in a murder case." *Id.* (quotation marks omitted).

In *Parker*, our Supreme Court examined the shortfalls of the traditional *corpus delicti* rule and concluded that reliance on an extrajudicial confession may be appropriate in certain circumstances, even though "independent proof of the commission of the crime—that is, the *corpus delicti*—is lacking." *Id.* at 152, 749 S.E.2d at 276. The Supreme Court elected to supplement the traditional *corpus delicti* rule by adopting the more modern "trustworthiness" formulation of the rule, which focuses "on the reliability of a defendant's confession." *State v. Messer*, ___ N.C. App. ___, ___, 806 S.E.2d 315, 322 (2017). Under this approach, the State need not provide independent proof of the *corpus delicti* so long as there is "substantial independent evidence tending to establish the trustworthiness of the defendant's extrajudicial confession." *Cox*, 367 N.C. at 152, 749 S.E.2d at 276. Such substantial independent evidence may "includ[e] facts that tend to show the defendant had the opportunity to commit the crime," as well as other "*strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession." *Parker*, 315 N.C. at 236, 337 S.E.2d at 495. Indeed, while noting that the newly adopted approach relaxed the standard of required corroboration, the *Parker* Court emphasized the need to "remain advertent to the reason for [the *corpus delicti* rule's] existence, that is, to protect against convictions for crimes that have not in fact occurred." *Id.*

c. Application

In the instant case, while the victim's pregnancy corroborated Defendant's confession as to one count of statutory rape of a child, the remaining two counts were supported solely by Defendant's extrajudicial confession. Accordingly, we must determine whether there was substantial independent evidence presented that tended to establish the trustworthiness of Defendant's confession that he engaged in vaginal intercourse with the victim on at least three separate occasions. We conclude that the victim's pregnancy, together with the evidence of Defendant's opportunity to commit these crimes and the circumstances surrounding his statement to detectives, provide sufficient corroboration to engender a belief in the overall truth of Defendant's confession.

Initially, we note that there is no contention in the instant case that Defendant's extrajudicial confession was the product of deception or coercion. *See id.* at 234, 337 S.E.2d at 494 ("The second historical justification for the *corpus delicti* rule relates to the concern that the defendant's confession might have been coerced or induced by abusive police tactics. To a large extent, these concerns have been undercut by . . . the development of . . . doctrines relating to the voluntariness of confessions which limit the opportunity for overzealous law enforcement. These developments make it difficult to conceive what additional function the *corpus delicti* rule still serves in this context." (quotation marks omitted)). Defendant was not under arrest at the time of his interview, but rather traveled "on his own" to the police department in order to speak with Detective Doughty. Nor does the record otherwise indicate that Defendant's confession was involuntary or the product of coercion. Thus, the trustworthiness of Defendant's confession to at least three separate instances of vaginal intercourse with the victim is "bolstered by the evidence that [he] made a voluntary decision to confess" to these crimes. *Cox*, 367 N.C. at 154, 749 S.E.2d at 277.

In addition, according to Detective Doughty, Defendant admitted that he engaged in vaginal intercourse with the victim "on at least three occasions *that he could account for*," evincing Defendant's appreciation and understanding of the importance that his statement be accurate. (Emphasis added). The trustworthiness of Defendant's extrajudicial confession is further reinforced by the fact that Defendant had ample opportunity to commit these crimes, in that Defendant was living in the victim's home during the relevant time frame. *See Parker*, 315 N.C. at 236, 337 S.E.2d at 495 ("[S]ubstantial independent evidence tending to establish [the] trustworthiness [of the accused's confession] includ[es] facts that tend to show the defendant had the opportunity to

commit the crime."). Finally, and most significantly, the undisputed fact that Defendant fathered the victim's child unequivocally corroborated Defendant's statement that he had, in fact, engaged in vaginal intercourse with her. We are satisfied that the "strong corroboration" of Defendant's confession in this respect sufficiently establishes the trustworthiness of his concurrent statement regarding the number of instances that he had sexual intercourse with the victim.

Accordingly, we conclude that there was substantial independent evidence to support the trustworthiness of Defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim "on at least three occasions," and therefore, the *corpus delicti* rule is satisfied. Defendant's confession constitutes substantial evidence that he committed three counts of statutory rape against the victim, and thus the trial court did not err in denying Defendant's motion to dismiss.

II. Foreign Birth Certificate

Defendant next challenges the trial court's admission of the victim's Honduran birth certificate.

To establish the victim's age pursuant to N.C. Gen. Stat. § 14-27.23(a), the State introduced a purported copy of the victim's Honduran birth certificate, which was obtained from the victim's school file (State's Exhibit 3). State's Exhibit 3 indicated that the victim was born on 15 September 2003, rendering her 12 years old when the alleged incidents occurred. Though not admitted for the purpose of establishing her age, Detective Doughty testified that the initial incident report also identified the victim's birth date as 15 September 2003. Detective Doughty opined that the victim "looked to be 10 or 11 years old" when he spoke with her on 1 December 2016. The photographs taken of the victim by Detective Doughty on the day of the interview were also admitted into evidence.

Defendant objected to the admission of the copy of the victim's Honduran birth certificate on authentication and hearsay grounds. After an extensive colloquy, the trial court overruled Defendant's objections and admitted State's Exhibit 3 into evidence. On appeal, Defendant reasserts both grounds for his objection and contends that the admission of State's Exhibit 3 constitutes reversible error. We consider each argument in turn.

a. Authentication

[2] Defendant first argues that the copy of the victim's Honduran birth certificate was not properly authenticated because (1) "the witness whom the State used to try and authenticate the document did not have

the requisite knowledge to authenticate it under Rule 901; and (2) the document was not self-authenticating under Rule 902(3)." We conclude that the document was properly authenticated.

"A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law." *State v. Allen*, ___ N.C. App. ___, ___, 812 S.E.2d 192, 195, *disc. review denied*, 371 N.C. 449, 817 S.E.2d 202 (2018). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

"Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Ferguson*, 145 N.C. App. 302, 312, 549 S.E.2d 889, 896, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). While the Rules of Evidence provide a multitude of methods by which evidence may be properly authenticated, *see generally* N.C. Gen. Stat. § 8C-1, Rules 901(b), 902 (2017), the ultimate inquiry for the trial court is whether there exists "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* § 8C-1, Rule 901(a). Thus, "[i]t [is] not error for the trial court to admit . . . evidence if it could reasonably determine that there was sufficient evidence to support a finding that the matter in question is what its proponent claims." *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) (quotation marks omitted), *disc. review denied*, 365 N.C. 553, 722 S.E.2d 607 (2012).

The trial court's function "is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the [finder of fact] could reasonably find that the evidence is authentic." *State v. Ford*, 245 N.C. App. 510, 519, 782 S.E.2d 98, 105 (2016) (quotation marks omitted). "[A] *prima facie* showing, by direct or circumstantial evidence, . . . is enough." *State v. Mercer*, 89 N.C. App. 714, 716, 367 S.E.2d 9, 11 (1988). Once that threshold is met, it is for the factfinder to determine the appropriate weight and credibility that the evidence ought to be given. *Id.* Indeed, defendants are always "free to introduce any competent evidence relevant to the weight or credibility" of the evidence. *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637.

Here, other than the fact that the birth certificate offered into evidence was not an original, there is nothing in the record to indicate that State's Exhibit 3 was forged or otherwise inauthentic. The document appears to bear the signature and seal of the Honduran Municipal Civil Registrar, and Ms. Vaughan testified that the school personnel "wouldn't

have made a copy [of the victim's birth certificate] unless we had the original." Moreover, Detective Doughty later testified that the incident report had "identified [the victim] as having a date of birth of September 15, 2003."[1] *See Santora, McKay & Ranieri v. Franklin*, 79 N.C. App. 585, 587, 339 S.E.2d 799, 801 (1986) ("[I]t is not necessary that proof of the [authentication] be made before the introduction of the evidence . . . .").

We conclude that the combination of these circumstances sufficiently established the requisite *prima facie* showing to allow the trial court, as factfinder, to reasonably determine that State's Exhibit 3 was an authentic copy of the victim's Honduran birth certificate. Accordingly, Defendant's argument on this basis is overruled.

b. Hearsay

[3] Defendant also argues that State's Exhibit 3 "was inadmissible hearsay because it lacked sufficient 'trustworthiness' to satisfy Rule 803(8)." Again, we disagree.

"This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015), *disc. review denied*, 368 N.C. 686, 781 S.E.2d 606 (2016).

" '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). "Hearsay is not admissible except as provided by statute . . . ." *Id.* § 8C-1, Rule 802. One such statutory exception is for "Public Records and Reports." *Id.* § 8C-1, Rule 803(8). Under this exception, a properly authenticated birth certificate is admissible "for purposes of proof of matters relevant to the information contained" therein. *State v. Joyner*, 295 N.C. 55, 62, 243 S.E.2d 367, 372 (1978); *see also* N.C. Gen. Stat. § 8C-1, Rule 803(8). However, the trial court may decline to admit such evidence if "the sources of information or other circumstances indicate [a] lack of trustworthiness." N.C. Gen. Stat. § 8C-1, Rule 803(8). "Guarantees of trustworthiness are based on a consideration of the totality of the circumstances[,] but only those that surround the making of the statement and that render the [statement] particularly worthy of belief." *State v. Little*, 191 N.C. App. 655, 666, 664 S.E.2d 432, 439, *disc. review denied*, 362 N.C. 685, 671 S.E.2d 326 (2008).

---

1. Although Detective Doughty's testimony was not admitted for the purpose of establishing the victim's age, his statements nevertheless corroborate the authenticity of the birth certificate that was maintained in the victim's school file.

In the instant case, Defendant argues that "[t]here was simply no sound basis for determining that a photocopied document contained in a cumulative school file that was given to an unknown person by another unknown person established any measure of trustworthiness." However, as explained above, there are no circumstances in the instant case that would suggest that the birth date revealed on State's Exhibit 3 lacked trustworthiness. Moreover, there was additional evidence presented that supported the victim's age as provided in State's Exhibit 3, including the photographs that were taken of the victim at the time of her pregnancy, as well as Detective Doughty's testimony that the victim "looked to be 10 or 11 years old" at the time he interviewed her. In fact, in finding Defendant guilty of three counts of statutory rape of a child, the trial court stated: "I just can't—could not follow the defendant's argument given the fact that one, obviously, these photographs, this is a young child. I mean, this is not a 16 year old. This is not a child who has reached majority."

Under these circumstances, we conclude that the statement of the victim's birth date contained in State's Exhibit 3, which was properly authenticated, was sufficiently trustworthy, and was therefore admissible as a public record. Accordingly, the trial court did not err by admitting State's Exhibit 3 into evidence.

III. Satellite-Based Monitoring

[4] Lastly, Defendant argues that the trial court erred in ordering that he enroll in satellite-based monitoring for the remainder of his natural life upon his release from prison.

Defendant did not file written notice of appeal from the trial court's order enrolling him in satellite-based monitoring, as required by Rule 3 of our Rules of Appellate Procedure. *See State v. Dye*, ___ N.C. App. ___, ___, 802 S.E.2d 737, 741 (2017) ("This Court has interpreted [satellite-based monitoring] hearings and proceedings as civil, as opposed to criminal, actions, for purposes of appeal. Therefore, a defendant must give written notice of appeal pursuant to N.C. R. App. P. 3(a), from a[] [satellite-based monitoring] proceeding." (quotation marks omitted)). Nevertheless, Defendant filed a petition for writ of certiorari asking this Court to review the trial court's conclusion that "Satellite Based Monitoring in this case is not an unreasonable search under law." Defendant argues that such a conclusion was erroneous "in the absence of any evidence from the State that lifetime [satellite-based monitoring] was a reasonable Fourth Amendment search." Indeed, the State presented no such evidence.

However, in addition to his failure to file written notice of appeal, Defendant made no argument before the trial court at his sentencing hearing that the satellite-based monitoring constituted an unreasonable Fourth Amendment search. Thus, because "constitutional errors not raised by objection at trial are deemed waived on appeal," *State v. Bursell*, ___ N.C. App. ___, ___, 813 S.E.2d 463, 465 (2017), Defendant essentially "asks this Court to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear [his] appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018).

Defendant, however, directs our attention to N.C. Gen. Stat. § 15A-1446 and the line of cases standing for the proposition that "when a defendant asserts that a 'sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law,' appellate review of such errors may be obtained regardless of whether an objection was made at trial." *Dye*, ___ N.C. App. at ___, 802 S.E.2d at 742 (original alteration omitted) (quoting N.C. Gen. Stat. § 15A-1446(d)(18)); *see id.* at n.2 (noting also that "this Court has held, in a recent unpublished opinion, that N.C.G.S. § 15A-1446(d)(18) preserved a defendant's right to appeal a[] [satellite-based monitoring] order when the defendant failed to object at the [satellite-based monitoring] hearing" (citing *State v. Egan*, 245 N.C. App. 567, 782 S.E.2d 580 (2016) (unpublished))). In other words, although satellite-based monitoring is a "civil, regulatory scheme," *State v. Hunt*, 221 N.C. App. 48, 56, 727 S.E.2d 584, 590, *disc. review denied*, 366 N.C. 390, 732 S.E.2d 581 (2012), rather than a "criminal punishment," *id.* at 57, 727 S.E.2d at 591, Defendant appears to suggest that his constitutional challenge thereto is nonetheless preserved by virtue of the error having occurred at his sentencing hearing. Thus, according to Defendant, this Court need only grant certiorari; his Fourth Amendment challenge is automatically preserved.

Defendant's argument is unavailing. This Court is bound by the precedent of our Supreme Court, which quite broadly and plainly has held:

> Although [a] defendant's nonconstitutional sentencing issues are preserved without contemporaneous objection . . . , constitutional issues are not. . . . This is true even when a sentencing issue is intertwined with a constitutional issue. [If a] defendant failed to argue to the sentencing court that the sentence imposed violates the [United

> States Constitution], she may not raise that argument on appeal.

State v. Meadows, ___ N.C. ___, ___, 821 S.E.2d 402, 407 (2018) (internal citations omitted); *see also State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 23 (2018) ("[A] defendant's Fourth Amendment [satellite-based monitoring] challenge must be properly asserted at the hearing in order to preserve the issue for appeal."). Accordingly, this Court cannot review Defendant's Fourth Amendment argument without invoking Rule 2.

We emphasize that this Court "must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370 (quoting *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007)). Here, because Defendant is no different from other defendants who failed to preserve a Fourth Amendment challenge to their enrollment in satellite-based monitoring below, we decline to invoke Rule 2. *See*, *e.g.*, *State v. Cozart*, ___ N.C. App. ___, 817 S.E.2d 599 (2018); *Bishop*, ___ N.C. App. ___, 805 S.E.2d 367. Consequently, we deny Defendant's petition for writ of certiorari. *See State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) ("A petition for the writ must show merit . . . ."), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960); *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370.

Conclusion

Because there is substantial independent evidence tending to establish the trustworthiness of Defendant's extrajudicial confession to three counts of statutory rape of a child, the *corpus delicti* rule is satisfied, and we affirm the trial court's denial of Defendant's motion to dismiss. Furthermore, the trial court did not err in admitting into evidence the purported copy of the victim's Honduran birth certificate. Accordingly, we affirm the trial court's judgment entered upon Defendant's convictions for three counts of statutory rape of a child. We deny Defendant's petition for writ of certiorari and dismiss his appeal from the trial court's order enrolling him in satellite-based monitoring.

AFFIRMED IN PART; DISMISSED IN PART.

Judge HAMPSON concurs.

Judge BERGER concurs in result only.

STATE OF NORTH CAROLINA
v.
MARK EDWIN JONES

No. COA18-508

Filed 7 May 2019

1. Pretrial Proceedings—criminal prosecution—trial calendar—section 7A-49.4—notice requirement—prejudice analysis

Defendant failed to demonstrate he was prejudiced by the State's failure to publish the trial calendar ten days prior to trial as required by N.C.G.S. § 7A-49.4(e) where the trial was scheduled months in advance and then continued multiple times, giving defendant adequate notice to prepare. Further, defendant's assertion that he could have called certain witnesses who would have given favorable testimony was speculative and did not constitute a showing that the outcome of the trial would have been different had he been given the statutory notice.

2. Evidence—rebuttal witness—denial of request—abuse of discretion analysis

The trial court did not abuse its discretion in denying defendant's request to add his father as a rebuttal witness in a prosecution for sex offenses where defendant was permitted to present other evidence to rebut unexpected testimony of the victim and her mother, and the court's determination that the requested rebuttal testimony would be repetitive and of limited relevance was not manifestly unreasonable.

Appeal by defendant from judgments entered 26 July 2017 by Judge Martin B. McGee in Cherokee County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Mark Hayes for defendant.

DIETZ, Judge.

Defendant Mark Edwin Jones appeals his convictions for first degree sexual offense and taking indecent liberties with a child. Jones

argues that the trial court erred by denying his motion for a continuance because the district attorney did not file an adequate trial calendar ten or more days before trial, in violation of N.C. Gen. Stat. § 7A-49.4(e). Jones also argues that the trial court erred in denying his request to present a rebuttal witness to respond to testimony from the State's witnesses.

As explained below, because the case was scheduled for trial many months in advance and then continued several times, even assuming the trial calendar submitted by the district attorney was inadequate under N.C. Gen. Stat. § 7A-49.4(e), Jones must establish that he was prejudiced by the failure to receive sufficient notice. He has not done so here.

With respect to the rebuttal witness, that decision is one left to the trial court's discretion and, because the trial court permitted other testimony that established the same facts Jones sought from his rebuttal witness, Jones has not shown that the trial court's decision was so manifestly arbitrary that it could not have been the result of a reasoned decision. We therefore find no prejudicial error in the trial court's judgment.

Facts and Procedural History

On 4 April 2013, Defendant Mark Jones went to work at 8:00 a.m. Jones's wife, Betty, stayed at home with their youngest child. At 9:15 a.m., Betty's sister dropped off her two children, Millie and Collin,[1] for Betty to babysit. Betty watched the children from 9:15 a.m. until she had to leave to drive her afternoon school bus route sometime between 2:30 and 2:45 p.m. After Betty left, the children were alone with Jones for a short period of time before Millie and Collin's mother arrived to pick them up around 2:45 p.m.

When Millie's mother picked her up, Millie was upset. Later that evening, Millie began crying. When her mother asked her what was wrong, Millie indicated that Jones had removed her underwear and touched her private area, put his finger in her "hole," and showed her his penis. Millie's parents contacted the police to report the incident.

On 8 April 2013, Millie went to a regularly scheduled appointment with a counselor who treated her for anxiety. The counselor observed that Millie was upset and asked Millie if she wanted to talk. Millie told the counselor that Jones had pulled her pants down and "stuck his finger in her hole and that it hurt."

On 10 June 2013, Jones was indicted for taking indecent liberties with a child and first degree sexual offense with a child by an adult. The

1. We use pseudonyms to protect the juveniles' identities.

case went to trial on 25 July 2017. Jones moved to continue the trial, arguing that he received insufficient notice of the trial date under N.C. Gen. Stat. § 7A-49.4(e) and that he did not have time to contact or subpoena certain witnesses. After hearing arguments, the trial court ruled that "in my discretion I'm going to deny the request to continue."

At trial, Betty testified that she typically left for her afternoon bus route at 2:30 p.m., but that on 4 April 2013, she left closer to 2:45 p.m. because her sister had not yet arrived to pick up her kids. Jones testified that, after Betty left, he played guitar for the children while sitting on his bed. He stated that he only played about one song before Millie's mother arrived. Jones testified that Millie was upset because she wanted one of Jones's guitar picks. He denied ever being alone with Millie or touching her.

Millie testified that she went into Jones's bedroom and was alone with him. She testified that Jones removed her pants and underwear and touched her "privates on the inside" and outside with his finger. Millie's mother testified about what Millie reported to her. She explained that Millie, who had a speech impediment, had clarified that she was talking about Jones's "dick," not his guitar pick.

At the close of the State's case, Jones requested to add his father as a rebuttal witness to testify that Jones was at work at the time Millie arrived at his home the morning of the alleged crime. Jones argued that this rebuttal testimony was necessary because Millie and her mother both had unexpectedly testified that Jones was home (rather than away at work) at that time. The trial court denied the request.

On 26 July 2017, the jury convicted Jones of both charges. The trial court sentenced him to 300 to 420 months in prison for first degree sexual offense and 16 to 29 months in prison for indecent liberties. Jones also was ordered to enroll in lifetime satellite-based monitoring and to register as a sex offender for life. Jones timely appealed.

Analysis

I. Denial of Motion for Continuance

[1] Jones first argues that the trial court erred in denying his motion for a continuance because his counsel was not given sufficient notice of trial in violation of N.C. Gen. Stat. § 7A-49.4(e). As explained below, we reject this argument because Jones has not shown that he was prejudiced by the trial court's error.

Section 7A-49.4 provides that "[c]riminal cases in superior court shall be calendared by the district attorney at administrative settings according to a criminal case docketing plan" which "shall, at a minimum, comply with the provisions of this section." N.C. Gen. Stat. § 7A-49.4(a). Subsection (e) of the statute requires that "[n]o less than 10 working days before cases are calendared for trial, the district attorney shall publish the trial calendar." *Id.* § 7A-49.4(e). This "trial calendar" is required to "schedule the cases in the order in which the district attorney anticipates they will be called for trial and should not contain cases that the district attorney does not reasonably expect to be called for trial." *Id.*

In his motion for continuance, Jones argued that he did not receive the minimum "10 working days" notice of trial required by the statute. In July 2016, the trial court entered an order setting the case for trial on 14 November 2016 but the trial was continued—apparently several times, from trial terms in November 2016, January 2017, April 2017, and June 2017, until the eventual 24 July 2017 trial date. The case also was placed on what the State calls a "trial session calendar" more than 10 days before the trial, but that calendar, titled "Superior/Criminal – Trial Matters" included more than a dozen criminal cases set for trial on 24 July 2017, all listed in alphabetical order by the defendants' last names. Jones contends that this calendar does not comply with section 7A-49.4(e) because it does not list cases "in the order in which the district attorney anticipates they will be called for trial" and, given the number of complicated criminal cases on the list, necessarily includes "cases that the district attorney does not reasonably expect to be called for trial" that day. *Id.*

Instead, Jones asserts that the "true trial calendar" necessary under section 7A-49.4(e) was a document filed 11 July 2017 and emailed to Jones's counsel on 12 July 2017. That document, titled "Trial Order the Prosecutor Anticipates Cases to be Called," listed Jones's case as the first case for trial on 24 July 2017. Jones contends that this trial order, because it identifies the cases actually to be tried on 24 July 2017 and lists them in the order in which they will be called for trial, is the "trial calendar" required by section 7A-49.4(e). And, Jones contends, he did not receive the necessary 10 days' notice of this calendar before trial, thus entitling him to a continuance.

We agree with Jones that the trial order entered 11 July 2017 is the only "trial calendar" that complies with N.C. Gen. Stat. § 7A-49.4(e), and it was not published 10 or more days before the trial date. But, as explained below, Jones has not shown that he was prejudiced by the

failure to receive the full 10-day notice and we therefore find no prejudicial error.

Jones first contends that he is not required to show prejudice because a defendant's right to 10-day notice of trial under N.C. Gen. Stat. § 7A-49.4(e) is analogous to the right to a week-long notice period between arraignment and trial under N.C. Gen. Stat. § 15A-943, which states that a defendant "may not be tried without his consent in the week in which he is arraigned." Our Supreme Court has held that a violation of this notice period between arraignment and trial is presumed prejudicial. *See State v. Shook*, 293 N.C. 315, 319, 237 S.E.2d 843, 847 (1977).

But there are key distinctions between the week-long notice period in section 15A-943 and the 10-day notice period in section 7A-49.4(e). First, the language in section 15A-943(b) provides that a defendant "may not be tried *without his consent* in the week in which he is arraigned." (Emphasis added). Our Supreme Court held that this language "vests a defendant with a right, for by its terms it requires his consent before a different procedure can be used." *Shook*, 293 N.C. at 319, 237 S.E.2d at 846–47. The Court reasoned that "[t]o require a defendant to show prejudice when asserting the violation of this statutory right which he has insisted upon at trial would be manifestly contrary to the intent of the legislature." *Id.* at 319, 237 S.E.2d at 847. Here, by contrast, the requirements in section 7A-49.4(e) for setting and publishing the trial calendar do not expressly vest any rights in the defendant. And, notably, other provisions in section 7A-49.4, such as subsection (f) governing the order of cases called for trial, expressly vest rights in the defendant in the same manner as section 15A-943.

In addition, the circumstances of this case highlight why a prejudice analysis is appropriate here, while inappropriate for the week-long notice period between arraignment and trial. During the week of arraignment, the defendant has only just announced the decision to plead not guilty and proceed to trial. The week-long notice period thus provides a minimum amount of time that the defendant will be permitted to prepare following the decision to go to trial. By contrast, the trial calendar often comes long after the defendant has made the decision to plead not guilty and go to trial; it is intended to provide time for the defendant to secure witnesses and take other steps that may be necessary once a specific trial date is set. Because the defendant may already have had ample time to prepare for trial, and because the nature of the case may mean the defendant did not need more time to prepare, it is appropriate to ask whether the lack of the minimum 10-day notice period actually prejudiced the defendant.

Here, for example, on 12 July 2016—more than a year before the trial in this case—the trial court entered an order stating that "the trial of this matter is hereby scheduled for November 14, 2016, subject to further motions for orders continuing this matter as may be agreed upon by the State and Defendant or ordered by the Court." The trial date was continued from that "November term" for nearly six months, although the record does not indicate whether those continuances were done by agreement of the parties or by order of the Court.

In any event, Jones certainly knew for months that his case would soon be called for trial, and thus knew he should prepare. In this context, it does not appear "manifestly contrary to the intent of the legislature" to require a showing of prejudice; to the contrary, this appears to be the sort of circumstance in which our legislature would expect a showing of prejudice before finding the violation amounted to reversible error compelling a new trial. *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Phachoumphone*, __ N.C. App. __, __, 810 S.E.2d 748, 752 (2018); *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 241 (2006). Accordingly, we hold that a violation of N.C. Gen. Stat. § 7A-49.4(e) is reversible error only upon a showing of prejudice to the defendant.

Jones also contends that, even if he must show prejudice, he has done so because he would have been able to contact and subpoena additional witnesses if he was allowed more time to prepare for trial. Specifically, Jones argues that he would have been able to make contact with the physician who performed the physical exam of Millie and with the person who performed the forensic interview of Millie.

But it is not enough to simply assert that there were witnesses Jones might have contacted if given more time. To show prejudice, a defendant asserting a violation of N.C. Gen. Stat. § 7A-49.4(e) must show that, had that statutory provision not been violated, there is a reasonable possibility that the outcome of the trial would have been different. N.C. Gen. Stat. § 15A-1443(a). This, in turn, means that the defendant must explain what testimony or evidence would have been admitted had the continuance been granted. In other words, as our Supreme Court has explained, the defendant must show what he "expected to attempt to prove through these witnesses" that would affect the jury's determination of guilt. *State v. Branch*, 306 N.C. 101, 105, 291 S.E.2d 653, 657 (1982). Without that evidence, an appellate court cannot assess prejudice because "we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record." *Id.*

Jones argues that, with more time, he might have been able to call as witnesses the physician who examined Millie and the investigator

who conducted a "forensic interview" with Millie. Jones argues that these witnesses could have established "how much [Millie's] story had changed over time, how much the story was coached out of the child, and whether the interviewer had already heard a version of the story from another adult." But this is all speculation. Jones has not shown that these witnesses would have offered the sort of testimony he imagines. Likewise, he has not asserted that the trial court denied him the opportunity to make an offer of proof or build a record of what testimony these witnesses actually would have provided—although there has been ample time to do so since the trial court's ruling denying the request for a continuance. Because Jones has not shown what testimony these witnesses would provide that might have impacted the outcome of the trial, we cannot conclude that Jones was prejudiced by the trial court's decision not to continue it. We thus find no prejudicial error.[2]

II. Denial of Request for Rebuttal Witness

[2] Jones also argues that the trial court erred in denying his request to add his father as a rebuttal witness to rebut evidence presented by the State indicating that Jones was at home on the morning of 4 April 2013 when Millie was dropped off. We disagree.

"Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). A trial court's decision on whether to admit rebuttal evidence will not be overturned "absent a showing of gross abuse of discretion." *State v. Anthony*, 354 N.C. 372, 421, 555 S.E.2d 557, 588 (2001). "In determining relevant rebuttal evidence, we grant the trial court great deference and we do not disturb its rulings absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 338, 626 S.E.2d 716, 724 (2006) (citations omitted). Additionally, "[e]videntiary

2. Jones also argues that the State refused to turn over "the prosecution's notes from its interviews with Millie." But the trial transcript indicates that the State declined to produce those notes not because Jones had not asked for them in time, but because the State determined that, in those interviews, Millie did not "make any additional disclosures or make any statements that would be materially different than what has already been included in discovery." In other words, the State did not intend to turn over those notes even if the trial court continued the trial. If Jones believes the State improperly withheld those notes, and this was error, that is a separate argument from the one Jones asserts in this appeal. N.C. R. App. P. 28(b)(6).

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 (2001).

After Millie and her mother unexpectedly gave testimony indicating that Jones was at home when Millie's mother dropped her off on the morning of 4 April 2013, Jones requested to present rebuttal testimony from his father, who would have testified that Jones was at work with him at the time Millie was dropped off. The trial court denied that request. But the Court permitted Jones to present other evidence rebutting that testimony, including testimony from both Jones and his wife. More importantly, no party disputes that, whether or not Jones was at home that morning with Millie, he was home alone with the children (at least for a short time) in the afternoon. The State contends that it was during this time, not in the morning, that the crimes occurred. Thus, the trial court reasonably determined that the requested rebuttal testimony was repetitive and of limited relevance to the issues at trial. *See State v. Reid*, 204 N.C. App. 122, 126, 693 S.E.2d 227, 231 (2010); *State v. Robinson*, 355 N.C. 320, 333–34, 561 S.E.2d 245, 254 (2002). Because this decision was not manifestly arbitrary and unreasonable, it was within the trial court's discretion and we cannot disturb it on appeal. *Anthony*, 354 N.C. at 421, 555 S.E.2d at 588.

Conclusion

For the reasons discussed above, we find no prejudicial error in part and no error in part in the trial court's judgments.

NO PREJUDICIAL ERROR IN PART; No ERROR IN PART.

Judges BRYANT and ARROWOOD concur.

STATE v. MASSEY

[265 N.C. App. 301 (2019)]

STATE OF NORTH CAROLINA
v.
DAMON MARIO MASSEY

No. COA18-1161

Filed 7 May 2019

Kidnapping—first-degree—with use or display of a firearm—victim not released in safe place

The State presented substantial evidence for the jury to convict defendant of first-degree kidnapping based on failure to release the victim in a safe place, where defendant forced the victim (a car mechanic) at gunpoint to examine defendant's truck, defendant shot the gun at the ground near the victim's feet, and then turned and fired another shot in the air, giving the victim time to escape. The evidence did not support an inference that defendant affirmatively took action to release the victim, nor that he allowed the victim to leave.

Appeal by defendant from judgment entered 17 May 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Cathy Hinton Pope, for the State.

Mark L. Hayes for defendant-appellant.

TYSON, Judge.

Damon Mario Massey ("Defendant") appeals from a judgment entered after a jury found him guilty of first-degree kidnapping. We find no error.

I. Background

Jaz Automotive is a used car dealership and auto repair shop located in Charlotte. Approximately two weeks before the kidnapping at issue occurred on 26 October 2015, Defendant brought his white Chevrolet 3500 pickup truck to Jaz Automotive to have his power steering repaired. Shawn Kinard was one of the mechanics who worked on Defendant's truck. Kinard and mechanics replaced the power steering pump in the

truck. Defendant's truck was operating normally when he picked it up from Jaz.

Defendant returned to Jaz Automotive with a tow truck towing his pickup truck on Saturday, 24 October 2015. Defendant told Kinard his pickup truck would not start. Kinard testified, in part: "[Defendant] was insinuating as if it was something we had [done] when we replaced the power steering pump." Kinard asked Defendant to return on Monday to speak to one of the owners of Jaz Automotive.

Defendant returned to Jaz Automotive the following Monday, 26 October 2015. Defendant had his truck towed to the front of Jaz's parking lot. Defendant entered the offices of Jaz Automotive and began speaking with Grady Lockhart ("Lockhart"), one of Jaz's owners. During this time, Kinard was working on another vehicle in the back part of Jaz's parking lot, away from where Defendant's truck was parked. Lockhart accompanied Defendant to speak with Kinard about the pickup truck.

After Defendant spoke with Kinard about the pickup truck, Kinard told him to "give me a few minutes" and "I'll see what I can do." Defendant returned to his truck while Kinard continued working on another customer's vehicle.

A short time later, Kinard looked up and saw Defendant walking towards him wearing a tactical vest and carrying a shotgun. Lockhart observed Defendant was carrying a shotgun and walking towards Kinard. Lockhart called 911. Kinard testified "[Defendant] walked up on me and he clicked the shotgun and he asked me, 'Do you have time to look at my truck now?' And so I proceeded to put my hands up and say, 'Let's go look at your truck.' " Kinard walked to the front of the lot where Defendant's picktup truck was parked, while Defendant pointed his shotgun at Kinard's back.

Defendant told Kinard "If you make any sudden moves . . . I'll put a bullet in your back right here." Kinard looked into the engine bay of Defendant's pickup truck, while Defendant pointed the shotgun at him. Defendant fired a shot at the ground, close to Kinard's feet. Defendant pumped the shotgun again, turned his back to Kinard and fired a shot into the air.

While Defendant was turned away from him, Kinard ran out of the lot to a gas station located down the road and called 911. Defendant did not tell Kinard he was free to leave.

Charlotte-Mecklenburg Police Sergeant Bryan Crum ("Sergeant Crum") was the first law enforcement officer to arrive on the scene.

Sergeant Crum parked his vehicle a short distance from Jaz Automotive. Sergeant Crum observed "a guy walking through the parking lot carrying a shotgun, had a hat on and he was smoking a cigarette." Sergeant Crum later identified this person as Defendant. Sergeant Crum drew his firearm and ordered Defendant to put the shotgun down. Defendant placed the shotgun in the back seat of his pickup truck and was arrested. Sergeant Crum observed a gunshot mark in the asphalt pavement in front of Defendant's pickup truck. Police recovered the shotgun Defendant had wielded along with the tactical vest Defendant had been observed wearing. A sheathed machete was present on the back portion of the tactical vest.

Defendant was charged with second-degree kidnapping, assault with a deadly weapon, assault by pointing a gun, discharging a firearm within a city limit, and first-degree kidnapping with the use or display of a firearm. Prior to trial, the State dismissed all charges except for first-degree kidnapping with a firearm.

The State presented the testimony of Kinard, Lockhart, Sergeant Crum, and a 911 dispatcher. Defendant did not present any evidence. At the close of the evidence, Defendant made a motion to dismiss the charge of first-degree kidnapping, in part, for insufficient evidence that he had not released Kinard in a safe place. The trial court denied Defendant's motion to dismiss.

The trial court submitted first-degree kidnapping to the jury, as well as the lesser-included offenses of second-degree kidnapping and false imprisonment. Following deliberation, the jury found Defendant guilty of first-degree kidnapping with the use or display of a firearm in a separate verdict. The trial court imposed an active presumptive term of 58 to 82 months for first-degree kidnapping. The minimum term of 58 months was increased to 72 months by the sentence enhancement provided by N.C. Gen. Stat. § 15A-1340.16A(c)(1) (2017) for Defendant's use or display of a firearm. Defendant was sentenced, in total, to an active term of 130 to 168 months. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdicts pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issue

Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping. Defendant contends the

State failed to present substantial evidence he did not release Kinard into a safe place. We disagree.

IV. Standard of Review

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Id.* (citations omitted).

"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. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citations omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

V. Analysis

"First-degree kidnapping is the unlawful confinement, restraint or removal from one place to another, of any other person 16 years of age or over without the consent of such person for the purpose of facilitating the commission of any felony or facilitating flight of any person following the commission of a felony." *State v. Ly*, 189 N.C. App. 422, 427, 658 S.E.2d 300, 304 (2008) (citation omitted).

Defendant does not dispute the State's evidence was sufficient to show he had kidnapped Kinard. Instead, Defendant challenges the sufficiency of the evidence to show first-degree, as opposed to second-degree, kidnapping. Second-degree kidnapping is elevated to first-degree kidnapping if the victim was not released in a safe place, was seriously injured, or was sexually assaulted. N.C. Gen. Stat. § 14-39(b) (2017). Defendant's indictment for first-degree kidnapping alleged Kinard was not released in a safe place. The State acknowledges in its brief no evidence tends to show Defendant injured or sexually assaulted Kinard.

"[T]he General Assembly has neither [statutorily] defined nor given guidance as to the meaning of the term 'safe place' in relation to the offense of first degree kidnapping." *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). "Further, the cases that have focused

on whether or not the release of a victim was in a safe place have been decided . . . on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129 (citations omitted).

The Supreme Court of North Carolina has held that releasing a victim in a safe place "implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983). " '[R]elease' [in a safe place] inherently contemplates an affirmative or willful action on the part of a defendant." *State v. Love*, 177 N.C. App. 614, 626, 630 S.E.2d 234, 242 (2006).

"Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place." *Ly*, 189 N.C. App. at 428, 658 S.E.2d at 305 (citing *Love*, 177 N.C. App. at 625, 630 S.E.2d at 242).

Defendant asserts he had "released" Kinard because he turned his back to him and fired a shot into the air. Defendant contends he affirmatively and voluntarily released Kinard because he did not "detain . . . Kinard with any restraints or confine him in a locked location" and he "voluntarily turned his back and allowed . . . Kinard to run away."

Defendant cites this Court's opinion in *State v. Leak*, 174 N.C. App. 628, 621 S.E.2d 341, 2005 WL 3046527 (2005) (unpublished), to support his argument Kinard was released in a safe place. In *Leak*, two individuals robbed a Wendy's restaurant at gunpoint. *Leak*, 2005 WL 3046527, at *1. During the robbery, the robbers forced three Wendy's employees to enter a walk-in freezer. *Id.* The defendant was one of the robbers, and he was charged, in part, with two counts of first-degree kidnapping. *Id.* At trial, the defendant filed a motion to dismiss the charges of first-degree kidnapping based upon a lack of sufficient evidence that he did not release the victims in a safe place. *Id.* at *2. The trial court denied the motion to dismiss. *Id.*

On appeal, this Court held all the evidence showed the victims were released in a safe place, because:

> Here, the victims were released at the place where they worked. The freezer could be opened from the inside and the employees walked out of the freezer on their own with-in minutes after ensuring the perpetrators had left the building. They awaited the arrival of the police, who had been called by the store manager.

Id. at *4.

The facts in *Leak* are clearly distinguishable from the State's evidence presented here. Defendant did not leave Kinard behind at the scene of the kidnapping. Instead, Kinard ran away when he saw he had an opportunity to do so. Viewed in the light most favorable to the State, a reasonable juror could find Kinard ran away to escape and that Defendant did not release him.

Defendant also cites this Court's opinion in *State v. White*, 127 N.C. App. 565, 492 S.E.2d 48 (1997), to support his argument. In *White*, the defendant and an accomplice abducted the victim and agreed to release the victim "if she agreed to tell authorities she had not seen her assailants." *White*, 127 N.C. App. at 568, 492 S.E.2d at 50. The defendant and his accomplice drove the victim to a motel and dropped her off at the motel parking lot in the middle of the afternoon. *Id.* The abductors also gave the victim change so she could use a pay phone. *Id.*

This Court held "all the evidence established that the victim was released in a safe place." *Id.* at 573, 492 S.E.2d at 53. In *White*, there was no evidence to indicate the victim had escaped, in contrast to the instant case. *See id.* The evidence in *White* indisputably showed her captors released her. *Id.* The issue in *White* was whether the victim was released *in a safe place* at a motel parking lot, not whether she was released at all. *Id.*

Viewed in the light most favorable to the State, the evidence does not show Defendant "relinquished dominion and control over" Kinard to "effectuate [his] release in a safe place." *See Ly*, 189 N.C. App. at 428, 658 S.E.2d at 305.

Defendant held Kinard at gunpoint and threatened to shoot him in the back if Kinard did not repair his truck. While Kinard was looking at the engine bay of Defendant's pickup truck, Defendant fired a shot into the asphalt close to Kinard's feet. Defendant then turned his back to Kinard, pumped another shell into the chamber, and fired a second shot into the air. When Defendant turned away, Kinard seized the opportunity to run away. Defendant never told or indicated to Kinard that he was free to leave, nor gave any indication that he would not shoot Kinard if he ran away.

The mere act of an armed kidnapper turning his back, without more, is not "a conscious, willful action on the part of the [kidnapper] to assure that his victim is released in a place of safety." *See Jerrett*, 309 N.C. at 262, 307 S.E.2d at 351. Kinard's seizing of the opportunity to flee from Defendant is not "an affirmative or willful action on the part

of [Defendant]," to release Kinard. *See Love*, 177 N.C. App. at 625, 630 S.E.2d at 242.

Although Defendant did not pursue Kinard or fire another shot at him as he ran away, this failure to pursue or attempt to re-establish control does not convert Kinard's escape into a release in a safe place to support dismissal of the first-degree kidnapping charge. *See State v. Cole*, 199 N.C. App. 151, 159, 681 S.E.2d 423, 429 (2009) ("[Defendant's] failure to chase or do any additional harm to [victim] does not convert her escape into a release"), *writ denied*, *review denied*, 363 N.C. 658, 686 S.E.2d 679 (2009).

In *Jerrett*, our Supreme Court noted the dichotomy which exists between a voluntary *release* of a victim by a defendant and an *escape* by a victim:

> [I]t is difficult to envision a situation when a release of the victim by the defendant could be other than voluntary. It seems the defendant would either release the victim voluntarily, or the victim would reach a place of safety by effecting an escape or by being rescued.

309 N.C. at 262, 307 S.E.2d at 351 (emphasis omitted). The defendant in *Jerrett* kidnapped his victim at gunpoint and forced her to drive him in her car. *Id.* at 263, 307 S.E.2d at 352. When the victim indicated the car was low on gas, the defendant permitted her to stop at a gas station. *Id*. The defendant allowed the victim to go inside the gas station, while he followed several feet behind her and carried his pistol underneath his shirt within his waistband. *Id*.

The victim walked past a police officer, who was inside the gas station, and told the officer in a low voice that the defendant had a gun. *Id*. The victim walked to the back of the gas station and locked herself inside a storage room. *Id*. The defendant did not attempt to stop the victim while they were both inside of the gas station. *Id*. The officer confronted and arrested the defendant. *Id*.

Our Supreme Court held that the evidence was sufficient to submit the theory of first-degree kidnapping to the jury, and stated:

> Although this evidence presents a close question as to whether defendant released [the victim] in a safe place, we are of the opinion that it was sufficient to permit the jury to reasonably infer that [victim] escaped or that she was rescued by the presence and intervention of the police officer. Conversely, this evidence would have permitted

> the jury to reasonably infer that defendant released [the victim] in a safe place. It was for the jury to resolve the conflicting inferences arising from this evidence.

Id.

As in *Jerrett*, the evidence presented here was sufficient to permit the jury to reasonably find that Kinard escaped when Defendant turned his attention away from Kinard. *See id.* Viewed in the light most favorable to the State, substantial evidence supports the jury's conclusion that Defendant did not release Kinard in a safe place to convict him of first-degree kidnapping.

The trial court instructed the jury on first-degree kidnapping, and the lesser-included offences of second-degree kidnapping and false imprisonment. After being properly instructed, the jury weighed and resolved conflicts in the evidence to reach its verdict. Defendant has failed to show the trial court erred by denying his motion to dismiss. Defendant's arguments are overruled.

VI. Conclusion

Viewed in the light most favorable to the State, sufficient evidence was admitted to submit the charge of first-degree kidnapping to the jury. The trial court also submitted the lesser-included offenses of second-degree kidnapping and false imprisonment for the jury to weigh the evidence. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the trial court's denial of Defendant's motion to dismiss, the jury's verdicts, or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge McGEE and Judge BERGER concur.

STATE OF NORTH CAROLINA
v.
ANTON THURMAN McALLISTER

No. COA18-726

Filed 7 May 2019

Constitutional Law—effective assistance of counsel—admission of client's guilt—acknowledgment that defendant injured victim—no deficiency

Defense counsel's representation was not deficient under *State v. Harbison*, 315 N.C. 175 (1985), where counsel did not concede defendant's guilt to one of the crimes charged—assault on a female—but rather acknowledged that defendant had injured the victim. Counsel did not state that defendant had assaulted, struck, pushed, bit, or committed any of the acts alleged by the State; and counsel did not acknowledge any elements of habitual misdemeanor assault, for which assault on a female was the underlying offense.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 22 August 2016 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 13 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Anton Thurman McAllister ("Defendant") appeals by petition for writ of certiorari from a judgment entered after a jury's conviction of one count of habitual misdemeanor assault. We find no error.

I. Background

Defendant met the victim, Stephanie Leonard, at a drug treatment facility group session in Winston-Salem. Soon after they met, Defendant moved into Ms. Leonard's apartment.

On the evening of 16 February 2015, Defendant and Ms. Leonard jointly consumed a large bottle of wine at a table inside Ms. Leonard's apartment. Around 9:00 p.m., they decided to walk to a nearby BP gas station to purchase cigarettes. Before arriving at the BP gas station, Ms. Leonard decided she wanted more wine and the pair began walking towards another store.

At this point, Defendant realized Ms. Leonard had not disclosed to him that she had money. Ms. Leonard testified that Defendant hit her in the face and knocked her to the ground, causing her to lose her wallet in the fall. Ms. Leonard got up and began to walk back towards the BP station. Defendant continued to strike her in the face. A cashier at the BP heard the struggle and saw Defendant "jerk" Ms. Leonard around outside of the store. The cashier called the police. Winston-Salem police responded to the call, but did not find Defendant or Ms. Leonard. An officer recovered Ms. Leonard's wallet and identification card at the scene.

The couple eventually returned to Ms. Leonard's apartment. Ms. Leonard testified that her face was bleeding and Defendant continued to hit her and drag her around the apartment. During the struggle, as Ms. Leonard struck at Defendant, her fingers entered his mouth and his fingers entered hers. Ms. Leonard testified that she bit Defendant's fingers and he bit her fingers back. At some point during the altercation, Ms. Leonard got into the bathtub. Defendant washed blood off of her body and splashed the blood-water mixture onto the walls.

Ms. Leonard went into her bedroom. Defendant attempted to force Ms. Leonard to perform fellatio. Defendant and Ms. Leonard then engaged in sexual intercourse and both fell asleep.

The next day, 17 February, Winston-Salem police arrived at the BP station to meet Ms. Leonard and investigate the assault. Officer P.M. Felske testified he observed Ms. Leonard's "cut lip and swollen lip and that it appeared that she had been assaulted." Law enforcement officers also entered and examined Ms. Leonard's apartment. Officer Christopher Ingram observed and photographed Ms. Leonard's injuries and the blood stains the officers had observed in the apartment, on the floor of the bathroom and walls of the bathtub.

Officer J.A. Henry collected a security video recorded at the BP station on 16 February and observed Defendant present in the area of that same BP on the evening of 17 February. Defendant agreed to go to the police department to speak with officers about an unrelated incident. At the police station, Defendant agreed to discuss the incident between

himself and Ms. Leonard. Defendant purportedly admitted he had pushed Ms. Leonard and engaged in other physical contact.

Defendant was indicted for habitual misdemeanor assault and charges of second-degree rape, second-degree sex offense, and assault by strangulation.

On 22 August 2016, the jury returned verdicts finding Defendant guilty of assault on a female, the underlying felony for habitual misdemeanor assault, and not guilty of all the other offenses. Defendant admitted to the predicate misdemeanor assault convictions for habitual misdemeanor assault. The trial court entered judgment sentencing Defendant to a term of 15 to 27 months imprisonment for habitual misdemeanor assault.

Defendant failed to file a notice of appeal. On 19 July 2017, Defendant filed a *pro se* "Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel." The trial court treated Defendant's motion as a motion for appropriate relief ("MAR") and denied the motion without an evidentiary hearing.

Defendant filed a petition for writ of certiorari with this Court on 11 August 2017. By order entered 29 August 2017, this Court allowed the petition "for the purpose of reviewing the judgment entered . . . on 22 August 2016."

On 17 October 2018, Defendant filed an appellate brief, and at the same time filed a second petition for writ of certiorari seeking review of the trial court's 27 July 2017 order denying the MAR. The second petition was referred to this panel for consideration.

II. Jurisdiction

This Court reviews Defendant's criminal conviction by writ of certiorari granted on 29 August 2017 pursuant to N.C. Gen. Stat. § 15A-1422(c)(3) (2017).

III. Issue

Defendant asserts his counsel conceded his guilt to the offense of habitual misdemeanor assault on a female which constitutes a *per se* denial of his constitutional right to effective assistance of counsel.

IV. Standard of Review

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

V. *State v. Harbison*

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), our Supreme Court held that where "counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." The Court stated the practical effect is the same as if defense "counsel had entered a plea of guilty without the client's consent." *Id.*

Our Supreme Court in *Harbison* requires a defendant's consent to be on the record to allow his counsel's concession of defendant's guilt of one or more of the offenses for which he is charged. An "ineffective assistance of counsel, per se in violation of the Sixth Amendment, [is] established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08.

Defendant argues his trial counsel admitted or conceded his guilt on the misdemeanor charge of assault on a female without his consent and asserts he is entitled to a new trial. The State argues that no *Harbison* violation occurred because counsel did not expressly concede Defendant's guilt to a charged crime or only admitted one element of a charged offense.

The facts and statements of the present case fall squarely within the rationale of the precedents cited by the State from the Supreme Court of North Carolina and our Court, where Defendant's counsel may have admitted an element of the offense, but he did not expressly concede the crime charged or all other elements of the charged crime.

A. State v. Gainey

In *State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 476 (2002), our Supreme Court rejected the defendant's assignment of error asserting his counsel's argument violated *Harbison*. The Court recognized that "defense counsel never conceded that defendant was guilty of any crime." *Id.* Counsel merely noted defendant's involvement in the events surrounding the death of the victim, and argued that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." *Id.* (defendant was charged with murder, kidnapping, and robbery). The Court noted the defendant had "taken defense counsel's statements out of context to form the basis of his claim, and . . . fail[ed] to note the consistent theory of the defense that defendant was not guilty." *Id.* The defendant's *Harbison* objections were overruled. *Id.*

B. State v. Fisher

In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), the defendant was charged with and tried for first-degree murder. His counsel argued:

> His Honor is going to submit to you a verdict form—Madam Clerk, do we have it drawn up yet? Thank you. In which its going to say, Ladies and Gentlemen of the Jury, Do you find the defendant guilty of murder in the first degree and then down below that it's going to say Do you find him guilty of second degree. Second degree is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard Johnny testify, there was malice there and then another possible verdict is going to say Do you find him guilty of voluntary manslaughter. Voluntary manslaughter is the killing of a human being without malice and without premeditation. It's a killing. And it also has not guilty, remember that too. I asked you about that and it's not a not guilty as in some trial I wasn't there, I don't know a darn thing about it, I wasn't there, never been to Silversteen, never will go there. There are some that say, some defenses that say not guilty, that I was there. It's stupid to be there, it don't make mama proud of being there but I was there.

Id. at 533, 350 S.E.2d at 346.

Our Supreme Court held defendant-Fisher was not entitled to a new trial as the counsel's comments did not admit his guilt and counsel's statement did not fall within the line of cases showing a *Harbison* violation. *Id.* Even though Fisher's counsel admitted malice, an element of the offense, the Court held that his counsel did not admit his client was guilty to murder as charged. *Id.*

Our Court has also recognized, "[a]dmission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *See, e.g.*, *State v. Wilson*, 236 N.C. App. 472, 477, 762 S.E.2d 894, 897 (2014) ("Because this purported admission by Defendant's counsel did not refer to either the crime charged or to a lesser-included offense, counsel's statements in this case fall outside of *Harbison*. At best, an admission by Defendant's trial counsel that Defendant pointed a gun at [victim] while still maintaining Defendant's innocence of attempted first-degree murder, would appear to place counsel's statements within the rule in [*State v.*] *Fisher*, and thus still outside of *Harbison*.").

C. State v. Randle

In *State v. Randle*, 167 N.C. App. 547, 550, 605 S.E.2d 692, 693 (2004), this Court reviewed a defendant's assertion his counsel had implicitly conceded his guilt to a lesser-included offense during closing argument without first obtaining his consent. Defendant's counsel told the jury

> they must be entirely convinced of each and every element of the crimes. As serious injury is the essential difference between first and second degree rape, defense counsel then attempted to cast doubt on the seriousness of the mental and physical injuries to [the victim] by arguing [the victim] did not suffer serious injury.

Id. at 549, 605 S.E.2d at 693.

Defendant's counsel also summarized evidence that the defendant had ejaculated on himself. *Id.* In his final sentence to the jury, defense counsel argued, "Teddy Randle is not guilty of first degree rape. Teddy Randle is not guilty of first degree sexual offense." *Id.* Our Court distinguished the *Randle* case from the requirements of *Harbison* because "counsel in the case at bar never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense." *Id.* at 552, 605 S.E.2d at 695.

D. State v. Maniego

The State also cites *State v. Maniego*, 163 N.C. App. 676, 683, 594 S.E.2d 242, 246, *appeal dismissed*, *review denied*, 358 N.C. 737, 602 S.E.2d 369 (2004), in which the defendant argued his counsel's opening statement violated *Harbison*. The defendant's counsel stated:

> Maniego put himself in the vehicle with Clifford Miller and David Brandt. He put himself driving the vehicle, he put himself at the scene where David Brandt was murdered by Clifford Miller. Through his statements, you'll hear his testimony in this case and he did make three different statements. The first two are incomplete. The third one is the final version. It's the truth about his involvement in these crimes, and it will show to you that he did not aid and abet in the killing of David Brandt by Clifford Miller, nor did he act in concert with Clifford Miller to kill David Brandt. The fact that he's at the scene where these acts occurred is not enough for you to find him guilty of these crimes.

Id. at 684, 594 S.E.2d at 247. This Court held no *Harbison* violation had occurred to award a new trial because "[a]dmitting a fact is not equivalent to admitting guilt." *Id.* (citation omitted).

E. Defendant's Cases

A review of cases cited by Defendant, wherein this Court awarded new trials based upon counsels' admissions of their client's guilt in closing arguments, also reflects the fallacy of Defendant's argument. Defendant's assertion that his counsel's statements in closing argument denied his constitutional right to effective counsel under *Harbison* is clearly not supported by these cases.

In *State v. Maready*, 205 N.C. App. 1, 4-5, 695 S.E.2d 771, 774-75 (2010), the defendant pled not guilty and was tried before a jury. During his closing argument, defense counsel "conceded that the State had met its burden with respect to the charges of DWI, reckless driving, DWLR and misdemeanor 'larceny and/or possession of stolen property.' " *Id.* at 4, 695 S.E.2d at 774. Counsel also made the following statements:

> We do have the two misdemeanor assaults. . . . We don't contest those. They are inclusive in the events that have significant issues associated with them, but we don't contest those. And you can go and make your decisions accordingly. . . . [Defendant] holds absolute—holds responsibility for [the death of the victim]. I just argue it's not murder. It's Involuntary Manslaughter.

Id. at 4, 695 S.E.2d at 774-75. This Court found:

> Defendant's counsel discussed the elements of involuntary manslaughter with the jury, stating that the second element was "that . . . [D]efendant's impaired driving proximately caused the victim's death. That's true. [Defendant's] guilty of that and should be found guilty of that." Defendant's counsel also stated that: "[Defendant's] already admitted to you guilt . . . to . . . Assault with a Deadly Weapon times two[.]"
>
> At the close of all the evidence and after closing arguments, but before jury instruction, Defendant's counsel again admitted Defendant's guilt to the charges of reckless driving, DWI, DWLR and misdemeanor possession of stolen goods.

Id. at 4-5, 695 S.E.2d at 775. The facts before us are clearly distinguishable from counsel's admissions and statements in *Maready*. *See id.*

Defendant also cites *State v. Spencer*, 218 N.C. App. 267, 275, 720 S.E.2d 901, 906 (2012), wherein the defendant was charged with resisting a public officer and eluding arrest. *See* N.C. Gen. Stat. § 20-141.5(a) (2017) ("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.").

The defendant's counsel's closing argument in *Spencer* admitted the defendant "chose to get behind the wheel after drinking, and he chose to run from the police" and "Officer Battle was already out of the way and he just kept on going, kept running from the police." *Spencer*, 218 N.C. App. at 275, 720 S.E.2d at 906. This Court held counsel had conceded defendant's guilt to resisting a public officer and to eluding arrest. This Court remanded the case for a determination of whether the defendant had received the proper *Harbison* warnings. *Id.*

VI. Crimes Charged

Defendant's other charges of second-degree rape, second-degree sexual offense, and assault by strangulation were submitted to the jury, in addition to the habitual misdemeanor assault charge. The habitual misdemeanor assault premised upon an assault on a female, was the only count the jury convicted defendant of committing. The State's evidence tended to show Defendant had assaulted and struck Ms. Leonard by pushing her down, biting her, and hitting her in the face, causing injuries of scrapes and bruises to her back and fingers, and bleeding and swelling of her lips.

The trial court instructed the jury that in order for them to find Defendant guilty, the State must prove three things beyond a reasonable doubt: (1) Defendant intentionally assaulted the alleged victim by hitting her; (2) the alleged victim was a female; and, (3) Defendant was a male over the age of 18. The elements of habitual misdemeanor assault are: (1) a simple assault or a simple assault and battery or affray; (2) which causes physical injury; and, (3) two or more prior convictions for either misdemeanor or felony assault. N.C. Gen. Stat. § 14-33.2 (2017).

Counsel's closing argument asserted two people had gotten drunk and argued, which escalated into a fight. Counsel stated, "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." Counsel's statements relayed and summarized the evidence before the jury, which included both the officer's testimony and Defendant's recorded hour-and-a-half long video interview with officers, shown to the jury. In the video interview, Defendant made the statements

that were summarized in counsel's closing argument. Counsel repeated his assertion that Defendant and Ms. Leonard were "[t]wo drunk people [who] got into an argument."

While defense counsel acknowledged the jurors may "dislike Mr. McAllister for injuring Ms. Leonard," he did not state Defendant "assaulted," struck, pushed, bit, or committed any of the specific acts or elements as alleged by the State. Further, counsel did not acknowledge Defendant's age or prior criminal record, both elements of habitual misdemeanor assault.

Our controlling precedents above hold that where counsel admits an element of the offense, but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison* to show a violation of the defendant's Sixth Amendment rights. Counsel's statements before us are not consistent with the facts of either *Maready* or *Spencer*, in which *per se* violations are presumed by counsel's admission of a client's guilt to crimes or all the elements thereof without the client's consent. *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897.

Here, counsel's conduct was not *per se* deficient under *Harbison* to award a new trial.

VII. *Strickland v. Washington*

Since counsel's statements do not fall within *Harbison* as *per se* ineffective assistance, Defendant's claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). A defendant's claim of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

However, here, Defendant presents no argument tending to show he was prejudiced by counsel's asserted deficient performance to such

an extent the outcome of the trial would have been different, but for the alleged errors. Defendant has not demonstrated or argued any prejudice. Defendant is not entitled to a new trial on this issue. *Id.*

VIII. Motion for Appropriate Relief

Defendant petitioned this Court on 18 October 2018 to issue another writ of certiorari to review on the merits the trial court's denial of his "Motion to Modify and Terminate Sentence for Ineffective Assistance of Counsel," which the trial court treated as a motion for appropriate relief ("MAR"). The trial court found Defendant's motion presented only matters of law and raised no factual issues to require an evidentiary hearing. The court summarily denied defendant's MAR on 27 July 2017.

Defendant had filed his earlier 11 August 2017 petition for writ of certiorari to this Court. On 29 August 2017, this Court allowed Defendant's petition for the limited purpose of reviewing the 22 August 2016 habitual misdemeanor assault judgment entered immediately after defendant's trial.

In his MAR, Defendant asserted, *inter alia*, his trial counsel had a conflict of interest because his law firm had represented the victim in a similar criminal matter. He asserted claims of ineffective assistance of counsel by his failure to object to alleged false statements of the police, failure to share discovery materials with defendant, and "many constitutional violations."

Defendant failed to provide any supporting affidavits or other evidence beyond the bare assertions in his motion. The General Statutes require a MAR to be supported by affidavit or other documentary evidence. N.C. Gen. Stat. § 15A-1420(b) (2017). "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears." N.C. Gen. Stat. § 15A-1420(c)(6) (2017).

Defendant's failure to provide affidavits or other evidence provided no basis for the trial court to review and be able to determine whether an evidentiary hearing would be required. *See State v. Payne*, 312 N.C. 647, 669, 325 S.E.2d 205, 219 (1985) (Because defendant submitted no supporting affidavits or other documentary evidence with his motion for appropriate relief and the alleged fact was not ascertainable from the record or transcripts submitted, the Court "cannot address the merits of defendant's request for appropriate relief"); *State v. Aiken*, 73 N.C. App. 487, 501, 326 S.E.2d 919, 927 (1985) ("Since defendant did not comply with G.S. 15A–1420(c)(6), the trial court's summary denial of the motion for appropriate relief was not error.").

Without any factual support, the trial court's summary denial of Defendant's MAR was proper. Defendant's subsequent and pending petition for writ of certiorari filed 17 October 2018 is denied.

IX. Conclusion

This case is controlled by the precedents and holdings in *Gainey*, *Fisher*, *Randle*, and *Maniego*. Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant admitted to his prior assault convictions to support the charge for habitual misdemeanor assault.

There is no error in the jury's verdict or in the judgment entered thereon. Defendant's pending petition for writ of certiorari filed 17 October is denied. *It is so ordered.*

NO ERROR.

Judge STROUD concurs.

Judge ARROWOOD dissenting with separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent. I would hold that, under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), there was a *per se* violation of defendant's right to effective assistance of counsel.

On appeal, defendant first argues that he was denied his constitutional right to effective assistance of counsel when his counsel conceded he was guilty of assault on a female during closing arguments. Defendant relies on our Supreme Court's decision in *Harbison*, and contends his counsel's concession amounts to a *per se* violation of the Sixth Amendment, thereby requiring a new trial.

In *Harbison*, the Court noted that it recently adopted in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985), the two-part test for resolving claims of ineffective assistance of counsel enunciated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). *Harbison*, 315 N.C. at 178, 337 S.E.2d at 506. That two-part test requires:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel

> made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Braswell, 312 N.C. at 562, 324 S.E.2d at 248 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693) (emphasis omitted). Our Supreme Court has more recently explained the test and the required showings as follows:

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

In *Harbison*, however, the Court recognized that, "[a]lthough [it] still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984)). For example, "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. The Court reasoned,

> [w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Id. Consequently, the Court held that "ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-508.

In the present case, the State brought the potential for a *Harbison* issue to the trial court's attention prior to opening statements. The State explained that defendant did make some admissions in a statement to law enforcement and cautioned that the court may need to make a *Harbison* inquiry if defense counsel is going to address the admissions in the opening statements. The trial court then questioned the defense as follows:

> THE COURT: Does the defense have any Harbison issues?
>
> [DEFENSE]: Not immediately, Your Honor. That's not something I was expecting yet.
>
> THE COURT: Are you expecting to make any comments in your opening with regard to admissions?
>
> [DEFENSE]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against --
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE]: Not in opening, I can stipulate to that.

The exchange ended with the court stating, "[l]et's rereview that when we get back from lunch." The court, however, did not come back to the issue. In fact, there is no further mention of the potential *Harbison* issue in the record.

The evidence presented by the State at trial included a video of defendant's interview with police. In that interview, defendant admitted to a physical altercation with the alleged victim that resulted in the alleged victim sustaining injuries.

It appears from the record that defense counsel knew the interview was damaging to defendant's case and addressed it during the closing

arguments. Defense counsel suggested to the jury that the interview was coercive, noting that it was "9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement[,]" and they begin talking to defendant about a moped that is unrelated to these charges. Defense counsel then, however, made the following statements:

> You heard [defendant] admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now they run with his one admission and say "well, then everything [the alleged victim] -- everything else [the alleged victim] said must be true."
>
> Because [defendant] was being honest, they weren't honest with him.

Following these statements, defense counsel returned to highlighting the coercive nature of the interview, stating, "[t]wo detectives for three hours into midnight. The whole time he's thinking he's going home."

Later in the closing argument, defense counsel stated that "[the alleged victim] was injured by [defendant]" and addressed the severity of the charges by stating, "[t]his is as serious as it gets, second-degree rape, second-degree sexual assault, assault by strangulation." Defense counsel did not mention the assault on a female charge serving as the underlying offense for habitual misdemeanor assault. Finally, in concluding the arguments to the jury, defense counsel stated,

> Jury, what I'm asking you to do is you may dislike [defendant] for injuring [the alleged victim], that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl. . . .
>
> . . . All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

Defendant now contends these statements by defense counsel during closing arguments amounted to a concession of guilt to the charge of assault on a female without his consent, in violation of *Harbison*. In response to defendant's *Harbison* argument, the State briefly contends

that this case does not fall under the prohibition in *Harbison* because "there was never any specific concession of guilt" because "[c]ounsel never stated to the jury that defendant was guilty of assault on a female in contrast to the counsel in *Harbison*." The State cites various cases in which our courts have determined there were no *Harbison* violations, such as cases in which counsel admitted an offense that was not charged, *see State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d. 165 (2002); *State v. Wilson*, 236 N.C. App. 472, 762 S.E.2d 894 (2014), or cases in which counsel did not concede all elements of the offense charged, *see State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995); *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986); *State v. Maniego*, 163 N.C. App. 676, 594 S.E.2d 242 (2004). The State further contends that defense counsel in this case "asked the jury to find defendant not guilty of the charged offenses" at the close of his argument.

Upon review of these cases, I would hold defense counsel's statement to the jury in closing arguments amounted to a concession of defendant's guilt to assault on a female. Defense counsel did not simply recite evidence, he choose to highlight specific evidence that defendant physically injured the alleged victim and argued to the jury that defendant honestly admitted to police what he did. It appears defense counsel used this strategy in order to cast doubt on the allegations of more serious offenses that defendant did not admit to police. Defense counsel further indicated defendant was wrong for his actions, defendant felt bad about his actions, and explicitly stated "he did wrong, God knows he did." I agree with defendant that defense counsel's statements amount to an admission to assault on a female, distinguishing this case from those cases cited by the State. Furthermore, the State mischaracterizes defense counsel's final plea to the jury to find defendant not guilty. As shown above, defense counsel only emphasized the serious nature of second-degree rape, second-degree sexual assault, assault by strangulation. Defense counsel then, after repeating those three charges, asked the jury to find defendant not guilty.

Considering defense counsel's argument in full, it is evident defense counsel acknowledged defendant's guilt on the assault on a female charge in an attempt to cast doubt on the evidence of the more serious charges.

For the majority of the State's response, the State does not focus on the substance of defense counsel's argument. Instead, the State focuses on defense counsel's strategy. The State emphasizes that the uncontroverted evidence was that defendant admitted to police during the

interview that he got physical with the alleged victim and contends it was a valid trial strategy for defense counsel to accept the evidence of assault on a female and argue doubt in the evidence of the more severe charges. The State asserts that this was defendant's "only viable defense" and acknowledges that it was successful because defendant was acquitted of the more severe charges. Thus, the State argues defense counsel was not ineffective and defendant cannot show prejudice. This argument by the State, however, does not address the *Harbison* issue.

"[M]atters of trial strategy . . . are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). However, just as our Supreme Court explained in *Harbison*, this Court has explained that

> [a] concession of guilt by a defendant's counsel has the same practical effect as a guilty plea, because it deprives the defendant of his right against self-incrimination, the right of confrontation and the right to trial by jury. Therefore, a decision to make a concession of guilt as a trial strategy is, like a guilty plea, a decision which may only be made by the defendant and a concession of guilt may only be made with the defendant's consent. Due process requires that this consent must be given voluntarily and knowingly by the defendant after full appraisal of the consequences and a clear record of a defendant's consent is required.

State v. Perez, 135 N.C. App. 543, 547, 522 S.E.2d 102, 106 (1999) (citations omitted), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000).

> [This Court] reject[ed], however, [the] defendant's argument that an acceptable consent requires the same formalities as mandated by statute for a plea of guilty. Our Supreme Court has found a knowing consent to a concession of guilt in compliance with *Harbison* where the record showed the defendant was advised of the need for his authorization for the concession, defendant acknowledged that he had discussed the concession with his counsel and had authorized it, and the defendant thereafter acknowledged that his counsel had made the argument desired by him.

Id. at 547-48, 522 S.E.2d at 106 (citations omitted).

Here, defendant does not question the strategy of defense counsel, because that is not at issue. Defendant only challenges defense counsel's concession of guilt on the charge of assault on a female without his authorization. I agree with defendant that there is nothing in the record to show that he agreed to defense counsel's concession. Therefore, under *Harbison*, there was a *per se* violation of defendant's right to effective assistance of counsel. No further showing is required. Accordingly, I would hold defendant is entitled to a new trial on the charge of assault on a female, the underlying offense for habitual misdemeanor assault.

Defendant also seeks for this Court to review the trial court's denial of his MAR pursuant to his second petition for *writ of certiorari* filed at the same time as his appellate brief on 17 October 2018. Unlike the majority, I would simply deny defendant's second petition as moot because of my determination defendant is entitled to a new trial on the first issue.

For the reasons above, I dissent.

STATE OF NORTH CAROLINA
v.
JEFFERY MARTAEZ SIMPKINS

No. COA18-725

Filed 7 May 2019

Constitutional Law—right to counsel—pro se—statutory inquiry—forfeiture

A criminal defendant was entitled to a new trial based on a violation of his right to counsel where the trial court failed to make a proper inquiry of defendant's decision to proceed pro se pursuant to N.C.G.S. § 15A-1242, including informing him of the range of permissible punishments for the crimes charged; defendant did not clearly and unequivocally waive his right to counsel; and there was no clear evidence that defendant forfeited his right to counsel by serious misconduct or that he engaged in dilatory conduct after being warned that such conduct would be treated as a request to proceed pro se.

Judge TYSON concurring in part and dissenting in part.

STATE v. SIMPKINS

[265 N.C. App. 325 (2019)]

Appeal by defendant from judgments entered on or about 8 June 2017 by Judge Andrew Taube Heath in Superior Court, Stanly County. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for resisting a public officer and failing to exhibit/surrender his license. Because the trial court did not properly instruct defendant on waiver of the right to counsel under North Carolina General Statute § 15A-1242 and because defendant did not forfeit his right to such an instruction, we conclude defendant must receive a new trial.

I. Background

In July of 2016, Officer Trent Middlebrook of the City of Locust was on patrol; he ran the "tag" of a vehicle and discovered that the owner of the vehicle, defendant, had a suspended driver's license and a warrant out for his arrest. Officer Middlebrook pulled defendant over and asked for his license and registration. Defendant refused to provide them and was uncooperative and belligerent. Officer Middlebrook arrested defendant.

Defendant's first trial was in district court, and there is no transcript of those proceedings. From the district court, there is an unsigned and undated waiver of counsel form with a handwritten note that appears to say, "Refused to respond to to [(sic)] inquiry by the court and mark as refused at this point[.]" There is also a waiver of counsel form from 16 August 2016 that also has a handwritten notation, "Defendant refused to sign waiver of counsel upon request by the Court[.]" Also on or about 16 August 2016, defendant was convicted in district court of resisting a public officer and failing to carry a registration card. Defendant appealed his convictions to superior court.

In superior court, defendant proceeded *pro se*. Defendant was tried by a jury and convicted of resisting a public officer and failing to exhibit/surrender his license. The trial court entered judgments, and defendant appeals.

II. Subject Matter Jurisdiction

Defendant contends "the trial court lacked subject matter jurisdiction to try [him] in violation of N.C. Gen. Stat. § 20-29 when the citation purporting to charge him was fatally defective." (Original in all caps.) But at oral argument before this Court, defendant's counsel withdrew this argument and conceded that *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701, (2017), *aff'd*, ___ N.C. ___, 819 S.E.2d 340 (2018), is the controlling authority on this issue, and defendant cannot prevail. Therefore, this argument is dismissed.

III. Waiver or Forfeiture of Counsel

Defendant argues that "the trial court erred by failing to make a thorough inquiry of . . . [his] decision to proceed *pro se* as required by N.C. Gen. Stat. § 15A-1242." (Original in all caps.) We review whether the trial court complied with North Carolina General Statute § 15A-1242 *de novo*. *See State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*.") (citations omitted)).

North Carolina General Statute § 15A-1242 provides,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2015). "The trial court's inquiry under N.C. Gen. Stat. § 15A–1242 is mandatory and failure to conduct such an inquiry is prejudicial error." *State v. Sorrow*, 213 N.C. App. 571, 573, 713 S.E.2d 180, 182 (2011) (citation and quotation marks omitted).

Defendant contends he

> was advised of his right to have counsel and of his right to have appointed counsel. However, there is no showing

> on the record that the trial court made the appropriate advisements or inquires to determine that . . . [he] understood and appreciate the consequences of his decision or comprehended "the nature of the charges and proceedings and the range of permissible punishments."

While the trial court did inform defendant he could be subjected to "periods of incarceration," the transcript confirms that defendant was not explicitly informed of "the *range* of permissible punishments." N.C. Gen. Stat. § 15A-1242 (Emphasis added). The State acknowledged at oral argument that without informing defendant of the "range of permissible punishments[,]" the trial court could not comply with the mandate of North Carolina General Statute § 15A-1242. Failure to comply with North Carolina General Statute § 15A-1242, if required, would result in prejudicial error. *Sorrow*, 213 N.C. App. 571, 713 S.E.2d 180. But the State contends the trial court was not required to comply with North Carolina General Statute § 15A-1242 due to defendant's forfeiture of his right to counsel.

In oral arguments, both defense counsel and the State relied heavily on *State v. Blakeney*, as it addresses not only the issue before us regarding waiver and forfeiture of counsel, but also thoroughly analyzes many prior cases; therefore, we turn to *Blakeney*, 245 N.C. App. 452, 782 S.E.2d 88 (2016). *Blakeney* first notes that there are two ways a defendant may lose his right to be represented by counsel: voluntary waiver after being fully advised under North Carolina General Statute § 15A-1242 and forfeiture of the right by serious misconduct. *Id.* at 459-61, 782 S.E.2d at 93-94.

> A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution. Our appellate courts have recognized two circumstances, however, under which a defendant may no longer have the right to be represented by counsel.
>
> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A

> trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A–1242. . . .
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant who is abusive toward his attorney may forfeit his right to counsel.

Id. (citations, quotation marks, ellipses, and brackets omitted).

Blakeney then notes a third way a defendant may lose the right to representation by counsel, a hybrid of waiver and forfeiture:

> > Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver

> by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Id. at 464-65, 782 S.E.2d at 96 (quotation marks omitted).

As to the facts in *Blakeney* specifically,

> In this case, neither defendant nor the State asserts that defendant ever asked to represent himself at trial, and our own review of the transcript fails to reveal any evidence that defendant indicated, must less clearly and unequivocally requested, that he be permitted to proceed *pro se*. The record clearly indicates that when defendant signed the waiver of his right to assigned counsel he did so with the expectation of being able to privately retain counsel. Before the trial court the defendant stated that he wanted to employ his own lawyer. There is no evidence that defendant ever intended to proceed to trial without the assistance of some counsel. We conclude that the present case is not governed by appellate cases addressing a trial court's responsibility to ensure that a defendant who wishes to represent himself is knowingly, intelligently, and voluntarily waiving his right to counsel.
>
> . . . .
>
> In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel. The State also cites *State v. Quick*, 179 N.C. App. 647, 649–50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel. *Montgomery* did not, however, include such a broad holding or suggest that any willful

> actions resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant[.]

Id. at 460-61, 782 S.E.2d at 93-94 (citations, quotation marks, ellipses, and brackets omitted).

Blakeney then provides a thorough review of the types of behavior prior cases have determined support forfeiture,

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.
>
> There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel. However, our review of the published opinions of our appellate courts indicates that, as discussed in *Wray*, forfeiture has generally been limited to situations involving severe misconduct and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights. The following is a list of published cases from North Carolina in which a defendant was held to have forfeited the right to counsel, with a brief indication of the type of behavior in which the defendant engaged:
>
> 1. *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000): the defendant fired several lawyers, was disruptive and used profanity in court, threw water on his attorney while in court, and was repeatedly found in criminal contempt.

2. *State v. Quick*, 179 N.C. App. 647, 634 S.E.2d 915 (2006): the defendant in a probation revocation case waived court-appointed counsel in order to hire private counsel, but during an eight month period did not contact any attorney, instead waiting until the day before trial.

3. *State v. Rogers*, 194 N.C. App. 131, 669 S.E.2d 77 (2008), *disc. review denied*, 363 N.C. 136, 676 S.E.2d 305 (2009): over the course of two years, the defendant fired several attorneys, made unreasonable accusations about court personnel, reported one of his attorneys to the State Bar, accused another of racism, and was warned by the court about his behavior.

4. *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009), *disc. review denied*, 691 S.E.2d 414 (2010): during a period of more than a year, the defendant refused to cooperate with two different attorneys, repeatedly told one attorney that the case was not going to be tried, was totally uncooperative with counsel, demanded that each attorney withdraw from representation, and obstructed and delayed the trial proceedings.

5. *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011): for more than a year after defendant was arraigned, he refused to sign a waiver of counsel or state whether or not he wanted counsel, instead arguing that the court did not have jurisdiction and making an array of legally nonsensical assertions about the court's authority.

6. *State v. Cureton*, 223 N.C. App. 274, 734 S.E.2d 572 (2012): the defendant feigned mental illness, discharged three different attorneys, consistently shouted at his attorneys, insulted and abused his attorneys, and at one point spat on his attorney and threatened to kill him.

7. *State v. Mee*, 233 N.C. App. 542, 756 S.E.2d 103 (2014): the defendant appeared before four different judges over a period of fourteen months, during which time he hired and then fired counsel

> twice, was represented by an assistant public defender, refused to state his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and refused to participate in the trial.
>
> 8. *State v. Joiner*, ___ N.C. App. ___, 767 S.E.2d 557 (2014): the defendant gave evasive and often bizarre answers to the court's questions, shouted and cursed at the trial court, smeared feces on the holding cell wall, had to be gagged during trial, threatened courtroom personnel with bodily harm, and refused to answer simple questions.
>
> 9. *State v. Brown*, ___N.C. App. ___, 768 S.E.2d 896 (2015): like the defendants in *Mee* and *Leyshon*, this defendant offered only repetitive legal gibberish in response to simple questions about representation, and refused to recognize the court's jurisdiction.

Id. at 461-63, 782 S.E.2d at 94-95 (quotation marks omitted).

Blakeney then explains how the defendant's actions in *Blakeney* were not as egregious as those in the cases where forfeiture was found:

> In stark contrast to the defendants discussed above, in this case:
>
> 1. Defendant was uniformly polite and cooperative. In fact, the trial court found as a mitigating factor that the defendant returned to court as directed during the habitual felon phase, even after he had been found guilty of the underlying offense.
>
> 2. Defendant did not deny the trial court's jurisdiction, disrupt court proceedings, or behave offensively.
>
> 3. Defendant did not hire and fire multiple attorneys, or repeatedly delay the trial. Although the case was three years old at the time of trial, the delay from September 2011 until August 2014 resulted from the State's failure to prosecute, rather than actions by defendant.
>
> We conclude that defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone his trial, was nowhere close to the serious misconduct that has previously been held to constitute forfeiture of counsel. In reaching this decision,

> we find it very significant that defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was defendant warned of the consequences of such a decision. We need not decide, and express no opinion on, the issue of whether certain conduct by a defendant might justify an immediate forfeiture of counsel without any preliminary warning to the defendant. On the facts of this case, however, we hold that defendant was entitled, at a minimum, to be informed by the trial court that defendant's failure to hire new counsel might result in defendant's being required to represent himself, and to be advised of the consequences of self-representation.

Id. at 463-64, 782 S.E.2d at 95 (quotation marks omitted).

Ultimately, *Blakeney* determines that based upon the facts the defendant had not forfeited his right to counsel,

> We find *Goldberg's* analysis useful in determining that, on the facts of this case, the defendant cannot be said to have forfeited his right to counsel in the absence of any warning by the trial court both that he might be required to represent himself and of the consequences of this decision.
>
> In reaching this conclusion, we have considered the State's arguments for a contrary result, some of which are not consistent with the trial transcript. On appeal, the State contends that at the outset of trial the trial court found that Defendant had only fired Mr. Cloud so as to attempt to delay the trial, citing page twenty-seven of the transcript. In fact, at the start of the trial, the trial court did not express any opinion on defendant's motivation for seeking to continue the case and hire a different attorney. During the habitual felon phase, after defendant had been found guilty of the charge, the jury was sufficiently concerned about defendant's self-representation to send the trial court a note asking whether defendant had refused counsel. It was only at that point that the trial court expressed its opinion that defendant had hoped to delay the trial by replacing one attorney with another. The State also alleges several times in its appellate brief that the trial court made specific findings about Defendant's forfeiture of his right to counsel, maintaining that the trial

court specifically found that Defendant's conduct in firing his lawyer to delay the trial forfeited his right to private counsel, thus requiring Defendant to proceed *pro se* and urging that we should affirm the trial court's finding that Defendant discharged his private counsel on the day of the trial to obstruct and delay his trial and thereby forfeited his right to counsel. However, as defendant states in his reply brief, the trial court never found that Mr. Blakeney forfeited his right to counsel. Indeed, the word forfeit does not appear in the transcript of the trial proceedings."

There is no indication in the record that the trial court ruled that defendant forfeited the right to counsel by engaging in serious misconduct. Moreover, defendant was not warned that he might have to represent himself, and the trial court did not conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the implications of appearing *pro se*. In *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986), our Supreme Court addressed a factual situation similar both to the present case and to the waiver by conduct scenario discussed in *Goldberg*. In *Bullock*, the defendants' attorneys moved to withdraw shortly before trial, due to irreconcilable differences with the defendant. . . .

. . . .

> The defendant consented to the withdrawal of his retained counsel because of irreconcilable differences but stated that he would employ other counsel. On the day of the trial, he said that he had been unable to get any attorney to take his case because of the inadequate preparation time. The trial court reminded the defendant that he had warned him he would try the case as scheduled. The defendant acquiesced to trial without counsel because he had no other choice. Events here do not show a voluntary exercise of the defendant's free will to proceed *pro se*.

The Court in *Bullock* also cited *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984), noting that in that case the court held that the defendant was entitled to a new trial because the record did not show that the defendant intended to go to trial without the assistance of counsel

> and because the inquiry required by N.C.G.S. § 15A–1242 was not conducted. *Bullock* appears to be functionally indistinguishable from the present case as regards the trial court's obligation to conduct the inquiry required by N.C. Gen. Stat. § 15A–1242.
>
> For the reasons discussed above, we conclude that defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

Id. at 465-68, 782 S.E.2d at 96-98 (citations, quotation marks, ellipses, and brackets omitted).

Turning to the facts before us, defendant did not "clearly and unequivocally" waive his right to counsel nor did the trial court comply with North Carolina General Statute § 15A-1224 as it failed to inform defendant of "the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242; *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. Thus, we consider whether "defendant engage[ed] in such serious misconduct that he forfeit[ed] his constitutional right to counsel" or if the "hybrid situation" is applicable where "[a] defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is forfeiting his right to counsel." *Id.* at 460-464, 782 S.E.2d at 93-96.

Both the State and defendant quote large sections of the discussions had by defendant and the trial court as evidence of forfeiture or the lack thereof, but as a whole there is no clear evidence of forfeiture. In summary, defendant raised arguments that were not legally sound and made unreasonable requests of the Court, including questioning the jurisdiction of the trial court and stating that he wanted an appointed attorney -- but not one paid for by the State. Defendant did state he would like to retain

his own counsel, but the State objected unless he could retain the counsel within 15 minutes because "[h]e's been advised, I would contend, on at least two or three occasions . . . as to his rights to obtain an attorney."[1] Defendant countered that he was not informed his trial would start that day but merely that he had "to be here or . . . be arrested." Thereafter defendant agreed to standby counsel, and the trial court informed him that at any point he could "step in" as counsel. The trial court never warned defendant that he was engaging in "dilatory conduct" or that he may lose his right to counsel based upon "dilatory conduct[.]" *Id.* at 464-65, 782 S.E.2d at 96. But before the jury was empaneled the trial court announced it was turning its "attention to the issue of standby counsel" and defendant waived his right to standby counsel.

However, defendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so defendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole defendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process. Ultimately, defendant was neither combative nor cooperative, and both trial court and defendant's tone express frustration.

Defendant's case, like *Blakeney*, is inapposite from *Montgomery*, *Quick*, *Rogers*, *Boyd*, *Cureton*, *Mee*, and *Joiner*, as defendant here had not fired or refused to cooperate with multiple lawyers, was not disruptive, did not use profanity or throw objects, and did not explicitly waive counsel but then fail to hire his own attorney over the course of several months. *See id.* at 462-63, 782 S.E.2d at 94-95. Even the cases with more factual similarities ultimately diverge from this case. *See id.* In both *Brown* and *Leyshon*, the defendants were found to have "obstructed and delayed the trial proceedings" because they had at least three hearings to discuss the matter; here it appears this was defendant's only appearance before the trial court. *See State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015); *State v. Leyshon*, 211 N.C. App. 511, 518-19, 710 S.E.2d 282, 288-89 (2011).

This case also diverges from *Blakeney*, as in that case a specifically enumerated ground for not finding forfeiture was because the defendant did not challenge the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 463, 782 S.E.2d at 95. Here, defendant repeatedly denied the trial court's

1. The State was apparently referring to defendant's proceedings in district court, since there is no prior indication of advisement in superior court.

jurisdiction and insisted on an attorney that was provided for him but was not paid for by the State, an unavailable option. Further, *Blakeney*, ultimately relied on two cases which are also distinguishable: In *State v. Bullock* and *State v. McCrowre*, the defendants had the clear intent to hire private counsel. *See Blakeney*, 245 N.C. App. at 467-68, 782 S.E.2d at 97-98; *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108-109 (1986); *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984).

Ultimately, after considering all of the factors noted in the cases discussed above, we conclude that the reasoning in *Blakeney* applies:

> defendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A–1242, in order to ensure that defendant understood the consequences of self-representation. The trial court's failure to conduct either of these inquiries or discussions with defendant resulted in a violation of defendant's right under the Sixth Amendment to be represented by counsel, and requires a new trial.

Id. at 468, 782 S.E.2d at 98. Because defendant did not "voluntarily waive the right to be represented by counsel" or "engage[] in such serious misconduct as to warrant forfeiture of the right to counsel" the trial court was required to comply with the mandate of North Carolina General Statute § 15A-1242. *Id*. Further, without any finding of dilatory conduct or warning that he may waive his right by dilatory tactics, the hybrid situation cannot apply here. *Id*. at 464-65, 782 S.E.2d at 96 ("This makes sense since a waiver *by conduct* requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*." (emphasis added)). As the trial court failed to properly advise defendant of his right to counsel, defendant must receive a new trial. *See id*. at 468, 782 S.E.2d at 98.

IV. Conclusion

Because defendant did not waive his right to counsel after proper advisement under North Carolina General Statute § 15A-1242; did not forfeit his right by serious misconduct; and did not engage in dilatory

tactics after having been warned of the consequences; he did not forfeit his right to counsel, so defendant must receive a new trial.

NEW TRIAL.

Judge COLLINS concurs.

Judge TYSON concurs in part and dissents in part.

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

I. Background

City of Locust Police Officer Trent Middlebrook was patrolling during July of 2016. He came upon and verified the validity of the registration of a vehicle. Officer Middlebrook was informed the owner of the vehicle, Defendant herein, Jeffrey Martaez Leroy Simpkins' driver's license was suspended, and an outstanding warrant for his arrest was issued and pending. Officer Middlebrook stopped the vehicle and asked Defendant to present his driver's license and registration. Defendant refused to provide either of them and was uncooperative and belligerent. Officer Middlebrook placed Defendant under arrest.

Defendant initially appeared and was tried in district court. He refused to enter a plea, and the trial court noted in the record that it entered a plea of not guilty on his behalf. He also twice refused to sign a waiver of counsel, after being advised of his rights as set out in North Carolina General Statutes § 15A-1242. Included in the record on appeal is an unsigned and undated waiver of counsel form with a handwritten note that states, "Refused to respond to to [*sic*] inquiry by the court and mark as refused at this point[.]"

There is another waiver of counsel form in the record, dated 16 August 2016 and signed by the presiding judge, which shows Defendant being advised of his rights as set out in North Carolina General Statutes § 15A-1242, and also contains a handwritten notation, "Defendant refused to sign waiver of counsel upon request by the Court[.]" On 16 August 2016, Defendant was tried and convicted in district court of resisting a public officer and failing to carry a registration card. The district court's judgments also expressly note that Defendant had waived counsel. Defendant appealed his convictions to superior court.

In superior court, Defendant did not assert he was indigent, but requested appointment of counsel, "not paid for by the State of North

Carolina." No affidavit of indigency appears in the record. He also refused to enter a plea or to sign a waiver of counsel. After an extensive colloquy with the trial court, a plea of not guilty was entered on his behalf and the court appointed standby counsel. Defendant's "Living man" *pro se* motion to dismiss asserting lack of jurisdiction was heard and denied by written order dated 7 June 2017. Defendant eventually elected in open court to dismiss and to waive his appointed standby counsel, and to proceed *pro se*. Defendant was tried by a jury and convicted of resisting a public officer and of failing to exhibit/surrender his license. The trial court entered judgments on the verdicts. The judgments again expressly note that Defendant had waived counsel. Defendant appeals.

II. Subject Matter Jurisdiction

I concur to dismiss Defendant's challenge to subject matter jurisdiction. Defendant's counsel conceded that *State v. Jones*, ___ N.C. App. ___, 805 S.E.2d 701 (2017), *aff'd*, 371 N.C. 548, 819 S.E.2d 340 (2018), is the controlling authority on this issue and withdrew this argument.

III. Issue

Defendant argues that "the trial court erred by failing to make a thorough inquiry of . . . [his] decision to proceed *pro se* as required by N.C. Gen. Stat. § 15A-1242."

IV. Standard of Review

Whether the trial court complied with North Carolina General Statutes § 15A-1242 is reviewed *de novo*. *See State v. Watlington*, 216 N.C. App. 388, 393-94, 716 S.E.2d 671, 675 (2011) ("Prior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A–1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*. We will therefore review this ruling *de novo*.") (citations omitted)). Whether Defendant was entitled to or forfeited counsel is also reviewed *de novo*. *See State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982); *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016).

V. Waiver or Forfeiture of Counsel

The State acknowledged at oral argument Defendant was not informed in the superior court of the "range of permissible punishments[,]" and Defendant had not waived counsel under North Carolina General Statutes § 15A-1242.

North Carolina General Statutes § 15A-1242 provides,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2017).

Defendant concedes he

> was advised of his right to have counsel and of his right to have appointed counsel. However, there is no showing on the record that the trial court made the appropriate advisements or inquires to determine that [he] understood and appreciated the consequences of his decision or comprehended the nature of the charges and proceedings and the range of permissible punishments.

While the trial court did inform Defendant he could be subjected to "periods of incarceration" if convicted, the transcript confirms Defendant was not explicitly informed of "the *range* of permissible punishments." N.C. Gen. Stat. § 15A-1242. In *State v. Sorrow*, this Court previously held: "The trial court's inquiry under N.C. Gen. Stat. § 15A–1242 is mandatory and failure to conduct such an inquiry is prejudicial error." *State v. Sorrow*, 213 N.C. App. 571, 573, 713 S.E.2d 180, 182 (2011) (citation and quotation marks omitted).

The State argues a *per se* new trial is not required, as Defendant forfeited counsel and cannot show any prejudice, given his history of belligerent and recalcitrant behaviors, and his non-acceptance and continued denial of and challenge to the trial court's jurisdiction over him. Defendant persisted in his jurisdictional challenges, even after his filed motion to dismiss on jurisdiction was formally denied by written order with findings of fact and conclusions of law, as Defendant had requested. Defendant has not appealed the entered order denying his motion to

dismiss, and any arguments concerning the trial court's jurisdiction are conceded and wholly without merit.

The State argues Defendant forfeited his right to counsel and asserts the trial court was not required to comply with North Carolina General Statutes § 15A-1242. Both parties' arguments cite and rely upon *State v. Blakeney*, 245 N.C. App. 452, 782 S.E.2d 88 (2016). *Blakeney* discusses two means by which a defendant may lose his right to be represented by counsel: (1) voluntary waiver after being fully advised under North Carolina General Statutes § 15A-1242; and, (2) forfeiture of the right by serious misconduct. *Id.* at 459-61, 782 S.E.2d at 93-94.

> First, a defendant may voluntarily waive the right to be represented by counsel and instead proceed *pro se*. Waiver of the right to counsel and election to proceed *pro se* must be expressed clearly and unequivocally. Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel. A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242. . . .
>
> . . . .
>
> The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel. Although the right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the North Carolina Constitution, in some situations a defendant may lose this right:
>
> > Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture. Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right. A defendant

> who is abusive toward his attorney may forfeit his right to counsel.

Id. (internal citations and quotation marks omitted).

The Court in *Blakeney* also describes a third manner, a mixture of waiver and forfeiture, in which a defendant may lose the right to counsel:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed pro se cannot complain that a court is forfeiting his right to counsel.*

Id. at 464-65, 782 S.E.2d at 96 (emphasis supplied) (quotation marks omitted).

This Court in *Blakeney* stated:

> In this case, the State argues that defendant forfeited his right to counsel, relying primarily upon generalized language excerpted from *Montgomery* stating that a forfeiture of counsel results when the state's interest in maintaining an orderly trial schedule and *the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel.* The State also cites *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006), in which this Court cited *Montgomery* for the proposition that *any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel. Montgomery* did not, however,

> include such a broad holding or suggest that any willful actions resulting in the absence of defense counsel are sufficient to constitute a forfeiture. Instead, as this Court has observed, forfeiture of the right to counsel has usually been restricted to situations involving egregious conduct by a defendant[.]

Id. at 461, 782 S.E.2d at 94 (emphasis supplied) (internal citations marks omitted).

This Court in *Blakeney* reviewed behavior in prior cases to support forfeiture.

> Although the United States Supreme Court has never directly addressed forfeiture of the right to counsel, the Court's other holdings demonstrate reluctance to uphold forfeiture of a criminal defendant's U.S. Constitutional rights, except in egregious circumstances. Additionally, the federal and state courts that have addressed forfeiture have restricted it to instances of severe misconduct.
>
> *There is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel.* However, our review of the published opinions of our appellate courts indicates that, as discussed in Wray, forfeiture has generally been limited to situations involving severe misconduct and *specifically to cases in which the defendant engaged in one or more of the following*: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; *or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal rights.*

Id. at 461-62, 782 S.E.2d at 94 (emphasis supplied) (quotation marks omitted).

The majority's opinion includes brief descriptions of the nine prior decisions cited in *Blakeney*, wherein this Court found the defendants had forfeited their right to counsel. Whether a "defendant engage[d] in such serious misconduct that he forfeit[ed] his constitutional right to counsel," or if the "hybrid situation" is applicable where "[a] defendant

who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel." *Id.* at 460, 465, 782 S.E.2d at 93-94, 96.

In their briefs, both the State and Defendant quote large sections of the discussions had by Defendant and the trial court as evidence of forfeiture or the lack thereof. Overall, the transcript supports a finding and conclusion that Defendant forfeited his right to counsel. From the start of the proceedings, Defendant repeatedly questioned the jurisdiction of the trial court:

> [Defendant]: Objection, sir. I did not enter any pleas. Do I need to stand?
>
> THE COURT: What is the basis of your objection?
>
> [Defendant]: There is no proof of jurisdiction here. There hasn't been since last year. I've been coming here over a year, and there's no evidence of anything besides the allegation.
>
> THE COURT: Well, sir, evidence is put on at the trial. So there is no evidence at this point.
>
> [Defendant]: So how can you force someone here without evidence, sir?
>
> THE COURT: You've been charged with a crime. And this is your day in court, your opportunity to be heard.

The trial court and Defendant engaged in detailed discussions concerning Defendant's representation:

> [The Court]: Mr. Simpkins, I see that in the Court's file there are waiver of counsel forms with notations that you refused to respond when you were notified of your right to an attorney, and so you were marked down as having waived an attorney. You are charged with violations that could subject you to periods of incarceration. *And so I would like to advise you that it is your right to have an attorney and if you cannot afford an attorney, the State can provide one for you. If you would like to apply for court-appointed counsel, we'll have you fill out an affidavit. If you wish to retain your own, you certainly have that opportunity as well.* How would you like to proceed with respect to an attorney?

> [Defendant]: May I proceed with counsel that's not paid for by the plaintiff?
>
> [The Court]: There's no plaintiff in this case. Would you like to hire your own attorney or would you like the State to provide an attorney for you *if you qualify for one*?
>
> [Defendant]: How is there no plaintiff, sir?
>
> [The Court]: Sir, this is the second time that I'm going to remind you that it is not your opportunity to ask questions of the Court. The Court asks you questions. The question before you right now is: *Would you like to apply for a court-appointed attorney, or would you like to retain your own attorney or would you like to waive your right to an attorney?*
>
> [Defendant]: I would like counsel that's not paid for by the State of North Carolina.
>
> [The Court]: Okay. So you would like an *opportunity to retain your own attorney*?
>
> [Defendant]: That's not paid for by the State of North Carolina, yes.

(Emphasis supplied).

When asked for its response, the State objected unless Defendant could retain the counsel within fifteen minutes because "[h]e's been advised, I would contend, on at least two or three occasions . . . as to his rights to obtain an attorney."

The colloquy continued, and Defendant was appointed standby counsel:

> [The Court]: Mr. Simpkins, according to the court file, you were advised of your right to an attorney on August 16th of 2016.
>
> [Defendant]: I asked for standby counsel then, sir.
>
> [The Court]: Would you like to be appointed standby counsel today?
>
> [Defendant]: Yes. Sure.
>
> [The Court]: All right.

Defendant never asserted he was indigent or was unable to afford to retain counsel. The record before us does not contain Defendant's affidavit of indigency to qualify for appointed counsel. Defendant's right to be appointed counsel was dependent upon a claim, an affidavit, and a finding of him being indigent. *State v. Cradle*, 281 N.C. 198, 204, 188 S.E.2d 296, 300 (1972).

Defendant continued to question the trial court's jurisdiction prior to and after jury selection:

> THE COURT: Any questions before we proceed?
>
> [Defendant]: Can the Court proceed without evidence of jurisdiction?
>
> THE COURT: Sir, evidence will be presented during the case in chief after a jury is selected. Any other questions?
>
> [Defendant]: If -- no.
>
> . . .
>
> [Defendant]: Can I see the evidence of jurisdiction then?
>
> THE COURT: Sir, you -- you are the defendant in a criminal proceeding.

Following the trial court's address to the prospective jurors, the jurors left the courtroom and a bench conference was held between the trial court, Defendant, Defendant's standby counsel, and the prosecutor, concerning a possible plea:

> THE COURT: What I heard at the bench was the mention of a potential plea. So, Mr. Simpkins, is it your wish to enter a plea in this matter?
>
> [Defendant]: I've been trying to enter a plea. I just wanted the evidence of jurisdiction.

The plea negotiations were ultimately unsuccessful. The trial court advised Defendant on his right to proceed with or to waive his standby counsel, which Defendant decided to waive and to proceed *pro se*. Defendant conducted jury selection on his own.

After bringing the trial court's attention to a previously filed motion to dismiss, and hearing the trial court's ruling on the motion, Defendant *again* argued with the trial court concerning its jurisdiction:

THE COURT: All right. Would you like to be heard on the motion?

[Defendant]: No. The motion speaks for itself, sir.

THE COURT: All right. The motion to dismiss is denied. Thank you.

[Defendant]: On what grounds, sir?

THE COURT: Well, to the extent that the motion is a motion to dismiss for lack of jurisdiction, I find and conclude that this Court has jurisdiction --

[Defendant]: May I have a copy of that, sir?

THE COURT: A copy of what?

[Defendant]: The jurisdiction.

THE COURT: Jurisdiction is not reduced to writing or a document that I can hand you. Thank you.

[Defendant]: So it's territorial?

THE COURT: Sir, I've ruled on the motion. Thank you.

[Defendant]: I don't get to speak at all, sir?

THE COURT: You were just heard on the motion. I issued my ruling. I issued my findings and conclusion. And that is all for that matter. Thank you, sir.

[Defendant]: Okay. Do I have a right to a fair and meaningful hearing if there's conflict of interest?

THE COURT: I'm sorry?

[Defendant]: Do I have the right to a fair and meaningful hearing if there's a conflict of interest?

THE COURT: You have a right to a fair and impartial hearing of your case, which is what we're doing right now. Okay.

[Defendant]: So --

THE COURT: Please bring in the jury.

[Defendant]: Sir? And what is the jurisdiction?

> THE COURT: This is not an appropriate time to be asking questions. The jurisdiction of the superior court of the State of North Carolina.
>
> [Defendant]: Does jurisdiction have to be submitted before the proceedings proceed?
>
> THE COURT: Please have a seat, sir.

Defendant repeatedly: (1) contested jurisdiction; (2) refused to enter pleas, sign waivers, or complete an affidavit of indigency to qualify for appointed counsel; (3) failed to retain his own counsel in the ten months between his district court and superior court trials; (4) filed motions and raised arguments that were not legally sound; and, (5) made unreasonable requests of the Court. Defendant repeatedly questioned the jurisdiction of the trial court and stated that he wanted an appointed attorney but "not one paid for by the State of North Carolina," something clearly not within the trial court's power.

This appearance and trial took place over three days. Defendant argued he was not informed his trial would start that day, but asserted he had "to be here or . . . be arrested." Defendant requested and was appointed standby counsel. The trial court informed Defendant that at any point standby counsel could "step in" as counsel.

The trial court warned Defendant that he was engaging in "dilatory conduct" by arguing and continuing to question the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 464-65, 782 S.E.2d at 96. Before the jury was empaneled, Defendant initially indicated he intended to enter a plea, though negotiations failed. The trial court announced it was turning its "attention to the issue of standby counsel," and Defendant waived his right to standby counsel.

Defendant sought to delay the process by repeatedly arguing and asking for rulings on jurisdiction, offering and withdrawing guilty pleas, requesting and dismissing standby counsel, and seeking to retain counsel after a ten-month delay between trials and then failing to do so. Defendant never asserted he was indigent and eligible for appointed counsel, nor filed an affidavit of indigency. Viewing the record as a whole, from arrest through district and superior court, Defendant's conduct, tactics, and arguments were designed to deny the legitimacy and jurisdiction of the courts and to delay or obstruct its proceedings. Defendant's prior record reflects extensive contact with the legal system in multiple states and reflects his general attitude that the law does not apply to him and he is above it.

Defendant, like the defendants in the cases of *Montgomery*, *Quick*, *Rogers*, *Boyd*, *Cureton*, *Mee*, and *Joiner*, refused to cooperate, was disruptive and argumentative, explicitly waived counsel twice in district court, failed to hire his own attorney over the course of several months between his district court convictions in August and his scheduled trial in superior court the following June. *See id.* at 462-63, 782 S.E.2d at 94-95.

In cases with more factual similarities, *Brown* and *Leyshon*, the defendants were found to have "obstructed and delayed the trial proceedings" because they had at least three hearings to discuss the matters. The defendants' appearances, motions, and trials in superior court occurred over multiple days. *See State v. Brown*, 239 N.C. App. 510, 519, 768 S.E.2d 896, 901 (2015); *State v. Leyshon*, 211 N.C. App. 511, 518-19, 710 S.E.2d 282, 288-89 (2011).

The facts before us also diverge from *Blakeney*, as that Court specifically enumerated a ground for not finding forfeiture because the defendant did not challenge or deny the jurisdiction of the court. *Blakeney*, 245 N.C. App. at 463, 782 S.E.2d at 95. Here, Defendant repeatedly denied the trial court's jurisdiction, argued frivolous motions and grounds as a "Living man" and sovereign citizen, refused to accept the trial court rulings, and insisted an attorney be provided for him, but not one "paid for by the State of North Carolina," an unavailable option. In *State v. Bullock* and *State v. McCrowre*, the defendants had the clear intent and opportunity to hire private counsel prior to trial. *See Blakeney*, 245 N.C. App. at 467-68, 782 S.E.2d at 97-98; *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108-109 (1986); *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 776-77 (1984).

Looking at the totality of Defendant's statements, conduct, actions, demeanor, and knowledge from prior multiple arrests through trials in both trial court divisions, Defendant knowingly forfeited his right to counsel, dismissed standby counsel, and elected to proceed *pro se*. Defendant also has made no showing nor argued that he was indigent and could not afford, or was unable, to retain counsel during the ten months pendency of his appeal from district court. His arguments are without merit.

VI. Conclusion

Defendant concedes and withdraws his argument on appeal challenging jurisdiction. The State concedes Defendant did not waive his right to counsel under North Carolina General Statutes § 15A-1242. Defendant's overall demeanor and conduct, from arrest through trial

in superior court, supports a finding and conclusion that he dismissed standby counsel and forfeited his right to counsel by frivolous and repeated objections to jurisdiction, serious misconduct, and dilatory tactics, all after being warned of the consequences of his behavior.

Defendant received a fair trial, free of prejudicial errors he preserved or argued. I find no error in Defendant's jury convictions or in the judgments entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ALBERT LEWIS SPEAS

No. COA18-456

Filed 7 May 2019

Indictment and Information—bill of indictment—felonious larceny—entity capable of owning property—sufficiency of name

The words 'and Company' included in the victim's name ('Sears Roebuck and Company') in an indictment for felonious larceny sufficiently identified the victim as a corporation capable of owning property.

Appeal by defendant from judgment entered 10 October 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Charlotte Gail Blake for defendant-appellant.

BRYANT, Judge.

Defendant Albert Lewis Speas appeals from judgment entered upon his conviction for felonious larceny. After careful review, we find no error.

On 14 February 2017, defendant was indicted for felonious larceny and felonious possession of stolen goods. The larceny indictment specifically alleged that defendant "unlawfully, willfully and feloniously

did steal, take and carry away one (1) television, the personal property of Sears Roebuck and Company, having a value of One Thousand Six Hundred Ninety-Nine Dollars and Ninety-Nine Cents ($1,699.99)." Defendant was also indicted for having attained habitual felon status.

On 10 October 2017, defendant was convicted by a jury of both felonious larceny and felonious possession of stolen goods. The trial court arrested judgment on the charge of possession of stolen goods. Defendant subsequently pled guilty to having attained the status of an habitual felon. The trial court sentenced defendant to a term of 89 to 119 months imprisonment. Defendant appeals.

On appeal, defendant's sole argument is that the indictment for larceny is fatally defective because it does not allege that "Sears Roebuck and Company" was an entity capable of owning property. We disagree.

"It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) (citation and quotation marks omitted). "The purpose of an indictment is to give a defendant notice of the crime for which he is being charged[.]" *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). An "indictment must allege all of the essential elements of the crime sought to be charged." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citation omitted). Lack of jurisdiction in the trial court due to a fatally defective indictment requires the appellate court to arrest judgment or vacate any order entered without authority. *State v. Hicks*, 148 N.C. App. 203, 205, 557 S.E.2d 594, 596 (2001).

Here, defendant was indicted for felonious larceny. The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982), *overruled on other grounds by State v. Munford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *see also* N.C. Gen. Stat. § 14-72 (2017). "To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property. If the entity named in the indictment is not a person, it must be alleged that the victim was a legal entity capable of owning property[.]" *State v. Phillips*, 162 N.C. App. 719, 720–21, 592 S.E.2d 272, 273 (2004) (alteration in original) (internal citations and quotation marks omitted). "If the property alleged to have been stolen . . . is the property of a corporation, the name of the corporation should be given, and the fact that it is a

corporation stated, unless the name itself imports a corporation." *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 903 (1960) (internal citation and quotation marks omitted).

The instant indictment charges defendant with larceny of the personal property of "Sears Roebuck and Company." Defendant contends that this is insufficient because, although the indictment contains the word "company," it does not identify "Sears Roebuck and Company" as a company or other corporate entity. We are not persuaded.

In *Thornton*, the North Carolina Supreme Court determined that an indictment which alleged defendant embezzled money belonging to "The Chuck Wagon" was insufficient because it failed to sufficiently identify "The Chuck Wagon" as a corporation, and the name itself did not import a corporation. *Id.* at 662, 111 S.E.2d at 904. By contrast, here, the word "company" is part of the name of the property owner, "Sears Roebuck *and Company*." Our Supreme Court has stated "the words 'corporation,' 'incorporated,' 'limited,' or '*company*,' or their abbreviated form, sufficiently identify a corporation in an indictment." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (emphasis added) (citing *Thornton*, 251 N.C. at 662, 111 S.E.2d at 904); *see also State v. Cave*, 174 N.C. App. 580, 583, 621 S.E.2d 299, 301 (2005) (concluding that an indictment was sufficient because the name "N.C. FYE, Inc." imports a corporation).

Therefore, we conclude the name of the property owner named in the indictment, "Sears Roebuck and Company," was sufficient itself to " 'import[ ] an association or a corporation capable of owning property.' " *Id.* at 83, 772 S.E.2d at 444 (quoting *Thornton*, 251 N.C. at 661, 111 S.E.2d at 903). Accordingly, we hold the larceny indictment here is valid on its face.

NO ERROR.

Judges BERGER and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DEANGELO JERMICHAEL WRIGHT

No. COA18-209

Filed 7 May 2019

1. Sentencing—aggravating factors—notice requirement—waiver

In a prosecution for drug offenses, defendant waived his right to receive the 30-day advance notice of the State's intent to use an aggravating factor to enhance his sentence (required by N.C.G.S. § 15A-1340.16(a6)) where he stipulated to the existence of the aggravating factor after a colloquy conducted in accordance with section 15A-1022.1.

2. Constitutional Law—effective assistance of counsel—direct appeal—claim not ripe for review

In a prosecution for drug offenses, defendant's claim for ineffective assistance of counsel was dismissed without prejudice to his right to assert his claim in a motion for appropriate relief in the trial court.

3. Judgments—criminal—clerical errors—range of sentence—aggravating factor—arrested judgment

In a prosecution for drug offenses, defendant's judgment was remanded for correction of multiple clerical errors, including for the trial court to clarify the correct sentencing range used, to fill out a corresponding form listing the aggravating factor, and to correct which of two counts the court was arresting judgment on.

Appeal by defendant from judgment entered 25 August 2017 by Judge Linwood O. Foust in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

STROUD, Judge.

At issue is whether the State provided the required notice of intent to prove aggravating factors. Because defendant waived his right to have a jury determine the presence of an aggravating factor, there was no error. We dismiss defendant's ineffective assistance of counsel claim without prejudice and remand for correction of clerical errors.

I. Background

Defendant was arrested for selling marijuana to an undercover officer in Charlotte on 7 August 2015 ("first arrest"). Defendant was arrested a second time for selling marijuana to an undercover officer in the same location on 15 October 2015 ("second arrest"). On 11 January 2016, defendant was indicted for the sale and delivery of marijuana and possession with intent to sell or deliver ("PWISD") arising from the second arrest. On 14 April 2016, the State served defendant with a notice of intent to prove aggravating factors for the charges arising only from the second arrest. Box 12a. on the notice was checked, which stated:

> The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of a parole or post-release supervision imposed pursuant to release from incarceration.

On 2 May 2016, defendant was indicted for sale and delivery of a controlled substance, PWISD, and possession of marijuana drug paraphernalia arising from the first arrest. Over a year later, but twenty days prior to trial of all charges against defendant, the State added the file numbers related to defendant's first arrest to a copy of the previous notice of intent to prove aggravating factors. A handwritten note was added to the form which stated, "Served on Defense Counsel on 8/1/2017," and it was signed by an assistant district attorney.

Defendant's trial began on 21 August 2017, and all of defendant's charges arising from the first and second arrests were joined for trial. Defendant was found not guilty of selling, delivering, or PWISD marijuana for the charges arising from the second arrest, but he was found guilty of attempted sale, attempted delivery, PWISD marijuana, and possession of marijuana drug paraphernalia for the charges from the first arrest. The trial court arrested the judgment for attempted sale, and the State informed the court it intended to prove an aggravating factor.

Defendant's attorney stated that he had received the proper notice, and after defendant and his attorney talked, defendant stipulated to the aggravating factor on 25 August 2017. The trial court sentenced defendant in the aggravated range, and defendant timely gave notice of appeal.

II. Notice of Intent to Prove Aggravating Factors

[1] Defendant argues that the trial court erred in sentencing defendant to an aggravated sentence when the State did not provide thirty days written notice before trial of its intent to prove an aggravating factor for charges arising from the first arrest, and defendant did not waive his right to such notice. We review this argument *de novo*:

> The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal. Pursuant to North Carolina's felony sentencing system, the prior record level of a felony offender is determined by assessing points for prior crimes using the method delineated in N.C. Gen. Stat. § 15A-1340.14(b)(1)-(7). As relevant to the present case, a trial court sentencing a felony offender may assess one prior record level point if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision. Prior to being assessed a prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(7), however, our General Statutes require the State to provide written notice of its intent to do so.

State v. Wilson-Angeles, ___ N.C. App. ___, ___, 795 S.E.2d 657, 668 (2017) (citations, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 15A-1340.16(a6) requires the State to give defendant thirty days' written notice before trial, or the entry of a guilty or no contest plea, of its intent to use aggravating factors:

> The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2017). Therefore, at least thirty days prior to a trial or plea, the State must give a defendant written notice of

its intent to prove an aggravating factor. *Id*. Here, defendant was tried on all pending charges, and prior to sentencing, defendant stipulated to the existence of the aggravating factor. N.C. Gen. Stat. § 15A-1022.1 requires the trial court, during sentencing, to determine whether the State gave defendant the required thirty days' notice of its intent to prove an aggravating factor *or* if defendant waived his right to that notice:

> (a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). *The court shall also determine whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.*
>
> (b) *In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of G.S. 15A-1022(a)*. In addition, the court shall address the defendant personally and advise the defendant that:
>
> (1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and
>
> (2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.
>
> . . . .
>
> (e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are inappropriate.

N.C. Gen. Stat. § 15A-1022.1 (emphasis added).

This Court has not addressed what constitutes waiver of the notice requirement of N.C. Gen. Stat. § 15A-1340.16(a6). "Waiver is the intentional relinquishment of a known right, and as such, knowledge of the

right and an intent to waive it must be made plainly to appear." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 336, 777 S.E.2d 272, 279 (2015) (citation and quotation marks omitted). In *State v. Snelling*, "the parties stipulated that defendant had 6 prior record level points and was thus a PRL III." 231 N.C. App. 676, 678, 752 S.E.2d 739, 742 (2014). This Court concluded that "the trial court never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point." *Id.* at 682, 752 S.E.2d at 744. "Moreover, the record does not indicate that defendant waived his right to receive such notice." *Id.* As a result, this Court remanded the case for a new sentencing hearing. *Id.* at 683, 752 S.E.2d at 744.

Here, after the jury returned verdicts of guilty for charges from the first arrest, the State advised the trial court it intended to prove aggravating factors for sentencing:

> THE COURT: The jury having returned verdicts of guilty in Case No. 16CRS13374, 16CRS13373, counts one and two, and 16CRS13375. The State having announced to the Court that it intends to proceed on aggravating factors in this matter, which is a jury matter. The district attorney has indicated to the Court that in conference with the defense counsel, that the Defendant would stipulate to aggravating factors; is that correct? What says the State?
>
> MR. PIERRIE: I do intend to proceed with aggravating factors. I did have a discussion with Mr. Curcio and indicated his intent was to stipulate to the one aggravating factor that I intended to offer, which was from the AOC form is Factor 12A, that the Defendant has during the ten year period prior to the commission of the offense for which the Defendant is being sentenced been found by a court of this state to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence.
>
> THE COURT: All right. Would you -- is that correct?
>
> MR. CURCIO: *That is correct, Your Honor. I've been provided the proper notice and seen the appropriate documents, Your Honor.*
>
> . . . .

THE COURT: . . . The State having indicated that it's going to proceed on aggravating -- an aggravating factor, which would enhance the punishment that the Court gives in this case. Your lawyer has informed the Court that you will admit that aggravating factor, stipulate to that aggravating factor and not require the jury to make a determination of that aggravating factor. In other words, for aggravating factors, the jury would deliberate just like it just did in the case in chief in determining whether or not that aggravating factor exists. Your lawyer has advised the Court that you are going to stipulate to that aggravating factor. And the jury therefore would not be required to deliberate and decide that issue. Is that correct?

DEFENDANT: Can I have a chance to -- may I have a chance to speak with him?

THE COURT: Yes.

(Discussion held off the record.)

MR. CURCIO: We're ready to proceed, Your Honor.

THE COURT: Is that correct, sir?

DEFENDANT: Yes, sir.

THE COURT: And have you had an opportunity to talk with your lawyer about this stipulation and what the stipulation means?

(Discussion held off the record.)

DEFENDANT: Yes, sir.

THE COURT: And do you now stipulate to the aggravating factor stated by the district attorney?

DEFENDANT: Yes, sir.

. . . .

THE COURT: Do you now waive your right to a -- to have the jury determine the aggravating factor?

(Discussion held off the record.)

DEFENDANT: Yes, sir. I'm ready to proceed.

> THE COURT: And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?
>
> DEFENDANT: Yes, sir.

(Emphasis added.)

The transcript indicates that the trial court inquired about the notice of the State's intent to prove the aggravating factor, and his counsel responded that he was "provided the proper notice" and had "seen the appropriate documents." The trial court also asked defendant directly if he "had an opportunity to talk with your lawyer about this stipulation and what the stipulation means?" and after discussion off the record, defendant responded, "Yes, sir." We find the trial court's colloquy satisfied the requirements of N.C. Gen. Stat. § 15A-1022.1. *See State v. Khan*, 366 N.C. 448, 455, 738 S.E.2d 167, 172 (2013) ("The record indicates that at the plea hearing the trial court went over the terms of the plea agreement with defendant and asked defendant directly if he understood its terms, and defendant responded, 'Yes.' During the hearing, the trial court also asked defendant if he stipulated to the aggravating factor, and defendant again answered, 'Yes.' We find the trial court's procedure satisfied the requirements of section 15A-1022.1.").

Defendant compares this case to *State v. Mackey*, 209 N.C. App. 116, 708 S.E.2d 719 (2011), but we find the facts of this case to be distinct. In *Mackey*, the defendant objected at trial to the use of the aggravating factor based upon the lack of proper written notice. *Id.* at 119, 708 S.E.2d at 721. The issue in *Mackey* was whether a letter regarding a plea offer could be used to provide notice, and, based upon the contents of the letter, we held it did not give the notice as required by N.C. Gen. Stat. § 15A-1340.16(a6). *Id.* at 126, 708 S.E.2d at 725. The letter simply communicated a plea offer but did not "acknowledge that the purpose of the document was to both give notice of aggravating factors *and* communicate an offer." *Id.* at 121, 708 S.E.2d at 722. In addition, there was a question in *Mackey* regarding proper service of the letter, which was served by facsimile, and defense counsel "represented that he had received the offer, but no notice of the aggravating factors." *Id.* This Court also noted that the State could have used the form created by the Administrative Office of the Courts (AOC–CR–614) specifically to give the required notice. *Id.* Here, there is no issue as to the form of the notice, the content of the notice, or the method of service of the notice, and, therefore, we do not find *Mackey* to be controlling.

This case can also be distinguished from *Snelling* due to the trial court's inquiry into whether defendant had received "proper notice" and his counsel's affirmative response. Even though the State had not technically given "proper notice" because the additional file numbers were added to the notice only twenty days before trial instead of thirty days, defendant and his counsel had sufficient information to give an "intentional relinquishment of a known right." *Ussery*, 368 N.C. at 336, 777 S.E.2d at 279. The trial court specifically inquired about notice, and the aggravating factor in question was the exact same as noted in the original notice of intent. The trial court also directly questioned defendant: "And do you waive the right to have the jury determine the aggravating factor and do you stipulate to the aggravating factor?" and defendant answered "Yes, sir." We conclude that defendant's knowing and intelligent waiver of a jury trial on the aggravating factor under the circumstances necessarily included waiver of the thirty day advance notice of the State's intent to use the aggravating factor.[1] This argument is overruled.

III. Ineffective Assistance of Counsel

[2] Defendant argues "that he received ineffective assistance of counsel at sentencing." However, "[i]n general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). We dismiss defendant's ineffective assistance of counsel claim without prejudice to his right to assert his claim in a motion for appropriate relief at the trial level.

IV. Clerical Errors

[3] Defendant argues that the judgment contains clerical errors which should be remanded for correction. We agree.

"A clerical error is defined as, an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (quotation marks and brackets omitted).

Defendant's AOC-CR-603C Judgment Suspending Sentence form for file number 16 CRS 013374 is checked by box one which states:

---

1. We note that on the AOC-CR-605 form, Felony Judgment Findings of Aggravating and Mitigating Factors, the trial court checked the box under "DETERMINATION" which states, "the State provided the defendant with appropriate notice of the aggravating factor(s) in this case."

> [The Court] makes no written findings because the prison term imposed is within the presumptive range of sentences authorized under G.S. 15A-1340.17(c).

But defendant was sentenced to a minimum of 7 months and a maximum of 18 months in the custody of the N.C. Division of Adult Correction. The presumptive range for a defendant with prior record level of III for a Class I felony is 5-6 months minimum and 15-17 months maximum. Defendant was sentenced in the aggravated range as the State requested during sentencing:

> On the possession with intent to sell or deliver marijuana, a Class I felony, that is an I block. So an active sentence cannot be imposed by law. However, I'd ask for at the top of the aggravated on that sentence would be eight to 19-month sentence with an extensive supervised probation.

Shortly thereafter, the trial court sentenced defendant within the aggravated range:

> In Case No. 16CRS13374, the possession with intent to sell and deliver marijuana, it is the judgment of the Court that Case No. 16CRS13375, be consolidated in that case for purposes of sentencing. And that the Defendant be committed to the custody of the North Carolina Department of Corrections for a period of not less than seven months and no more than 18 months.

Therefore, box two should have been checked on the form indicating that:

> [The Court] makes the Determination of aggravating and mitigating factors on the attached AOC-CR-605.

It is apparent from the transcript that the trial court sentenced defendant in the aggravated range based upon the factor as stipulated. In fact, defendant expressed his displeasure with the sentence, but his comments show he was fully aware of the aggravating factor, since he noted that he had done two years on probation and "didn't get violated till the end. Till my last month getting off probation. I got violated for a misdemeanor."

There is also a clerical error on the form arresting judgment (AOC-CR-305). At trial, the State clarified which count for file number 16 CRS 13373 was the sale and which was the delivery:

> MR. PIERRIE: Count 1 is the sale. In 13373, Count 1 is indicted as sale of marijuana. And Count 2 of 16CRS13373 is indicted as delivery.

The jury found defendant guilty of both counts, and the trial court arrested judgment for the second count:

> The jury having returned verdicts of guilty in Cases 16CRS13373, counts one and two . . . . The Court arrest judgment in Count 2 of Case No. 16CRS13373.

However, on AOC-CR-305 the trial court mistakenly arrested judgment for count one, "ATTEMPTED SELL MARIJUANA."

We remand for the limited purpose of checking box two on defendant's AOC-CR-603C form for file number 16 CRS 013374 and to fill out a corresponding AOC-CR-605. In addition, the AOC-CR-305 for file number 16 CRS 013373 should be corrected on remand to reflect that judgment was arrested for attempted delivery of marijuana.

V. Conclusion

Defendant received a fair trial, free of prejudicial error, but we dismiss his ineffective assistance of counsel claim without prejudice and remand for the limited purpose of correcting two clerical errors.

NO ERROR IN PART; DISMISSED IN PART WITHOUT PREJUDICE; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges ZACHARY and MURPHY concur.

THOMAS v. BURGETT

[265 N.C. App. 364 (2019)]

TRACY SUSAN THOMAS, PLAINTIFF
v.
JEFFRY PAUL BURGETT, DEFENDANT

No. COA18-783

Filed 7 May 2019

1. Child Custody and Support—support—monthly gross income—deductions—rental property expenses

A child support order was vacated and remanded for more specific findings regarding a father's rental property expenses where there was no indication that the trial court took into account the rental property's insurance and property tax expenditures when calculating gross monthly income. The Court of Appeals declined to remand for findings regarding imputation of rental income—based on the mother's argument that the father deliberately rented the property to his son below market value—because the mother did not raise the issue in the trial court.

2. Child Custody and Support—support—extraordinary expenses—after-school activity—speculative evidence

In calculating a father's child support obligation, the trial court's determination that his child required $500 per month for band expenditures was not based on competent evidence where the child had not yet been accepted to the honor band to which she had applied. If, on remand (for another issue), the trial court heard nonspeculative evidence from which it could determine the child was actually participating in the band, it was directed to make findings in support of any award based on those expenses.

3. Child Custody and Support—support—N.C. Child Support Guidelines—deviation—lack of requisite findings precluding review

The trial court failed to justify its deviation from the N.C. Child Support Guidelines—by deciding not to grant a father a credit for the social security payments received by the mother on behalf of the child—where the court did not make necessary findings regarding reasonable needs of the child for her health and maintenance relative to the well-being and accustomed standard of living of her and her parents, whether the presumptive support amount would exceed or not meet the reasonable needs of the child, and a calculation of the child's reasonable needs and expenses.

4. Attorney Fees—child support action—findings of fact —sufficiency

The trial court's findings adequately addressed a mother's insufficient means to defray the cost of a child support action, the court was not required to compare the parties' relative estates before awarding attorney fees, and the court made the necessary findings that the amount awarded was reasonable. Further, the father had adequate notice and an opportunity to be heard on the issue of attorney fees, including after the mother's attorney filed an amended affidavit, to which no objection was made. Where the child support order was vacated and remanded for other reasons, the attorney fee award was also vacated, to be reconsidered after a new determination on the mother's monthly child support expense.

Appeal by Defendant from order entered 19 January 2018 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 13 February 2019.

Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellant.

Arnold & Smith, PLLC, by Matthew R. Arnold, for Plaintiff-Appellee.

INMAN, Judge.

Defendant Jeffry Paul Burgett ("Mr. Burgett") appeals the district court order requiring him to pay his ex-spouse, Tracy Susan Thomas ("Ms. Thomas"), retroactive and prospective child support and attorney's fees. Mr. Burgett argues that the trial court: (1) failed to deduct expenses incurred from his rental property when calculating his gross monthly income; (2) abused its discretion in ordering him to pay $500 per month for his child's band expenses; (3) failed to make sufficient findings of fact when it deviated from the child support guidelines; and (4) erred in awarding Ms. Thomas attorney's fees. After careful review of the record and applicable law, we reverse in part, vacate in part, and remand.

I. Factual and Procedural Background

The record reflects the following facts:

Ms. Thomas and Mr. Burgett married on 14 July 2001, separated on 29 September 2013, and are now divorced. During their marriage, they adopted a minor child, D.N.B.,[1] who was born in 2004.

Following their separation, Ms. Thomas filed a complaint in Union County for, among other things, child custody, child support, equitable distribution, and attorney's fees. After a hearing, the district court (1) awarded Ms. Thomas temporary joint legal and primary physical custody, and Mr. Burgett temporary visitation rights; and (2) ordered Mr. Burgett to pay Ms. Thomas $1,036 per month in temporary child support, with an additional $12,700 in total arears in child support to be paid in monthly $50 installments. The trial court deferred for a further hearing regarding Ms. Thomas' claim for equitable distribution and attorney's fees. Mr. Burgett moved to Wisconsin shortly after the temporary order.

Mr. Burgett began receiving social security benefits after retiring as a pilot in 2015. In December 2015, he filed a motion to modify child support. Before the motion was heard, starting in November 2016, Mr. Burgett unilaterally reduced his monthly child support payments to $446.46 per month, without receiving court permission, in accordance with what he believed to be consistent with the North Carolina Child Support Guidelines ("the Guidelines"). Mr. Burgett contended that Ms. Thomas was receiving $1,251 per month directly from the Social Security Administration for the benefit of D.N.B. and that the child support amount should be recalculated to reflect that additional income. Ms. Thomas opposed the motion.

On 24 August 2016, the parties resolved their disputes on equitable distribution, permanent child custody, and alimony, but could not reach an agreement regarding permanent child support.[2] Following hearings in May and July 2017 in Union County District Court, on 19 January 2018, the trial court ordered Mr. Burgett to pay: (1) $1,679.91 per month in ongoing child support; (2) $21,176.74 in retroactive child support at $50 per month; and (3) $15,000 for a portion of Ms. Thomas' attorney's fees. Mr. Burgett timely appealed.

---

1. We use the above pseudonym to preserve the juvenile's anonymity.

2. The trial court's order pursuant to the parties' settlement inadvertently states that permanent child support was resolved.

II. Analysis

A. Rental Property Expenses Attributable to Gross Income

[1] Mr. Burgett first argues that the trial court erred in failing to deduct rental property expenses from its calculation of his monthly gross income. In child support cases, determinations of gross income are conclusions of law reviewed *de novo*, rather than findings of fact. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992). If the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000); *Eakes v. Eakes*, 194 N.C. App. 303, 311, 669 S.E.2d 891, 897 (2008).

The Guidelines define "income" as a "parent's actual gross income from any source, including but not limited to . . . rental of property." N.C. Child Support Guidelines 2018 Ann. R. 53. The calculation of actual gross income derived from rental of property is "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." *Id.* Although the Guidelines do not define "ordinary and necessary expenses," this Court has explained that such expenses include "repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Mortgage principal payments, however, are not an 'ordinary and necessary expense' within the meaning of the Guidelines." *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

In our case, Mr. Burgett's financial affidavit lists his total monthly gross income at $9,205.24—an accumulation of wages, rent, and social security and pension benefits. The affidavit goes on to provide that Mr. Burgett—paralleling his testimony at trial—owns a rental property which he leases to his adult son for $1,137.63 per month. The monthly $1,137.63 payment, however, is offset by $333.32 in property tax payments and $44.08 per month in renter's insurance.[3]

In finding of fact 18, "per his Financial Affidavit," the trial court calculated Mr. Burgett's gross monthly income at $9,205, noting that the rent his son paid was used for the mortgage payment. Mr. Burgett contends that the trial court did not factor in the other required rental expenses into its calculation of gross income. We agree that insurance and property tax expenditures should be deducted in calculating gross income,

3. Mr. Burgett also has a monthly mortgage payment equal to the rent charged to his son. While the record does not reveal whether that payment encompasses both principal and interest, upon remand, if any portion of that payment includes interest, it is an expense that can be deducted from Mr. Burgett's income for purposes of the Guidelines. *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

as the Guidelines provide. N.C. Child Support Guidelines 2018 Ann. R. 53; *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182. But on the record before us, it appears the trial court did not deduct those expenses from Mr. Burgett's income when calculating his gross income. *See Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997) (reversing and remanding a child support order because it was unclear whether the trial court deducted expenses in calculating a supporting parent's gross income).

"In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors." *Id.* at 176, 493 S.E.2d at 806 (citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). "In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence." *Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

The trial court's finding of fact 18 is the sole finding related to Mr. Burgett's rental property. There are no findings indicating how the trial court treated the insurance and tax expenses associated with the rental property. Because the Guidelines include insurance and taxes as ordinary and necessary expenses, the trial court was required to explain its decision relative to the evidence of such expenses submitted by Mr. Burgett. Without any evidence indicating the trial court's contemplation of those expenses, we do not have enough findings to conduct adequate review. We thus vacate and remand back to the trial court for more specific findings.

We are unpersuaded by Ms. Thomas' arguments that the trial court did not err in calculating Mr. Burgett's monthly gross income. Ms. Thomas contends that the trial court "determine[d] the weight and credibility" of Mr. Burgett's evidence and adequately decided not to include certain expenses in its calculation. However, as in *Burnett*, even "if the trial court chose not to find [Mr. Burgett's evidence] credible at all and therefore did not factor it into its computation," its findings do not provide its rationale for doing so.[4] 128 N.C. App. at 176, 493 S.E.2d at 806; *see also Coble*, 300 N.C. at 714, 268 S.E.2d at 190 ("What all this evidence *does* show, however, is a matter for the trial court to determine in appropriate factual findings." (emphasis in original)).

4. In the same vein, Ms. Thomas also points out that portions of Mr. Burgett's financial affidavit conflict with one another. Part I of his financial affidavit fails to indicate any ordinary and necessary expenses associated with the rental property. Yet, in Part III, Mr. Burgett lists the expenses in dispute. Any apparent discrepancy argued by Ms. Thomas was for the trial court to weigh and resolve, which it failed to acknowledge in its order.

Ms. Thomas also argues that the trial court properly "exercised its discretion to impute income from [Mr. Burgett's] rental property" because there was evidence that he was "renting the property to his adult son at a below market rate. . . . [and] was not making a good faith effort to obtain the highest and best rental income from the property." Ms. Thomas contends that because the trial court "failed to include specific findings of fact regarding this imputation," this case "should be remanded only for the limited purpose of making additional findings of fact consistent with the imputation of rental income." But the record does not reflect that Ms. Thomas raised this issue at trial or that it was ever contemplated by the trial court. Our review of the record reveals no evidence concerning the fair market rate of the rental property or Mr. Burgett's effort in obtaining the appropriate amount of rental income. As such, in remanding this issue back to the trial court regarding the proper findings as to ordinary and necessary expenses, we decline to remand for findings concerning the appropriate valuation of rental income.

B. Extraordinary Expenses

[2] Mr. Burgett next argues that the trial court erred in finding that Ms. Thomas incurs an extraordinary expense of $500 per month for D.N.B.'s participation in a school band program. "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a 'determination of whether there was a clear abuse of discretion.' " *Biggs v. Greer*, 136 N.C. App. 294, 296, 524 S.E.2d 577, 581 (2000) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). We "review whether the trial court's findings are supported by competent evidence." *Doan v. Doan*, 156 N.C. App. 570, 572, 577 S.E.2d 146, 148 (2003).

The Guidelines allow a trial court, in its discretion, to add to the basic child support obligation for "extraordinary expenses," which include:

> (1) expenses related to special or private elementary or secondary schools to meet a child's particular education needs, and (2) expenses for transporting the child between the parent's homes . . . if the court determines the expenses are reasonable, necessary, and in the child's best interest.

N.C. Child Support Guidelines 2018 Ann. R. 55. Although the Guidelines only reference two instances of extraordinary expenses, we have held that "the list of extraordinary expenses . . . is not exhaustive of the

expenses that can be included."[5] *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (1994) (quotation marks and citation omitted).

In findings of fact 20 and 21, the trial court found:

> The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given her special needs.
>
> [Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of $40.00 per week ($173.20 per month), and *an average of $500.00 per month on band and related expenses*.

(emphasis added). During the May 2017 trial, Ms. Thomas testified that D.N.B. suffers from dyspraxia—a neurological disorder generally affecting her motor skills—sensory integration dysfunction, and reactive attachment disorder.[6] D.N.B. has participated in occupational therapy since she was in second grade to improve her physical and social skills. D.N.B.'s therapist recommended that she get involved in music therapy to help her hand-eye coordination and social skills, and to experience "more fun" compared to occupational therapy sessions.

In May 2017, D.N.B. was about to begin eighth grade and was a band member and a member of color guard at her school. Ms. Thomas testified that band participation cost $500 per year. Ms. Thomas further testified that D.N.B.'s prospective additional participation in the "honor band" would cost "approximately [$500] per month" based on a fee sheet given to her by a person affiliated with band registration.[7] However, Ms. Thomas also admitted that these costs were conditioned on D.N.B. successfully auditioning for a spot in the honor band.

We agree with Mr. Burgett that Ms. Thomas' cost estimates are too hypothetical and speculative to be considered competent evidence to allow the trial court to find that D.N.B. requires $500 per month for band

---

5. We do not need to address whether the expenses related to D.N.B.'s band participation were appropriately considered an extraordinary expense by the trial court, as that issue was not raised by Mr. Burgett.

6. Mr. Burgett did not object at trial nor does he contest on appeal D.N.B.'s medical conditions.

7. While Ms. Thomas testified that she had "written the secretary," the record discloses that she was also in contact with a "band treasurer," by email and telephone. It is unclear whether Ms. Thomas spoke to two separate people or only one.

expenditures. While the "trial court has wide discretion in the determination of extraordinary expenses, there must nevertheless exist some evidence to support the court's determination." *Doan*, 156 N.C. App. at 573, 577 S.E.2d at 149. In *Witherow v. Witherow*, we dealt with a comparable issue involving a plaintiff who argued that the trial court erred in taking into its consideration rental payments which the defendant was not making at the time of the hearing, but which he testified he "*might make in the future* upon moving out of his parents' residence." 99 N.C. App. 61, 64, 392 S.E.2d 627, 630 (1990) (emphasis added). The defendant provided in his financial affidavit that he "pays $500 per month as rent[]," but testified that he had lived in his parents' home since his separation with the plaintiff and paid no rent. *Id.* In denying the defendant's argument that "he has a right to be able to afford to move from his parents['] home in the future," we concluded that the trial court erroneously "include[d] personal expenditures not yet made by a party with no concrete plans to make such an expenditure." *Id.* Although *Witherow*'s issue involved the defendant's relative ability to pay child support—rather than determining the proper amount of extraordinary expenses—we are persuaded by the general proposition that "an award which takes into consideration an unsubstantiated expense rather than a current expense is an abuse of the court's discretion." *Id.*

Here, much like in *Witherow*, at the time of the parties' hearing, Ms. Thomas was not required to pay $500 per month on band expenses as D.N.B. had yet to audition and acquire a spot on the honor band. The only actual band expense Ms. Thomas incurred by the July 2017 hearing was the annual fee of $500. Further, scant evidence was introduced as to the person Ms. Thomas communicated with who provided her with the estimated costs that led to Ms. Thomas' $500 per month calculation.[8] Because the trial court lacked competent evidence to find that Ms. Thomas incurs a $500 extraordinary expense for band and other related expenses, we reverse that finding and remand for further proceedings.

Ms. Thomas cites to our opinion in *Doan* and contends that, while D.N.B.'s band "expenses are estimated[,] [] the probability of incurring these expenses is high based on [her] reputation and progress during her time participating in" band. In *Doan*, we determined that a child's figure-skating expenses could be an extraordinary expense but that there was no competent evidence to sustain the trial court's calculated

8. The record contains email correspondence between Ms. Thomas and the "band treasurer" discussing band expenditures. But the band treasurer noted that certain fees were "not all inclusive nor [were those] fees set in stone." There was also an apparent phone conversation between the two that is not recounted in the record.

amount. 156 N.C. App. at 572-75, 577 S.E.2d at 148-50. Ms. Thomas argues, because we held in *Doan* that "the child ha[d] a unique talent for ice skating and ha[d] both the drive and physical potential to become an Olympic-caliber skater, and that the monetary costs associated with the child's skating [we]re high for a person of [the] defendant's financial status," it is consistent with D.N.B.'s apparent superior band participation. *Doan*, however, did not discuss the child's skating prowess relative to the concrete nature of the purported expenses, but instead addressed whether skating could be labeled an extraordinary expense. Thus, Ms. Thomas' reliance on *Doan* is misplaced. If, on remand, the trial court determines that D.N.B. is actually participating in the honor band, and receives nonspeculative evidence concerning the expense, it must make findings to support any award based on those expenses.

C. Deviating from the Guidelines

[3] In finding of fact 30, the trial court determined:

> This Court finds sufficient cause to justify *a deviation in the North Carolina Child Support Guidelines* in this case, and finds that it is in the best interest[9] of the minor child herein that *[Mr. Burgett] not receive a credit for the social security payments that [Ms. Thomas] receives on behalf of the minor child* against the appropriate worksheet A monthly child support amount, as shown.[10]

(emphasis added). Mr. Burgett argues that the trial court, with respect to his social security benefits, did not make sufficient findings of fact showing that a deviation of the Guidelines was warranted.

Regarding social security benefits, the Guidelines mandate:

> Social Security benefits received for the benefit of a child as a result of the . . . retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation.

N.C. Child Support Guidelines 2018 Ann. R. 53. In other words, "the Guidelines provide that Social Security benefits received on behalf of a

---

9. We note that, while Mr. Burgett argues that the trial court here erroneously used the "best interests of the child" standard, we need not discuss it, as we conclude that it failed to make the requisite statutory findings in deviating from the Guidelines.

10. The trial court reiterated this finding in conclusion of law 3.

child are included as income to the parent," but "once the child support obligation has been determined, [those] benefits are deducted from that parent's support obligation" that he or she actually pays out month to month. *New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008).

Although the trial court is obligated to "determine the amount of child support payments by applying the presumptive guidelines," it may deviate from the Guidelines under the following circumstances:

> If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (2017). If the trial court does deviate from the Guidelines, "the court shall make findings of fact as to the criteria that justify varying from the [G]uidelines and the basis for the amount ordered." *Id.*

This Court has stated that the trial court must adhere to a four-step process to deviate from the Guidelines:

> *First*, the trial court must determine the presumptive child support amount under the Guidelines. *Second*, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. *Third*, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. *Fourth*, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

Sain v. Sain, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999) (emphasis added) (internal quotation marks and citations omitted). When the trial court is to make findings pertaining to the child's reasonable needs and the relative ability of each parent to provide support, we have stated that, pursuant to N.C. Gen. Stat. § 50-13.4(c1), it must consider and include in its findings:

> [T]he reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1) (2017); *accord Spicer v. Spicer*, 168 N.C. App. 283, 293, 607 S.E.2d 678, 685 (2005) ("These 'factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.' " (quoting *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993))).[11]

As discussed *supra* in Part B, we also review "[a] trial court's deviation from the Guidelines . . . under an abuse of discretion standard." *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). But, before we can "determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law," the trial court's "findings of fact must show justification for the deviation and a basis for the amount ordered." *Id.* at 644-45, 507 S.E.2d at 593 (quotation marks and citations omitted).

Mr. Burgett argues that the trial court failed to address the third and fourth steps necessary to deviate from the Guidelines.[12] We agree. The record before us is akin to the record in *Spicer* and *Lukinoff*, in which we held that the trial court's order lacked findings necessary for us to review whether it abused its discretion in deviating from the Guidelines.

---

11. As Ms. Thomas requested that the trial court deviate from the Guidelines by written notice of intent on 26 January 2016 pursuant to Section 50-13.4(c), the trial court was encouraged to make these findings.

12. Contrary to Mr. Burgett's and Ms. Thomas' concessions that the trial court determined the presumptive support amount, the order does not include that calculation. The order references a child support worksheet that is not included in the record. The only amounts of support the trial court determined were the final amount of $1,679.91 per month and the $21,176.74 in back child support that Mr. Burgett was ordered to pay. These amounts, however, are calculations derived *after* the trial court deviated from the Guidelines in refusing to deduct Mr. Burgett's social security income. However, because both parties do not argue this issue, we do not address it on appeal.

Spicer, 168 N.C. App. at 292-95, 607 S.E.2d at 684-86; *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594.

In *Spicer*, we concluded that the trial court did not make any specific findings regarding the reasonable needs of the child because it "simply found, without further explanation, that the child's reasonable needs and expenses totaled $1,260.10 per month." *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685-86. The trial court lacked "specific consideration of what amount [was] necessary for the child's health, education, and maintenance" and omitted analysis considering "the accustomed standard of living of the child and the parties." *Id.* at 293-94, 607 S.E.2d at 685-86 (quotation marks and citation omitted). Similarly, in *Lukinoff*, we held that the trial court failed to make any findings regarding the child's reasonable needs, "including his education, maintenance, or accustomed standard of living." *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594. Moreover, the trial court's findings failed to "indicate . . . whether the presumptive amount . . . would not meet or would exceed the reasonable needs of the child." *Id.* at 646, 507 S.E.2d at 594 (emphasis omitted) (quotation marks and citation omitted).

As in *Spicer* and *Lukinoff*, the trial court here failed to satisfy steps three and four of the four-step process when it deviated from the Guidelines. There is a dearth of findings concerning D.N.B.'s health and maintenance relative to the well-being and accustomed standard of living of her and her parents, which appear below, in relevant part:

> [Ms. Thomas] works for US Airways/American Airlines, where she is employed as a flight attendant.
>
> [Ms. Thomas] earns an average gross monthly income of $2,493.00 per month.
>
> [Mr. Burgett] earns a gross monthly income of $9,205.00 per month from all combined sources, per his Financial Affidavit . . . .
>
> [Ms. Thomas] and . . . [D.N.B.] live in a home owned by [Ms. Thomas'] mother, and [Ms. Thomas] struggles to make ends meet.
>
> The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given her special needs.

> [Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of $40.00 per week ($173.20 per month), and an average of $500.00 per month on band and related expenses.
>
> There is a significant disparity in income between the parties. . . .
>
> On average, [D.N.B.] spends three-hundred and eight (308) overnights per year with [Ms. Thomas], and approximately fifty-seven (57) overnights per year with [Mr. Burgett]. . . .
>
> [Mr. Burgett] qualifies for social security payments, and a portion of those payments are paid for the benefit of [D.N.B.]; [Ms. Thomas] is the payee of those funds, which total $1,255.00 per month.

The trial court made no findings regarding D.N.B.'s educational expenses or whether application of the presumptive guidelines would exceed or not meet the reasonable needs of D.N.B. or whether the presumptive support would be unjust or inappropriate. *See Lukinoff*, 131 N.C. App. at 646, 507 S.E.2d at 594 ("An award other than that set forth in the Guidelines is proper only when the trial court determines that the greater weight of the evidence establishes 'the [G]uidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.' " (emphasis omitted) (quoting N.C. Gen. Stat. § 50-13.4(c)). Further, the trial court failed to calculate D.N.B.'s reasonable needs and expenses. *See Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005) ("Without knowing what the children's reasonable expenses are, we cannot review the trial court's decision to deviate from the Guidelines or the amount ultimately awarded.").

While the trial court may have been correct in deviating from the Guidelines, "[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it[.]" *Coble*, 300 N.C. at 712, 268 S.E.2d at 189 (emphasis in original). Absent such specific findings, "we are precluded from reviewing the basis of the award." *Spicer*, 168 N.C. App. at 294-95, 607 S.E.2d at 686. We thus vacate and remand this issue to the trial court for more specific findings pursuant to Section 50-13.4(c) and this Court's precedents.

D. Attorney's Fees

[4] Mr. Burgett's last challenge is to the trial court's order that he pay $15,000 for Ms. Thomas' attorney's fees.

Mr. Burgett makes three arguments to support his contention that the trial court erred in awarding Ms. Thomas attorney's fees, and we discuss each one in turn.

In actions involving child support:

> [T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6 (2017); *see also Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) ("[T]he trial court [is] required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit."). Because this is also an "action solely for child support, the court must make the required finding . . . that the party required to furnish adequate support failed to do so when the action was initiated." *Spicer*, 168 N.C. App. at 296, 607 S.E.2d at 687 (citing *Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975)). "Whether these statutory requirements have been met is a question of law, reviewable on appeal." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980).

In finding of fact 32, the trial court determined:

> [Ms. Thomas] is an interested party, acting in good faith, without the means to pursue child support for [D.N.B.'s] benefit, but for an award of attorney's fees.

Mr. Burgett contends that this sole "finding" as to attorney's fees is inadequate because the trial court failed to "determin[e] that [Ms. Thomas] ha[d] insufficient means to defray the costs of the action."[13] *See Atwell*

13. Because Mr. Burgett does not argue that the trial court failed in making the appropriate findings regarding Ms. Thomas' good faith or his failure to provide support at the time of the action, we need not address these issues.

v. Atwell, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985) (stating that a "finding" as to one's ability to defray the costs of suit "is, in reality, a conclusion of law" that must be supported by adequate factual findings). Specifically, Mr. Burgett argues that there are no evidentiary findings concerning Ms. Thomas' expenses nor is there a finding of the parties' estates that help support the trial court's determination that Ms. Thomas cannot independently pay for her action against him. We disagree.

When a trial court is making findings necessary to award attorney's fees pursuant to Section 50-13.6, "there is no need to compare the parties' relative estates when considering whether to award attorney's fees in child custody and support actions." *Taylor v. Taylor*, 343 N.C. 50, 57, 468 S.E.2d 33, 37 (1996). Mr. Burgett cites this Court's holding in *Barrett v. Barrett* that "a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses' estates may sometimes be appropriate." 140 N.C App. 369, 374, 536 S.E.2d 642, 646 (2000). *Barrett* does not mandate that the trial court compare the parties' estates. *See Van Every v. McGuire*, 348 N.C. 58, 60, 497 S.E.2d 689, 690 (1998) (holding that Section 50-13.6 "does not *require* the trial court to compare the relative estates of the parties" (emphasis in original)). Thus, we are unpersuaded that the trial court committed *per se* error by omitting findings discussing the parties' estates.

While " 'a bald statement that a party has insufficient means to defray the expenses of [a] suit' " is insufficient as a matter of law, the trial court here made related findings of fact that satisfy its statutory obligation. *Sarno v. Sarno*, __ N.C. App. __, __, 804 S.E.2d 819, 827 (2017) (quoting *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989)). The trial court made the following findings associated with Ms. Thomas' ability to pay her attorney's fees: (1) her monthly gross income is $2,493; (2) she lives at her mother's residence with D.N.B. and "struggles to make ends meet;" (3) she incurs $40 per week in medical expenses and $500 per month on band expenses; (4) since February 2015, she has received $1,255 per month from Mr. Burgett's social security payments; and (5) since November 2016, after Mr. Burgett unilaterally reduced his child support payment in contravention of the temporary child support amount of $1,036 per month, as well as an additional $50 per month in back child support, Ms. Thomas has received "a little less than $500 per month" from Mr. Burgett.

The trial court's findings not only show that Ms. Thomas' income is vastly inferior to Mr. Burgett's, but go well beyond the "bare statutory language" that she cannot employ adequate counsel. *Dixon v. Gordon*,

223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012); *cf. id.* ("Although information regarding father's gross income and employment was present in the record in father's testimony, there are no findings in the trial court's order which detail this information."). These findings support the trial court's determination that, without, at least, partial payment of attorney's fees, Ms. Thomas would not, "as litigant, [be] able to meet [Mr. Burgett], as litigant, on substantially even terms with respect to representation by counsel." *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982), *superseded in part by statute on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (1983); *see also Hudson*, 299 N.C. at 474, 263 S.E.2d at 725 ("[H]e or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.").

Mr. Burgett then argues that the trial court failed to make adequate findings pertaining to the reasonableness of its award regarding Ms. Thomas' attorney's time and skill during her representation. Mr. Burgett does not contend that the amount of attorney's fees is not supported by the evidence. *See Hudson*, 299 N.C. at 473, 263 S.E.2d at 724 ("[T]he *amount* of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." (emphasis in original)). He argues only that the trial court failed to make the appropriate statutory findings to determine its award was reasonable. We disagree.

The trial court expressly referenced and relied on Ms. Thomas' attorney's amended affidavit for attorney's fees—which came at the trial court's request. The detailed affidavit describes the attorney's experience and background in domestic relations law, her hourly rate, the total number of hours she worked on Ms. Thomas' case, and attaches as an exhibit more than 30 pages of records identifying the specific work she performed for Ms. Thomas. *See Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-06 (1991) (holding that the trial court did not abuse its discretion in the amount of fees given based on findings of the hourly rate and number of hours worked provided by the plaintiff's attorneys' affidavits). We thus reject Mr. Burgett's argument.

Lastly, Mr. Burgett argues that the trial court erred in awarding attorney's fees without giving him an opportunity to be heard and contest Ms. Thomas' attorney's amended affidavit prior to the trial court's order. Mr. Burgett contends that this case is analogous to *Allen v. Allen*, 65 N.C. App. 86, 308 S.E.2d 656 (1983). In *Allen*, the trial court issued an order awarding custody to the defendant and directed the plaintiff to pay the defendant's attorney's fees but deferred a ruling as to the amount until a later date when the plaintiff would appear in court. *Id.* at 87, 308

S.E.2d at 657. Before another hearing, the defendant's counsel filed an affidavit itemizing his expenses and time spent on the case. *Id*. at 88, 308 S.E.2d at 658. A copy of the affidavit was never delivered to the plaintiff or his counsel, nor were they notified when the trial court would decide the matter on attorney's fees. *Id*. The day after the affidavit was filed, the trial court entered an *ex parte* judgment against the plaintiff, ordering him to pay over $16,000 in attorney's fees. *Id*.

In vacating the trial court's order, we reasoned that the plaintiff had the right to question the reasonableness of the affidavit and the services rendered. *Id*. We held that, because "parties have a right, not only to be present, but to be heard when their substantial rights and duties are being adjudged"—such as paying more than $16,000 in legal fees—the plaintiff should have been presented with the opportunity to "question the necessity or reasonableness of any service claimed, as well as the worth of any service approved." *Id*. at 88-89, 308 S.E.2d at 658-59.

Here, on 17 May 2017, Ms. Thomas' attorney served an affidavit of fees on Mr. Burgett's attorney. Two months later, in the morning prior to the July 2017 hearing, Ms. Thomas' attorney filed that same affidavit with the trial court, and the issue of fees and the affidavit itself was discussed at the hearing. Two months later, by email sent 21 September 2017, the trial court informed the parties of its findings and rulings to be declared in its later order, including that Ms. Thomas should be awarded attorney's fees. In that email, the trial court instructed Ms. Thomas' attorney to "provide an affidavit of her time" to the trial court and Mr. Burgett's attorney and told the parties that "[i]f either of [them had] questions, don't hesitate to find me." Subsequently, Ms. Thomas' attorney filed her amended affidavit of fees on 11 January 2018 and served it on Mr. Burgett's attorney that same date. Eight days later, on 19 January 2018, the trial court entered its permanent child support order and ordered that Mr. Burgett pay $15,000 of the $23,132.50 in legal fees and expenses incurred by Ms. Thomas.

This case is readily distinguishable from *Allen* in that Mr. Burgett had adequate notice and frequent opportunities to address the trial court regarding Ms. Thomas' legal expenses. Throughout the litigation, Mr. Burgett and his attorney were notified by Ms. Thomas and the trial court regarding the issue of attorney's fees. Mr. Burgett chose not to object to Ms. Thomas' motion for attorney's fees during the July hearing. Mr. Burgett did not notify the trial court or Ms. Thomas' attorney of any objection to the amended affidavit filed and served at the trial court's request. Mr. Burgett argues that he "had no opportunity to be heard after

the requested amount" was amended by Ms. Thomas' attorney. Yet in his brief, Mr. Burgett concedes that Ms. Thomas' "counsel did serve [his] counsel with a copy of the amended affidavit." Mr. Burgett's attorney had eight days to contest anything within that amended affidavit but failed to act on it. Moreover, unlike *Allen*, the trial court only ordered Mr. Burgett to pay a portion, rather than the entirety, of Ms. Thomas' attorney's fees. Accordingly, we hold that the trial court did not deprive Mr. Burgett of his opportunity to be heard.[14]

Although we hold that the trial court did not err in awarding attorney's fees, we vacate and remand the award for the trial court to consider the amount in light of its new determination of Ms. Thomas' monthly child support expense. As we concluded in Part B, no competent evidence supported the trial court's finding that Ms. Thomas incurred a monthly expense of $500 for D.N.B.'s band participation. The record does not indicate whether, or how, the trial court weighed its erroneous finding of this monthly expense in its calculation of the attorney's fees award.

III. Conclusion

In sum, we reverse the trial court's finding that at the time of the hearing, Ms. Thomas was incurring $500 in monthly expenses for D.N.B.'s band participation and we vacate the trial court's order with respect to its (1) calculation of Mr. Burgett's gross income; (2) deviation from the Guidelines in not removing Mr. Burgett's social security payments from his child support obligation; and (3) award of attorney's fees, and remand these matters for further proceedings consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and COLLINS concur.

14. Mr. Burgett also argues in his reply brief that there is "nothing in the record that indicates when [his] attorney actually received" a copy of the amended affidavit, but fails to provide evidence of a contrary date of receipt. Absent any conflicting evidence, we rely on the record before us and the stipulated date of the certificate of service.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 7 May 2019)

COLEY v. COWAN No. 18-1020	Wayne (17CVS1550)	Reversed in part, Affirmed in part, and Remanded.
IN RE J.J. No. 18-989	Durham (07JA262) (08JA352-353) (14JA157) (14JA88-89)	Affirmed
IN RE K.L.C. No. 18-1003	Robeson (13JT352)	Vacated
IN RE N.S.J No. 18-1005	Yadkin (16J60-63)	Affirmed
IN RE T.J.M.L. No. 18-1022	Alleghany (16JT24)	Vacated and Remanded
McFARLAND v. PITT CTY. BD. OF EDUC. No. 18-946	Pitt (17CVS2739)	Appeal dismissed.
ORANGE CTY. EX REL. LACY v. CANUP No. 18-1139	Orange (17CVD1633)	Affirmed in Part, Reversed in Part and Remanded
RIDER v. PRYOR No. 18-821	Henderson (14CVS1610)	Affirmed
STATE v. BAMACA No. 18-1244	Pitt (17CR056158)	Vacated and Remanded
STATE v. BROWN No. 18-1044	Mecklenburg (16CRS205383-84)	Affirmed
STATE v. CASE No. 18-746	Madison (17CRS50129)	No Error
STATE v. DUDLEY No. 18-1121	Guilford (99CRS110602)	Affirmed
STATE v. GRAHAM No. 18-1	New Hanover (16CRS51705-06)	Affirmed
STATE v. JONES No. 18-502	Mecklenburg (08CRS250566-67) (08CRS80584)	Appeal Dismissed; Petitions Denied

STATE v. JORDAN No. 18-875	Johnston (17CRS2089) (17CRS53724)	No error in part; No plain error in part.
STATE v. NEESE No. 18-1204	Randolph (16CRS53077)	No Error
STATE v. PHILLIP No. 18-1012	Durham (13CRS60812) (13CRS61115)	No Error
STATE v. RICHARDSON No. 18-696	Forsyth (17CRS197) (17CRS50582) (17CRS50584-85) (17CRS50622)	Dismissed in Part, No Error in Part.
STATE v. SANDERS No. 18-954	Edgecombe (16CRS50135)	No Error
STATE v. THOMPSON No. 18-557	Forsyth (16CRS60350)	No Error
STATE v. ZEY No. 18-955	Onslow (17CRS51429)	No Error
STATHUM-WARD v. WAL-MART STORES, INC. No. 18-738	Wake (16CVS8931)	No Error
STULL v. STULL No. 18-915	Jackson (12CVD217)	Remanded

ASHE COUNTY, NORTH CAROLINA, PETITIONER
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC, RESPONDENTS

No. COA18-253

Filed 21 May 2019

1. Zoning—permits—ordinance change—permit choice statute—timing of application's completion

An application for a permit to operate an asphalt plant was sufficiently complete prior to a temporary moratorium on the issuance of certain permit approvals to trigger the Permit Choice statute, N.C.G.S. § 153A-321.1. The county accepted and deposited the application fee after the application was submitted, and the remaining requirement to submit the state-issued air quality permit did not prevent the submission from triggering the Permit Choice statute.

2. Zoning—permits—permit choice statute—moratorium—new ordinance

An application for a permit to operate an asphalt plant, which was submitted before a temporary moratorium on the issuance on certain types of permits, was subject to the Permit Choice statute (N.C.G.S. § 153A-320.1) even though the county replaced the former permit ordinance with a new one when it lifted the moratorium.

3. Zoning—permits—letter from county planning director—partially binding

A county planning director's letter positively commenting on an application for a permit to operate an asphalt plant was not, by its language and the surrounding circumstances, intended to be a determination that the permit would be issued once a state-issued air quality permit was obtained. However, the letter did bind the county to the planning director's determination that a portable shed and a barn within 1,000 feet of the proposed building site were not "commercial buildings" that would prohibit the asphalt plant from being built on the proposed site.

4. Zoning—permits—county planning board—authority to overrule denial of application

A county planning board had the authority to overrule the county planning director's determination that a company's alleged

misrepresentations on its permit application warranted the denial of the application.

Judge BERGER concurring in separate opinion.

Appeal by Ashe County, North Carolina, from an order entered 30 November 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals 3 October 2018.

Womble Bond Dickinson (US) LLP, by John C. Cooke, for Ashe County, North Carolina, Petitioner-Appellant.

Poyner Spruill LLP, by Chad W. Essick, Keith H. Johnson, and Colin R. McGrath, for Appalachian Materials, LLC, Respondent-Appellee.

DILLON, Judge.

Appalachian Materials, LLC ("Appalachian Materials"), filed an application for a permit to operate an asphalt plant in Ashe County (the "County"). Its permit was initially denied by the County's Planning Director. However, the County's Planning Board reversed the Planning Director's decision, directing that the permit be issued. The County appealed the decision of its Planning Board to the superior court. The superior court affirmed the decision of the Planning Board. The County appeals to this Court. We affirm.

I. Background

In June 2015, Appalachian Materials submitted an application to the County, seeking a PIDO permit[1] to operate an asphalt plant on a certain tract of land. However, Appalachian Materials noted in its application that it had applied for but not yet obtained an air quality permit *from the State*, a permit which must be obtained before the County can issue a permit for an asphalt plant in its jurisdiction.[2]

Later in June 2015, the County's Planning Director sent Appalachian Materials a letter (the "June 2015 Letter") positively commenting on the

1. A permit issued under Ashe County's then-existing Polluting Industries Development Ordinances.

2. *See S.T. Wooten v. Zebulon Bd. of Adjustment*, 210 N.C. App. 633, 635, 711 S.E.2d 158, 159 (2011) (Judge, now Chief Justice, Beasley, writing for our Court, commenting on an asphalt plant operator applicant obtaining a State-issued air quality permit as a precursor to obtaining a permit from the town).

application, but stating that Appalachian Materials needed to provide the State-issued air quality permit before any PIDO permit could be issued.

Four months later, in October 2015, Ashe County's elected Board of Commissioners (the "Governing Board") adopted a temporary moratorium on the issuance of PIDO permits (the "Moratorium").

During the Moratorium, in February 2016, Appalachian Materials finally supplemented its PIDO permit application with the State air quality permit. But two months later, in April 2016, the Planning Director issued a letter to Appalachian Materials denying the PIDO permit request. In the denial letter, the Planning Director cited the Moratorium, among other reasons, for the denial. Appalachian Materials appealed the Planning Director's denial to the Planning Board.

In the Fall of 2016, prior to the decision of the Planning Board, the County's Governing Board lifted the Moratorium, but repealed the PIDO ordinance (the "Old Ordinance") and replaced it with a new ordinance (the "New Ordinance") which created additional barriers for the approval of a permit to operate an asphalt plant.

In December 2016, the Planning Board reversed the decision of the Planning Director, determining that Appalachian Materials was entitled to the PIDO permit. The County appealed the Planning Board's decision to the superior court.

Almost a year later, in November 2017, Superior Court Judge Bray affirmed the Planning Board's order. The County has now appealed Judge Bray's order to our Court.

II. Analysis

The County's unelected Planning Board, which operates as the County's board of adjustments, voted in favor of permitting Appalachian Materials' proposed asphalt plant. *See* Ashe County Code § 153.04(J) (2015) (stating that the County's Planning Board acts as the County's board of adjustments). The County's elected Governing Board, however, is against the decision of its Planning Board, and is seeking a reinstatement of the decision made by its Planning Director, a County employee, denying the permit application. To better understand the issues on appeal, we pause briefly to describe the bases why the Planning Director denied the permit application and why the Planning Board reversed, voting to allow the permit application.

In June 2015, Appalachian Materials applied for the permit. In October 2015, the County's Governing Board adopted its temporary

Moratorium on permit approvals. By October 2016, the Moratorium had been lifted, the Old Ordinance was repealed, and the New Ordinance had gone into effect.

However, in April 2016, while the Moratorium was still in effect, the County's Planning Director denied Appalachian Materials' application for a PIDO permit, concluding that: (1) his June 2015 Letter to Appalachian Materials, in which he positively commented on the permit application shortly after the application was submitted, did not constitute a binding decision on the County that the permit would be approved once the State permit was procured; (2) the proposed site of the asphalt plant was within one thousand (1,000) feet of certain commercial buildings, in violation of the Old Ordinance's set-back requirements; (3) Appalachian Materials' permit application was not completed when the Moratorium went into effect, as the required State permit was still pending; and (4) Appalachian Materials made misrepresentations in its application.

Appalachian Materials appealed the Planning Director's denial to the County's Planning Board. The Planning Board reversed the Planning Director's conclusions and ultimate denial, itself concluding that (1) the June 2015 Letter from the Planning Director did constitute a binding determination that the permit would be approved once the State permit was procured; (2) the proposed site was *not* in violation of the Old Ordinance's one thousand (1,000) foot buffer; (3) Appalachian Materials' application was sufficiently completed when submitted, prior to the adoption of the Moratorium, to merit a decision under the Old Ordinance; and (4) the application did not contain misrepresentations which warranted denial.

For the following reasons, we conclude that Judge Bray was correct in affirming the decision of the Planning Board.

A. Appalachian Materials' Application Was Sufficiently Complete

[1] One disagreement between the parties is whether Appalachian Materials had completed its application sufficiently *prior to* the October 2015 Moratorium to trigger the statute which allows an applicant to choose which version of an ordinance to have its application considered under where the ordinance is changed before a submitted application is acted on by a county. Specifically, Section 153A-320.1 of our General Statutes, the "Permit Choice" statute, provides that "[i]f a [county's] rule or ordinance changes between the time a permit application is submitted and a permit decision is made, then G.S. 143-755 shall apply." N.C. Gen. Stat. § 153A-320.1 (2015). And Section 143-755 provides that, in such situations, "the permit applicant may choose which

version of the rule or ordinance will apply to the permit." N.C. Gen. Stat. § 143-755 (2015).

We conclude that Appalachian Materials' application had been "submitted" to the County, notwithstanding that a required State permit was still under review. The required State permit is one of many possible prerequisites which might have to be met after a sufficient application is submitted but before a permit can be finally approved. Here, the application was submitted, and the County accepted and deposited the application fee. The application was still before the County when the State permit was approved. Therefore, we conclude that the application was sufficiently "submitted," pursuant to the Permit Choice statute, in June 2015.

B. The Moratorium Does Not Nullify Permit Choice Rights

[2] A county has the right to adopt a temporary moratorium on certain permit approvals. N.C. Gen. Stat. § 153A-340(h) (2015). We conclude that the existence of a moratorium is not grounds to deny a permit. A moratorium simply delays the decision.

The County, though, argues that when a county adopts a temporary moratorium and then modifies an ordinance, the Permit Choice statute has no application. Instead, the County contends, a pending application must be reviewed under the new ordinance once the moratorium is lifted. We understand the County's policy arguments, but we are compelled to disagree.

In reaching our conclusion, we are guided in part by our Supreme Court's decision in *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007). In that case, Mr. Robins applied for a permit to construct an asphalt plant. *Id.* at 194, 639 S.E.2d at 422. While his application was pending, the town adopted a moratorium and then amended an ordinance which prohibited asphalt plants from operating in the town. *Id.* at 195-96, 639 S.E.2d at 423. Our Supreme Court ruled that Mr. Robins had the right to have his application considered under the version of the town ordinance in effect when his application was filed, an ordinance which *did* allow asphalt plants to operate within the town, under certain conditions:

> We hold that when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application. Accordingly, [Mr. Robins] was entitled to receive a

> final determination from [the town] regarding his application and to have it assessed under the ordinance in affect when the application was filed. We express no opinion [on the application's merits], but merely that [Mr. Robins] is entitled to a decision by [the town] pursuant to the ordinance as it existed before passage of the moratorium and the amendment.

Id. at 199-200, 639 S.E.2d at 425.

Seven years later, in 2014, the General Assembly essentially codified much of the Supreme Court's reasoning in *Robins* when it enacted the Permit Choice statute. Like the rule applied in *Robins*, there is no language in Section 153A-340(h), the moratorium statute, which prevents the Permit Choice statute from applying once the moratorium is lifted.

C. The June 2015 Letter Was Only Partially Binding on the County

[3] The Planning Board concluded that the June 2015 Letter, in which the Planning Director positively commented on the application, was a determination that the application would be approved once the State permit was obtained. The Planning Board further concluded that this determination by the Planning Director in his June 2015 Letter became binding on the County when the County failed to appeal the June 2015 Letter within thirty (30) days.

The County now argues that the June 2015 Letter has no binding effect.

The record shows the following: In early June 2015, Appalachian Materials submitted its application for a PIDO permit. About a week later, an Appalachian Materials representative followed up, requesting a letter from the Planning Director regarding the application:

> . . . . A letter detailing that standards of our ordinance have been met for [our] site, with the one exception [the absence of the required State air quality permit] would be great. If you could just email that to me, it would help a great deal.

That same day, the Planning Director responded by email that he would send a letter but that it would be merely his "favorable recommendation" of the application, that he still needed to see Appalachian Materials' final plans, and that he did not have the authority to provide conditional approval for the PIDO permit:

> . . . . I will write up a permit for the site *assuming the new plans meet the requirements* [*of the PIDO*].
>
> Concerning the conditional approval based on getting the [required State permit], *I cannot do that without approval from the Planning Board*. The language in the ordinance is pretty clear, "no permit from the planning department shall be issued until [all required State and Federal] permits have been issued."
>
> That said, I could write *a favorable recommendation*, or letter stating that standards of our ordinance have been met for this site, with one exception.

(Emphasis in italics added.)

A week later, the Planning Director sent the June 2015 Letter, which stated as follows:

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> The proposed site does meets (*sic*) the requirements of the Ashe County Polluting Industries Ordinance, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being issued. We have on file the general NCDENR Stormwater Permit and also the Mining Permit for this site. Once we have received the NCDENR Air Quality Permit[,] our local permit can be issued for this site.
>
> If you have any questions regarding this review please let me know.
>
> [/s/ Planning Director]

The June 2015 Letter enclosed the following checklist, which aligns with the "Permitting Standards" required to receive a PIDO permit under the Old Ordinance:

159.06A	Fee	**$500.00 Paid 6/5/2015**
	State & Federal Permits	Air Quality Permit – **applied for by applicant, local permit on hold until received**
159.06B	Buffer Requirements	1,000 feet of a residential dwelling or commercial building 1,320 feet of any school, daycare, hospital, or nursing home facility. **Verified, survey attached to permit.**
159.06B1	Permanent Roads	Permanent roads, used in excess of six months, within the property site shall be surfaced with a dust free material (soil cement, portland cement, bituminous concrete. **To be inspected prior to final inspection.**
159.06B3	Security Fence	**No extraction operation planned. Fence not required unless conditions change.**
159.06B4	Noise	**Operations shall not violate noise ordinance. Ongoing inspection required.**

Our Court has held that where a planning department official makes a decision, it may be binding on the city or county if not appealed to the board of adjustments within thirty (30) days. *See S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 210 N.C. App. 633, 639, 711 S.E.2d 158, 162 (2011). In determining whether a statement by a town official represents a decision binding on the County (if not appealed timely), our Court has relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a planning director; (3) whether

the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of [a] zoning ordinance to a landowner seeking such interpretation as it related specifically to its property;" and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *S.T. Wooten Corp.*, 210 N.C. App. at 641-42, 711 S.E.2d at 163.

However, we have also held that "[w]here the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T. Wooten Corp.*, 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

Here, based on the circumstances in which the June 2015 Letter was issued and the language of the prior email and the June 2015 Letter itself, we conclude that the Planning Director did not intend for his June 2015 Letter to be a determination that the permit would be issued once the State permit was obtained. But we also conclude that the June 2015 Letter did have *some* binding effect, as noted in the following section.

D. The June 2015 Letter Binds the County With Respect to the Buffer

The Old Ordinance prohibited any asphalt plant from being developed on a site within one thousand (1,000) feet of a "commercial building." Ashe County Code § 159.06(B) (2015) (repealed). The Planning Director denied the permit, in part, because the proposed site was within one thousand (1,000) feet of a portable shed, not attached to the land, used by Appalachian Materials' parent company on the same site and also within one thousand (1,000) feet of a barn on an adjacent property. The Planning Department determined that these structures were not "commercial buildings."

Our review of language in an ordinance is *de novo*; that is, we interpret language in an ordinance just like we interpret language in a statute. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155-56, 712 S.E.2d 868, 871 (2011) ("Reviewing courts apply de novo review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a

municipal ordinance."). And "[z]oning ordinances should be given a fair and reasonable construction in light of . . . the general structure of the Ordinance as a whole[,]" but, since zoning regulations are in "derogation of common law rights," they "should be resolved in favor of the free use of property." *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Here, there is uncontradicted evidence that the barn was owned by a neighbor who ran a business in which he harvested and sold hay and that he used the barn to store his hay inventory and to store farm equipment used to harvest hay.

It may be argued that it is ambiguous whether the barn's agricultural use is a "commercial use." But it could be strongly argued that the language of the Ashe County Ordinance as a whole supports the view that the barn in question, used for an agricultural purpose which is commercial in nature (to sell farm products in the marketplace), is a "commercial" property as used in the Old Ordinance. For instance, one provision in the ordinance defines "business" as a "commercial trade . . . including but not limited to . . . agricultural . . . and other similar trades or operations." Ashe County Code § 163.05 (2015). And a planned unit development is defined as any development that includes residential and commercial uses, without any separate delineation for agricultural uses. Ashe County Code § 156.48 (2015). The ordinances dealing with permit fees to construct buildings categorize buildings as either "one and two family dwellings," "mobile homes," and "commercial," without any separate delineation for "agricultural." Ashe County Code § 150.29 (2015).

But we need not resolve whether the County's interpretation or its Planning Board's interpretation of "commercial building" as applied to the barn or the shed is correct. Rather, we conclude that the Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and that his determination was binding on the County. Indeed, the record shows that these buildings were shown in the application and that the Planning Director stated in his June 2015 Letter that he had "verified" that these buildings were not a problem. Further, Appalachian Materials was prejudiced by this determination in that it could have sought a variance had the Planning Director not made the determination. Ashe County Code § 159.07(B) (2015) (repealed) (allowing applicant to seek a variance for any buffer issues).

We conclude that the June 2015 Letter was not a binding determination that the permit would be issued once the State permit was obtained. But we also conclude that the table in the June 2015 Letter is indicative

that the Planning Director was making a determination concerning the status of the buildings shown in the application to be in proximity of the proposed site.

It could be argued that the rule we apply creates the likelihood of "interlocutory" appeals to a board of adjustments from decisions made by planning department officials. However, we are bound by our precedent. And where a county's planning department official has made an interlocutory determination that is relied upon by an applicant, to its detriment, such determination must be appealed by the county to its board of adjustments within thirty (30) days; otherwise, the determination becomes binding. Our precedent favors a policy that citizens should not suffer when they reasonably rely upon determinations made be a county official. It is, therefore, on each county to develop a process whereby it can become aware of determinations made by its own staff so that it can preserve its right to appeal such determinations, unless and until the law in this regard is changed.

E. Misrepresentations in the Application

[4] The Planning Director denied the application based on other factors such as his view that Appalachian Materials made misrepresentations on its application. The Planning Board reviewed these alleged misrepresentations and determined that they were not sufficient to warrant the denial of the application. We note that, under the Ashe County Code, the Planning Board has the authority to "uphold, modif[y], or overrule[] in part or in its entirety" any determination made by the Planning Director. Ashe County Code § 153.04(f) (2015). Here, the Planning Board has made its determination; and we cannot say that the Planning Board has exceeded its authority to overrule the determination made by the Planning Director.

IV. Conclusion

The Moratorium is no longer in effect. Appalachian Materials' application must be reviewed under the Old Ordinance, as requested by Appalachian Materials. The Planning Director bound the County on the issue of whether certain buildings were each a "commercial building" as defined in the buffer provision in the Old Ordinance. The Planning Board had the authority to determine whether the application otherwise complied with the Old Ordinance. We, therefore, affirm the trial court's order affirming the decision made by the Planning Board.

AFFIRMED.

Judge STROUD concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority that the Polluting Industries Development Ordinance permit ("PIDO" or "PIDO permit") should be released to Appalachian Materials, LLC. However, because the County did not timely appeal to the Planning Board, neither the Planning Board nor the trial court had the requisite subject matter jurisdiction to review the appeal. Therefore, the trial court's order should be vacated, this matter dismissed, and the permit released to Appalachian Materials.

In June 2015, Appalachian Materials submitted an application to Adam Stumb ("Stumb"), Ashe County's Planning Director, for a permit to be issued, as required under the local PIDO. This permit would authorize Appalachian Materials to operate portable asphalt equipment on a portion of its leased property in Ashe County, North Carolina. Appalachian Materials' application included the required $500.00 application fee and a copy of its air quality permit application, which Appalachian Materials contemporaneously submitted to the North Carolina Department of Environmental Quality ("NCDEQ"). As this air quality permit was required for a PIDO permit to be issued, Appalachian Materials further promised that it would forward a copy of the air quality permit to Stumb upon receipt from NCDEQ.

Shortly after Appalachian Materials submitted its PIDO permit application, Stumb agreed to provide written confirmation as to whether Appalachian Materials' permit complied with PIDO, notwithstanding the pending air quality permit determination. Stumb's decision "was important for Appalachian [Materials] to know in order to continue to spend time, money and resources in connection with securing" another necessary permit. In response to Appalachian Materials' request, Stumb visited Appalachian Materials' property, "created and reviewed certain GIS maps and photographs that identified all buildings in close proximity to the [p]roperty and created certain GIS shape files identifying any buildings that required buffering or setbacks from the proposed polluting industry under [PIDO]."

On June 22, 2015, Stumb sent Appalachian Materials the following letter (the "June 2015 Letter"):

> I have reviewed the plans you have submitted on behalf of Appalachian Materials LLC for a polluting industries permit. The proposed asphalt plant is located on Glendale School Rd, property identification number 12342-016, with no physical address.
>
> *The proposed site does meets* (*sic*) *the requirements of the Ashe County Polluting Industries Ordinance*, Chapter 159 (see attached checklist). However, the county ordinance does require that all state and federal permits be in hand prior to a local permit being *issued*. We have on file the general [NCDEQ] Stormwater Permit and also the Mining Permit for this site. Once we have received the [NCDEQ] Air Quality Permit[,] our local permit can be *issued* for this site.
>
> If you have any questions regarding this review please let me know.
>
> [Stumb's Signature]
> Adam Stumb
> Director of Planning

(emphasis added). Appalachian Materials "continued to invest time, money[,] and resources into the proposed asphalt facility" after receiving the June 2015 Letter.

On February 26, 2016, NCDEQ issued the outstanding air quality permit to Appalachian Materials. On February 29, 2016, Appalachian Materials forwarded a copy of its air quality permit to Stumb and requested that he issue its PIDO permit as promised. That same day, Stumb responded via email that he may need additional information from Appalachian Materials or NCDEQ before considering the request to issue the PIDO permit. After a series of communications between Stumb and Appalachian Materials, Stumb wrote a letter to Appalachian Materials on April 20, 2016 (the "April 2016 Letter"), which denied its request to issue a PIDO permit. In the April 2016 Letter, Stumb contended that "the proposed polluting industry was located with 1,000 feet of a residential dwelling unit or commercial building, in violation of [PIDO], that the [a]pplication was incomplete because Appalachian [Materials] had not obtained all necessary state and federal permits, and that Appalachian [Materials] made several false statements in the [a]pplication."

On May 16, 2016, Appalachian Materials appealed Stumb's April 2016 Letter to the Planning Board. The Planning Board held a quasi-judicial hearing on October 6, 2016, in which Appalachian Materials argued that Stumb's June 2015 Letter was a binding determination that the County did not timely appeal. Therefore, Appalachian Materials argued that Stumb had no authority to subsequently reverse this binding decision by denying Appalachian Materials' application for a PIDO permit in the April 2016 Letter. On December 1, 2016, the Planning Board entered an order (the "Planning Board's Order"), in which the Planning Board unanimously reversed the April 2016 Letter; concluded that Appalachian Materials had satisfied all the requirements of PIDO; classified the June 2015 Letter as a binding and final determination; and found "no basis for any other allegation made by Stumb in his April 2016 Letter that any material misrepresentation was made in the [a]pplication," and ordered Stumb to release the PIDO permit to Appalachian Materials.

The County appealed from the Planning Board's Order by filing a petition for writ of certiorari with in Ashe County Superior Court on December 30, 2016. On November 30, 2017, the superior court entered an order (the "Superior Court's Order"), affirming the Planning Board's Order in all respects and ordering the County to issue a PIDO permit to Appalachian Material within ten business days.

On December 7, 2017, the County filed a motion with the superior court to stay its order. However, the County did not calendar the motion, therefore no stay has been entered. Moreover, the County failed to comply with the Superior Court's Order because it transferred custody of Appalachian Materials' PIDO permit to the superior court rather than issuing the PIDO permit directly to Appalachian Materials.

The County timely appealed the Superior Court's Order to this Court, arguing, *inter alia*, that the superior court erred by concluding that the June 2015 Letter was a final, binding determination. Because the June 2015 Letter was a final determination that the County did not timely appeal to the Planning Board, the Planning Board and superior court lacked the requisite subject matter jurisdiction to review this matter. Accordingly, the trial court's order should be vacated and the PIDO permit should be released to Appalachian Materials.

It is well settled in North Carolina that

> *boards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed.* The extent to which a board of adjustment has jurisdiction

> to hear an appeal is a question of law. In the event that a board of adjustment decision is alleged to rest on an error of law such as an absence of jurisdiction, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined.

Meier v. City of Charlotte, 206 N.C. App. 471, 476, 698 S.E.2d 704, 708 (2010) (citations omitted) (emphasis added). "Upon further appeal to this Court from a superior court's review of a municipal board of adjustment's decision, the scope of our review is the same as that of the trial court." *S.T. Wooten Corp. v. Bd. of Adjustment of Zebulon*, 210 N.C. App. 633, 637-38, 711 S.E.2d 158, 161 (2011) (*purgandum*).

Section 153.04(J) of the Ashe County Code of Ordinances states:

> The Planning Board shall act as the Board of Adjustment for all land usage ordinances in the Ashe County Code of Ordinances (Title XV: Land Usage). The Board shall act and hold hearings in accordance with G.S. § 153A-345.1 entitled Planning Boards. Each hearing shall follow rules applied to quasi-judicial proceedings. Each decision shall be based upon competent, material, and substantial evidence noted in the record of the proceeding.

Ashe County Code § 153.04(J) (2019).

Section 153A-345.1(a) of the North Carolina General Statutes dictates that "[t]he provisions of G.S. 160A-388 are applicable to the counties." N.C. Gen. Stat. § 153A-345.1(a) (2017). In relevant part, Section 160A-388 states:

> (a1) *Provisions of Ordinance.* – The zoning or unified development ordinance may provide that the board of adjustment hear and decide special and conditional use permits, requests for variances, and appeals of decisions of administrative officials charged with enforcement of the ordinance. As used in this section, the term "decision" includes any final and binding order, requirement, or determination. The board of adjustment shall follow quasi-judicial procedures when deciding appeals and requests for variances and special and conditional use permits. The board shall hear and decide all matters upon which it is required to pass under any statute or ordinance that regulates land use or development.

N.C. Gen. Stat. § 160A-388(a1) (2017).

Aligning with Section 160A-388(b1), Section 153.04(J)(3) of the Ashe County Code states, in relevant part:

> The Planning Board shall hear and decide appeals from decisions of Planning Department officials charged with enforcement of the development ordinances and may hear appeals arising out of any other ordinance that regulates land use, subject to all of the following:
>
> (a) Any person who is directly affected may appeal a decision to the Planning Board. An appeal is taken by filing a notice of appeal with the clerk to the Board. The notice of appeal shall state the grounds for appeal.
>
> (b) A county administrative official who has made a decision from which someone wishes to appeal shall give written notice to the owner of the property that is the subject of the decision and to the party who sought the decision, if different from the owner. The written notice shall be delivered by personal delivery, electronic mail, or by first class mail.
>
> (c) The owner or other party shall have 30 days from receipt of the written notice within which to file an appeal. Any other person with standing to appeal shall have 30 days from receipt from any source of actual or constructive notice of the decision within which to file an appeal.

Ashe County Code § 153.04(J)(3).

Simply stated, to appeal a decision made by an Ashe County Planning Department official, a petitioner must (1) have standing and (2) file the appeal within 30 days after receiving actual or constructive notice of the official's binding decision. "Our case law has made clear that for this thirty-day [notice of appeal] clock to be triggered, the order, decision, or determination of the administrative official must have some binding force or effect for there to be a right to appeal . . . ." *S.T. Wooten Corp.* 210 N.C. App. at 639, 711 S.E.2d at 162 (citation and quotation marks omitted). "Where the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official." *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjust. of Raleigh*, 153 N.C. App. 737, 743, 571 S.E.2d 588, 591 (2002). Notably, a determination that is conditioned upon a future event occurring "does not convert [the official's] unequivocal . . . interpretation into an advisory opinion." *S.T. Wooten Corp.*, 210 N.C. App. at 643, 711 S.E.2d at 164 (concluding that a planning director

was bound by his prior, written determination that the local zoning ordinance would permit a proposed asphalt plant pending the issuance of a prerequisite building permit).

When assessing whether a letter from an administrative official represents the official's binding and appealable decision, this Court has previously relied upon the following factors: (1) whether the decision was made at the request of a party "with a clear interest in the outcome," such as at the request of a landowner, adjacent landowner, or builder rather than a city attorney; (2) whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a Planning Director; (3) whether the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," such as "providing a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property"; and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance." *Id.* at 641-42, 711 S.E.2d at 163.

Here, the parties do not dispute standing, and it is uncontested that the County did not timely appeal Stumb's June 2015 letter. Rather, the crux of this appeal is whether Stumb's June 2015 Letter served as a final determination binding the County to issue Appalachian Materials a PIDO permit.

Applying the above-mentioned factors, it is clear that (1) Stumb issued the June 2015 Letter to Appalachian Materials who, as the lessee of the disputed property and owner of the proposed asphalt plant, had a "clear interest" in whether Stumb concluded that its permit application complied with PIDO; (2) Stumb, as Ashe County's Planning Director, had the authority to issue PIDO permits and determine whether Appalachian Materials' permit application complied with PIDO; (3) the June 2015 Letter reflected Stumb's formal and definitive interpretation that Appalachian Materials' permit application complied with PIDO; and (4) Appalachian Materials relied on Stumb's June 2015 Letter as a binding decision that its application had been approved and that the PIDO permit would be issued once the air quality permit was obtained. Accordingly, the June 2015 Letter represented a binding determination that was subject to appeal to the Planning Board per N.C. Gen. Stat. § 160A-388(a1) and Ashe County Code § 153.04(J)(3).

Therefore, the County was required to voice any objection to the June 2015 Letter by noticing appeal within the requisite 30-day

period per N.C. Gen. Stat. § 160A-388(b1)(3) and Ashe County Code § 153.04(J)(3)(c). Because the County did not timely appeal from the June 2015 Letter, both the Planning Board and the superior court lacked subject matter jurisdiction to reconsider whether Appalachian Materials' application complied with PIDO. *See Meier*, 206 N.C. App. at 476, 698 S.E.2d at 708 ("[B]oards of adjustment do not have subject matter jurisdiction over appeals that have not been timely filed."). Absent a timely appeal, the June 2015 Letter bound the County to release the PIDO permit to Appalachian Materials once a copy of the outstanding air quality permit was forwarded to Stumb on February 29, 2016.

Because neither the Planning Board nor the trial court had subject matter jurisdiction, the order should be vacated, this matter dismissed, and the PIDO permit released to Appalachian Materials.

SHEENA BAREFOOT, PLAINTIFF
v.
JACQUELYN PATRICIA RULE, DEFENDANT

No. COA18-1160

Filed 21 May 2019

Collateral Estoppel and Res Judicata—voluntary dismissal without prejudice—same claims re-filed in another state—no res judicata effect

Where plaintiff filed a personal injury action in Tennessee that was voluntarily dismissed without prejudice, she was not barred under res judicata principles from re-filing the same claims from her Tennessee action in a separate North Carolina lawsuit, even though Tennessee's one-year statute of limitations for filing personal injury claims had expired. The voluntary dismissal without prejudice left plaintiff in the same position as she was prior to filing the Tennessee action, so it was not a final judgment on the merits and plaintiff was free to re-file her personal injury claims in either North Carolina (within its three-year statute of limitations) or Tennessee (within its one-year statute of limitations).

Appeal by plaintiff from order entered 13 August 2018 by Judge Marvin P. Pope, Jr. in Superior Court, Buncombe County. Heard in the Court of Appeals 10 April 2019.

Crumley Roberts, LLP, by David J. Ventura, for plaintiff-appellant.

McAngus Goudelock & Courie, by Zephyr Jost Sullivan, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals an order granting defendant's motion for judgment on the pleadings based upon res judicata. Because we conclude that plaintiff's voluntary dismissal without prejudice of her prior lawsuit in Tennessee under Tennessee Rule 41 had no res judicata effect, we reverse and remand for further proceedings consistent with this opinion.

I. Background

On 28 June 2016,[1] plaintiff filed a personal injury action in Tennessee against defendant, alleging that defendant's negligence caused her injuries arising out of an automobile accident. The collision between the parties' vehicles was on 3 July 2015 in North Carolina, but both parties were residents of Tennessee. In Tennessee, the statute of limitations for a personal injury claim is one year. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A) (Supp. 2016). On 7 November 2016, plaintiff filed a "Nonsuit without Prejudice" noticing voluntary dismissal without prejudice citing "T.R.C.P. 41.01" which is similar to North Carolina General Statute § 1A-1, 41(a)(1) (2015). *Compare* Tenn. R. Civ. P. 41.01; N.C. Gen. Stat. § 1A-1, Rule 41 (2015). Both the Tennessee Rule of Civil Procedure Rule 41.01 and North Carolina's Rule of Civil Procedure 41 allow voluntary dismissal by a plaintiff without prejudice. Tenn. R. Civ. P. 41.01; N.C. Gen. Stat. § 1A-1, Rule 41. Further, both states extend the statute of limitations to refile a claim for one year from the date of the voluntary dismissal without prejudice, if the statute of limitations would have otherwise expired. *See* Tenn. Code Ann. § 28-1-105(a) (2000); N.C. Gen. Stat. § 1A-1, Rule 41. On 16 November 2016, the Tennessee trial court entered an order dismissing plaintiff's action without prejudice, noting it was the first dismissal.

On 5 April 2018, plaintiff filed a complaint seeking recovery for personal injuries arising from the same automobile accident in North Carolina, alleging essentially the same tort claims as she had in Tennessee. The statute of limitations for a personal injury claim in North Carolina is

1. The file stamp is barely legible but defendant notes 28 June 2016 as the date of the complaint, and our record confirms that an answer to that complaint was filed by August of 2016.

three years, *see* N.C. Gen. Stat. § 1-52(16) (2015); so the North Carolina case was filed within North Carolina's statute of limitations, *see id.*, but Tennessee's one year statute of limitations and the one-year extension would have expired. *See* Tenn. Code. §§ 28-1-105(a); -3-104(a)(1)(A).

In June of 2018, defendant answered plaintiff's complaint, denying the material factual allegations and alleging several affirmative defenses, including res judicata. Defendant alleged:

> Plaintiff filed a nearly identical action in the Circuit Court of Davidson County, Tennessee. A copy of the pleadings for this action is attached hereto as Exhibits A-F. On November 7, 2016, Plaintiff filed Exhibit F, Non-Suit without Prejudice. Tennessee has a one year statute of limitations for negligence claims. Plaintiff had one year to re-file her action after taking the voluntary dismissal, during which the statute of limitation was tolled. Plaintiff failed to re-file her action within the time allowed.

Defendant later filed a motion for judgment on the pleadings based upon the res judicata defense. On 13 August 2018, the trial court granted defendant's motion: "[T]he Court hereby finds that the Plaintiff's claims are barred by the doctrine of res judicata. Accordingly, Defendant's Motion for Judgment on the Pleadings i[s] hereby GRANTED." Plaintiff appeals.

II. Voluntary Dismissal without Prejudice

Plaintiff contends that the trial court erred in granting defendant's motion for judgment on the pleadings.

A. Standard of Review

We review the trial court's ruling on this issue *de novo:*

> A trial court's ruling on a motion for judgment on the pleadings is subject to *de novo* review on appeal. In determining whether to grant a motion for judgment on the pleadings,
>
> > the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and

> matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.
>
> A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. For that reason, the motion's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit, with a motion for judgment on the pleadings being the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. We will now utilize this standard of review to determine whether the trial court correctly granted Defendant's motion.

Samost v. Duke Univ., 226 N.C. App. 514, 517–18, 742 S.E.2d 257, 259–60, *aff'd per curiam*, 367 N.C. 185, 751 S.E.2d 611 (2013) (citations, quotation marks, ellipses, brackets, and footnotes omitted).

B. Res Judicata

Defendant argued to the trial court, and the trial court agreed, that plaintiff's claim should be dismissed based upon res judicata.

> Res judicata precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction. A judgment operates as an estoppel not only as to all matters actually determined or litigated in the proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. . . .
>
> . . . In order to successfully assert the doctrine of res judicata, a litigant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.

Moody v. Able Outdoor, Inc., 169 N.C. App. 80, 84, 609 S.E.2d 259, 261–62 (2005) (citations and quotation marks omitted).

Plaintiff contends that res judicata is not relevant because "[t]his Appeal involves the fundamental question of whether North Carolina's Three Year Statute of Limitations or Tennessee's One Year Statute of Limitations governs the instate action[.]" Defendant contends,

> Notably, the statute of limitations for negligence claims in Tennessee is one year. Tenn. Code Ann. §28-3-104(a)(1)(A). Since the car accident at issue occurred on 3 July 2015, Plaintiff would have initially had to file her negligence claim in Tennessee on or before 3 July 2016. However, because the statute of limitations for Plaintiff's claim was tolled for one year after the dismissal order was entered, she had until 16 November 2017 to re-file her claim. Plaintiff failed to re-file in Tennessee within that time period and instead filed the instant action on 5 April 2018. Plaintiff's claim was barred in Tennessee when she failed to re-file on or before 17 November 2017 because the tolling of the statute of limitations lapsed. As such, the Tennessee court's dismissal, filed on 16 November 2016, became a final judgment on the merits for purposes of res judicata.

Plaintiff presumes, without citing legal authority, that North Carolina automatically steps in to apply its laws instead of Tennessee's law upon re-filing her claim in North Carolina, and defendant presumes, also without citing legal authority, that once plaintiff filed her suit in Tennessee she would thereafter be bound by Tennessee law on this claim even though she voluntarily dismissed that suit without prejudice and re-filed in North Carolina. Neither brief directly addresses the question at the core of this appeal – whether taking a voluntary dismissal without prejudice in one state requires the law of that state, here specifically the statute of limitations, to control, even if the same claim is later filed in a different state, which has a longer statute of limitations. Essentially, this is a question of how a voluntary dismissal without prejudice operates between states.

Tennessee's case law interprets a Rule 41.01 voluntary dismissal without prejudice to place the parties in the same position they were in prior to filing the suit: "When a voluntary nonsuit is taken, the rights of the parties are not adjudicated, and the parties are placed in their original positions prior to the filing of the suit." *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012). In *Cooper v. Glasser*, the plaintiff had sued in California state court and voluntarily dismissed his case without prejudice. 419 S.W.3d 924, 925 (Tenn. 2013). The plaintiff re-filed the action

in a federal court in Tennessee; thereafter, the plaintiff dismissed that action and re-filed in Tennessee state court. *Id.* Unlike North Carolina, Tennessee allows for two voluntary dismissals without prejudice. *See* N.C. Gen. Stat. § 1A-1, Rule 41; Tenn. R. Civ. P. 41.01. The case was appealed to Tennessee's Supreme Court on the issue of whether federal or state law should control on claim preclusion, and notably, as applicable to this case, Tennessee's Supreme Court stated,

> Tennessee Rule of Civil Procedure 41.01(1) permits a plaintiff to voluntarily dismiss his case two times without prejudice. Moreover, this Court has previously recognized that a voluntary dismissal places the parties in their original positions prior to the filing of the suit. We are therefore convinced that Tennessee law does not give claim-preclusive effect to Mr. Cooper's second voluntary dismissal in federal court.

Cooper, 419 S.W.3d at 927-30 (citation and quotation marks omitted). Thus, the Tennessee Supreme Court explained that a voluntary dismissal without prejudice functions to "place the parties in their original positions" and thereby allows them to switch between state and federal courts. *See id.*

North Carolina's Rule 41 operates in the same manner since the dismissal puts the plaintiff in the same position "as if the suit had never been filed[.]" *Hous. Auth. of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) (citation, quotation marks, and brackets omitted).

> It is well settled that a Rule 41(a) dismissal strips the trial court of authority to enter further orders in the case. The effect of a judgment of voluntary dismissal is to leave the plaintiff exactly where he or she was before the action was commenced. After a plaintiff takes a Rule 41(a) dismissal, there is nothing the defendant can do to fan the ashes of that action into life, and the court has no role to play. As a result of the fact that, once a party voluntarily dismisses its action pursuant to N.C. Gen. Stat. § 1A–1, Rule 41(a)(1) (1990), it is as if the suit had never been filed.

Id. (citations, quotation marks, ellipses, and brackets omitted).

Under either Tennessee or North Carolina law, a Rule 41.01 or 41 voluntary dismissal without prejudice leaves the plaintiff "exactly where

he or she was before the action was commenced." *Id.* Before this action was commenced, plaintiff was free to file a lawsuit in either North Carolina or Tennessee. Plaintiff had three years to file in North Carolina and only one year to file in Tennessee. *See* N.C. Gen. Stat. § 1-52(16); Tenn. Code Ann. § 28-3-104(a)(1)(A). The Tennessee Court's order of voluntary dismissal placed no restrictions upon plaintiff upon re-filing her claim.[2] We conclude plaintiff was free to re-file her claim in North Carolina as an entirely new claim, as if she had never filed the first suit, since the dismissal order in Tennessee operated to leave her in the same position as she was prior to filing the lawsuit. Defendant's argument that the Rule 41.01 dismissal without prejudice operated as a final judgment on the merits in an earlier suit and that plaintiff's claim is barred by res judicata is not supported by either Tennessee or North Carolina law. Nor is Tennessee's statute of limitations substituted for North Carolina's based upon the voluntary dismissal order. We reverse the order of the trial court and remand for further proceedings. We express no opinion on the merits of plaintiff's claim or other defenses raised by defendant other than res judicata, the issue on appeal.

III. Conclusion

We conclude the trial court erred in granting defendant's motion for judgment on the pleadings based on res judicata. We reverse and remand.

REVERSED and REMANDED.

Judges BRYANT and COLLINS concur.

---

2. We do not suggest that the Tennessee court would have had any authority to enter an order of voluntary dismissal without prejudice with any additional conditions upon plaintiff's re-filing, but even if this was possible, the order here did not include any conditions. *See generally Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 289 (5th Cir. 2016).

HILLS MACH. CO., LLC v. PEA CREEK MINE, LLC

[265 N.C. App. 408 (2019)]

HILLS MACHINERY COMPANY, LLC, Plaintiff
v.
PEA CREEK MINE, LLC, JOC FARMS, LLC, and
JOSEPH D. BRILEY, JR., Defendants
v.
JOC FARMS, LLC and PEA CREEK MINE, LLC, Counterclaim and
Third-Party Plaintiffs
v.
HILLS MACHINERY COMPANY, LLC, Counterclaim Defendant, and
CNH INDUSTRIAL AMERICA, LLC d/b/a CASE IH, Third-Party Defendant

No. COA18-890

Filed 21 May 2019

1. Warranties—manufacturer warranty—breach of express warranty—summary judgment

In an action concerning a defective wheel loader, the trial court properly granted summary judgment in favor of the loader manufacturer on the purchaser's breach of warranty claim because, based on undisputed evidence and the warranty's plain language, no genuine issue of material fact existed as to when the warranty period expired or whether the manufacturer received notice of the defect within the warranty period. Additionally, even assuming the manufacturer did receive notice of the defect during the warranty period, neither the notice itself nor the manufacturer's failure to cure the defect within the warranty period— the latter of which could have tolled the statute of limitations for bringing a breach of warranty claim—automatically extended the warranty period.

2. Fraud—accompanying claim for unfair and deceptive trade practices—fraudulent intent—mere nonperformance or broken promise

Where plaintiff purchased a defective wheel loader and the manufacturer promised to fix the defect but failed to do so, the trial court properly granted summary judgment in favor of the manufacturer on plaintiff's claims for fraud and unfair and deceptive trade practices, because plaintiff failed to forecast any evidence that the manufacturer lacked the intent to fulfill its promise at the time it made that promise.

Appeal by JOC Farms, LLC from order entered 1 May 2018 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 26 March 2019.

Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for third-party plaintiff-appellant JOC Farms, LLC.

Womble Bond Dickinson (US) LLP, by Jamie A. Dean and Ryan H. Niland, for third-party defendant-appellee CNH Industrial America, LLC.

TYSON, Judge.

JOC Farms, LLC ("JOC") appeals from the trial court's order, which granted CNH Industrial America, LLC, d/b/a Case IH ("Case") summary judgment on JOC's claims for breach of warranty, fraud, and unfair and deceptive trade practices. We affirm the trial court's order.

I. Background

JOC purchased a 2006 model 921C loader (the "Loader") manufactured by Case from Briggs Construction Equipment, Inc. ("Briggs") on or about 30 April 2009. Briggs had previously purchased the Loader from Case on 29 August 2008. Case had issued a manufacturer's warranty (the "Case Warranty") for the Loader. The Case Warranty states, in relevant part:

> **What's Covered**
>
> *If a defect in material or workmanship is found in a unit and reported during the Warranty Period*, Case will pay parts and labor costs to repair the defect, if the services are performed by an authorized Case dealer at the dealer's location. [Emphasis supplied].

The warranty period stated in the Case Warranty began "at the time that any person, dealer or agent first places the unit into service" and ended "when either the month or machine hour limit is reached, whichever limit occurs first." The warranty period for the Loader's engine lasted 24 months or until the engine reached 2,000 machine hours, whichever occurred first. The warranty period for components, other than the engine, was one year after the date the Loader was placed into service.

The Case Warranty also states, in relevant part:

> **No Modification or Extension of Warranty**
>
> The Case Warranty is limited to the written terms in this pamphlet. Case *does not authorize any person, dealer*

> *or agent to change or extend* the terms of this warranty in any manner. *Any assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of this warranty will not constitute a waiver of the terms, limitations or exclusions of this warranty, nor will such assistance extend or re-establish the warranty.* [Emphasis supplied].

The Case Warranty included the following disclaimer:

> **THIS DOCUMENT CONTAINS THE ENTIRE CASE WARRANTY. CASE MAKES NO OTHER REPRESENTATIONS OR WARRANTIES EXPRESSED OR IMPLIED AND SPECIFICALLY EXCLUDES THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE.** [Emphasis in original]

When Appellant purchased the Loader from Briggs, the Loader had already accrued 887 machine hours. Before completing the purchase, Appellant's owner Joseph Briley, Jr. ("Briley) took the Loader for a test drive. During the test drive, Briley mentioned to Briggs' salesman that the Loader exhibited a significant vibration. Briley did not think the vibration was significant enough to preclude his purchase.

When purchasing the Loader, JOC also purchased a 3-year/3,000 hour extended warranty plan, referred to as a "Purchased Protection Plan," ("PPP") through Briggs' dealership. The PPP was issued by EPG Insurance, Inc. ("EPG"). According to the affidavit of Mark T. Heman ("Heman"), a product support manager for Case, "PPPs are sold through the dealer and are generally designed to cover defects that arise after the manufacturer's warranty has expired[,]" and "[Case] is not a party to any PPP issued by EPG."

After JOC's purchase of the Loader, JOC and a sister company named Pea Creek Mine, LLC ("Pea Creek") began using the Loader for industrial tasks, including extracting sand, loading, and hauling lime and fertilizer. Pea Creek was also owned by JOC's owner, Briley. Over a five year period after purchase, JOC and Pea Creek amassed more than 7,000 machine hours on the Loader.

The first time JOC took the Loader to Briggs for servicing was on 8 June 2009. JOC reported that the Loader's battery would not hold a charge and the cables were not working. A warranty claim was submitted to Case, who paid the claim under the Case Warranty.

The next time JOC brought the Loader to Briggs for repairs was September 2010. The reported issue was a problem with the Loader's fuel coil. A warranty claim was not submitted to Case for this problem. Instead a claim was submitted to EPG by Briggs under the PPP. EPG paid the covered portion of this claim. At the time JOC brought the loader to Briggs for repair in September 2010, the Loader had accrued 2,508 hours.

In February 2011, JOC brought the Loader to East Carolina Equipment Company for repairs related to a bearing in the transmission which was causing "vibration in power train while traveling." A claim was submitted to EPG for the repairs and EPG paid the covered portion under the PPP.

In April 2011, Case received a warranty claim relating to the Loader's transmission. In October 2011, Case received another warranty claim relating to the Loader's instrumentation. The Case Warranty had long expired by accrued hours and passage of time when both of these claims were filed. According to Heman's affidavit, for the April 2011 claim, Case paid $6,625.00 to JOC for a rental loader. For the October 2011 claim, Case paid $1,146.29 towards the repair costs. According to Heman, Case made these payments as gestures of goodwill to maintain clients and as "assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of [the] warranty."

Sometime in 2011 or 2012, JOC contacted Case to request further financial assistance with an alleged vibration problem with the Loader. Case's product support manager, Jeffrey Schoch, met with JOC's representatives to discuss the issue. According to JOC's owner, Briley, Schoch told him that Case "would stand behind their product." JOC and Pea Creek continued to use the Loader.

On 20 February 2012, JOC filed a voluntary petition for bankruptcy protection under Bankruptcy Code Chapter 11 in the United States Bankruptcy Court for the Eastern District of North Carolina. *See* 11 U.S.C. § 301. On 26 February 2013, the Bankruptcy Court approved JOC's proposed plan of reorganization. JOC did not list any potential legal claims against Case as an asset in its bankruptcy filings.

Sometime in September 2013, JOC brought the Loader to Hills Machinery Company, LLC ("Hills") for repairs. In May 2015, Hills filed suit against JOC, Pea Creek, and Briley, allegedly for the failure to pay a balance due of $34,708 allegedly owed for repairs to the Loader. JOC responded by filing counterclaims against Hills and asserting third-party claims against Case on 4 August 2015. JOC alleged that problems with

the Loader were related to a vibration it asserted Case had undertaken to repair during the warranty period, but had failed to do. JOC asserted claims for breach of warranty, fraud, and unfair and deceptive trade practices against Case.

On 23 October 2017, Case filed a motion for summary judgment on JOC's claims pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure. On 26 October 2017, Pea Creek and JOC gave notice of five depositions to Hills and Case. Hills filed a motion for a protective order to reschedule the deposition of one of its witnesses due to a medical condition. Case filed an emergency motion for a protective order to prevent Pea Creek and JOC from proceeding with the depositions. The trial court heard Case's and Hills's motions for protective order, and ordered JOC to postpone one of the noticed depositions. The parties consented to JOC and Pea Creek proceeding with the other four depositions.

Following the completion of depositions by JOC and Pea Creek, Case filed a renewed motion for summary judgment. The trial court heard Case's summary judgment motion and granted summary judgment to Case on all of JOC's claims. JOC filed timely notice of appeal. JOC and Case are the only parties participating in this appeal.

II. Jurisdiction

The trial court certified its interlocutory order, which granted summary judgment to Case on all of JOC's claims, as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017).

III. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [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* 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).

"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). "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) (citations omitted).

IV. Analysis

A. *Breach of Warranty*

[1] JOC argues genuine issues of material fact exist "regarding when JOC notified Case of the defects and whether Case's failures to repair the defects it was notified about during the shortest of the manufacturer's warranty periods asserted (one year) tolls the statute of limitations (and thereby extends the warranty until the repairs are made)" to support its breach of warranty claim.

In response, Case contends it "has not relied on a statute of limitations defense, and JOC's arguments concerning tolling of the statute of limitations are misplaced."

JOC argues conduct by a warrantor which would toll the statute of limitations for a breach of warranty claim also extends the warranty period. JOC also implies that a warrantor receiving notice of a purported defect also extends the warranty period.

JOC cites two cases in support of its argument: *Haywood Street Redevelopment Corp. v. Peterson, Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995), and *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 267 S.E.2d 919 (1980).

In *Haywood*, this Court held a three-year statute of limitations for a breach of warranty claim was tolled during the time the defendant attempted to repair a waterproofing treatment it had applied to the plaintiff's parking deck to bring it into conformity with the warranty during the warranty period. 120 N.C. App. at 838, 463 S.E.2d at 567. This Court stated: "A statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty." *Id.* (citations omitted).

In *Stutts*, the plaintiff sought repairs on his Ford truck purchased from the dealership. 47 N.C. App. at 509, 267 S.E.2d at 923. Ford Motor Company and the dealership had jointly warranted "(a)ny part [found to be defective in factory material or workmanship] during the first 12 months or 12,000 miles of operation, whichever is earliest (except tire and diesel engines manufactured by others than Ford . . .)." *Id.* at 512, 267 S.E.2d at 924 (brackets in original). The plaintiff returned the truck to the dealership to repair an oil leak during the warranty period. *Id.*

After the dealership repeatedly fail to fix the oil leak, the plaintiff took the truck to another Ford dealership. *Id.* at 513, 267 S.E.2d at 925. At the end of the warranty period, the truck continued to leak oil despite several attempts by the selling Ford dealership and the other Ford dealership to fix the leak. *Id.*

The plaintiff filed claims, in part, against the dealership from which he had bought the truck and against Ford, the manufacturer, for breach of warranty. *Id.* at 507, 267 S.E.2d at 922. The dealership and Ford filed motions for directed verdicts, which the trial court granted. *Id.* at 507-08, 267 S.E.2d at 922. On appeal, the plaintiff argued the trial court erred in granting the defendants' motions for directed verdicts. *Id.* In response, the defendants argued:

> [The dealership] contends that plaintiff has failed to meet his burden of showing that [the dealership] failed to repair and replace parts found to be defective as required by the warranty and, further, that plaintiff's refusal to permit [defendant] to perform any further work on the truck after 26 October 1976 relieved it of any liability under the warranty. Likewise, defendant Ford Motor Company contends that its warranty obligation was satisfied when either [the selling dealership] or [the other dealership] replaced defective parts called to their attention.

Id. at 511, 267 S.E.2d at 924.

This Court stated:

> Although limited warranties are valid, compliance with their covenants to repair and to replace defective parts requires that the warrantor do more than make good faith attempts to repair defects when requested to do so. A manufacturer or other warrantor may be liable for breach of warranty when it repeatedly fails within a reasonable time to correct a defect as promised. A party seeking to recover for breach of a limited warranty is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty.

Id. at 511-12, 267 S.E.2d at 924.

This Court rejected the dealership and Ford's arguments, reasoning:

> [T]here is sufficient evidence presented in the record from which the jury could infer that [the dealership] either refused to perform further repairs on plaintiff's truck, or that it failed to make proper repair of defective parts on the truck within a reasonable time, thereby causing plaintiff to seek repairs from another Ford dealer. In either event, both defendants' liability for breach would attach, and the plaintiff's refusal to return the vehicle to the selling dealer for further repairs would not preclude him from recovery.

Id. at 513, 267 S.E.2d at 925.

This Court reversed the trial court's grant of the defendants' motions for directed verdicts and remanded for a new trial. *Id.* at 514, 267 S.E.2d at 925.

Stutts and *Haywood* do not address the rule for which JOC purports to cite them. Neither case held that conduct by a warrantor, which may toll the statute of limitations on a breach of warranty claim, also extends the warranty period. *See id.*; *Haywood*, 120 N.C. App. at 838, 463 S.E.2d at 567. Neither of these cases hold that a warrantor's notice of a defect extends the warranty period until the defect is repaired. After extensive review of the case law, we have found no cases which stand for the proposition JOC attempts to assert.

Presuming, *arguendo*, attempts by a warrantor to correct a defect or notice of a defect during the term of the warranty extends the warranty period, the evidence, viewed in the light most favorable to JOC, does not

establish a genuine issue of material fact with respect to its breach of warranty claim.

The Case Warranty is a written express warranty. " 'An express warranty is an element in a sale contract and is contractual in nature.' " *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 343, 623 S.E.2d 334, 338 (2006) (quoting *Perfecting Serv. Co. v. Product Development & Sales, Co.*, 261 N.C. 660, 668, 136 S.E.2d 56,62 (1964)). As a contract being interpreted, the terms of an express warranty "are therefore construed in accordance with their plain meaning," *Coates v. Niblock Dev. Corp.*, 161 N.C. App. 515, 517, 558 S.E.2d 492, 494 (2003) (citations omitted).

The Case Warranty expressly states that the warranty period for the Loader began "at the time that any person, dealer or agent first places the unit into service" and ended "when either the month or machine hour limit is reached, whichever limit occurs first." Service records for the Loader indisputably show it was placed into service beginning on 29 August 2008. Briley, the owner of JOC, acknowledged in his deposition he knew the Loader had been used by a company in Florida prior to JOC's purchase.

The plain language of the Case Warranty indicates the applicable warranty period for the Loader's engine lasted 24 months after the Loader was placed into service or until the engine reached 2,000 machine hours, whichever occurred first. The warranty period for components, other than the engine, was one year from the date the Loader was placed into service. Under its plain and unambiguous terms, the *latest* time the Case Warranty would cover any defects would have been 29 August 2010, or 24 months after the Loader was placed into service.

The Case Warranty plainly states that a repair is covered "[i]f a defect in material or workmanship is found in a unit and reported during the Warranty Period[.]"

Between 30 April 2009, when Briley purchased the Loader on JOC's behalf, and 29 August 2010, the latest time the Case Warranty was in force and valid, the Loader was never brought to Briggs nor any other Case dealer for repairs related to the vibration that JOC's claim is premised upon. The undisputed evidence presented by the parties shows the only claim submitted during the longest period the Case Warranty could have covered was for repairs to the Loader's battery and cables in June 2009. Case paid for the costs for this claim, which JOC does not dispute. Case's records from June 2009 do not mention any vibration in the Loader. JOC has produced no evidence tending to indicate the problems

with the battery and cables in June 2009 were related to or caused by the vibration issue.

JOC also contends it gave Case notice of the alleged vibration defect when Briley test drove the Loader with Briggs's sales representative, Billy Tedder, in April 2009. Briley test drove the Loader prior to purchase. Briley testified in his deposition he noticed a vibration in the Loader when he test drove it, but "[a]t the time [he] didn't think it was a problem." Briley mentioned to Tedder that the Loader "had a vibration in it." Briley further testified:

> [Briley]: Well, I – I figured a new model machine, didn't know it was a problem. But I did make Billy aware of it as we were driving it. Not, you know – not in the sense that – basically curious, asked Billy, it seems to have a shake compared to the other loaders we've had before, a vibration.
>
> Q. Did you do anything else to make sure the [L]oader worked before you bought it other than this test drive?
>
> [Briley]: No.
>
> Q. When you told Billy that the [L]oader seemed to have a vibration problem during the test drive, what did Billy say?
>
> [Briley]: Basically he stated that it had the remaining warranty on it and that if we want to purchase extended warranty through them, that it would cover it if there's an issue with it. But as far as he's concerned, he – really wasn't familiar with the bigger loaders, that he thought maybe all of them had that type of vibration in them.

Later in his deposition, Briley was asked, "Does JOC claim that [Case] knew the [L]oader was defective before it was sold?" Briley responded: "No. I can't say that. But they knew immediately afterwards it did."

JOC has produced no evidence showing what notice Case had of the vibration problem in between the time Briley purchased the Loader and the latest time the Case Warranty could have expired in August 2010. Briley admitted he did not think the vibration was a problem when he test drove the Loader and no evidence shows JOC brought the Loader to Briggs, nor any other authorized Case dealer, to investigate or repair the vibration during the Case Warranty period. JOC contends the comments Briley made during the pre-purchase test drive put Case on notice of the

alleged defect, but Briley admitted in his own testimony that Case did not know the Loader was defective before it was sold.

Briley signed and acknowledged the terms of the Case Warranty when he purchased the Loader on JOC's behalf. Briley testified he understood "that in order to be covered by the manufacturer's [Case] warranty, a defect would have to be reported within the warranty period."

Based upon the plain language of the Case Warranty, the documentary exhibits, and Briley's deposition testimony, JOC is unable to establish a genuine issue of material fact exists with respect to its breach of warranty claim. JOC did not provide Case the notice of the alleged vibration defect during the warranty period, as is required by the express terms of the Case Warranty. JOC's argument is overruled.

B. *Fraud and Unfair and Deceptive Trade Practices*

[2] JOC also argues genuine issues of material fact exist with regards to its fraud and unfair and deceptive trade practices claims against Case. We disagree.

Unfair and deceptive trade practice ("UDTP") claims are governed by N.C. Gen. Stat. § 75-1.1. *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 87-88, 747 S.E.2d 220, 226 (2013). Under the statute, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2017).

To prevail upon a UDTP claim, a plaintiff must establish the following elements: " '(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff.' "*Capital Res.*, *LLC v. Chelda*, *Inc.*, 223 N.C. App. 227, 239, 735 S.E.2d 203, 212 (2012) (citation omitted) (alteration in original), *review dismissed*, *cert. denied*, __ N.C. __, 736 S.E.2d 191 (2013).

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "To prove deception, while 'it is not necessary . . . to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception, [a] plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception.' " *Capital Res.*, 223 N.C. App. at 239, 735 S.E.2d at 212 (citation omitted) (alterations in original).

"Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains." *Tucker v. Blvd. At Piper Glen, LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (citation and quotation marks omitted).

With respect to a fraud claim, a plaintiff must establish the following elements:

> (1) that the defendant made a representation of a material past or present fact; (2) that the representation was false; (3) that it was made by the defendant with knowledge that it was false or made recklessly without regard to its truth; (4) that the defendant intended that the plaintiff rely on the representation; (5) that the plaintiff did reasonably rely on it; and (6) injury.

Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985) (citing *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980)).

"[A] mere promissory representation will not support an action for fraud." *Id.* "However, a promissory misrepresentation may constitute actual fraud if the misrepresentation is made with intent to deceive and with no intent to comply with the stated promise or representation." *Id.* (citations omitted).

In support of its UDTP and fraud arguments, JOC asserts: "Case acknowledged repeatedly by word and deed that the Loader had yet to be repaired to address JOC's very first vibration complaints while at the same time telling Mr. Briley to go ahead and run the Loader. JOC, Pea Creek and Mr. Briley relied on those words and deeds to their detriment."

In its complaint, JOC alleges UDTP and fraud against Case based upon "fraudulent misrepresentations." Briley testified that "roughly three years after JOC purchased the Loader," he met with Jeffrey Schoch, a product support manager with Case, to discuss the vibration issue with the Loader. If the meeting occurred three years after JOC had purchased the Loader, it would have occurred outside the maximum time period the Case Warranty could have covered any defects. Briley testified that, at this meeting, Schoch told him Case "stand[s] behind their product and they were going to have [the Loader] fixed."

Case concedes in its brief that "for the purposes of summary judgment, Case does not dispute that the statement was made." Briley acknowledged JOC was not relying on any statements other than "we stand behind our product to support its fraud claim[.]"

Viewed in the light most favorable to JOC, no evidence establishes a genuine issue of fact with respect to JOC's fraud claim. Even if Schoch's statements that Case "stands behind their product and they were going to have it fixed" is construed as a promise that Case would fix the Loader, this is a promise of future performance. The Supreme Court of North Carolina has long recognized: "It is generally held, and is the law in this State, that mere unfulfilled promises cannot be made the basis for an action of fraud." *Williams v. Williams*, 220 N.C. 806, 810, 18 S.E.2d 364, 366 (1942). "Mere proof of nonperformance is not sufficient to establish the necessary fraudulent intent." *Id.* at 811, 18 S.E.2d at 367. This Court has stated: "The general rule is that an unfulfilled promise cannot be the basis for an action for fraud unless the promise is made with no intention to carry it out." *Northwestern Bank v. Rash*, 74 N.C. App. 101, 105, 327 S.E.2d 302, 305 (1985) (citation omitted).

JOC failed to forecast any evidence to show Case lacked the intent to fix the Loader at the time Schoch made the statement in question in 2011. Case submitted the affidavit of one of its product support managers, Heman, in support of its motion for summary judgment. Included as an exhibit to Heman's affidavit, is a copy of Case's "internal database called ASIST [which is used] to track any repairs for which a dealer requests assistance." The ASIST records show instances from 2013 and 2014 where Case employees provided advice to Hills's mechanics on how to fix the Loader's front axle and differential.

To the extent JOC purportedly argues Schoch's representations in 2011 somehow renewed or extended the Case Warranty, such a situation is expressly disclaimed by the Case Warranty, which states:

> Case does not authorize any person, dealer or agent to change or extend the terms of this warranty in any manner. Any assistance to the purchaser in the repair or operation of any Case product outside the terms or limitations or exclusions of this warranty will not constitute a waiver of the terms, limitations or exclusions of this warranty, nor will such assistance extend or re-establish the warranty.

Upon review of the evidence in the record, no genuine issue of material fact exists with respect to JOC's fraud claim against Case. *See Supplee v. Miller-Motte Bus. C., Inc.*, 239 N.C. App. 208, 229, 768 S.E.2d

582, 598 (2015) (affirming trial court's grant of summary judgment where plaintiff "failed to present specific evidence that . . . defendants had no intention of carrying out its unfulfilled promise; an essential element for a successful fraud claim.").

With respect to JOC's UDTP claim, the evidence of Schoch's statement that Case "stands behind its product," and promised to fix the vibration in the Loader, when viewed most favorably to JOC, shows, at most, a broken promise. A broken promise, standing alone, is not enough to establish a UDTP claim, unless the evidence shows the promisor "intended to break its promise at the time that it made the promise." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 196, 767 S.E.2d 374, 378 (2014); *see Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 451-52, 279 S.E.2d 1, 6 (1981).

In *Overstreet*, the defendant promised to the plaintiff that no part of a subdivision would be used for non-residential purposes. *Overstreet*, 52 N.C. App. at 451-52, 279 S.E.2d at 6. A year later, the defendant sold a subdivision lot to a buyer who it knew would use the lot for non-residential purposes. *Id.* On review of the trial court's grant of a motion for directed verdict to the defendant, this Court held that no evidence indicated that the defendant intended to break its promise at the time defendant made the promise and plaintiff had failed to establish a UDTP claim. *Id.* at 452-53, 279 S.E.2d at 6-7.

JOC has produced no evidence to indicate Case did not intend to fix the Loader at the time Schoch made the unauthorized representation to Briley in 2011. *Wells Fargo*, 238 N.C. App. at 196-97, 767 S.E.2d at 378. Schoch's representation is contrary to the express terms of the "No Modification or Extension of Warranty" provision in the Case Warranty, which prohibits "any person, dealer or agent to change or extend the terms of [the] warranty in any manner." The ASIST system records show Case continued to provide information and advice to Hills's mechanics on how to repair the Loader after Briley had met with Schoch in 2011. No genuine issue of material fact exists to support JOC's UDTP claim. JOC's arguments are overruled.

C. *Judicial Estoppel*

Case argues the equitable defense of judicial estoppel as an alternative and independent basis to support summary judgment. Case argued the equitable defense of judicial estoppel as one of the bases for its motion for summary judgment before the trial court. Based upon our holding to affirm the trial court's order on the grounds that there are no genuine issues of material fact with respect to any of JOC's

claims, it is unnecessary and we decline to address Case's judicial estoppel argument.

V. Conclusion

Viewed in the light most favorable to JOC, no genuine issues of material fact exist with respect to JOC's claims for breach of warranty, fraud, and UDTP. The trial court correctly ruled Case was entitled to summary judgment as a matter of law. *See Summey*, 357 N.C. at 496, 586 S.E.2d at 249; *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. The trial court's order, which granted summary judgment to Case, is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and HAMPSON concur.

IN THE MATTER OF TONY SAMI BOTROS, ATTORNEY

No. COA18-1137

Filed 21 May 2019

1. Attorneys—impairment—disability inactive status—court order—findings of fact—sufficiency of evidence

A trial court's findings of fact in its order transferring an attorney to disability inactive status (for appearing in court in an impaired condition) were supported by sufficient competent evidence.

2. Jurisdiction—trial court—attorney regulation—transfer to disability inactive status—inherent authority

The trial court had jurisdiction to enter an order transferring an attorney to disability inactive status pursuant to state courts' inherent authority to regulate the conduct of practicing attorneys. Since the court's show cause order did not arise out of a criminal contempt proceeding, Chapter 5A of the General Statutes did not apply.

3. Constitutional Law—due process—attorney impairment in court—show cause order—sufficiency of notice

An attorney's due process rights were not violated where he received sufficient notice of a show cause hearing, which was initiated by the trial court pursuant to its inherent authority to regulate the conduct of practicing attorneys—after the attorney appeared in

court in an impaired condition—and not pursuant to the criminal contempt statute.

4. Attorneys—impairment—disability inactive status—order—conclusions of law

The trial court did not abuse its discretion by placing an attorney on disability inactive status for appearing in court in an impaired condition, where its conclusions of law were supported by findings which were in turn supported by competent evidence. Six witnesses testified that they believed the attorney was impaired on two separate occasions in court, and the attorney failed to produce evidence of a medical opinion at his show cause hearing that supported his competency to practice law.

Appeal by Respondent from Order entered 8 June 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 February 2019.

North Carolina State Bar, by A. Root Edmonson, Deputy Counsel, for plaintiff-appellee.

Tony S. Botros, respondent-appellant, pro se.

HAMPSON, Judge.

Factual and Procedural Background

Tony Sami Botros (Respondent) appeals from an Order (Disability Order) transferring him to "disability inactive status."[1] The evidence presented at Respondent's hearing tends to show the following:

At all relevant times, Respondent, who was admitted to the North Carolina Bar in 2013, was engaged in the practice of law and maintained an office in Wake County. In March of 2018, Respondent was representing the plaintiff in a tort case before Wake County Superior Court, and the defendant had filed a motion for summary judgment with the court, which was scheduled to be heard the week of 26 March 2018. On 26 March 2018, Superior Court Coordinator, Lisa Tucker, notified Respondent that

1. The North Carolina State Bar Rules define "disability inactive status" as a class of membership in the North Carolina State Bar that "includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney, as determined by the courts, the council, or the Disciplinary Hearing Commission." 27 N.C. Admin. Code 1A.0201(c)(2)(C) (2018).

the summary judgment motion would be heard at 12:00 p.m. on 29 March 2018 in courtroom 10-B of the Wake County Courthouse, with Superior Court Judge A. Graham Shirley (Judge Shirley) presiding.

On the morning of 29 March 2018, Respondent also had an unrelated custody hearing before Wake County District Court Judge Ashleigh P. Dunston (Judge Dunston) in courtroom 2-A of the Wake County Courthouse. Respondent appeared in Judge Dunston's courtroom at approximately 9:40 a.m. When Respondent's opposing counsel sought to call a six-year-old girl to testify, Judge Dunston called both Respondent and opposing counsel into chambers and suggested the parties attempt to mediate a resolution. While in chambers, Judge Dunston began to suspect Respondent might be impaired based on his slurred speech, dilated eyes, and incoherent arguments.

As noon approached, Respondent and opposing counsel had not reached an agreement regarding their clients' custody dispute. As a result, Respondent failed to appear in Judge Shirley's courtroom for the hearing on the summary judgment motion. Around this time, the clerk from Judge Dunston's courtroom called the clerk in Judge Shirley's courtroom to notify Judge Shirley of Respondent's whereabouts and that Respondent was unsure which court, superior or district court, had priority. Upon being notified of Respondent's dilemma, Judge Shirley went to Judge Dunston's courtroom to discuss the matter.

When Judge Shirley arrived in Judge Dunston's courtroom, Judge Dunston informed Judge Shirley of her suspicions regarding Respondent's potential impairment. During their discussions, the two judges decided Judge Shirley had priority and ordered Respondent to report to Judge Shirley's courtroom to address the summary judgment motion. Thereafter, Judge Shirley left Judge Dunston's chambers and rode the elevator back to his courtroom with Respondent.

Upon arriving in Judge Shirley's courtroom, Respondent appeared distressed and requested five minutes to "collect himself," which Judge Shirley allowed. While Respondent was away, Judge Shirley requested Lisa Tucker and Kellie Myers, who was the Trial Court Administrator in Wake County, accompany him in chambers, as Lisa Tucker had encountered Respondent on a previous occasion and could gauge whether Respondent's behavior was consistent with her previous interaction with him. When Respondent returned to the courtroom, Judge Shirley requested both Respondent and opposing counsel join him in chambers.

Once in chambers, "[i]t became readily apparent to [Judge Shirley] that [Respondent] was impaired" because his pupils were dilated, his

speech was slurred, and he did not have "a rational thought process." When asked by Judge Shirley if he was on any medication or other mind-altering substances, Respondent admitted he took antidepressants, as he suffered from an anxiety disorder and depression, but adamantly denied he was impaired. Based on Respondent's condition, Judge Shirley informed Respondent that he believed Respondent was impaired and unable to represent his client, and that he intended to continue the hearing to the following week. Respondent insisted Judge Shirley allow him to state on the record he was not impaired and was ready to proceed with the hearing. However, Judge Shirley refused Respondent's calls to go on the record in order to save Respondent from publicly damaging his reputation with his client. Thereafter, Respondent was allowed to leave, and the summary judgment hearing was continued until 6 April 2018.

Upon leaving Judge Shirley's chambers, Respondent returned to Judge Dunston's courtroom. Judge Dunston informed Respondent that she would not allow him to proceed with the custody hearing and asked Respondent if he would submit to an examination by a drug recognition expert (DRE). Respondent initially agreed to the DRE examination. However, when the DRE arrived, Respondent stated he was embarrassed and wanted to leave, and refused to submit to the DRE examination. Thereafter, Respondent left.

On 6 April 2018, Respondent returned to Judge Shirley's courtroom for the hearing on the summary judgment motion. Respondent arrived at the hearing late, and after approximately two-thirds of his argument, Respondent stopped and asked Judge Shirley if he could pause to have a drink of water, which Judge Shirley allowed. Thereafter, Respondent informed Judge Shirley that he was not on his "A-game" and requested the court continue the matter, which Judge Shirley denied. At the conclusion of the hearing, Judge Shirley took the matter under advisement and requested Respondent accompany him back to chambers.

Once in chambers, Judge Shirley expressed his concerns regarding Respondent's behavior on 29 March 2018, which he believed amounted to contempt of court. Judge Shirley also informed Respondent that he believed Respondent was impaired on 6 April 2018 as well. Based on these concerns, Judge Shirley presented Respondent with a draft Motion to Show Cause for Contempt and told Respondent he would not file this Motion if Respondent would voluntarily seek evaluation and treatment through the Lawyer Assistance Program (LAP). As a further condition, Judge Shirley required Respondent sign a release allowing the LAP to report Respondent's compliance status to Judge Shirley. Thereafter,

Respondent agreed to Judge Shirley's request and signed the release (LAP Agreement).

At 4:37 a.m. on 2 May 2018, Respondent sent an email to Kellie Myers revoking the LAP Agreement and declaring it "null and void," contending he was initially coerced into signing the LAP Agreement. Respondent also sent an email to the Eastern Clinical Coordinator of the LAP revoking the LAP Agreement.

After learning of Respondent's revocation of the LAP Agreement, Judge Shirley filed an Order to Show Cause (Show Cause Order), which was served on Respondent on 15 May 2018. The Show Cause Order stated, in pertinent part:

> YOU ARE HEREBY GIVEN NOTICE THAT . . . a hearing will be held . . . to determine whether this Court shall impose professional discipline or transfer your law license to disability inactive status as a result of your recent conduct within the Tenth Judicial District.
>
> The Court initiates this action on its own motion, pursuant to its inherent authority to regulate the conduct of officers of the court. The information before the Court (as more specifically set forth herein) raises the question of whether you have violated the North Carolina Rules of Professional Conduct, or in the alternative, whether you are presently suffering from a mental or physical condition (which may include but is not limited to mental illness and/or substance abuse) which significantly impairs your professional judgment, performance, or competency as an attorney.

On 1 June 2018, a hearing on the Show Cause Order came on before Wake County Senior Resident Superior Court Judge Paul C. Ridgeway (Judge Ridgeway). Respondent attended this hearing and represented himself *pro se*. At the end of the day, Judge Ridgeway adjourned the hearing and notified Respondent that the hearing would resume on 6 June 2018. However, Respondent failed to appear on 6 June 2018 when the hearing resumed. At the conclusion of the 6 June 2018 hearing, Judge Ridgeway took the matter under advisement, and on 8 June 2018, Judge Ridgeway entered the Disability Order transferring Respondent to disability inactive status. On 9 July 2018, Respondent timely filed Notice of Appeal from the Disability Order.

Issues

Respondent raises several arguments on appeal, and these arguments distill into the following issues: (I) whether the trial court's Findings of Fact are supported by competent evidence; (II) whether the trial court had subject matter jurisdiction to place Respondent on disability inactive status; (III) whether Respondent was afforded the requisite due process, including proper notice of the proceedings; and (IV) whether the trial court's Findings and Conclusions supported placing Respondent on disability inactive status.

Standard of Review

Respondent challenges numerous Findings of Fact and Conclusions of Law in the trial court's Disability Order. When reviewing an order of a trial court entered pursuant to its inherent authority to regulate officers of the court, "[f]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (alteration in original) (citations and quotation marks omitted). Because acts of the trial court under its inherent authority are discretionary in nature, when reviewing the trial court's conclusions of law, "we need determine only whether they are the result of a reasoned decision[.]" *Id.* at 180, 695 S.E.2d at 435 (citation omitted); *see also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) ("The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion." (citation omitted)). By way of example, "[w]hen discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion." *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted).

Analysis

I. Findings of Fact

[1] Respondent argues there is insufficient evidence to support 12 of the trial court's Findings. We disagree.

Respondent first challenges Finding 4, which states:

> [Respondent] failed to appear at the appointed time on March 29, 2018 in Courtroom 10-B presided over by Judge A. Graham Shirley ("Judge Shirley"). The Courtroom Clerk in Courtroom 10-B received a call from the Courtroom

> Clerk in Courtroom 2-A and indicated that [Respondent] was in that Courtroom and was attempting to determine which court had priority despite previously being told that he was expected in Courtroom 10-B at 12:00 p.m. Judge Shirley went to Courtroom 2-A to discuss this matter with the presiding District Court Judge Ashleigh P. Dunston ("Judge Dunston").

In his brief, Respondent contends this Finding is unsupported because Judge Shirley testified he came down to Judge Dunston's courtroom before 12:00 p.m. However, competent evidence was presented at the hearing showing Respondent did not appear in Judge Shirley's courtroom at the appointed time, 12:00 p.m. At the 1 June 2018 hearing, Judge Shirley testified "[a]t 12 o'clock, [Respondent] had not shown up." Further, Judge Shirley's courtroom clerk testified Respondent was not in Judge Shirley's courtroom by 12:00 p.m. on 29 March 2018. Therefore, this Finding is supported by competent evidence.

Respondent next challenges Findings 5 and 6, which state:

> 5. In the course of their conversation in Courtroom 2-A, Judge Dunston informed Judge Shirley that she was of the opinion that [Respondent] was impaired. She recounted that while [Respondent] was in or around Courtroom 2-A, Judge Dunston observed that [Respondent] spoke in a rambling and sometimes ranting fashion, had slurred speech and dilated eyes, and that she believed him to be under the influence of an impairing substance.
>
> 6. The Courtroom Clerk in Courtroom 2-A also formed the opinion that [Respondent] was impaired. She observed that [Respondent] initially appeared lethargic, and that he spoke with slurred speech, was sweaty, and that he frequently wiped his face and tugged at his collar. This same Clerk also encountered [Respondent] outside of the courthouse during the lunch hour, and [Respondent] was walking down stairs in a very unsteady manner and needed to steady himself on the hand rails.

Respondent contends these Findings are not supported by competent evidence because (1) Judge Dunston testified several times that she was unsure if Respondent was impaired and (2) the Courtroom Clerk in 2-A, Christina Sollers, testified she could not tell whether Respondent's eyes were dilated.

First, Respondent mischaracterizes Judge Dunston's testimony. Although Judge Dunston did testify that on 29 March 2018 she initially "did not know for sure" whether Respondent was impaired, her testimony throughout the 1 June 2018 hearing consistently shows she believed Respondent was impaired that day. Judge Dunston testified, "I definitely thought something was wrong [with Respondent]. His eyes did appear dilated; they – you know, his words were slurred; he was rambling about things that had nothing to do with what we were talking about[.]" Judge Dunston also notified Judge Shirley of her suspicions regarding Respondent's impairment, and Judge Dunston also testified she thought "[Respondent] was impaired on some type of pill or something."

As for Finding 6, although Christina Sollers stated she could not tell whether Respondent's eyes were dilated, she consistently testified Respondent seemed impaired on 29 March 2018. Sollers averred Respondent seemed impaired because "he seemed a little lethargic . . . . He was very sporadic. He came to court late. He slurred his words. He tugged on his collar a lot; wiped his face a lot." In addition, Sollers testified Respondent seemed sweaty and she observed Respondent needing to steady himself as he walked down a flight of stairs at the courthouse. Therefore, competent evidence supports the trial court's Findings 5 and 6.

In addition, Respondent asserts Finding 7 is not supported by competent evidence, which Finding states: "After speaking with Judge Dunston and upon leaving Chambers for Courtroom 2-A, Judge Shirley witnessed [Respondent] speaking with a Deputy of the Wake County Sheriff's Office. Based upon [Respondent's] speech he continued to appear impaired and disoriented." Respondent contends because the Deputy did not testify, this Finding is unsupported. However, Finding 7 relates to Judge Shirley's impressions of Respondent during his conversation with the Deputy, which Judge Shirley was competent to testify about because he personally witnessed the conversation. *Cf. Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E.2d 884, 886 (1960) ("A witness is not competent to testify to a fact beyond his personal knowledge or to base an opinion upon facts of which he has no knowledge." (citations omitted)). Therefore, the fact that the Deputy did not testify is inconsequential to Finding 7.

Respondent next challenges Finding of Fact 9, which provides: "Immediately upon appearing before Judge Shirley, [Respondent] requested five minutes to 'collect' himself. [Respondent] appeared somewhat distressed and disoriented." Respondent argues this Finding is unsupported by competent evidence because on cross-examination

Respondent played a recording of the 29 March 2018 hearing showing Respondent requested to "have one -- one moment[,]" without saying it was to "collect" himself. However, the trial court's Finding that Respondent's request for a moment was to "collect" himself is a reasonable inference from Judge Shirley's testimony. *See Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 358, 734 S.E.2d 125, 128 (2012) ("While plaintiff may not have used the precise words of the findings in his testimony, the findings reasonably paraphrase plaintiff's testimony or *are inferences reasonably drawn from that testimony*." (emphasis added)). In any event, this Finding is not necessary to the trial court's Conclusions of Law; therefore, Respondent's argument on this Finding is without merit. *See In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded. . . . It is sufficient if enough *material* facts are found to support the judgment." (citations omitted)).

Respondent also contends Finding of Fact 10 is not supported by the evidence, which Finding states:

> When [Respondent] returned, Judge Shirley met with counsel in Chambers. [Respondent's] pupils were dilated, his speech was slurred, and he did not appear to be able to speak in a coherent manner. [Respondent] stated that he was taking antidepressant medication and had been diagnosed with depression and social anxiety disorder.

Respondent asserts this Finding is unsupported because three of the State's witnesses testified they could not tell whether Respondent's pupils were dilated. However, Judge Shirley testified "[Respondent's] pupils were dilated." Further, Judge Dunston also testified Respondent's "eyes did appear dilated[.]" This constitutes competent evidence supporting Finding 10.

Respondent next challenges Finding of Fact 12, which reads:

> The Courtroom Clerk in Judge Shirley's courtroom[, Caitlyn Beale,] also formed the opinion that [Respondent] was impaired on March 29, 2018. She noted that he was jumpy, erratic, sweating, not able to express coherent thoughts and that his eyes were dilated. This same clerk had seen [Respondent] on March 26, 2018 at calendar call, and his appearance and actions on March 29, 2018 were markedly different from his more normal demeanor on March 26, 2018.

Respondent argues this Finding is unsupported because Caitlyn Beale "testified she was unsure of whether Respondent was impaired, stated she could not tell if Respondent's eyes were dilated when he first presented, and stated that Respondent's matter was never argued and thus could make no judgment of whether Respondent was able to express coherent thoughts." However, the following testimony by Caitlyn Beale supports Finding 12:

> Q. And did you observe [Respondent] while he was in the courtroom [on 29 March 2018]?
>
> A. I did.
>
> Q. Did he appear to you to be effective for his client?
>
> A. No.
>
> Q. What -- what did you witness that made you think he was ineffective?
>
> A. His behavior was very erratic. He seemed a little jumpy and he was kind of sweaty or clammy and just not able to put a coherent thought together.
>
> Q. Did -- did he -- did his eyes appear to be dilated?
>
> A. When he first came out, he was not close enough to see him [sic], so I can't really say for sure. But later, after we took a brief recess, he did come up to my desk and they did appear to be dilated.
>
> Q. Did -- did he -- and did he appear to you to be impaired by maybe a substance he was taking?
>
> A. I mean I can't say for sure, but he was not his normal self. I had seen him at calendar call that Monday and that was not his behavior on Monday.
>
> Q. And was he able to articulate an argument on behalf of his client?
>
> A. We never even heard his matter, so no.
>
> Q. So he -- why did you not hear his matter?
>
> A. Judge Shirley pulled him in chambers and asked if he was okay to proceed hearing the matter and I believe Judge Shirley didn't feel comfortable proceeding to hear

> it anyway, and so we decided to continue it to the following week.

Respondent next challenges Finding 13, which provides:

> After leaving Courtroom 10-[B] on March 29, 2018 [Respondent] returned to Courtroom 2-A. There, Judge Dunston informed him that based upon her observations and Judge Shirley's observations, she was not going to allow [Respondent] to proceed. [Respondent] told Judge Dunston that he was not taking anything other than prescribed medications and that he was not "high." Judge Dunston asked whether he would submit to an examination by a Drug Recognition Expert (DRE) and [Respondent] answered he would. However, when the DRE arrived, [Respondent] stated that he did not want to submit to an examination and just wanted to leave.

Respondent contends this Finding is not supported by the evidence because Judge Dunston testified she was unsure if Respondent was impaired and admitted she released Respondent prior to a DRE arriving. However, the following testimony regarding what Judge Dunston told Respondent upon returning to her courtroom supports this Finding:

> So [Respondent and opposing counsel] came up and approached the bench. And I basically told [Respondent] as nicely as I could that based upon what I believed as far as him being impaired, also the fact of what I had learned from Judge Shirley and also that [Judge] Shirley had already determined that he was not what I believed competent to proceed that day, which is why he continued the case, that at that point I said, okay, well, I don't -- I also don't believe -- if a superior court judge has done this, I -- I definitely can't have you practice in my court immediately after that. And I don't think that you should. And I had some questions this morning, but now I'm confirmed in that.
>
> And he basically told me that he had a social disorder, social -- some -- some type of disorder, that he was taking medication for that, that he's not on anything other than his prescribed medication. He -- he said that he was not -- that he was not high.
>
> . . . .

> And I asked him at the bench, I said, will you submit to a drug recognition expert? I have one coming and if, you know, they determine that there's nothing wrong, I mean then that's -- then it is what it is.
>
> And he told me he would. He said, yes, I will because I'm not -- there's nothing wrong with me, blah, blah, blah. And I said, Okay.
>
> . . . .
>
> [After approximately 20 minutes,] DRE had arrived. And so when the DRE got there, [Respondent] did not submit to his testing and said that he just wanted to leave and that he was embarrassed and that he was not going to submit to the DRE. And then that was the last time I saw him when he walked out of the courtroom.

Although Respondent contends Judge Dunston's testimony contradicted the above exchange (without citing where in the transcript this occurred), we hold the above exchange supports Finding 13. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434 ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, *even if . . . there is evidence to the contrary*." (alterations in original) (emphasis added) (citation and quotation marks omitted)).

Respondent next challenges Finding of Fact 17, which states:

> In Chambers, Judge Shirley advised [Respondent] that Judge Shirley was concerned with his conduct on March 29, 2018 and that his conduct on April 6, 2018 did nothing to alleviate those concerns. Judge Shirley informed [Respondent] that the Court believed that his conduct on March 29, 2018 amounted to Contempt of Court and a violation of the Rules of Professional Conduct and that the Court had prepared a Motion to Show Cause, which he showed to [Respondent]. Judge Shirley further informed [Respondent] that first and foremost he was concerned for [Respondent's] well-being. Judge Shirley explained that he was prepared to issue and file the Motion to Show Cause but would hold off on signing any order if [Respondent] would voluntarily present himself to the Lawyer's Assistance Program (LAP) for an evaluation and follow any recommended treatment. As a further condition of not proceeding with the Motion to Show Cause,

> Judge Shirley indicated that he would only defer entering the Motion to Show Cause if [Respondent] executed a release that would allow LAP to provide the following information to the Court: (a) whether [Respondent] made contact with LAP; (b) the status of [Respondent's] participation with LAP, including whether or not he was compliant with the clinical recommendations of the LAP; (c) a copy of any LAP Recovery Contract entered into by [Respondent]; and (d) the status of [Respondent's] LAP Recovery Contract.

Respondent asserts this Finding is not supported because the "release" was never introduced or admitted into evidence. However, Judge Shirley had personal knowledge of the release and was competent to testify to its contents. *Cf. Robbins*, 251 N.C. at 666, 111 S.E.2d at 886 (citations omitted). Regarding the release, Judge Shirley testified as follows:

> So [Respondent] came back into chambers. I had him take a seat. And I told [Respondent], I said, [Respondent], I said, I am very concerned about what happened in my court in 10B last week. And to be honest, your conduct -- and again, I reiterated, I told him I believed he was impaired -- your conduct to me amount to contempt of court. And as a judge, that is something that I could not let pass and I was going to have to do something about it.
>
> I told him that my primary concern was his well-being and the well-being of his clients. And I showed him an order I had prepared on a Motion to Show Cause. At that point in time it's a Motion to Show Cause why he shouldn't be held in contempt of court and/or why he shouldn't be disciplined or have his -- be placed on an inactive status because of either a substance abuse problem or mental health problem. And I told him I was prepared to enter that order that day, but what I would do is I would defer entering that order on the -- on the following conditions: That he voluntarily present himself to LAP. And I disclosed what that was; that he get an evaluation. That if after the evaluation they recommended any treatment, that he'd follow that treatment protocol and whatever contract he had with LAP; and finally that -- so I could ensure that he was in compliance with whatever LAP was asking him to do, I asked him -- I told him he'd be -- have to sign a consent form. And that if he did those things, I would -- and told him what the consent form was for. And -- and told

> him that if he did those things, I would not file and make a public record.
>
> . . . .
>
> I -- I would not make a public. That, you know, you wouldn't have a public record with the -- the Motion to -- to Show Cause.
>
> He readily agreed. In fact, his reaction was almost one of relief. He signed the consent order -- or he signed the consent allowing me to monitor him. I told -- I gave him, I believe, until 5 o'clock on Monday to -- to make telephonic communication with LAP. I then informed the folks from LAP they should be expecting a call.

This testimony constitutes competent evidence to support Finding 17.

Respondent next challenges Findings 19 and 20, which state as follows:

> 19. [Respondent] indicated that he wanted to voluntarily present himself to LAP and he thereafter executed the release.
>
> 20. As a result of the April 6, 2018 hearing, the Court ultimately granted the Defendant's Motion for Summary Judgment. In addition to the Court concluding that the evidence did not show intentional or reckless conduct, [Respondent] failed to present any evidence in the form required by Rule 56(e) of the North Carolina Rules of Civil Procedure concerning any severe emotional distress suffered by Plaintiff. In defense of this lack of evidence [Respondent] complained to the Court that his client's deposition had not even been taken.

Respondent asserts these two Findings are not supported by competent evidence because the execution of the release was not voluntary. We first note Finding 20 is immaterial to the trial court's Conclusions of Law; therefore, we do not address this Finding. *See In re Custody of Stancil*, 10 N.C. App. at 549, 179 S.E.2d at 847 ("Immaterial findings of fact are to be disregarded." (citation omitted)).

As for Respondent's contention that the execution of the release was not voluntary, Respondent did not present any evidence at the 6 June 2018 hearing, as Respondent did not attend the hearing on this date. As the above testimony in support of Finding 17 shows, Judge Shirley

testified Respondent "readily agreed" to sign the release. Further, Kellie Myers, who witnessed Respondent sign the release, testified Respondent did not object or complain about signing the release. Therefore, Finding 19 is supported by competent evidence.

Lastly, Respondent challenges Finding 23, which states: "After the hearing in this matter was concluded on June 6, 2018, [Respondent] sent communications to the Court regarding this matter. Because these communications were not offered as evidence or argument during the hearing in this matter, the communications have not been reviewed or considered by the Court."

Respondent contends this Finding is "not supported by the evidence as the Prosecutor represented to the trial court that Respondent had emailed him a medical opinion on 5 June 2018." However, we fail to see how this assertion renders the Finding erroneous. Finding 23 simply indicates the trial court did not consider any post-hearing submissions by Respondent in reaching its decision. Given Respondent did not testify and Respondent's 5 June 2018 email was not received into evidence, this Finding is not erroneous.

II. Subject Matter Jurisdiction

[2] Respondent challenges the trial court's Conclusion 1, which states: "This Court has personal and subject matter jurisdiction." Respondent contends this Conclusion is erroneous because the Show Cause Order was in violation of several subsections of Chapter 5A of our General Statutes, which relate to criminal contempt, thereby depriving the trial court of subject matter jurisdiction and rendering the Disability Order null and void. However, this action was not a criminal contempt proceeding; rather, the Show Cause Order and Disability Order stem from the trial court's inherent authority to regulate the conduct of attorneys appearing before it. Thus, Chapter 5A is inapplicable to this case.

The courts of this State have inherent authority to regulate the conduct of attorneys practicing in this State:

> Attorneys are answerable to the summary jurisdiction of the court for any dereliction of duty except mere negligence or mismanagement. A court may enforce honorable conduct on the part of its attorneys and compel them to act honestly toward their clients by means of fine, imprisonment or disbarment. The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them

> from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.

In re Burton, 257 N.C. 534, 542-43, 126 S.E.2d 581, 587-88 (1962) (citation and quotation marks omitted).

The inherent powers of the judicial branch are those powers that are "essential to the existence of the court and the orderly and efficient exercise of the administration of justice." *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987); *see also Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001) ("All courts are vested with inherent authority to do all things that are reasonably necessary for the proper administration of justice." (citations and quotation marks omitted)). Our Supreme Court has noted that this inherent authority encompasses not only the "power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (citation omitted).[2] Further, this Court has stated, "[t]here is no question that a Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *In re Robinson*, 37 N.C. App. 671, 676, 247 S.E.2d 241, 244 (1978).

Although we have found no case addressing the trial court's authority with regard to placing attorneys on disability inactive status, a trial court's inherent authority to regulate attorneys before it must also include the authority to place an attorney on disability inactive status under appropriate circumstances.[3] Just as our trial courts have the inherent authority to impose sanctions upon attorneys appearing before them, there is no question that a superior court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that

---

2. Indeed, in *In re Hunoval*, the Supreme Court was exercising its own inherent authority by entering an order of discipline against an attorney practicing before it. *See id.*

3. We also find support for this conclusion in the definition of "disability inactive status" found in the North Carolina State Bar Rules, which defines this class as "members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney, *as determined by the courts* . . . ." *See* 27 N.C. Admin. Code 1A.0201(c)(2)(C) (emphasis added). This definition assumes a trial court has the necessary authority to transfer an attorney practicing before it to disability inactive status.

the administration of justice is accomplished as expeditiously as possible, has the authority to transfer an attorney to disability inactive status. *See id.* at 676-77, 247 S.E.2d at 244-45 (recognizing a court's inherent authority to impose reasonable and appropriate sanctions upon lawyers practicing before it); *see also In re Beasley*, 151 N.C. App. 569, 571-73, 566 S.E.2d 125, 127-28 (2002) (upholding a trial court's order, entered pursuant to its inherent authority, suspending an attorney's license for substance abuse issues).[4]

Here, the Show Cause Order states Respondent was to show cause why, *inter alia*, he should not be placed on disability inactive status. The Show Cause Order further provides the trial court "initiat[ed] this action on its own motion, pursuant to its inherent authority to regulate the conduct of officers of the court." In the Disability Order, the trial court explicitly found that Respondent was impaired and pursuant to its inherent authority, ordered Respondent be placed on disability inactive status. Because the trial court at all times was acting pursuant to its inherent authority to regulate officers of the court, the trial court had subject matter jurisdiction to enter its Disability Order.

III. Due Process

[3] Respondent next challenges Conclusion 3, which reads: "[Respondent] received appropriate notice of these proceedings." Respondent alleges this Conclusion is erroneous because it "is not supported by evidence nor does it follow from the Findings of Fact[,]" and because Judge Shirley violated N.C. Gen. Stat. § 5A-13(a), which deals with notice procedures when deferring proceedings for direct criminal contempt.

As already discussed, Judge Shirley's Show Cause Order was issued pursuant to the trial court's inherent authority and was not a criminal contempt proceeding. Therefore, N.C. Gen. Stat. § 5A-13(a) is inapplicable. Further, the Record shows Respondent was served with the Show Cause Order at least 17 days prior to the 1 June 2018 hearing, and at this hearing, Respondent appeared and did not object to service of the Show Cause Order. *See*, *e.g.*, *In re Howell*, 161 N.C. App. 650, 655-56, 589 S.E.2d 157, 160 (2003) (explaining a general appearance and failure to object by a party in an action can waive defense of insufficiency of service of process). Therefore, Conclusion 3 is supported by the Findings.

---

4. Indeed, all of the judges' efforts below were clear attempts to take proactive remedial steps in order to avoid formal discipline and provide assistance to Respondent.

In a similar vein, Respondent also alleges the trial court violated his due process rights by failing to give him notice. *See In re Burton*, 257 N.C. at 543, 126 S.E.2d at 588 ("A license to engage in business or practice a profession is a property right which cannot be taken away without due process of law." (citation and quotation marks omitted)).

We conclude Respondent was given due notice of the proceedings. *See*, *e.g.*, *id*. Here, Respondent first learned Judge Shirley intended to file the Show Cause Order on 6 April 2018. Pursuant to the LAP Agreement, Judge Shirley waited to file the Show Cause Order as long as Respondent participated in the LAP. However, when Respondent revoked the LAP Agreement on 2 May 2018, Judge Shirley resorted to filing the Show Cause Order, as he had explicitly informed Respondent he would do if Respondent failed to comply with the LAP Agreement. Respondent was personally served with the Show Cause Order on 15 May 2018. The Show Cause Order detailed the allegations against Respondent and ordered Respondent to attend a hearing to determine "whether [Respondent is] presently suffering from a mental or physical condition (which may include but is not limited to mental illness and/or substance abuse) which significantly impairs [Respondent's] professional judgment, performance, or competency as an attorney." Prior to the hearing on 1 June 2018, Respondent hired counsel to represent him at this hearing; however, Respondent allowed counsel to withdraw on the day of the hearing. In addition, the hearing on Judge Shirley's Show Cause Order was presided over by Judge Ridgeway, who had had no previous involvement with Respondent or the events leading up to the Show Cause Order. At the hearing on 1 June 2018, Respondent represented himself, cross-examined the State's witnesses, and presented evidence. Respondent, however, failed to attend the second day of the hearing on 6 June 2018. Based on these facts, we conclude Respondent was provided due process.

IV. Disability Inactive Status

[4] Lastly, Respondent challenges Conclusions 4 through 7, which state as follows:

> 4. [Respondent's] conduct, as set out in the Findings of Fact above, demonstrates that [Respondent] suffers from a mental or physical condition that materially impairs his performance, judgment or competence as an attorney.
>
> 5. Due to [Respondent's] inability to effectively handle his clients' matters, and the delays caused by his appearances

> in court in an impaired condition, his continuing to practice law poses a threat of significant potential harm to his clients, to the public, to the profession, and to the administration of justice.
>
> 6. It is in the best interest of [Respondent's] clients, the public, the profession and the administration of justice that [Respondent] should be placed on disability inactive status until [Respondent] has been evaluated and treated for his impaired condition.
>
> 7. It is in the best interest of [Respondent], his clients, the public, the profession and the administration of justice for [Respondent] to undergo, under the supervision of the Lawyers Assistance Program ("LAP") or some other qualified provider approved by this Court, a substance abuse evaluation, a psychiatric evaluation and a fitness to practice evaluation, and to follow all treatment recommendations found to be appropriate, prior to returning to active practice.

Respondent essentially argues these Conclusions are not supported by the Findings because (1) the Findings are not supported by competent evidence and (2) Respondent had provided a medical opinion to the Deputy Counsel for the State Bar, who had been appointed to prosecute this matter, on 5 June 2018 that Respondent was competent to practice law. With regard to the 5 June 2018 medical opinion, Respondent failed to appear at the 6 June 2018 hearing and did not present any evidence of this medical opinion throughout the two hearings. Because this 5 June 2018 medical opinion was not admitted, the trial court did not err by failing to consider this opinion.

As for Respondent's remaining argument, we have already determined the Findings were supported by competent evidence, and we hold these Findings support the trial court's Conclusions. Specifically, the Record shows all six of the State's witnesses testified to believing Respondent was impaired on two separate occasions, 29 March 2018 and 6 April 2018. Both Judges Dunston and Shirley testified they believed it was in Respondent's best interest, and the interest of the proper administration of justice, that he should be placed on disability inactive status until he has been evaluated and treated for his impaired condition. Therefore, we hold the trial court's Conclusions of Law are supported by the Findings of Fact and the trial court did not abuse its discretion by placing Respondent on disability inactive status.

Conclusion

Accordingly, based on the foregoing reasons, we affirm the trial court's Disability Order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

IN THE MATTER OF J.C.D.

No. COA18-957

Filed 21 May 2019

1. Mental Illness—involuntary commitment—physician's report—right to confront physician—failure to assert

In an involuntary commitment hearing, the trial court did not err by admitting a physician's report into evidence pursuant to N.C.G.S. § 122C-268(f) where respondent did not object and did not assert her right to have the physician appear to testify.

2. Mental Illness—involuntary commitment—ultimate finding—mentally ill and dangerous to self and others—sufficiency of findings—conflicts in evidence

An involuntary commitment order lacked findings sufficient to support its ultimate finding that respondent was mentally ill and dangerous to herself and others, where the findings were simply the facts stated in a physician's letter, which the order incorporated by reference. The order lacked any findings based upon another witness's or respondent's testimony, and it failed to resolve conflicts in the evidence.

3. Mental Illness—involuntary commitment—sufficiency of evidence—dangerous to others—no evidence

An involuntary commitment order's conclusion that respondent was dangerous to others was vacated where there was no evidence that respondent had threatened to, attempted to, or actually harmed anyone—or that respondent had previously done so.

Appeal by respondent from order entered 14 March 2018 by Judge J. Henry Banks in District Court, Halifax County. Heard in the Court of Appeals 27 February 2019.

IN RE J.C.D.

[265 N.C. App. 441 (2019)]

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

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

STROUD, Judge.

J.C.D. ("Respondent") appeals from an involuntary commitment order which committed her to Halifax Regional Medical Center ("HRMC") for up to 30 days. We vacate the district court's order and remand for additional findings of fact and entry of a new order.

I. Background

Respondent, age 76, presented to the emergency room with bruising on the left side of her mouth and eyes and rambling speech. Respondent was initially examined by Dr. E. Conti at HRMC. Dr. Conti noted Respondent had stated her daughter had hit her, and she had rambling speech focused on her daughters trying to take advantage of her. Dr. Conti recounted Respondent had a history of "delusional" disorder and determined Respondent was "mentally ill," "dangerous to self," and "dangerous to others."

On the Examination and Recommendation to Determine Necessity for Involuntary Commitment Form ("commitment form"), Dr. Conti states, "daughter reports that [Respondent] has been doing dangerous things such as walking long distances to the store in a bad neighborhood, telling strangers her personal buisness [sic] and inviting strangers into her home. Daughter also reports that [Respondent's] guns were take [sic] away from her due to threatening behavior."

Respondent was examined by Dr. Ijaz the following day to determine the continued necessity for involuntary commitment. Dr. Ijaz determined Respondent was "mentally ill," "dangerous to self," and "dangerous to others." The commitment form completed by Dr. Ijaz indicates "[Respondent] presents with occular [sic] and facial bruising. She maintains that her daughter assulted [sic] her because she would not sell her house." Dr. Ijaz found Respondent was "at risk of causing harm to herself or others due to her impaired judgement and delusional thinking and requires inpatient hospitalization for stabilization and treatment."

Dr. Conti signed an affidavit and petition requesting involuntary commitment of Respondent on 8 March 2018. An involuntary commitment

hearing was held on 14 March 2018. Respondent was represented by counsel. The only witness who testified for the hospital was Latasha Motley, who was employed by HRMC. Respondent also testified. All parties indicate the transcript is unintelligible regarding Ms. Motley's specific job title at HRMC. Ms. Motley identified her role as being involved with "psychiatric discharge," but she also testified about Respondent's course of care in the hospital. Petitioner also offered as evidence a report by Dr. Ijaz, who had evaluated and treated Respondent. The report was admitted without objection from respondent.

The trial court announced at the conclusion of the hearing it found there were facts supporting the involuntary commitment, and it would incorporate by reference as findings in the order the report signed by Dr. Ijaz and offered by Ms. Motley. The trial court also announced that it found respondent mentally ill and a danger to herself and others and committed her for up to 30 days.

The court's written order, filed after the hearing, is on North Carolina Administrative Office of the Courts form order SP-203. In the "Findings" portion of the form,[1] box number four was marked:

> Based on the evidence presented, the Court
>
> 4. by clear, cogent, and convincing evidence, finds as facts all matters as set out in the physician's/eligible psychologist's report specified below, and the report is incorporated by reference as findings.
>
> Date of Last Examiner's Report *3-14-18*
>
> Name of Physician/Eligible Psychologist *Dr. Ijaz*

The trial court also marked box five:

> 5. by clear, cogent, and convincing evidence, finds these other facts:
>
> . . .

1. Italics indicate hand-written additions to Form 203; the remainder is the preprinted text of the form.

facts supporting the involuntary commitment:

> *All facts as set out in the physician's report date 3-14-18. The physician's report shall be incorporated by reference as evidence to support this order.*

Dr. Ijaz's letter which was incorporated by reference stated:

> [Respondent] is a 76 year old female admitted to Halifax Regional on March 4, 2018, under Involuntary Commitment Order, with a diagnosis of Possible Neurocognitive D/O (Alzheimer's disease). Patient presented to the Emergency Care Center on this date with reports of confusion, auditory and visual hallucinations, flight of ideas and confabulation prior to admission. Patient was checked and has been cleared for all things medical that could produce these symptoms in patients.
>
> **Psychiatric Medications**
>
> Xanax 0.5mg BID PO Antianxiety
>
> Since being on the unit, patient has shown some improvement. However she still presents with intermittent episodes of confusion and paranoia. She is easily redirected at this time with no agitation or verbally aggressive behaviors as initially presented upon admission to the unit. Patient is compliant with medications and unit activities at present. In my opinion, patient is a danger to self, due to level of confusion and confabulation. I recommend that patient remain on the inpatient psychiatric unit for up to 30 days for further stabilization and to formulate an effective discharge plan. Patient's daughter petition the court and became her legal guardian so that she can make necessary decisions for patient's care due to change in patient's mental status and concerns for her safety.

The court concluded Respondent was mentally ill and a danger to herself and others. Respondent timely appealed.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment of involuntary commitment. N.C. Gen. Stat. § 7A-27(b)(2) (2017); N.C.

Gen. Stat. § 122C-272 (2017). "[A] prior discharge will not render questions challenging the involuntary commitment proceeding moot. When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot." *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009) (citations and quotation marks omitted). This appeal is not moot even though Respondent's commitment period has expired.

III. Issues

Respondent argues the trial court erred by ordering her commitment, where the only findings of fact were solely those incorporated from and set out in the non-testifying physician's report. She asserts findings were insufficient to support the conclusion she was dangerous to herself and others. Respondent also asserts a denial of her statutory right to effective assistance of counsel.

IV. Standard of Review

The trial court is required to support its findings of fact and ultimate conclusion that Respondent "is mentally ill and dangerous to self . . . or dangerous to others" by "clear, cogent and convincing evidence." N.C. Gen. Stat. § 122C-268(j) (2017). Further, "[t]he court shall record the facts that support its findings." *Id.*

> On appeal of a commitment order our function is to determine whether there was any competent evidence to support the "facts" recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the "facts" recorded in the order.

In re Whatley, 224 N.C. App. 267, 270, 736 S.E.2d 527, 530 (2012) (citation omitted); *see also In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980) ("On appeal of a commitment order our function is to determine . . . whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the 'facts' recorded in the order.").

V. Admissibility of Physician's Report

[1] Respondent first argues that "[t]he admission of Dr. Ijaz's report, without Dr. Ijaz's presence at the hearing, constituted a denial of J.D.'s right to confront and cross-examine the witness." Respondent contends that based upon N.C. Gen. Stat. § 122C-268(f), Dr. Ijaz's report was

improperly admitted as evidence because she did not appear at the hearing to testify.

N.C. Gen. Stat. § 122C-268(f) provides that "[c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied." N.C. Gen. Stat. § 122C-268(f) (2017). Respondent suggests that because her "right to confront and cross-examine witnesses may not be denied," Dr. Ijaz's report could not be admitted unless she appeared to testify. Respondent's counsel failed to object to admission of Dr. Ijaz's report as evidence under N.C. Gen. Stat. § 122C-268(f) or for any other reason. Although Respondent had a right to object to admission of the report without Dr. Ijaz's testimony, she waived this right by her failure to object. N.C. R. App. P. 10(a)(1). Respondent's interpretation of the statute—that she has a non-waivable right for the physician to appear and testify—is the opposite of what the statute allows. N.C. Gen. Stat. § 122C-268(f) specifically allows the physician's report to be admitted into evidence. Since respondent did not object to admission of the report, and she did not assert her right to have Dr. Ijaz appear to testify, the trial court did not err by admitting and considering the report.

VI. Sufficiency of Findings of Fact under N.C. Gen. Stat. § 122C-268(j)

[2] The trial court's ultimate findings of mental illness and dangerous to self or others must be based upon clear, cogent, and convincing evidence and be "supported by the 'facts' recorded in the order." *Whatley*, 224 N.C. App. at 270, 736 S.E.2d at 530. "But unlike many other orders from the trial court, these ultimate findings, standing alone, are insufficient to support the order; the involuntary commitment statute expressly requires the trial court also to record the facts upon which its ultimate findings are based." *In re W.R.D.*, ___, N.C. App. ___, ___, 790 S.E.2d 344, 347 (2016) (citation and quotation marks omitted). The order for Respondent's involuntary commitment indicates the trial court had "incorporated by reference" Dr. Ijaz's report as the "clear, cogent, and convincing evidence" of Respondent's mental illness and danger to herself. The facts found by the trial court to support its conclusions and order were simply the facts set out in Dr. Ijaz's letter and did not include any findings based upon Ms. Motley's or respondent's testimony at the hearing. Respondent does not challenge the specific facts as incorporated from Dr. Ijaz's letter as unsupported by the evidence but argues here that the incorporation alone is not sufficient under N.C. Gen. Stat. § 122C-268(j). Thus, the issue is whether the incorporation by reference

of Dr. Ijaz's report was sufficient to comply with the statutory mandate for the trial court to "record the facts that support its findings." N.C. Gen. Stat. § 122C-268(j). Given the higher standard for findings of fact set forth by N.C. Gen. Stat. § 122C-268(j) than in many other types of orders, we agree and hold that the findings are not adequate to support the ultimate conclusion.

Based upon the incorporation of Dr. Ijaz's letter, the trial court made findings that Respondent "is a 76 year old female admitted to Halifax Regional on March 4, 2018; she had a "diagnosis of Possible Neurocognitive D/O (Alzheimer's disease);" she "presented to the Emergency Care Center on this date with reports of confusion, auditory and visual hallucinations, flight of ideas and confabulation prior to admission;" she "was checked and has been cleared for all things medical that could produce these symptoms in patients;" she had a prescription for "Xanax 0.5mg BID PO Antianxiety;" she "has shown some improvement" while in the hospital but "she still presents with intermittent episodes of confusion and paranoia;" "She is easily redirected at this time with no agitation or verbally aggressive behaviors as initially presented upon admission to the unit;" and she was "compliant with medications and unit activities at present." The trial court also found by incorporation of Dr. Ijaz's report that Respondent "is a danger to self, due to level of confusion and confabulation" and that she should "remain on the inpatient psychiatric unit for up to 30 days for further stabilization and to formulate an effective discharge plan."

We must therefore consider whether the trial court's findings of fact, made by incorporation of Dr. Ijaz's report, were sufficient to comply with the statutory requirements to "record the facts which support its findings." N.C. Gen. Stat. § 122C-268(j). Certainly, the trial court's order included more detail than those cases in which the only findings were 'checking the boxes" on the form, with no other indication of the facts upon which it relied. Merely "placing an 'X' in the boxes" of the form order has been disapproved repeatedly, as noted in *Matter of Jacobs*, where respondent

> assign[ed] as error the district court's failure to make findings of fact to support its commitment order. G.S. 122-58.7(i) provides in unambiguous terms: "The court shall record the facts which support its findings." This Court has held on numerous occasions that the district court must record the facts necessary to support its findings. We note that the commitment order in the case *sub judice* is essentially identical to that order found to

> be insufficient in *In Re Koyi*, *supra*. Merely placing an "X" in the boxes on the commitment order form does not comply with the statute.

38 N.C. App. 573, 575, 248 S.E.2d 448, 449 (1978). It is not uncommon, and is specifically provided as an option on AOC Form 203 for the trial court to incorporate the physician's report as at least a portion of the findings of fact in the order. Yet where there is "directly conflicting evidence on key issues," incorporation of a document or other evidence is not sufficient for this Court to determine if the trial court resolved the conflicts in the evidence to the required standard and burden of proof by petitioner, and we must remand for findings of fact resolving the factual issues. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000) ("These findings are simply a recitation of the evidence presented at trial, rather than ultimate findings of fact. In a nonjury trial, it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony. If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected. Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." (citations omitted)); *see also In re Allison*, 216 N.C. App. 297, 300, 715 S.E.2d 912, 915 (2011) ("The trial court used a locally modified form involuntary commitment order and in making its findings of fact checked the box stating, 'Based on the evidence presented, the Court by clear, cogent and convincing evidence finds these other facts: Court Finds That The Respondent Meets Criteria For Further Inpatient Commitment.' The trial court did not make any written findings of fact or incorporate by reference either physician's report. Had the trial court utilized the standard Administrative Office of the Courts form involuntary commitment order and entered the findings of fact required by that form, this remand may not have been necessary as the evidence tends to show that respondent is likely mentally ill and potentially dangerous to himself and to others. But, the trial court's checking of a box on its locally modified form is insufficient to support this determination."). If the report incorporated into the order does not include sufficient facts to support the trial court's conclusions, remand may be necessary for additional findings. For example, in *In re Booker*, the respondent's sister, his physician, and respondent testified at the hearing, and there were substantial conflicts in the evidence. 193 N.C. App. 433, 667 S.E.2d 302 (2008). The trial court's order incorporated the physician's

report, but that report included minimal information and there were no additional findings to resolve the conflicts in the evidence so remand was necessary:

> In its order, the trial court checked the box on the printed form that reads: "Based on the evidence presented, the Court by clear, cogent and convincing evidence finds as facts all matters set out in the physician's report, specified below, and the report is incorporated by reference as findings." The date of the last physician's report was 13 November 2007 and the physician's name listed was Dr. P.R. Chowdhury. The next box on the printed form that provided a section for other findings of fact to be recorded was not checked and no other findings of fact were recorded in the order.
>
> The 13 November 2007 report stated it was Dr. Chowdhury's opinion that Respondent was mentally ill, dangerous to himself, and dangerous to others, but the only "matters set out in" the report as findings by Dr. Chowdhury were that Respondent was a "56 year old white male, with history of alcohol abuse/dependence, admitted with manic episode. He continues to be symptomatic with limited insight regarding his illness." These findings by Dr. Chowdhury "incorporated by reference" in the trial court's order are insufficient to support the trial court's determination that Respondent was dangerous to himself and to others.

Id. at 437, 667 S.E.2d at 304 (brackets omitted). In contrast, this Court has also held that the trial court's incorporation by reference of the physician's report included sufficient facts to support the trial court's conclusion that the respondent presented a "danger to himself." *See In re Zollicoffer*, 165 N.C. App. 462, 468-69, 598 S.E.2d 696, 700 (2004) ("Judge Senter's involuntary commitment order incorporates Dr. Soriano's examination and recommendation of 3 June 2003 in his findings of fact. In Dr. Soriano's recommendation she states that respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him 'at high risk for mental deterioration,' that respondent does not cooperate with his treatment team, and that he 'requires inpatient rehabilitation to educate him about his illness and prevent mental decline.' These findings of fact were not objected to in respondent's assignments of error, thus they are binding on appeal.").

Here, the facts included in Dr. Ijaz's report were more detailed than those in *Booker*, but still did not address conflicts in the evidence or resolve questions of credibility. The trial court's findings did not address Ms. Motley's testimony at all and did not resolve any conflicts in the evidence presented by Respondent's testimony. Respondent testified in her own defense. Her testimony was rambling and not always coherent, but she testified that she had lived alone for over 20 years and was able to take care of herself. She also testified that her daughter, who worked at the hospital where she was involuntarily committed, was "working together" with the hospital personnel to "permanently put [her] somewhere." "If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected." *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365-66.

The trier of fact could draw from the evidence an inference that Respondent's daughter was simply seeking to put her away, and, because she worked at the hospital, the physicians there were helping her. Respondent drove and presented herself with physical injuries at the emergency room, but was immediately taken for involuntary commitment evaluation by the nurses who stated Respondent's daughter told them that Respondent was mentally ill. Or the trier of fact could infer that Respondent's paranoia and confusion led her to believe that her daughter was seeking to harm her when she was actually trying to protect Respondent. But only the trial court can draw these inferences or any other potential inferences based on the evidence. This Court does not resolve issues of credibility and "[w]e do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. This Court does not review whether the trial court properly adjudicated all the evidence under the applicable burden of proof and whether its findings of fact support its conclusions. The trial court's order did not resolve the conflicts in the evidence and did not fully state the facts upon which its conclusions rested, so we must remand for additional findings of fact.

VII. Sufficiency of Evidence to Support Findings

[3] We also note that although evidence was presented at the hearing which could, if the trial court adjudicates conflicts in the evidence and makes the required findings of fact, support a conclusion that Respondent was "dangerous to self," there was no evidence she was "dangerous to others." In relevant part, N.C. Gen. Stat. § 122C-3(11) provides that one is "dangerous to self" when:

> [w]ithin the relevant past:
>
> 1. The individual has acted in such a way as to show:
>
>> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety[.]

N.C. Gen. Stat. § 122C-3(11) (2017).

There was evidence that Respondent's daughter was seeking treatment for her because she was dangerous to herself, and she had demonstrated the potential for harming herself most recently by her fall, by which she was actually injured, and frequent calls from neighbors reporting she was wandering in the streets. Ms. Motley testified regarding Respondent's condition upon admission to the hospital and the reasons for her admission:

> She came in. She did have the entire left side of her face was bruised. When she initially came into the hospital she told us that her daughter . . . had beaten her and she said that had happened before Christmas, a couple weeks or the week before Christmas. Since being on the unit she has come back and said that's not what happened at all, she remembered that she was scrubbing her floor and she slipped and fell and hit her face. It's the confusion and the wandering in the streets as described by her neighbors, her being out in the street and they're afraid that something may happen to her as well so that's why she was actually brought into the hospital for the bruising and the confusion and the wandering.

The evidence tends to show that Respondent was diagnosed with "possible neurocognitive disease disorder which is Alzheimer's disease." She had psychiatric hospitalizations at least twice before for this condition. Dr. Ijaz noted that respondent's symptoms upon admission were "confusion, auditory and visual hallucinations, flight of ideas, and confabulation." The term "confabulation" as used in the medical context refers to "filling in of gaps in memory through the creation of false memories by an individual who is affected with a memory disorder . . . and is unaware that the fabricated memories are inaccurate and false[.]"

Merriam-Webster, https://www.merriam-webster.com/medical/confabulation (last visited May 1, 2019). Respondent's own testimony at the hearing could also support Dr. Ijaz's findings of confusion, flight of ideas, and confabulation.

But there was no evidence, including in Dr. Ijaz's report, that respondent was dangerous to others. N.C. Gen. Stat. § 122C-3(11) defines "dangerous to others" as:

> [w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.

N.C. Gen. Stat. § 122C-3(11)(b).

There was no evidence that respondent had "inflicted or attempted to inflict or threatened to" harm anyone or of any "previous episodes of dangerousness." The court's conclusions that Respondent is mentally ill and dangerous to self *and others* are based solely upon the incorporated "facts set out in" Dr. Ijaz's letter. But Dr. Ijaz did not state any opinion that Respondent was dangerous "to others;" her opinion was only that "patient is a *danger to self*, due to level of confusion and confabulation." (Emphasis added.) Nor did Ms. Motley testify that Respondent had threatened anyone or presented any danger to others. No evidence was presented to support any findings or conclusion that Respondent was dangerous to others. The trial court's conclusion she was dangerous *to others* was not supported by either the evidence or findings of fact and must be vacated without remand.

VIII. Ineffective Assistance of Counsel

Respondent argues that "she was denied effective counsel when her attorney conceded that [she] should be involuntarily committed, an argument which was in stark contrast to her wishes." However, no prior case has determined that either *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984) (finding a criminal ineffective assistance of counsel claim to require deficient performance and prejudice), or *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (finding

where defendant's counsel admits to guilt in a criminal proceeding without defendant's consent to be per se ineffective assistance of counsel), are applicable to an involuntary commitment hearing. Even if we presume that an ineffective assistance of counsel claim is potentially available to a respondent denied their liberty in an involuntary commitment case, it is unnecessary for this Court to address this issue here. Since we must vacate and remand for additional findings of fact, any potential prejudice to Respondent from her counsel's argument can be addressed by the trial court on remand.

IX. Conclusion

The court's order contains insufficient findings to support its determination that Respondent was dangerous to herself or to others. *See Whatley*, 224 N.C. App. at 270, 736 S.E.2d at 530. Because the trial court failed to make sufficient findings of fact resolving material conflicts in the evidence, adjudicate questions of credibility, and only made findings by incorporation of Dr. Ijaz's report, we must vacate the order and remand for additional findings of fact regarding dangerousness to self and entry of a new order. Because there was no evidence to support a conclusion that Respondent was dangerous to others, we vacate the trial court's conclusion on that issue without remand. The commitment order is vacated and the matter is remanded.

VACATED AND REMANDED.

Judges TYSON and ARROWOOD concur.

IN RE M.T.-L.Y.

[265 N.C. App. 454 (2019)]

IN THE MATTER OF M.T.-L.Y.

No. COA18-826

Filed 21 May 2019

1 Termination of Parental Rights—effective assistance of counsel—denial of motion to continue

A mother was not deprived of her right to the effective assistance of counsel by the trial court's denial of a motion to continue a termination of parental rights hearing where the mother communicated regularly with her attorney for several months prior to the hearing and she provided no explanation as to how her attorney would have been better prepared had the hearing been continued.

2. Child Abuse, Dependency, and Neglect—permanency planning—section 7B-906.2(b)—concurrent plans—reunification efforts ceased

Based on prior case law interpreting N.C.G.S. § 7B-906.2(b), the trial court erred by removing reunification as a concurrent plan after the first and only permanency planning hearing for a neglected child, requiring the Court of Appeals to vacate the initial permanent plan and subsequent order terminating a mother's parental rights. The trial court's order ceasing reunification efforts, however, contained sufficient findings that addressed the relevant statutory factors and were supported by evidence.

Appeal by respondent-mother from order entered 18 April 2018 by Judge Laurie L. Hutchins in Forsyth County District Court. Heard in the Court of Appeals 13 March 2019.

Erica Glass for petitioner-appellee Forsyth County Department of Social Services.

Parent Defender Wendy Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent appellant-mother.

Parker Poe Adams & Bernstein LLP, by Catherine R.L. Lawson, for guardian ad litem.

INMAN, Judge.

Respondent-mother ("Mother") appeals, pursuant to N.C. Gen. Stat. § 7B-1001(a)(5)a., from the trial court's permanency planning order and the order terminating her parental rights over her daughter, Megan.[1] Mother argues that the trial court (1) violated her constitutional right to effective assistance of counsel when it denied her attorney's motion for continuance at the termination hearing; (2) erred in eliminating reunification as a permanent plan; and (3) erred by ordering that reunification efforts cease. After careful review of the record and applicable law, we affirm the trial court's denial of the motion for continuance and the order ceasing reunification efforts. But we conclude that recent precedent requires that we vacate the permanency planning and termination orders and remand this matter for further proceedings because the trial court failed to include reunification as an initial permanent plan.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record reflects the following facts:

On 29 July 2016, Megan was born prematurely at 34 weeks to Mother and Father (collectively "the parents"). At birth, Megan exhibited abnormalities and the parents were told to attend follow-up appointments with the pediatrician. After the parents missed two appointments, the Dare County Department of Social Services ("DDSS") became involved.

Father was charged with possession of cocaine on 9 September 2016. On 12 September 2016, DDSS and Mother agreed to a safety plan that Father was to only have supervised contact with Megan. Mother did not follow this plan. She left Megan in Father's care unsupervised at times when she could not find suitable care.

On 21 September 2016, the Dare County Sheriff's Office arrested Father pursuant to a warrant and, following a search of the parents' home, discovered a "marijuana pipe, 10 used syringes, and a spoon with cocaine residue." The next day, DDSS and Mother agreed to a new safety plan, stipulating that, among other things, Father would no longer reside in the home. Mother again failed to adhere to the safety plan. She allowed Father to return to their home, prompting DDSS to file a juvenile petition claiming that Megan was a neglected juvenile. On 23 September 2016, the trial court ordered that Megan be placed in non secure custody with DDSS.

---

1. To preserve anonymity, we use the above pseudonym to refer to the juvenile. Respondent-father ("Father") is not a party to this appeal nor was he involved in any of the trial court proceedings.

Following a custody hearing on 3 October 2016, the trial court continued non secure custody but placed Megan into the care of her maternal grandmother, who lived in Winston Salem, within Forsyth County. Megan's maternal grandmother was also caring for Mother's two other juvenile children stemming from a voluntary placement agreement with DDSS. Mother was allowed unlimited supervised visitation so long as it was inside the grandmother's home.

Although the plan approved by the trial court was for Mother to reside in Winston Salem and provide regular care to her two other children and Megan in their grandmother's home, she did not follow through. She lived with the grandmother for two days, but then left, and visited Megan only once between 5 and 20 October. Mother struggled to sustain a proper living situation and had no contact with DDSS following the custody hearing until 20 October 2016, when the grandmother fell ill and could no longer care for the children. DDSS assumed care of Megan and placed her into her former foster care home.

Mother and Father then stipulated that Megan was a neglected juvenile pursuant to Section 7B-101(15) of our General Statutes. On 14 November 2016, after an adjudication hearing, the trial court adjudicated Megan neglected and ordered that she remain in non secure custody of DDSS. Mother was allowed "at least one visit" with Megan before a December dispositional hearing date and any other visits "as may be arranged," on the conditions she participate in mental health and substance abuse treatment services, undergo psychological evaluations, refrain from consumption of alcohol and drugs, submit to drug testing, establish stable housing, and maintain regular communication with DDSS.

Mother's living and work circumstances reportedly improved, although they were not verified to the trial court or DDSS. Mother told DDSS that she rented a room in her uncle's[2] house in Winston Salem and that he employed her to do office work in his real estate business.

In January 2017, the trial court transferred Megan's case to Forsyth County, concluding that Dare County was an inconvenient forum, and the Forsyth County Department of Social Services ("FDSS") substituted for DDSS and placed Megan in a new foster home.

---

2. Documents in the record and the trial court referred to this same person as Mother's "father" at times and as her uncle at other times. Because Mother in her briefs refers to him as her uncle, we refer to him as such.

After a hearing in February 2017, the trial court on 17 April 2017 ordered that non secure custody remain with FDSS but that reunification efforts continue. The trial court ordered that for Mother to regain full custody of Megan, she was required to, among other things, abstain from consuming drugs and alcohol; perform any drug screening requested by FDSS, with a refusal to cooperate being interpreted as a positive result; submit to psychological evaluations; notify foster care within 24 hours of any change in her employment or household status; arrange a family services agreement to work toward reunification; participate in Megan's medical appointments; comply with the visitation plan of two visits per week at Megan's daycare under a social worker's supervision; complete parenting classes; and confirm her employment and wages.

During the next hearing, on 8 May 2017, FDSS introduced evidence that Mother had failed to comply with the court-ordered conditions to regain custody of Megan. Specifically, Mother (1) had not enrolled in or completed any parenting classes; (2) often missed, was late to, or canceled visitation appointments with Megan; and (3) did not fully cooperate with drug testing. Mother's urine tested positive for cocaine in February 2017, and she did not attend a February hair testing appointment, saying she did not think she had to go because she was required to complete a substance abuse assessment from the previous positive test. In March, Mother successfully completed a urine test but not a hair test. Although she stated previously that she had completed hair testing for Dare County, she told the trial court that she did not perform the hair test because she had never done it before. When confronted by FDSS, Mother then explained that her adherence to the religion of Islam prevented her from performing the hair tests because the test required her to cut her hair; but FDSS reported that Mother "does cut, color and not cover her hair." Mother maintained to FDSS that she was being financially supported by her uncle and was remodeling the older home and planned for her family to live there. She also stated that her uncle had promoted her to the position of vice president of his company and had increased her responsibilities and salary. However, Mother failed to provide any verification of the hours she worked, her salary, or her job title. Furthermore, Megan's social worker learned from a relative and one of Mother's older children's teachers that Father had been seen residing in Mother's home and picking up the child from school in January 2017.

Mother did not arrive at the hearing until near the end, after FDSS had introduced evidence and the trial court announced its ruling from the bench to continue custody with FDSS. By written order on 12 July 2017, the trial court kept custody with FDSS and conditioned reunification

with Megan on Mother's cooperation with all of the trial court's previously ordered conditions. The order also included findings of fact adopting the evidence presented by FDSS.

In June 2017, Mother notified Megan's social worker via email that her father was diagnosed with a terminal illness, and she traveled with her two other children to Georgia to care for him. Sometime between the end of July and early September, Mother emailed to her attorney that her father's health had deteriorated and that she no longer had a support system in Winston Salem as she could not live in her uncle's home or work for his real estate business anymore. Mother wrote in July that she was living in a motel in Portsmouth, Virginia, and that she was receiving counseling in Chesapeake, VA for her anxiety and depression. She did not have a phone until the first week of September after starting a job at a Waffle House. Though she explained that she was in dire straits, Mother told her attorney she intended to attend the next hearing in September and requested that it be continued one week.

On 8 September 2017, the trial court convened the first and only permanency planning hearing. Mother did not attend. Mother's attorney requested a continuance, arguing that additional time was needed because Mother was still out of state and wanted to send information relevant to the trial court's permanent plan via facsimile. After FDSS objected to the motion, Mother's attorney agreed for the hearing to start that day but requested that it be "continue[d] [] in progress." Mother's attorney advised the trial court that she had spoken with Mother on the phone that morning as well as the day before, and, prior to that, their last contact was by email in July.[3] Megan's social worker also stated to the trial court that her last line of communication with Mother was between 27 and 29 June 2017, when she notified Mother of Megan's ear surgery. The trial court summarily denied the motion.

Between the May and the September hearings, Mother attended only three of 37 scheduled visits with Megan, one of which she attended for 12 minutes. She last visited Megan in June. Mother never verified that she completed a substance abuse assessment; complied with drug testing for over three months; participated in Megan's medical appointments for June, July, and August 2017; notified foster care within 24 hours of

3. The record is unclear as to when Mother's attorney last communicated with her prior to the day before the permanency planning hearing. Mother's brief states that the email about her father was sent in early September, but at the September hearing, her attorney stated that the last contact was in July and that "[she] had sent letters to [Mother]" pursuant to the "last address [she] had for her."

any change in employment or household status; or complied with the family services agreement formulated in February.

On 25 October 2017, following the permanency planning hearing, the trial court found that there was a "slim likelihood of reunification" between Mother and Megan as she was (1) "not making adequate progress within a reasonable period of time;" (2) not "actively participating in or cooperating with the plan;" (3) not available to the trial court for hearings; and (4) "acting in a manner inconsistent with the health or safety" of Megan. The trial court ordered that FDSS cease reunification efforts and ordered that the primary permanent plan for Megan be adoption, with a secondary plan of guardianship.

On 9 February 2018, the trial court heard FDSS's motion to terminate Mother's parental rights regarding Megan, with Mother in attendance. Mother's attorney again motioned for a continuance, arguing that she had little contact with Mother prior to the hearing date. The trial court denied the motion.

Mother testified in the hearing that she had been residing in motels in Virginia Beach since June 2017.[4] She stated that she had been working for a construction company in Virginia since November 2017 as an insurance claims specialist and contractor, earning $650 a week, and that she had been attending parenting classes and participating in mental health and drug assistance programs. Mother, however, failed to verify her circumstances with the social worker. She also admitted that, as of the hearing date, she could not care for Megan.[5]

By order written on 18 April 2018, the trial court terminated Mother's parental rights regarding Megan[6] after finding that Mother (1) failed to verify completion of substance abuse assessments; (2) failed to adhere to drug screening requests; (3) continually had no stable living environment and did not verify her working and living situation in Virginia; (4) with the exception of three payments, failed to provide financial support for Megan; and (5) consistently had minimal to no contact with Megan, last visiting in June 2017. Mother appeals.

---

4. Mother also stated that her two older children's daycare teacher has had "custody" of them, outside of any state social services participation, since December 2017.

5. The record includes no testimony or other evidence concerning Mother's father or her time spent caring for her father in Georgia.

6. Father's parental rights were terminated as well. He did not appeal.

II. ANALYSIS

A. Effective Assistance of Counsel

[1] Mother first argues that the trial court violated her constitutional right to effective assistance of counsel when it denied her attorney's motion for continuance at the termination hearing. Generally, a trial court's decision concerning a motion to continue is reviewed for abuse of discretion; however, "the denial of a motion to continue presents a reviewable question of law when it involves the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989). Questions of law are reviewed *de novo*. *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights," including the right to effective assistance of counsel. *In re L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (quotations and citation omitted). We held in *Bishop*:

> The right to effective assistance of counsel includes, as a matter of law, the right of client and counsel to have adequate time to prepare a defense. Unlike claims of ineffective assistance of counsel based on defective performance of counsel, prejudice is presumed in cases where the trial court fails to grant a continuance which is essential to allowing adequate time for trial preparation.

92 N.C. App. at 666, 375 S.E.2d at 679 (quotations and citations omitted). But, if the "lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue." *Id.* (citing *State v. Sampley*, 60 N.C. App. 493, 299 S.E.2d 460 (1983)).

In support of her argument, Mother contends that, notwithstanding that she and her attorney communicated via "phone and by e-mail and by text," they lacked sufficient face to face communication to prepare adequately for the termination hearing. The record shows that FDSS filed its motion to terminate Mother's parental rights on 17 November 2017, almost three months before the motion was heard on 9 February 2018. Additionally, Mother had the same attorney during the 8 September 2017 hearing and as early as the trial court's 17 April 2017 order keeping non secure custody of Megan with FDSS. Mother does not justify the necessity of in person preparation—other than citing bare "logistical difficulties" for the distance she had to travel—as her attorney admitted that they had otherwise been communicating effectively for several months and that Mother has had the same attorney of record for about a year.

Mother states in her brief that "[t]here was no indication from [her attorney's] motion that [she] did not keep in contact with counsel and did not attempt, as best she could, to cooperate with counsel." Mother offers no legal authority on the importance of having face to face communication with one's attorney when alternative means have been employed. Nor does she explain why or how her attorney would have been better prepared had the hearing been continued.[7] Accordingly, we hold that Mother was not deprived of effective assistance of counsel and the trial court did not err in denying the motion to continue.

B. Reunification and Reunification Efforts

[2] Mother contends that N.C. Gen. Stat. § 7B-906.2(b) required the trial court to include reunification in its initial permanent plan, so that the trial court had no statutory authority to conclude otherwise. Following controlling precedent, we agree.

When juveniles are adjudicated abused, neglected, or dependent, Chapter 7B provides for, among other things, "services for the protection of juveniles by means that respect . . . the juveniles' needs for safety, continuity, and permanence." N.C. Gen. Stat. § 7B-100(3) (2017). Chapter 7B expressly delineates the procedural responsibilities and duties of the court, the requisite county department of social services, and the affected parties. N.C. Gen. Stat. §§ 7B-100 *et seq*. (2017). Importantly, Chapter 7B establishes the "standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(4) (2017). In the event that the trial court removes custody of the juvenile from the parents, "there shall be a review hearing designated as a permanency planning hearing" within 12 months from the date of the initial order. N.C. Gen. Stat. § 7B-906.1(a) (2017).

At the permanency planning stage involving a neglected juvenile, the trial court must adopt concurrent permanent plans consisting of a primary and secondary plan. N.C. Gen. Stat. §§ 7B-906.2(a), (b) (2017). If determined to be in the juvenile's best interest, the trial court can adopt two of the six statutory plans, including adoption, guardianship,

7. In her reply brief, Mother also reasons that her attorney "did not explain to the trial court the specific reasons why she needed more time to prepare, and was not required to do so, as that would have been a violation of her duty of confidentiality." We nonetheless conclude that there was ample communication, time, and knowledge surrounding Mother's case for her attorney to prepare for the termination hearing.

reinstatement of parental rights, and reunification. N.C. Gen. Stat. § 7B-906.2(a). When deciding which plans to impose, Chapter 7B instructs the trial court as follows concerning reunification:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c)[8] or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b). The language of Section 7B-906.2(b) seems plainly to provide that a trial court, in any permanency planning hearing, can omit reunification as a concurrent plan if it determines that reunification efforts are either futile or contrary to the juvenile's well being.

Our interpretation of Section 7B-906.2(b), however, is controlled by a prior decision by this Court. Mother cites this Court's recent decision in *In re C.P.*, __ N.C. App. __, 812 S.E.2d 188 (2018), and argues that it requires this Court to vacate the trial court's order omitting reunification from its initial concurrent permanent plan. In *In re C.P.*, the respondent mother appealed the trial court's award of permanent guardianship of her child to the child's half brother following the initial permanency planning hearing. *Id.* at __, 812 S.E.2d 190. After we held that the trial court could hold joint adjudicatory, initial disposition, and initial permanency planning hearings, we agreed with the respondent mother that "reunification *must* be part of an *initial* permanent plan." *Id.* at __, 812 S.E.2d at 191 (emphasis added). We reasoned that "[t]he statutory requirement that 'reunification shall remain' a plan presupposes the existence of a prior concurrent plan which included reunification." *Id.* As such, this Court held, a trial court is only at liberty to remove reunification from

---

8. Section 7B-901(c) "authorizes the elimination of reunification efforts at an initial disposition under limited [statutorily-prescribed] circumstances" when the order puts custody of the juvenile with a department of social services. *In re J.M.*, __ N.C. App. __, __, 804 S.E.2d 830, 840 (2017) (citing N.C. Gen. Stat. § 7B-901(c)). Because the trial court first ceased reunification efforts at the initial permanency planning hearing, rather than at a dispositional hearing, Section 7B-901(c) does not apply.

the concurrent plan during *subsequent* permanency planning hearings. *Id.* The holding in *In re C.P.* requires us to hold in this case that the trial court erred in removing reunification as a concurrent plan following the first and only permanency planning hearing on 8 September 2017.

In re C.P. went on to hold that, notwithstanding the obligation to include reunification as an initial concurrent plan, Section 7B-906.2(b) allows the trial court to cease reunification efforts during an initial permanency planning hearing. *Id.* A year before *In re C.P.* was decided, this Court held in *In re H.L.* that a trial "court was permitted to [cease reunification efforts] even though [the hearing] was the first permanency planning hearing in [that] case." __ N.C. App. __, __, 807 S.E.2d 685, 693 (2017). In *In re C.P.* we explained that, contrary to *In re H.L.*'s holding, such action by the trial court conflicts with N.C. Gen. Stat. § 7B-906.1(g), which provides:

> At the conclusion of each permanency planning hearing, the judge shall make specific findings as to the best permanent plans to achieve a safe, permanent home for the juvenile within a reasonable period of time. *The judge shall inform* the parent, guardian, or custodian that failure or refusal to cooperate with the plan *may result* in an order of the court in a subsequent permanency planning hearing that reunification efforts may cease.

N.C. Gen. Stat. § 7B-906.1(g) (2017) (emphasis added); *accord In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191 ("[D]espite the plain language of Section 7B-906.1(g), . . . [*In re H.L.*] held that a trial court can cease reunification efforts at the first permanency planning hearing[.]"). *In re C.P.* reasoned that this provision "required prior notice to be provided to a parent before reunification efforts may be ceased;" so that the trial court was prohibited from ceasing reunification efforts in that case. However, because "case law require[d] us to follow" *In re H.L.*, we affirmed the trial court's ceasing of reunification efforts, as it made the appropriate findings required by Section 7B-906.2(b) that such efforts would have adversely affected the juvenile's health or safety. *In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191, 191 n.3 (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

The trial court in *In re C.P.* conducted its adjudicatory, initial disposition, and initial permanency planning hearings simultaneously; by contrast, in this case, the trial court staggered the hearings over a period of months. *Id.* at __, 812 S.E.2d at 190. But *In re C.P.*'s broad holding that "reunification *must* be part of an *initial* permanent plan" is not limited

by its other procedural circumstances. *Id.* (emphasis added). Because we cannot distinguish *In re C.P.*'s holding, and in particular its interpretation of Section 7B-906.2(b), we are bound to follow it. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37.

In that neither this Court nor our Supreme Court has cited to, followed, or analyzed the holding of *In re C.P.*, we note our reservations concerning that decision's interpretation of Section 7B-906.2(b). There are two statutory provisions in Chapter 7B that seem to contradict this Court's interpretation of Section 7B-906.2(b). First, N.C. Gen. Stat. § 7B-906.2(c) provides:

> *At the first permanency planning* hearing held pursuant to [N.C. Gen. Stat. §] 7B-906.1, the court shall make a finding about whether the efforts of the county department of social services toward reunification were reasonable, *unless reunification efforts were ceased in accordance with* [N.C. Gen. Stat. §] 7B-901(c) or *this section*.

N.C. Gen. Stat. § 7B-906.2(c) (2017) (emphasis added). Although *In re H.L.* quoted subdivision (c) to support its holding that reunification efforts could be ceased initially, *In re C.P.* did not discuss this analysis, instead reasoning that *In re H.L.* only misapplied a notice requirement in Section 7B-906.1(g). *See In re C.P.*, __ N.C. App. at __, 812 S.E.2d at 191 n.3 ("Respectfully, it appears that our Court in *H.L.* did not focus on Section 7B-906.1(g) in its entirety. The second sentence of that section requires prior notice be provided to a parent before reunification efforts may be ceased."). Second, Chapter 7B provides:

> *At each hearing*, the court shall consider . . . . Whether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety . . . . If the court determines efforts would be unsuccessful or inconsistent, the court shall schedule a permanency planning hearing within 30 days to address the permanent plans in accordance with this section and [N.C. Gen. Stat. §] 7B-906.2, *unless the determination is made at a permanency planning hearing*.

N.C. Gen. Stat. § 7B-906.1(d)(3) (2017) (emphasis added). Section 7B-906.1(d)(3) does not constrain ceasing reunification efforts to subsequent permanency planning hearings, but rather seems to allow reunification efforts to be ceased before, after, and even during the first permanency planning hearing. These statutes cannot be read in isolation. Sections 7B-906.2(c) and 7B-906.1(d)(3), when considered together,

seem to provide—consistent with our reading of Section 7B-906.2(b)—that reunification can be eliminated as a primary or secondary plan at the first permanency planning hearing, so long as the trial court makes the required statutory findings.

In re C.P.'s assertion that reunification is a precondition to the trial court's first permanent plan also brings about anomalous results and consequences that raise more questions than answers going forward. For instance, if a trial court were to order reunification initially, but correctly conclude reunification efforts should cease, it still must "order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans." N.C. Gen. Stat. § 7B-906.2(b). We are unable to identify what "efforts" social services must perform when reunification efforts have been ceased but reunification is still included in a permanent plan. A trial court order for a department of social services to cease reunification efforts seems implicitly to eliminate reunification as a permanent plan and vice versa. This example can also be applied to *In re H.L.* In that case the trial court ordered a secondary plan of reunification while also ceasing reunification efforts. *See* __ N.C. App. at __, 807 S.E.2d at 687 ("[T]he court also . . . established a secondary permanent plan of reunification."). The issue of whether reunification must be included in the initial concurrent plan was not raised on appeal in *In re H.L.*

Section 7B-1001(a)(5) also provides that a parent can appeal a final "order entered under [Section] 7B-906.2(b)," obligating the Court of Appeals to "review the order *eliminating reunification as a permanent plan*." N.C. Gen. Stat. § 7B-1001(a)(5)a. (2017) (emphasis added). If a trial court ceases reunification efforts, but includes reunification as a permanent plan, by the express language of Section 7B-1001(a)(5), an aggrieved parent does not have the statutory right to appeal that order.

Lastly, *In re C.P.* creates a dichotomy between "reunification" and "reunification efforts." One could reasonably construe both terms as being a unitary concept—*i.e.*, being mutually inclusive. This Court has alluded to this interpretation. *See In re A.P.W.*, 225 N.C. App. 534, 537, 741 S.E.2d 388, 390 (2013) (agreeing with respondent mother that "the order, while not explicitly ceasing reunification efforts, implicitly did so by changing the permanent plan to adoption and ordering the filing of a petition to terminate parental rights"); *see also In re J.N.S.*, 207 N.C. App. 670, 680, 704 S.E.2d 511, 518 (2010) ("Although the trial court failed to make any findings regarding reasonable efforts at reunification . . . the trial court effectively determined that reunification efforts . . . should

cease when it ordered DSS to file a petition to terminate respondent mother's parental rights.").

To avoid confusion of our DSS workers and trial courts and to promote permanency for children in these cases, we encourage the North Carolina General Assembly to amend these statutes to clarify their limitations.

Because *In re C.P.* and *In re H.L.* direct that a trial court can cease reunification efforts during the initial permanency planning hearing, we review Mother's arguments that the trial court here made insufficient findings to support its ruling that reunification efforts should cease. *See In re T.W.*, __ N.C. App. __, __, 796 S.E.2d 792, 796 (2016) ("[I]f reunification efforts are not foreclosed . . . pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C. Gen. Stat. § 7B-906.2(b)." (emphasis in original)). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

When relying on Section 7B-906.2(b) for ceasing reunification efforts, the trial court must "demonstrate lack of success" regarding each of the following:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2017); *see In re D.A.*, __ N.C. App. __, __, 811 S.E.2d 729, 734 (2018) (providing that the trial court must establish the four factors in Section 7B-906.2(d) when ceasing reunification efforts under Section 7B-906.2(b)). In its permanency planning order, the trial court mirrored the statutory language and provided:

> [Mother] and [Father] are not making adequate progress within a reasonable period of time under the plan. [Mother] and [Father] are not actively participating in or cooperating with the plan, [FDSS], and the guardian ad litem for [Megan]. [Mother] and [Father] are not available to the Court, [FDSS], and the guardian ad litem for [Megan]. [Mother] and [Father] are acting in a manner inconsistent with the health or safety of the juvenile.

The trial court subsequently found and concluded that "[e]fforts towards reunification of [Megan] with [Mother] . . . should cease," concluded that a "permanent plan of adoption with a concurrent plan of guardianship" was in Megan's best interest, and ordered that reunification not be included in Megan's permanent plan.

Mother contends that some of the trial court's findings conflict with one another and therefore the order must be reversed and remanded to clarify that discrepancy. In finding of fact 30, the trial court found that "[t]here is a *slim likelihood* of reunification with [Mother] within the next six months as [she] *may have completed* some of the court ordered requirements in [Virginia]," but "has failed to provide verification of this to date." (emphasis added). But finding of fact 33 determined that "[Mother is] *not making adequate progress* within a reasonable period of time under the plan." (emphasis added).

"At any permanency planning hearing where the juvenile is not placed with a parent," the trial court must make written findings of fact pertaining to, among other things, "[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests." N.C. Gen. Stat. § 7B-906.1(e)(1) (2017). Despite Mother's argument that there is discrepancy between findings of fact 30 and 33, the trial court was merely performing its statutory mandate in determining the likelihood of reunification between Megan and Mother in the following months. The trial court succinctly concluded that, though Mother may have made some efforts to comply with court ordered conditions, she failed to verify their completion and, partly because of that, Mother was not making adequate progress. Because partially performing a required condition does not necessarily preclude a conclusion that the performance is inadequate, the findings are not contradictory.

Mother next argues that there was no evidence supporting the trial court's finding that she was "acting in a manner inconsistent with the health or safety of [Megan]" because the "court-ordered requirements[,]

which [Mother] did not follow," did not affect Megan's health and safety. We disagree. The record includes an abundance of evidence to support the trial court's finding, including: Mother (1) never verified participating in any substance abuse assessment; (2) failed to verify her living arrangements with FDSS; (3) failed to comply with the family services agreement; (4) allowed Father to supervise one of her other two children and to reside in her residence in violation of the safety plan; (5) sporadically, at best, adhered to the visitation schedule; (6) refused frequent requests to perform the necessary drug screens, and tested positive for drugs; (7) failed to verify her employment with her uncle's real estate business—including hours worked, salary, and title; and (8) never participated in Megan's mandatory medical appointments relating to the abnormalities she had upon her birth. Mother's actions need only be "inconsistent" with Megan's health or safety; her continued recalcitrance to the trial court and her responsibilities satisfy this statutory requirement.

Mother finally argues that the "trial court failed to make the ultimate finding required under Section 7B-906.2(b) 'that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety.' " Although the trial court did not use the precise statutory language from Section 7B-906.2(b), our Supreme Court has held:

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language . . . . The trial court's written findings must address the statute's concerns, but need not quote its exact language. On the other hand, use of the precise statutory language will not remedy a lack of supporting evidence for the trial court's order.

In re L.M.T., 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013). On appellate review, we need only "consider whether the trial court's findings of fact address the *substance* of the statutory requirements." *Id.* at 165, 752 S.E.2d at 454 (emphasis added).

Despite Mother's contention, the trial court here made the requisite findings "address[ing] the statute's concerns," *id.* at 168, 752 S.E.2d at 455, that reunification efforts would be unsuccessful or inconsistent with Megan's well being. Throughout proceedings following Megan's removal from her custody, Mother regularly avoided her court-ordered responsibilities and continuously showed little desire to reunite with Megan. While some of the findings, as argued by Mother, could indeed

"suggest that further efforts toward reunification would not be unsuccessful or inconsistent," (emphasis omitted), we cannot conclude that the trial court's "ruling [was] so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 11, 650 S.E.2d 45, 51 (2007).

Even assuming that the trial court's permanency planning order failed to adequately establish that reunification efforts should cease, contrary to Mother's argument, its termination order provides supplemental findings that support the trial court's order ceasing reunification efforts. *See In re L.M.T.*, 367 N.C. at 170, 752 S.E.2d at 456-57 ("[I]f a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order. . . . Because we consider both orders 'together,' incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order."); *cf. In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (2015) ("We hold that the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders."). The trial court found that Mother (1) never communicated nor verified with FDSS her exact address or employment status while residing in Virginia; (2) was residing in motels in Virginia since June 2017 and "had no place to live;" (3) other than three payments, did not pay for any medical care for Megan; and (4) stated in open court during the termination hearing that "she can not [sic] care for Megan."

III. CONCLUSION

In sum, we affirm the trial's court order denying Mother's attorney's motion for continuance because it did not violate her constitutional right to effective assistance of counsel. We vacate the trial court's initial concurrent permanent plan for failure to include reunification as either a primary or secondary plan and its order terminating Mother's parental rights, *see In re J.T.*, __ N.C. App. __, __, 796 S.E.2d 534, 537 (2017) (vacating both permanency planning order and order terminating parental rights for failure to properly cease reunification efforts), but affirm the trial court's order ceasing reunification efforts, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges STROUD and ZACHARY concur.

TODD PRESTON JACKSON, PLAINTIFF
v.
THE TIMKEN COMPANY, DEBORAH K. GENTRY, RN,
A/K/A DEBORAH GENTRY WEATHERMAN, DEFENDANTS

No. COA18-695

Filed 21 May 2019

Jurisdiction—trial court—medical negligence—incident at work —not subject to Worker's Compensation Act

A machine operator's claim that he was misdiagnosed by a company nurse after suffering a stroke at work was not covered under the Worker's Compensation Act—and therefore not subject to the exclusive jurisdiction of the Industrial Commission—because the alleged injury was not caused by an accident nor did it arise out of the employee's employment.

Appeal by Defendants from order entered 8 March 2018 by Judge Julia L. Gullett in Gaston County Superior Court. Heard in the Court of Appeals 14 November 2018.

Charles G. Monnett III & Associates, by Charles G. Monnett III and Helen S. Baddour, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Carl Newman and Samuel H. Poole, Jr., for defendants-appellants.

MURPHY, Judge.

Where an injury occurs in the course of one's employment but is not caused by an accident and does not arise out of the employment, that injury does not fall under the Workers' Compensation Act, and the injured party may not be compensated thereunder. If the Industrial Commission lacks exclusive jurisdiction to hear a claim that occurs in the course of one's employment, a trial court does not err in asserting subject matter jurisdiction over that claim.

BACKGROUND

This action was initiated in September 2017 when Plaintiff filed a civil complaint in Gaston County Superior Court asserting a claim for medical negligence against his employer, The Timken Company ("Timken"), and its company nurse, Deborah Gentry ("Gentry"). Plaintiff alleged he was

negligently diagnosed and treated after suffering a stroke at work. Prior to filing his complaint, Plaintiff had also filed a workers' compensation claim with the Industrial Commission based on the same facts. Plaintiff's workers' compensation claim was heard by a Deputy Commissioner, who issued an Opinion and Award denying Plaintiff's claim on 1 November 2017. The Opinion and Award concluded Plaintiff did not sustain an injury by accident arising out of and in the course of his employment, and therefore his suit did not fall under the Industrial Commission's jurisdiction. Plaintiff did not appeal the Industrial Commission's Opinion and Award, and that matter is not ongoing.

In lieu of answering Plaintiff's civil complaint, Defendants moved to dismiss the suit for lack of subject matter jurisdiction because "the Workers' Compensation Act provides the exclusive remedy for actions such as this against the employer . . . ." The trial court denied Defendants' motion and made the following conclusions of law:

> 1. This court has jurisdiction over the subject matter of this action.
>
> 2. The Exclusive Remedy provision of the North Carolina Workers' Compensation Act generally applies to injuries sustained in the course and scope of employment, but the provisions of the Act do not apply to this case.
>
> 3. There is no causal relationship between the Plaintiff's alleged injuries and the Plaintiff's employment at The Timken Company.
>
> 4. As determined by the Industrial Commission's Opinion and Award, the Plaintiff's alleged injuries do not arise out of the course and scope of his employment at The Timken Company.

Defendants now appeal pursuant to N.C.G.S. § 7A-27(b)(3)(a).

ANALYSIS

Defendants' only argument on appeal is that the trial court erred in denying their *Motion to Dismiss* for lack of subject matter jurisdiction. Defendants argue the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims and note that the parties stipulated as much in the action before the Industrial Commission. "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).

We first note that the parties cannot confer subject matter jurisdiction upon a court by consent or stipulation. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) ("Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.") (internal quotation marks omitted); *Reid v. Reid*, 199 N.C. 740, 743, 155 S.E. 719, 720 (1930) ("Jurisdiction, withheld by law, may not be conferred on a court, as such, by waiver or consent of the parties."). The parties' stipulation of subject matter jurisdiction in the workers' compensation claim has no effect upon our consideration of the jurisdiction of the General Court of Justice.

Defendants correctly note our Workers' Compensation Act ("The Act") provides that "[i]f the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . ." N.C.G.S. § 97-10.1 (2017). Section 10.1 of The Act has been interpreted as a bar to a plaintiff's common law ordinary negligence suit against his employer or coworkers where the allegations and evidence show that their alleged harm stems from an injury by accident arising out of and in the course of the plaintiff's employment. *Abernathy v. Consolidated Freightways Corp. of Delaware*, 321 N.C. 236, 240-41, 362 S.E.2d 559. 562 (1987). However, it has never been applied where, as here, Plaintiff alleges a coworker was negligent under our medical malpractice statute. Additionally, The Act does not cover injuries that occur at one's place of work but that are not the result of an accident arising out of and in the course of that person's employment. *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 580, 364 S.E.2d 186, 188 (1988).

In resolving this appeal, we must decide, as the trial court did, whether Plaintiff's claim is covered by The Act. "An injury is compensable under [The Act] only if (1) it is caused by an 'accident,' and (2) the accident arises out of and in the course of employment." *Pitillo v. N.C. Dep't. of Envtl. Health & Nat. Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002). Here, Plaintiff argues his injury was not caused by an accident and did not arise out of and in the course of his employment. We agree.

"Injury and accident are separate concepts, and there must be an accident which produces the injury before an employee can be awarded compensation." *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 138, 620 S.E.2d 533, 536 (2005). "An accident under [The Act] has been defined as . . . 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected

consequences.' " *Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811 (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999)). Similarly, our Supreme Court has defined an accident as "an unlooked for and untoward event which is not expected or designed by the injured employee. A result produced by a fortuitous cause. An unexpected or unforeseen event. An unexpected, unusual or undesigned occurrence." *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947) (internal quotation marks and citations omitted).

Here, Gentry's alleged failure to properly diagnose and treat Plaintiff cannot be described as an "accident" as contemplated by The Act. Timken employed Gentry as an on-site nurse to provide medical care to its employees. When Plaintiff sought and received medical care from Gentry, it was not "an unlooked for and untoward event which [was] not expected or designed by [Plaintiff]." *Id.* It is entirely foreseeable and expected that a sick or injured Timken employee will visit the company nurse to receive treatment. By way of analogy, if a janitor at WakeMed suffered a heart attack on the job and received negligent treatment from an on-site cardiologist, he would certainly be able to bring a medical malpractice claim in Superior Court. An employee seeking care from a medical professional at his place of work is not the type of occurrence that creates an injury by accident under The Act. Plaintiff's visit to the company nurse is not an instance that falls within the definition of accident promulgated by our Supreme Court.

Assuming *arguendo* this occurrence could be classified as such, we are nevertheless unpersuaded the injury arose out of Plaintiff's employment.[1] "Arising out of employment relates to the origin or cause of the accident. The controlling test of whether an injury arises out of the employment is whether the injury is a natural and probable consequence

1. The phrase "arising out of and in the course of employment" represents a single test of work connection. *Ramsey v. Southern Indus. Constructors Inc.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006). Nevertheless, "[T]he phrases 'arising out of' and 'in the course of' one's employment are not synonymous but rather are two separate and distinct elements[,] both of which a claimant must prove to bring a case within the Act." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). "The words 'in the course of [employment]' refer to the time, place, and circumstances under which an accident occurred. The accident must occur during the period and place of employment." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 381, 752 S.E.2d 677, 681 (2013) (internal quotation marks and citations omitted). Plaintiff does not contest the fact that his injury occurred in the course of his employment, which is clear from the record. We need only determine whether the alleged injury by accident arose out of his employment.

of the nature of the employment." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 381, 752 S.E.2d 677, 680 (2013) (internal quotation marks and citations omitted). We have said an injury meets this definition "when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein." *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E.2d 47, 52 (1968).

Here, Plaintiff's alleged injury resulted from a failure to properly diagnose and treat the stroke he suffered on the job. That injury, although caused by a coworker, does not spring from his employment as a grinding machine operator for Timken because it is not a natural or probable consequence of the nature of Plaintiff's employment. Stated differently, when Plaintiff reported to work as a grinding machine operator he would not have considered being misdiagnosed or mistreated for a stroke by a medical professional as a possible consequence of that work.

In arguing that the Industrial Commission has exclusive jurisdiction over this action, Defendants point to our Supreme Court's decision in *Abernathy v. Consolidated Freightways Corp. of Delaware*, 321 N.C. 236, 362 S.E.2d 559 (1987). In *Abernathy*, an employee sued his coworkers for causing him to be injured by a brakeless tow motor, but his suit was dismissed by our Supreme Court when it concluded The Act "provides the exclusive remedy when an employee is injured in the course of his employment by the ordinary negligence of co-employees." *Id.* at 237, 362 S.E.2d at 560. Here, unlike in *Abernathy*, Plaintiff alleges his coworker is liable to him for breaching N.C.G.S. § 90-21.12, our statute establishing a special duty for medical professionals when rendering care. This case is further distinguishable from *Abernathy* because Plaintiff did not suffer an injury by accident arising out of his employment.

In sum, Plaintiff's claim does not fall under the exclusive jurisdiction of the Industrial Commission through The Act. Where an injury occurs in the course of one's employment but is not caused by an accident and does not arise out of that employment, that injury does not fall under The Act and the injured party may not be compensated thereunder. As both the Industrial Commission and trial court correctly concluded, Plaintiff's injuries are not compensable under The Act. Therefore, the Commission does not have exclusive jurisdiction over Plaintiff's claim, and the trial court did not err in denying Defendants' *Motion to Dismiss* for lack of subject matter jurisdiction.

CONCLUSION

The Industrial Commission does not have exclusive jurisdiction over Plaintiff's claim. The trial court did not err in asserting jurisdiction over this matter or in denying Defendants' *Motion to Dismiss*.

AFFIRMED.

Judges STROUD and DIETZ concur.

ANITA KATHLEEN PARKES, PLAINTIFF
v.
JAMES HOWARD HERMANN, DEFENDANT

No. COA18-888

Filed 21 May 2019

Medical Malpractice—proximate cause—loss of chance of a better medical outcome—summary judgment

In a medical malpractice case, the trial court properly granted summary judgment in favor of the physician after finding insufficient evidence of proximate cause where the evidence showed that, even if the physician had correctly diagnosed plaintiff's stroke and had administered the proper treatment, there would have been only a 40% chance of improving plaintiff's neurological condition. More importantly, North Carolina law does not recognize a "loss of chance" at a better outcome as a separate type of injury for which plaintiffs may recover in medical malpractice cases.

Judge BERGER concurring by separate opinion.

Appeal by Plaintiff from order entered 25 May 2018 by Judge Jesse B. Caldwell III in Lincoln County Superior Court. Heard in the Court of Appeals 28 March 2019.

Melrose Law, PLLC, by Mark R. Melrose and Adam R. Melrose, for the Plaintiff.

Roberts & Stevens, P.A., by Phillip T. Jackson and Elizabeth T. Dechant, for the Defendant.

DILLON Judge.

Plaintiff Anita Kathleen Parkes appeals from an order granting summary judgment on her medical malpractice claim in favor of Defendant James Howard Hermann ("Dr. Hermann"). We affirm the trial court's grant of summary judgment to Dr. Hermann as Ms. Parkes failed to show evidence of proximate cause.

I. Background

The evidence in the light most favorable to Ms. Parkes shows as follows:

Ms. Parkes exhibited signs of a stroke just after midnight on 24 August 2014. Her family transported her to the emergency room of a nearby hospital, arriving shortly before 2:00 A.M. The proper protocol where a patient presents herself for treatment within three hours of suffering a stroke is to administer Alteplase, a tissue plasminogen activator, (hereinafter "tPA"). Where this drug is administered within three hours of the onset of a stroke, a patient who would otherwise suffer lasting neurological effects has a 40% chance of an improved neurological outcome.

When Ms. Parkes arrived at the hospital, she was seen immediately by Dr. Hermann, who was the on-duty emergency physician. Dr. Hermann failed to properly diagnose that Ms. Parkes had suffered a stroke; and, accordingly, he did not administer tPA within the three-hour window. Ms. Parkes continues to suffer adverse neurological effects, such as diminished mobility, from her stroke.

Had Dr. Hermann properly diagnosed the stroke, the standard of care would have dictated that he administer tPA. If tPA had been administered, Ms. Parkes would have had a 40% chance of a better neurological outcome than the outcome that she, in fact, is experiencing.

Because tPA was not available at the local hospital where Ms. Parkes was seen, she would have needed to be transported to the nearest hospital where tPA could be administered. Thus, prompt diagnosis of the stroke was crucial to arrange tPA therapy within the three-hour period.

In April 2017, Ms. Parkes brought this medical malpractice negligence action against Dr. Hermann, claiming that her chance for an improved neurological outcome was diminished by Dr. Hermann's failure to diagnose her stroke and administer tPA. Dr. Hermann moved for summary judgment on the grounds that Ms. Parkes did not satisfy

the "proximate cause" element of her claim. Specifically, Dr. Hermann argues that Ms. Parkes failed to establish that she *more likely than not* (greater than 50% likelihood) would be better but for Dr. Hermann's negligent conduct.

After a hearing on the matter, the trial court entered summary judgment in favor of Dr. Hermann. Ms. Parkes timely appealed.

II. Analysis

We review an order granting summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). To survive summary judgment in a medical malpractice action, the plaintiff must not only demonstrate that the doctor was negligent, but also that his "treatment proximately caused the injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978). All facts and evidence must be viewed "in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). To establish proximate cause, the plaintiff must show that the injury was more likely than not caused by the defendant's negligent conduct. *See White v. Hunsinger*, 88 N.C. App. 382, 386, 363 S.E.2d 203, 206 (1988) ("Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery.").

In the present case, Ms. Parkes has suffered an injury; namely diminished neurological function. To be sure, her stroke was a proximate cause of this injury. Ms. Parkes filed this action, contending that Dr. Hermann's negligence was also a proximate cause of this injury. However, the evidence in the light most favorable to Ms. Parkes only shows that there is a 40% chance that Dr. Hermann's negligence[1] caused Ms. Parkes' injury. That is, this evidence shows that had Dr. Hermann properly diagnosed Ms. Parkes and had administered tPA, there was only a 40% chance that Ms. Parkes' condition would have improved. Therefore, we must conclude that the trial court correctly determined that Ms. Parkes failed to put forth evidence showing, more likely than not, that Dr. Hermann's negligence caused Ms. Parkes' current condition.

---

1. As we write this opinion based on the evidence viewed in the light most favorable to Ms. Parkes, our opinion should not be construed to resolve any factual issues in this case. *See Caldwell*, 288 N.C. at 378, 218 S.E.2d at 381. For instance, our opinion should not be construed as a conclusion that Dr. Hermann, in fact, acted negligently. We also recognize that tPA, like all drugs, has risks as well as potential benefits, but we assume for purposes of summary judgment that Ms. Parkes would have elected to receive tPA if offered and that tPA would have given Ms. Parkes a 40% chance of a better outcome.

Ms. Parkes argues, however, that she has suffered a *different* type of injury for which she is entitled to recovery; namely, her "loss of chance" of a better neurological outcome. Though Ms. Parkes would certainly put a high value on being able to live with better neurological function than she is currently experiencing, she had a less than 50% chance of this result when she arrived at the emergency room, no matter what kind of treatment she received from Dr. Hermann. But what she did have early that morning was a *40% chance* of a better neurological outcome had she been administered tPA, and this 40% chance *itself* certainly had some value to Ms. Parkes. The question presented is whether her loss of this *40% chance*, itself, is a type of injury for which Ms. Parkes can recover.

There is a split of authority around the country as to whether a patient may recover for the injury of the mere "loss of chance" of a better medical outcome proximately caused by a physician's negligence: Some states allow a plaintiff to recover for a "loss of chance" injury while others exclusively follow a traditional approach. *See Valadez v. Newstart, LLC*, 2008 Tenn. App. LEXIS 683, *10-16 (2008) (discussing the different approaches followed around the country).

Under the "traditional" approach, a plaintiff may not recover for the loss of a less than 50% chance of a healthier outcome. But, if the chance of recovery was over 50%, a plaintiff may recover for *the full value of* the healthier outcome itself that was lost by merely showing, more likely than not (greater than 50%), that a healthier outcome would have been achieved, but for the physician's negligence. *Id.* at *14.

We conclude that North Carolina has not departed from this traditional approach. As such, we must conclude that Ms. Parkes' "loss of chance" at a better result is not a separate type of injury for which she may recover in a medical malpractice negligence action. We note that neither party cites to any North Carolina case where such a claim has been recognized. Rather, our Supreme Court has sustained a nonsuit in a medical malpractice case where the plaintiff's expert merely testified that the plaintiff would have had a better chance of recovery had he received immediate medical attention, stating "[t]he rights of the parties cannot be determined upon chance." *Gower v. Davidian*, 212 N.C. 172, 176, 193 S.E. 28, 30 (1937). And our Court has expressly refused to adopt "loss of chance" as a separate cause of action in a negligence claim case. Specifically, we refused to recognize a claim for the mere increase in risk of a serious disease, stating that any change in our negligence law lies "within the purview of the legislature and not the courts[,]" quoting our Supreme Court:

> The excelsior cry for a better system in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than to the courts.

Curl v. American Multimedia, Inc., 187 N.C. App. 649, 656-57, 654 S.E.2d 76, 81 (2007) (quoting *Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949)).

III. Conclusion

"Loss of chance" is not a recognized claim in North Carolina in medical malpractice negligence cases. We, therefore, affirm Judge Caldwell's order granting summary judgment for Dr. Hermann.

AFFIRMED.

Judge STROUD concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority.

"[R]ecognition of a new cause of action is a policy decision which falls within the province of the legislature." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) (quoting *Ipock v. Gilmore*, 85 N.C. App. 70, 73, 354 S.E.2d 315, 317 (1987)). Because "loss of chance" is not a cognizable cause of action in North Carolina, our analysis should begin and end there. Consideration of what the law ought to be is for the people to decide through their elected representatives. It is not the proper subject for judges at any level.

STATE v. ALLEN

[265 N.C. App. 480 (2019)]

STATE OF NORTH CAROLINA
v.
JULIEN ANTONIO ALLEN, DEFENDANT

No. COA18-1159

Filed 21 May 2019

1. Constitutional Law—Confrontation Clause—unavailability—forfeiture by wrongdoing

In a prosecution for robbery-related crimes, the trial court properly admitted a recorded statement by the defendant's girlfriend where it correctly determined that the girlfriend was unavailable for purposes of the Confrontation Clause and Rule of Evidence 804. The trial court's findings of fact demonstrated that the State used reasonable means and made a good faith effort to procure the girlfriend's presence at trial, and the State satisfied its burden of showing, by a preponderance of the evidence, that defendant forfeited his confrontation rights by making threatening phone calls to his girlfriend to deter her from testifying.

2. Evidence—evidence of gang membership—harmless error

At a trial for multiple crimes arising from a store robbery, the admission of testimony regarding defendant's gang affiliation was harmless where—even if the testimony had been inadmissible under Rules of Evidence 401 and 403—defendant failed to show a reasonable possibility of acquittal if the testimony had been excluded because there was overwhelming evidence of his guilt, including a co-conspirator's testimony and surveillance footage indicating defendant's participation in the robbery.

Appeal by defendant from judgments entered 29 March 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 25 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Kathryn L. VandenBerg, for defendant.

ARROWOOD, Judge.

Julien Antonio Allen ("defendant") appeals from judgments entered upon his convictions for first degree murder, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit robbery with a dangerous weapon. For the following reasons, we find no error.

I. Background

On 10 January 2017, a Johnston County Grand Jury indicted defendant for first degree murder of Mr. Esmail Alshami ("Mr. Alshami"), robbery with a dangerous weapon from the person and presence of Mr. Alshami, assault with a deadly weapon with intent to kill inflicting serious injury of Mr. Ricky Lynch ("Mr. Lynch"), and conspiracy to commit the murder. The Grand Jury later entered a superseding indictment, replacing the aim of the conspiracy charge with conspiracy to commit robbery. The matter came on for trial on 19 March 2018 in Johnston County Superior Court, the Honorable Thomas H. Lock presiding. The State's evidence tends to show as follows.

Defendant and his friend Omari Smith ("Smith") robbed a Knightdale restaurant on 20 October 2016, with the help of an additional accomplice. They used gray bandanas, guns, and a clown mask to carry out the robbery. A week later, on 27 October 2016, defendant and Smith agreed to rob a Shop-N-Go variety store. Their friend Darius McCalston ("McCalston") also agreed to participate in the robbery.

The group met at Smith's grandmother's house, and got into defendant's girlfriend, Grecia Montes ("Montes")'s, mother's car. Defendant drove, Montes sat in the front passenger seat, and Smith and McCalston sat in the backseat. They arrived at the Shop-N-Go around 10:00 p.m., parking the car on the other side of the street, across from the store.

Defendant and Montes remained in the car while Smith and McCalston left to stand outside the store, armed with guns supplied by defendant. Their faces were covered with gray bandanas. Defendant kept watch, and communicated with Smith and McCalston by phone. At defendant's direction, Smith and McCalston began the robbery.

A store clerk, Mr. Alshami, stood behind the counter. Smith and McCalston demanded that Mr. Alshami fill a bag with money. Smith went behind the counter, holding out the bag for Mr. Alshami to fill, and grabbing cigars. McCalston told Mr. Alshami: "Make one more move, I'll shoot the shit out of you." McCalston then shot Mr. Alshami. He later told Smith that he shot Mr. Alshami because Mr. Alshami hit an alarm.

The other store clerk, Mr. Lynch, said, "Hey, what's going on in there?" Smith and McCalston fled. Smith ran out the backdoor, shooting behind him at Mr. Lynch as he made his way to Montes' mother's car. One of the shots hit Mr. Lynch in the abdomen. Once Smith and McCalston reached Montes' mother's car, defendant drove them to Montes' mother's house, where Smith and McCalston divided the money they stole during the course of the robbery.

Mr. Alshami died as a result of gunshot wounds to his neck and back. Mr. Lynch recovered after spending three weeks in the hospital.

One of defendant's housemates, Malik Rogers ("Rogers") later found gray and blue bandanas, a gun, and a clown mask in defendant's closet. He used the bandanas and clown mask to carry out a robbery on 1 November 2016. Although defendant did not participate in this robbery, the evidence tended to connect the masks from the other robberies to defendant. Smith and defendant again robbed a store on 9 December 2016, with another accomplice, Nathan Davis ("Davis).

On 29 March 2018, the jury found defendant guilty of all charges. The trial court sentenced defendant to life imprisonment without parole for first degree murder, 83 to 112 months for assault with a deadly weapon with intent to kill inflicting serious injury, and 29 to 47 months for conspiracy, all to be served consecutively. The trial court arrested judgment on the robbery charge.

Defendant appeals.

II. Discussion

Defendant argues the trial court erred by admitting into evidence: (1) a recorded statement given by Montes, and (2) gang-related evidence. We address each argument in turn.

A. Montes' Recorded Statement

[1] Montes did not attend defendant's trial. Nevertheless, after finding Montes was "unavailable" for purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2017) and the Confrontation Clause of the United States Constitution, and holding that defendant forfeited his constitutional right to confront her, the trial court admitted a recorded statement Montes made to law enforcement prior to trial. Defendant argues the trial court erred by admitting this statement because: (1) Montes was not "unavailable" for purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) and the Confrontation Clause, and (2) defendant did not forfeit his constitutional right to confront Montes. We disagree.

i. Unavailability

Rule 804(a) of the North Carolina Rules of Evidence lists the scenarios that permit a trial court to determine a declarant is "unavailable" to testify as a witness at trial. Here, the trial court determined Montes was unavailable pursuant to Rule 804(a)(5), which permits statements to be introduced at trial in lieu of live testimony if: (1) the declarant is unavailable as a witness, and (2) the statement qualifies as a circumstance listed in Rule 804(b). N.C. Gen. Stat. § 8C-1, Rule 804(b). The trial court determined Montes' recorded statement fell within the scope of both Rule 804(b)(3) and (5):

> (3) Statement Against Interest. - A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
>
> . . . .
>
> (5) Other Exceptions. - A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

N.C. Gen. Stat. § 8C-1, Rule 804(b).

In contrast, our courts have held that finding witnesses unavailable for the purposes of the Confrontation Clause requires a finding that "the prosecutorial authorities have made a good-faith effort to obtain [the declarant's] presence at trial." *State v. Clonts*, 254 N.C. App. 95, 114, 802 S.E.2d 531, 544 (2017) (quoting *Barber v. Page*, 390 U.S. 719, 724-25, 20 L. Ed. 2d 255, 260 (1968)), *aff'd*, 371 N.C. 191, 813 S.E.2d 796 (2018).

Thus, in sum,

> [t]he trial court was required to make sufficient findings of fact, based upon competent evidence, in support of any ruling that the State had satisfied its burden of demonstrating that it had been unable to procure [the declarant's] attendance . . . by process or other reasonable means for the purposes of N.C. Gen. Stat. § 8C-1, Rule 804(a)(5), and that it had made a good-faith effort to obtain [her] presence at trial for Confrontation Clause purposes.

Id. at 115, 802 S.E.2d at 545 (citation and internal quotation marks omitted).

To review a trial court's determination that a witness is unavailable, our Court considers "whether the trial court's findings of fact related to the witness' unavailability were supported by the evidence and, in turn, supported its conclusions of law." *Id.* at 114, 802 S.E.2d at 545 (citations omitted). "The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case." *Id.* at 115, 802 S.E.2d at 545 (quoting *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740-41 (1986)).

In the present case, Montes was arrested in connection with the crimes charged against defendant. Following her arrest, she cooperated with law enforcement and gave a statement about the robbery that tended to incriminate defendant. Montes agreed to appear in court and testify against defendant, but failed to appear. Her whereabouts were unknown to her family, bondsman, and the State. The State moved the trial court to allow her recorded statement into evidence on grounds that she was unavailable, and also that defendant forfeited his constitutional right to confrontation with regard to Montes due to his own wrongdoing.

The trial court heard the motion at an evidentiary hearing on 28 March 2018. The trial court found, in relevant part:

> 8. After Montes failed to appear, the State obtained recordings of the defendant's telephone calls from jail to his mother and grandmother. . . .
>
> 9. On 15 March 2018, the defendant made a recorded call to his mother. . . . [His mother] then connected Montes to the call so that it became a three-way call. During this call, the defendant made the following statements to Montes: "You know what the f***

you're supposed to be doing. You know what I'm talking about. You got time to do everything else, n*****." Montes responded to the defendant and said, "Now I have to testify against you, how do you think that makes me feel? You didn't take the plea."

10. Later that same day, the defendant placed a recorded call to his grandmother . . . [she] then connected Montes to this call. During this call, the defendant said to Montes: "You're thinking about your mother f****** self, n*****, lying, thinking of yourself. You're trying to save your own ass. You ain't doing a mother f****** thing, you are a selfish mother f*****. You're trying to blame it on me. What the f***** wrong with you?" Montes responded and asked, "What am I supposed to do?" The defendant replied: "Let me break it down, I'm not trying to save my neck to f*** someone else's life up. You're f****** stupid. You don't listen. You ain't doing a thing you're supposed to because you're out getting your nails done. The only thing on my shit is your lying ass because you are a selfish mother f*****. You're the mother f****** reason I'm in here right now while you're out getting your nails done. Who the f*** else know [sic]? At the end of the day, you might be home, but I've to deal with this shit you've put me in."

11. On 22 March 2018, the day before a cooperating co-defendant, Omari Smith, was scheduled to testify, the defendant placed a recorded call to an unknown recipient. . . . The defendant told the recipient to attend court the next day because Omari would be in court at 9:30 "lying his ass off," and the defendant told the recipient to "put it on Facebook."

12. On the morning of 23 March 2018, the court observed two young male individuals appear in the courtroom. These two males had not previously attended any part of the trial. After approximately one hour, the court ordered the bailiff to eject one of these males from the courtroom because of his disruptive behavior. Both males left the courtroom and never returned.

13. Omari Smith testified that the defendant called him prior to their arrests and threatened Smith's brother.

Smith further testified that he decided to testify against the defendant in part because of this threat.

. . . .

15. On 15 March 2018, the defendant's mother and grandmother . . . appeared at the residence of Montes' parents. Montes was not home. . . . [Defendant's mother and grandmother] had been to the residence on prior occasions . . . but this time they stayed longer than usual, waiting until Montes arrived home.

16. After Montes arrived home from work, [defendant's mother and grandmother] engaged in a hushed conversation with her. When [they] left, Montes' parents questioned her about the conversation. Montes said [they] had told her to "make the best choice that she had to make." Montes' mother told Montes that her decision had already been made and that she needed to go to court and testify.

17. Montes' parents have not seen or talked with Montes since Sunday, 18 March 2018, and have reported her missing to the Johnston County Sheriff's Office.

18. The net effect of the defendant's words and conduct, in particular his words and conduct directed towards [Montes], was to pressure and intimidate her into not appearing in court and testifying in this case.

19. On 26 March 2018, the State gave the defendant written notice under [N.C. Gen. Stat. §] 8C-1, Rule 804(b)(5) of its intent to introduce the recorded statement of Montes. The recorded statement had been provided to the defendant during discovery.

Based on these findings of fact, the trial court concluded Montes was "unavailable as a witness for the State within the definition of [N.C. Gen. Stat. §] 8C-1, Rule 804(a)(5)." Additionally, the trial court concluded:

3. The statement was at the time of its making so far contrary to Montes' penal interest that she reasonably would not have made it unless she believed it to be true, and corroborating circumstances clearly indicate the trustworthiness of the statement.

4. Montes' recorded statement is admissible under [N.C. Gen. Stat. §] 8C-1, Rule 804(b)(3) and (5).

5. The conduct of the defendant as described above constitutes a forfeiture of the defendant's rights under the Sixth Amendment to the United States Constitution and under Article I, Section 23 of the Constitution of North Carolina to confront and cross-examine [Montes].

Defendant argues the trial court did not properly find Montes unavailable under the North Carolina Rules of Evidence and the Confrontation Clause because the trial court failed to find the State made a good faith effort to obtain Montes' attendance at trial. We disagree. The trial court made sufficient findings of fact to demonstrate that the State utilized reasonable means and made a good faith effort to procure Montes' presence at trial.

The North Carolina Rules of Evidence require that a finding of unavailability be supported by evidence of process or other reasonable means, *Clonts*, 254 N.C. App. at 115, 802 S.E.2d at 545, whereas, "a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber*, 390 U.S. at 724-25, 20 L. Ed. 2d at 260 (finding the State did not make a good faith effort to obtain a witness' presence at trial where the sole reason the witness was not present was because the State did not attempt to seek his presence).

Defendant refers us to *Clonts*, a case where our Court held the State did not make a good faith effort to obtain a witness' presence where the trial court made insufficient findings of fact related to a witness' unavailability where the trial court "did not address the option of continuing trial until [the witness] returned from [military] deployment, nor did it make any finding . . . the State made a good-faith effort to obtain [the witness'] presence at trial[,] much less any findings demonstrating what actions taken by the State could constitute good-faith efforts." *Clonts*, 254 N.C. App. at 116, 802 S.E.2d at 546 (citation and internal quotation marks omitted). The Court then noted that, assuming *arguendo* the findings were sufficient, the evidence was not sufficient to support a good faith effort to obtain the witness' presence where the State knew the witness was deployed, and only served a last minute subpoena, despite being provided with contact information with military personnel who were identified as the point of contact for the matter months prior. *Id.* at 116-117, 802 S.E.2d at 546-47.

In contrast, here, the trial court found that the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court and testify against defendant. Unlike the findings in *Clonts*, these findings

support a conclusion both that the State utilized reasonable means and made a good faith effort to obtain the witness' presence at trial.

ii. Confrontation Rights

We now turn to defendant's argument that he did not forfeit his confrontation rights by wrongdoing. We disagree.

Once a witness has been shown to be unavailable, our Court has held that, to protect a defendant's right to confrontation, "[w]e must determine: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *Id.* at 126, 802 S.E.2d at 551-52 (citation and internal quotation marks omitted). Our Court reviews for alleged violations of constitutional rights *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted). In the instant case, the recorded statement at issue was given by an unavailable declarant and is testimonial in nature, but defendant did not have the opportunity to cross-examine the declarant. However, the trial court found that, nonetheless, defendant forfeited his confrontation rights as to Montes by wrongdoing.

"Under the doctrine of forfeiture by wrongdoing, 'one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.' " *State v. Weathers*, 219 N.C. App. 522, 524, 724 S.E.2d 114, 116 (2012) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 165 L. Ed. 2d 224, 244 (2006)), *cert. denied*, 366 N.C. 596, 743 S.E.2d 203 (2013). Pursuant to this doctrine,

> when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal trial system.

Id. Although North Carolina courts have applied this doctrine, they have not yet taken a position on the standard necessary to demonstrate forfeiture by wrongdoing. *Id.* at 525, 724 S.E.2d at 116. Here, the trial court held the government to the preponderance of the evidence standard. The preponderance of the evidence standard is generally applied by federal courts applying Rule 804(b)(6) of the Federal Rules of Evidence, and tends to also be applied by state courts assessing forfeiture by wrongdoing. *See Davis*, 547 U.S. at 833, 165 L. Ed. 2d at 244. In accord with these courts, we hold the trial court correctly determined that the State was

required to establish forfeiture by wrongdoing pursuant to the preponderance of the evidence standard.

Furthermore, we hold the State met this burden. The record shows defendant made phone calls that the court could find evidenced his intent to intimidate Montes into not testifying. He also threatened another testifying witness, Smith. In addition, his mother and grandmother, who helped facilitate defendant's threatening calls to Montes, showed up at Montes' parents' house prior to trial to engage in a conversation with her about her testimony. Based on the trial court's findings of fact related to this evidence, the trial court properly found, by at least a preponderance of the evidence, that the net effect of defendant's conduct was to pressure and intimidate Montes into not appearing in court and testifying in this case. Accordingly, the trial court properly concluded defendant forfeited his confrontation rights by wrongdoing.

B. Evidence of Gang Affiliation

[2] Next, defendant argues the trial court erred by admitting irrelevant and prejudicial evidence of gang affiliation, including: (1) Smith's testimony that he and defendant were in a gang together, (2) Smith's testimony about his and defendant's ranking in the gang, (3) Davis' testimony that Smith and defendant were members of the Crip gang, and (4) Rogers' testimony that Smith and defendant were members of the Crip gang and that when he used defendant's masks during a robbery, he and his accomplices did so to "act like [they were] Crip."

"North Carolina courts have long held that membership in an organization may only be admitted if relevant to the defendant's guilt." *State v. Hinton*, 226 N.C. App. 108, 113, 738 S.E.2d 241, 246 (2013) (citations omitted). Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). "Relevant evidence may also be excluded if 'its probative value is substantially outweighed by the danger of unfair prejudice.' " *Hinton*, 226 N.C. App. at 113, 738 S.E.2d at 246 (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (2017)). The "admission of gang-related testimony tends to be prejudicial[.]" *Id.*

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the

> existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

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

Pursuant to N.C. Gen. Stat. § 15A-1443 (2017), it is the defendant's burden to prove the testimony was erroneously admitted and he was prejudiced by the erroneous admission. "The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Moses*, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)).

Here, assuming *arguendo* that the admission of this evidence was error, defendant has not shown that a different result likely would have ensued had the evidence been excluded because there was overwhelming evidence of defendant's guilt. Smith, a co-conspirator, and Rogers both testified that defendant participated in the robbery of the Shop-N-Go. Rogers' testimony also tended to tie the bandanas used in the Shop-N-Go robbery to defendant. Similarly, Montes' statement to law enforcement averred that she was present and witnessed defendant participate in the Shop-N-Go robbery. Additionally, the jury was shown surveillance video taken by cameras at the Shop-N-Go on the night in question, which tended to be consistent with Smith's testimony, Montes' statement, and the motive and planning shown by the other robberies that Smith and Davis testified defendant committed.

In view of all of this evidence, we hold that defendant failed to show that there was a reasonable probability that defendant would have been acquitted if the gang references made during Smith, Roger, and Davis' testimony had not been admitted into evidence.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges INMAN and YOUNG concur.

STATE v. CAPPS

[265 N.C. App. 491 (2019)]

STATE OF NORTH CAROLINA
v.
BEN LEE CAPPS

No. COA18-386

Filed 21 May 2019

Jurisdiction—superior court—section 15A-922—amendment to charging instrument—misdemeanor statement of charges—timeliness

The superior court lacked jurisdiction to proceed on charges for misdemeanor larceny and injury to personal property where the prosecutor amended the original charging instrument (the arrest warrant), after defendant was convicted in district court, by filing a misdemeanor statement of charges. While section 15A-922 permits amendment of a charging instrument under limited circumstances, since none of those applied here, the State's amendment of one charging instrument by filing a different type after arraignment in district court rendered its misdemeanor statement of charges untimely. The judgment was vacated and the matter remanded for re-sentencing on defendant's remaining conviction (for reckless driving to endanger).

Judge BERGER dissenting.

Appeal by defendant from judgments entered 24 October 2017 by Judge Stanley L. Allen in McDowell County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Associate Attorney General Vinston Walton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Ben Lee Capps ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of misdemeanor larceny, injury to personal property, and reckless driving to endanger. However, the trial court lacked jurisdiction to try Defendant on offenses alleged in the misdemeanor statement of charges. Thus, we vacate the judgment

stemming from the charges alleged in the misdemeanor statement of charges and remand to the trial court to resentence Defendant for his remaining conviction.

I. Background

On 19 April 2016, a McDowell County magistrate issued arrest warrants charging Defendant with misdemeanor larceny and injury to personal property in file number 16 CRS 50513 and reckless driving to endanger in 16 CRS 50514. Defendant pleaded guilty to the charges in district court on 24 August 2016. He was sentenced to time served and ordered to pay restitution of $25.00 to Love's Truck Stop. On 2 September 2016, Defendant filed notice of appeal to superior court for a trial *de novo* pursuant to N.C. Gen. Stat. § 15A-1431.

Defendant was tried in superior court on 23 October 2017 before the Honorable Stanley L. Allen. Prior to jury selection, the prosecutor moved to amend the charges in 16 CRS 50513 with a misdemeanor statement of charges, as follows:

> THE COURT: The State has a motion to amend.
>
> [PROSECUTOR]: Yes, sir. I have drafted it on a misdemeanor statement of charges. The history of this case briefly is that this was a misdemeanor which was pled guilty to in [district] court based on the charging language, and it was a time-served judgment, and so it was not scrutinized closely. The charging language alleges that the personal property and the property stolen in the larceny are the property—Love's Truck Stop. I am moving to amend the owner of that property to Love's Travel Stop & Country Stores, Incorporated. May I approach?
>
> THE COURT: Yes, sir. What says the defendant?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.

The trial court granted the State's motion and a misdemeanor statement of charges was signed and entered that day. The arrest warrant identified the owner of the stolen property as "Loves Truck Stop," while the misdemeanor statement of charges identified the owner as "Love's Travel Stops & Country Stores, Inc." In 16 CRS 50513, the State proceeded upon the statement of charges signed by the prosecutor, rather than the arrest warrant upon which Defendant was convicted in district court and from which he appealed to superior court.

At trial, the State presented evidence that Defendant drove to Love's Truck Stop on 19 April 2016 and stopped his vehicle at the store's air pump. While arguing loudly with a passenger, Defendant exited his vehicle and attempted to put air in the rear tire. He then began swinging the air hose at the passenger-side window and telling the passenger "to be quiet." Defendant then cut off the end of the air hose, dragged the passenger from the vehicle, attempted to strike her with the severed hose, and placed the section of hose inside of his car.

Deputy Donald Cline, an off-duty member of the Swain County Sheriff's Office, was at the truck stop refueling his vehicle, and he walked toward the disturbance. As Defendant began to berate an attendant, Deputy Cline approached Defendant, displayed his badge, and lifted his shirt to reveal his service weapon. With his passenger lying on the ground, Defendant reentered his vehicle and drove around the store at a high speed while "burning" his tires, leaving a continuous tread mark on the pavement. Defendant then drove through an intersection, where he narrowly passed between a tractor-trailer and a stopped car, ran a red light, and headed "up the interstate at a high rate of speed."

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to 120 days in the custody of the North Carolina Division of Adult Correction for misdemeanor larceny and ordered him to pay $25.00 in restitution, together with $1,170.00 in court-appointed counsel fees. The court consolidated the reckless driving and injury to personal property convictions for judgment and imposed a 45-day sentence to run consecutively with Defendant's larceny sentence. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, Defendant contends that the superior court lacked jurisdiction to try him for misdemeanor larceny and injury to personal property because the State proceeded upon an untimely misdemeanor statement of charges in 16 CRS 50513 rather than the arrest warrant upon which Defendant was convicted in district court. We agree.

A trial court's subject matter jurisdiction is a question of law reviewed *de novo* on appeal. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). A misdemeanor statement of charges is one of several charging instruments that may serve as a pleading in North Carolina. N.C. Gen. Stat. § 15A-921(5) (2017). Typically, a "citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court,

unless the prosecutor files a statement of charges[.]" *Id.* § 15A-922(a). "A statement of charges is a criminal pleading which charges a misdemeanor." *Id.* § 15A-922(b)(1). "When a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State." *Id.* § 15A-922(a).

The timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor can file a statement of charges. "The prosecutor may file a statement of charges upon his own determination *at any time prior to arraignment in the district court*." *Id.* § 15A-922(d) (emphasis added). "After arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient." *State v. Wall*, 235 N.C. App. 196, 199, 760 S.E.2d 386, 388 (2014) (citing N.C. Gen. Stat. § 15A-922(e)). If the trial court allows the State to file a statement of charges at or after arraignment, the new statement of charges "may not change the nature of the offense." N.C. Gen. Stat. § 15A-922(e). "A statement of charges, criminal summons, warrant for arrest, citation, or magistrate's order may be amended at any time prior to or after final judgment when the amendment does not change the nature of the offense charged." *Id.* § 15A-922(f).

Although N.C. Gen. Stat. § 15A-922(f) permits a misdemeanor charging instrument to be amended at any time, a charging instrument may be amended by a misdemeanor statement of charges only under limited circumstances. In *Wall*, the defendant was charged by magistrate's order with resisting a public officer and giving false information to a public officer. *Wall*, 235 N.C. App. at 198, 760 S.E.2d at 387. Following his conviction in district court, the defendant appealed to superior court for a trial *de novo*. *Id.* The State filed a misdemeanor statement of charges in superior court on which the defendant was tried and found guilty. *Id.* This Court vacated the judgment, holding that the superior court "lacked legal authority and, therefore, was without subject matter jurisdiction to try [the] defendant on the offense alleged in the misdemeanor statement of charges." *Id.* at 197, 760 S.E.2d at 386. We explained:

> While subsection (f) allows the charging instrument to be amended prior to or after a final judgment is entered, *this does not grant the State authority to change the form of the charging instrument; i.e., the State cannot "amend" a magistrate's order by filing a misdemeanor statement of charges*. Doing so would change the nature of the original pleading entirely. Accordingly, the State has a limited

> window in which it may file a statement of charges on its own accord, and that is prior to arraignment.

Id. at 199, 760 S.E.2d at 388 (emphasis added).

Just as the magistrate's order in *Wall* could not be "amended" by filing a misdemeanor statement of charges, here, the arrest warrant could not be "amended" by filing a misdemeanor statement of charges, unless either (1) the prosecutor filed the statement of charges prior to Defendant's arraignment in district court, N.C. Gen. Stat. § 15A-922(d); or (2) Defendant objected to the warrant's sufficiency as a pleading, and the trial court agreed that the warrant was insufficient. *Id.* § 15A-922(e). Neither of these exceptions apply in the present case. The statement of charges was untimely and therefore unauthorized. *Wall*, 235 N.C. App. at 200, 760 S.E.2d at 388. "Thus, the superior court had no jurisdiction to try [D]efendant for the new offense alleged in the statement of charges." *Id.*; *see also State v. Killian*, 61 N.C. App. 155, 157-58, 300 S.E.2d 257, 259 (1983) (vacating judgment because the State filed a misdemeanor statement of charges alleging a separate statutory violation than that charged by the warrant, but reasoning that even if the statement of charges had alleged the same offense, "it would have been untimely and thereby without legal authorization").

In the instant case, the State could have amended the warrant "at any time prior to or after final judgment [so long as] the amendment d[id] not change the nature of the offense charged." N.C. Gen. Stat. § 15A-922(f); *see also State v. Clements*, 51 N.C. App. 113, 115-17, 275 S.E.2d 222, 224-25 (1981) (allowing the State to amend the arrest warrant at the close of the State's evidence because the amendment did not change the nature of the charged offense). However, this Court's holding in *Wall*, applying the plain language of N.C. Gen. Stat. § 15A-922, dictates that the State may not amend a charging instrument in superior court by filing a misdemeanor statement of charges unless the defendant objects to the sufficiency of the charging instrument and the trial court rules that the pleading is in fact insufficient. *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. The only fact distinguishing this case from *Wall* is the nature of the original charging instrument. The defendant in *Wall* was charged upon a magistrate's order, *id.* at 198, 760 S.E.2d at 387, whereas here, Defendant was charged upon an arrest warrant. In neither instance did the defendant object to the sufficiency of the charging instrument. *Id.* at 200, 760 S.E.2d at 388. Nor is it of any consequence that Defendant failed to object to the statement of charges before the superior court. "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to . . . object to the jurisdiction is immaterial." *State v. Collins*, 245 N.C. App. 478, 485, 783 S.E.2d 9, 14 (2016).

The State argues in this case that "the prosecutor did not file a statement of charges on his own accord at superior court . . . . [but] moved to amend the original warrant, and the statement of charges was entered as an amendment to the warrant." That argument contradicts the statute and this Court's holding in *Wall*. The plain language of the statute clearly provides that "[w]hen a statement of charges is filed it supersedes all previous pleadings of the State and constitutes the pleading of the State." N.C. Gen. Stat. § 15A-922(a). *Wall* explains that although section 15A-922(f) permits the State to amend the charging instrument before or after final judgment is entered, "this does not grant the State authority to change *the form* of the charging instrument; i.e., the State cannot 'amend' a[n] [arrest warrant] by filing a misdemeanor statement of charges. Doing so would change the nature of the original pleading entirely." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (emphasis added).

In the instant case, the State informed the trial court that it had "a motion to amend [the arrest warrant]" that was "drafted . . . on a misdemeanor statement of charges." While the State may assert that it merely intended to amend the arrest warrant, the newly filed misdemeanor statement of charges superseded the arrest warrant and became the pleading of the State. *See* N.C. Gen. Stat. § 15A-922(a). This Court's case law does not allow the State, after arraignment in district court, to amend one charging instrument by filing a different type of charging instrument; indeed, it forbids it. *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. This Court is bound by that precedent. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Additionally, this Court is "an error-correcting body, not a policy-making or law-making one. We lack the authority to change the law . . . ." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 739, 796 S.E.2d 529, 533 (citation omitted), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017).

In that the State filed an untimely and unauthorized misdemeanor statement of charges, the trial court was without subject matter jurisdiction to try Defendant on the charges therein. Therefore, the judgment entered on those charges is void and must be vacated.

III. Conclusion

In that the prosecutor proceeded on an untimely misdemeanor statement of charges in 16 CRS 50153, the trial court lacked jurisdiction to try Defendant on the charges listed. Accordingly, we vacate Defendant's

convictions for misdemeanor larceny and injury to personal property. We remand the case for the court to resentence Defendant on his conviction for reckless driving to endanger in 16 CRS 50154.

VACATED IN PART; REMANDED FOR RESENTENCING IN PART.

Judge HAMPSON concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

The majority relies on *State v. Wall*, 235 N.C. App. 196, 760 S.E.2d 386 (2014) in reaching its decision. However, the majority has failed to discuss the plain language of N.C. Gen. Stat. § 15A-922(d) and *Wall* regarding the meaning of the phrase "upon [the prosecutor's] determination." Moreover, the majority and *Wall* incorrectly conclude that the State is prohibited from using a misdemeanor statement of charges to change the nature of the original pleading. Therefore, I respectfully dissent.[1]

"A statement of charges is a criminal pleading which charges a misdemeanor." N.C. Gen. Stat. § 15A-922 (b)(1) (2017); *see also* N.C. Gen. Stat. § 15A-921 (2017). Criminal pleadings must comply with the relevant requirements of N.C. Gen. Stat. § 15A-924. In addition, Section 15A-922 imposes as a jurisdictional requirement that a misdemeanor statement of charges "must be signed by the prosecutor who files it." N.C. Gen. Stat. § 15A-922 (b)(1).

Defendant does not argue that the misdemeanor statement of charges here fails in any way under Section 15A-924, or that the pleading was not signed by the prosecutor. Instead, Defendant argues for the first time on appeal that the filing of the misdemeanor statement of charges post-district court arraignment caused the superior court to be divested of jurisdiction.

Section 15A-922 states that a "prosecutor may file a statement of charges *upon his own determination* at any time prior to arraignment in the district court. It may charge the same offenses as the . . . warrant . . .

1. This panel is bound by *State v. Wall* pursuant to *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent . . . ."). "Our panel is following [*Wall*], as we should. However, I write separately to dissent because" the majority and a portion of *Wall* are incorrect. *Watson v. Joyner-Watson*, ___ N.C. App. ___, ___, 823 S.E.2d 122, 126, (2018) *Dillon, J., dissenting.*

or additional or different offenses." N.C. Gen. Stat. § 15A-922(d) (2017) (emphasis added). This section does in fact impose a limitation on the timing of a prosecutor's filing of a misdemeanor statement of charges when filed "upon his own determination." *Id.*

Section 15A-922(e) allows a defendant to file a motion objecting to the sufficiency of certain criminal pleadings. The motion may be filed in district court or upon trial de novo in superior court. If the trial court determines such pleadings are "insufficient, the prosecutor may file a statement of charges, but a statement of charges . . . may not change the nature of the offense." N.C. Gen. Stat. § 15A-922(e) (2017). Defendant here filed no such motion.

The majority and *Wall*, contend that "[a]fter arraignment, the State may only file a statement of charges when the defendant (1) objects to the sufficiency of the criminal summons and (2) the trial court rules that the pleading is in fact insufficient." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (citation omitted). The majority here goes further in limiting the State's use of misdemeanor statements of charges by contending that "[t]he timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor can file a statement of charges." This is correct *only* for statements of charges filed by a prosecutor "upon his own determination" or when a defendant files a motion contesting an insufficient criminal pleading. However, these limitations are not as sweeping as the majority or *Wall* contend.

In *State v. Killian*, 61 N.C. App. 155, 300 S.E.2d 257 (1983), the defendant was charged by warrant with a misdemeanor offense and convicted in district court. The defendant appealed his conviction. When the case came on for trial de novo in superior court, "the District Attorney issued a misdemeanor statement of charges." *Id.* at 156, 300 S.E.2d at 258 (1983) (quotation marks omitted). There was no motion by the defendant in the record objecting to the original warrant pursuant to Section 15A-922(e), and no indication that the parties had agreed to the filing of the misdemeanor statement of charges. *Id.* at 157, 300 S.E.2d at 259. This Court reversed the defendant's conviction because the misdemeanor statement of charges filed by the prosecutor alleged a different offense than that alleged in the original warrant. The Court also stated that even if the statement of charges alleged the same charge as the original warrant, the new pleading would have been untimely because "[t]he statement of charges was filed by the prosecutor '*upon his own determination*'; and *that* could only be done 'prior to arraignment in the district court,' not upon trial de novo on appeal to superior court . . . ." *Id.* at 157, 300 S.E.2d at 259 (emphasis added).

Similarly, in *State v. Wall*, the defendant was tried and convicted for a misdemeanor in district court. The State filed a misdemeanor statement of charges after the case was appealed for trial de novo in superior court. This Court noted that "the State has a limited window in which it may file a statement of charges *on its own accord*, and that is prior to arraignment." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388 (emphasis added).

Both *Killian* and *Wall* recognize that Section 922(d) imposes a procedural limitation on the filing of a statement of charges *on the prosecutor's own determination or accord*. The prosecutor has discretion to file a misdemeanor statement of charges on his own accord at any time prior to arraignment in district court. A statement of charges filed at this time can correct a prior criminal pleading or may charge new offenses.

However, neither the statute nor *Wall* or *Killian*, preclude a prosecutor's post-district court arraignment use of statements of charges when the prosecutor and the parties agree. Here, there is no question that the statement of charges was filed post-district court arraignment. The relevant inquiry then is whether or not the statement of charges was filed on the prosecutor's own determination.

The State made an oral motion to amend the warrant in superior court using a misdemeanor statement of charges. Not only was the State's request to use a statement of charges to correct a perceived defect in the warrant consented to by Defendant, it was allowed by the trial court as set forth in the following exchange:

> THE COURT: The State has a motion to amend[?]
>
> [PROSECUTOR]: Yes, sir. I have drafted it on a misdemeanor statement of charges. The history of this case briefly is that this was a misdemeanor which was pled guilty to in [district] court based on the charging language, and it was a time-served judgment, and so it was not scrutinized closely. The charging language alleges that the personal property and the property stolen in the larceny are the property – Love's Truck Stop. I am moving to amend the owner of that property to Love's Travel Stop & Country Stores, Incorporated. May I approach?
>
> THE COURT: Yes, sir. What says the defendant?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.

Based upon this exchange between the parties and the court, the statement of charges was not filed upon the prosecutor's own determination or accord, and thus, not subject to the procedural limitation in Section 15A-922(d). Rather, the misdemeanor statement of charges was a new pleading filed with consent of all parties and permission of the Court because "there [was] some problem with the original process as a pleading," N.C. Gen. Stat. ch. 15A, art. 49 official commentary (2015). The majority has declined to discuss the wording of the statute, or the intent of the Legislature as set forth in the Official Commentary.

Therefore, because the statement of charges was not filed upon the prosecutor's own determination, the criminal pleading only had to meet the requirements set forth in Section 15A-924 and be signed by the prosecutor to satisfy jurisdictional concerns. Again, Defendant did not take issue with the sufficiency of the criminal pleading.

In addition, the majority and *Wall* incorrectly state that a misdemeanor statement of charges may not be filed when it "change[s] the form of the charging instrument, i.e., the State cannot 'amend' a magistrate's order by filing a misdemeanor statement of charges." *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388. The majority and *Wall* incorrectly view the filing of a statement of charges as an amendment to a criminal pleading when it is not. A statement of charges is a new criminal pleading, not an amendment to a prior criminal pleading.

The Official Commentary to Article 49 notes that

> The "statement of charges" is new. Being able to use the warrant as the pleading has worked well in this State, and saved much solicitorial manpower as compared to jurisdictions which require the drafting of a new misdemeanor pleading in each instance. *It was felt that there is some loss in trying to "amend" the warrant, and sometimes issue a new warrant, when what is desired is a correct statement of the charges--a proper pleading.* . . . [T]he "statement of charges" is created, as a new pleading, to be used when there is some problem with the original process as a pleading. As such it takes the place of amending the warrant (or amending other process which may also be used as the pleading). When filed prior to arraignment, it also may charge additional crimes. *That simple idea requires some complexity for statement in statutory form, but that is the underlying idea in § 15A-922. It should be relatively easy to prepare a statement of charges; a form should be sufficient in many cases.*

N.C. Gen. Stat. ch. 15A, art. 49 official commentary. (emphasis added). When read together, Section 15A-922 and the Official Commentary make it clear that a misdemeanor statement of charges was, contrary to *Wall*, intended to "change the form of the charging instrument" *Wall*, 235 N.C. App. at 199, 760 S.E.2d at 388.

Here, the State could have cured the defect in the warrant by amendment or by filing a statement of charges. *See* N.C. Gen. Stat. § 15-24.1 (2017) and § 15A-922(f) (2017). It is nonsensical that a trial court would be divested of jurisdiction by the filing of a statement of charges when an oral motion would have accomplished the same practical result: correcting the pleading.

Nevertheless, the majority and *Wall* incorrectly view Section 15A-922 as somehow prohibiting the use of a statement of charges to correct criminal pleadings when there is no such prohibition in the statute or the Official Commentary. In fact, the use of the misdemeanor statement of charges here was as the Legislature intended. N.C. Gen. Stat. § 15A-922(a); *see also* N.C. Gen. Stat. ch. 15A, art. 49 official commentary.

Because the filing of the statement of charges, with consent of Defendant and permission of the trial court, merely corrected a defect in a pleading, the trial court did not err.

STATE OF NORTH CAROLINA
v.
DAVID LEROY CARVER

No. COA18-935

Filed 21 May 2019

Search and Seizure—warrantless stop—reasonable suspicion—anonymous tip—reliability—corroboration

In a prosecution for driving while impaired, the arresting officer lacked a reasonable suspicion of criminal activity to conduct a warrantless stop of a truck—in which defendant was a passenger—based on an anonymous tip about a truck attempting to pull a drunk driver and his car out of a ditch. The tip lacked any indicia of reliability because it did not contain detailed descriptions of the car, the truck, or the driver, and the officer could not corroborate the tip where all he observed at the scene of the stop was a truck driving normally on the highway.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 23 April 2018 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 9 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Leslie S. Robinson for defendant-appellant.

TYSON, Judge.

David Leroy Carver ("Defendant") appeals from an order denying his motion to suppress. We reverse and remand.

I. Background

Beaufort County Sheriff's Deputy Dominic Franks received a dispatch call, which had originated from an anonymous tipster, a little before 11:00 p.m. on 8 January 2016. Deputy Franks was advised of a vehicle being located in a ditch on Woodstock Road, possibly with a "drunk driver, someone intoxicated," and that "a truck was attempting – getting ready to pull them out." Deputy Franks received no information concerning the description of the car, the truck, or the driver. There was also no information regarding the caller or at what time the call was received.

When Deputy Franks arrived at the rural location approximately ten minutes later, he noticed a white Cadillac "catty-cornered" or "partially in" someone's driveway at an angle. The vehicle had mud on the driver's side, and Deputy Franks opined that from "gouges in the side of the road . . . it appeared the vehicle had ran off the road." Deputy Franks did not stop at the vehicle to determine ownership and kept driving, though he testified he did not observe anyone in or around the vehicle as he passed.

As Deputy Franks continued driving past, he observed a truck "a couple of hundred feet" from where the Cadillac was parked, traveling away from his location. Deputy Franks testified he followed the truck to check its license plate. When he caught up from behind, he estimated the truck was traveling thirty-five to forty miles an hour, approximately fifteen to twenty miles below the posted 55 m.p.h. speed limit. Deputy Franks testified the truck was the only truck on the highway and "it was big enough to pull the car out." He did not see any chains, straps,

or other apparatus that would indicate that the truck had just pulled a vehicle out of a ditch.

Deputy Franks' sole reason to initiate the traffic stop was "due to what was called out from communications." The truck promptly came to a stop on the highway. The truck was being driven by a Mr. Griekspoor. Defendant was observed sitting in the passenger seat. Deputy Franks explained to Mr. Griekspoor that there was a report of a truck attempting to pull a vehicle out of a ditch. Mr. Griekspoor told Deputy Franks that he had pulled Defendant's car out of the ditch, was giving him a ride home, and he was "trying to help out a friend."

Deputy Franks observed that Defendant's legs were "covered in mud" from "half his thighs down." Defendant did not answer Deputy Franks' question of why he was so muddy. Deputy Franks' supervisor, Corporal Sheppard, arrived upon the scene as Deputy Franks was collecting Mr. Griekspoor's driver's license and registration.

Deputy Franks filled his supervisor in on the situation. Corporal Sheppard went to the passenger side to talk with Defendant, a "routine practice" according to Corporal Sheppard. Deputy Franks took Mr. Griekspoor's documents back to his patrol car to get information from communications on the license and registration and found no wants or warrants outstanding. He returned Mr. Griekspoor's documents while Corporal Sheppard was speaking with Defendant.

Corporal Sheppard asked Defendant to open the door and testified he noticed "a moderate odor of alcohol" from the passenger area. Defendant exited the truck at the officer's request. Corporal Sheppard stated he "continue[d] smelling the alcohol coming from [Defendant]," and observed Defendant was "unsteady on his feet."

Corporal Sheppard instructed Defendant to perform the Horizontal Gaze Nystagmus test. Corporal Sheppard purportedly detected all of the six clues from the test. By the time the Highway Patrol arrived to "process" Defendant ten to fifteen minutes later, he had been detained "based on [Corporal Sheppard's] suspicion of DWI." Defendant was given a Breathalyzer test by Highway Patrol Trooper Peele, with a result of 0.08. Defendant was charged with driving while impaired.

Defendant filed a motion to suppress evidence. The district court denied Defendant's motion, found him guilty of impaired driving, and sentenced him to sixty days imprisonment, which was suspended for twelve months of unsupervised probation. Defendant appealed to the superior court, where he filed another motion to suppress

evidence. After a hearing, the superior court entered an order denying Defendant's motion.

Defendant preserved his right to appeal the denial of his motion to suppress and entered a plea of guilty to impaired driving. The superior court sentenced Defendant to thirty days imprisonment, which was suspended for six months of unsupervised probation. Defendant gave oral notice of appeal.

II. Jurisdiction

An appeal of right lies to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant argues the deputy's observations of the scene and an anonymous tip were insufficient to defeat Defendant's motion to suppress. Defendant also argues the trial court erred by finding (1) there were "little artificial lights" in the general area; (2) there were gouges in the dirt shoulder of the road leading to the ditch in close proximity to the Defendant's car; and, (3) the deputy did not stop at the white car because he observed a truck going in the same direction he was.

IV. Standard of Review

On review of a denial of a motion to suppress, this Court is limited to the determination of "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. Rose*, 170 N.C. App. 284, 287-88, 612 S.E.2d 336, 338-39 (2005) (citations and quotation marks omitted).

V. Investigatory Stop

"The Fourth Amendment protects individuals against unreasonable searches and seizures. The North Carolina Constitution provides similar protection." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (citations and quotation marks omitted).

"[B]rief investigatory detentions such as those involved in the stopping of a vehicle" are considered seizures of the person and subject to Fourth Amendment protections. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citation omitted).

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has a particularized

> and objective basis for suspecting the particular person stopped of criminal activity. The reasonable suspicion necessary to justify such a stop is dependent upon both the content of information possessed by police and its degree of reliability. The standard takes into account the totality of the circumstances—the whole picture. Although a mere hunch does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.

Navarette v. California, 572 U.S. 393, 396-97, __ L. Ed. 2d __, __ (2014) (citations and quotation marks omitted).

"An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. To determine whether this reasonable suspicion exists, a court must consider the totality of the circumstances." *State v. Kincaid*, 147 N.C. App. 94, 97, 555 S.E.2d 294, 297-98 (2001) (citations and internal quotation marks omitted). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 98, 555 S.E.2d at 298 (quoting *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70).

> It is well established that [a]n anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability. Even if a tip lacks sufficient indicia of reliability, it may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration. In sum, to provide the justification for a warrantless stop, an anonymous tip must have sufficient indicia of reliability, and if it does not, then there must be sufficient police corroboration of the tip before the stop may be made.

State v. Veal, 234 N.C. App. 570, 577, 760 S.E.2d 43, 48 (2014) (internal citations and quotation marks omitted).

The State correctly concedes the anonymous tip in and of itself likely fails to provide sufficient reliability to justify a stop. *See Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000). The anonymous tip provided no description of either the car or the truck or how many people were involved. There is no indication of when the call came in or when the anonymous tipster witnessed the car in the ditch with a truck attempting to pull it out. However, the State argues since "nearly every

aspect of the tip was corroborated by the officer," the deputy had sufficient reasonable suspicion to stop the truck. We disagree.

The State asserts the facts in this case are comparable to *State v. Watkins*. In *Watkins*, an officer was informed of a suspicious vehicle behind the Virginia Carolina Well Drilling Company from a tip provided by an anonymous caller around 3:00 a.m. *Watkins*, 337 N.C. at 442, 446 S.E.2d at 70. The officer did not know the description of the "suspicious vehicle," but he did know that the business was normally closed at that time. *Id.* As he investigated, the officer saw a vehicle driving away. *Id.* at 440, 446 S.E.2d at 69. The officer followed, turning on his blue lights and stopping the car "for the purpose of continuing his [suspicious vehicle] investigation and not because of anything he observed about the defendant's driving." *Id.* at 440-41, 446 S.E.2d at 69.

Our Supreme Court upheld the stop, holding that the officer had reasonable suspicion. "All of the facts, and the reasonable inferences from those facts, known to the officer when he decided to make the investigatory stop, would lead to a reasonably cautious law enforcement officer to suspect that criminal activity was afoot." *Id.* at 443, 446 S.E.2d at 70. "[C]onsidered as a whole and from the point of view of a reasonably cautious officer on the scene, the officer had a reasonable suspicion to detain defendant for a brief investigatory stop." *Id.* at 443, 446 S.E.2d at 71.

Unlike in *Watkins*, the facts and inferences drawn from these facts are insufficient for a reasonable officer to suspect criminal activity had occurred. When Deputy Franks passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or had been able to pull, a car out of a ditch. There were no chains or other apparatuses visible to the deputy. Deputy Franks could not see how many people were in the truck prior to the stop. He testified the truck was not operating in violation of the law. He believed it was a suspicious vehicle merely because of the fact it was on the highway.

Subsequent opinions from this Court are more applicable to the facts in this case. In *State v. Peele*, the officer responded to a call describing a burgundy pickup truck being driven recklessly by a possible intoxicated driver "headed towards the Holiday Inn intersection." 196 N.C. App. 668, 669, 675 S.E.2d 682, 684 (2009). The officer arrived on the scene "within a second," saw and followed a burgundy truck for about a tenth of a mile, observed the truck "weave within his lane once," and pulled the truck over. *Id.* This Court held that the officer lacked reasonable suspicion because "all we have is a tip with no indicia of reliability, no

corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." *Id.* at 674, 675 S.E.2d at 687 (citation and quotation marks omitted).

The Court in *Peele* relies on *State v. McArn*, where this Court found an anonymous tip describing a specific car at a specific location was insufficient to provide the officer with reasonable suspicion:

> [T]he fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant's actions. The police were thus unable to test the tipster's knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity.

State v. McArn, 159 N.C. App. 209, 214, 582 S.E.2d 371, 375 (2003).

In *State v. Horton*, a police officer received a dispatch regarding a "suspicious white male, with a gold or silver vehicle in the parking lot" of a local business in an area with a history of break-ins. *State v. Horton*, __ N.C. App. __, __, __ S.E.2d __, __, 2019 N.C. App. LEXIS 302 at *2 (2019). When the officer arrived at the location, he exited his patrol vehicle and walked toward a silver car with a black male in the driver's seat, who then drove away. *Id.* at *2-3. The officer followed the vehicle because he thought the man's behavior was a little odd, but never observed "any bad driving, traffic violations, criminal offense, or furtive movements" prior to stopping the vehicle. *Id.* at *3. When the officer conducted a traffic stop, he smelled a strong odor of marijuana and searched the vehicle. *Id.* at *4. The search revealed narcotics, a scale, a stolen firearm, and cash. *Id.*

This Court found the officer's justification for the traffic stop was "nothing more than an inchoate and unparticularized suspicion or hunch." *Id.* at *11 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 7 (1989)). The anonymous tip "reported no crime and was only partially correct," and "it merely described the individual as 'suspicious' without any indication as to why." *Id.* at *15.

> The type of detail provided in the [anonymous] tip and corroborated by the officers is critical in determining whether the tip can supply the reasonable suspicion necessary for the stop. Where the detail contained in the tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip.

Id. at *12 (quoting *State v. Johnson*, 204 N.C. App. 259, 264, 693 S.E.2d 711, 715 (2010)).

Here, the details in the anonymous tip were not sufficient to even establish identifying characteristics, let alone to allow Deputy Franks to corroborate the details. *See id.* The anonymous tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After Deputy Franks passed the scene and the Cadillac and drove into a curve, he noticed a truck ahead driving under the posted speed limit. Deputy Franks' testimony indicated the road was curvy and the truck "was already in the curve" as he approached it from behind.

Deputy Franks provided no testimony tending to show the truck was engaging in any unsafe, reckless, or illegal driving behavior prior to his stop. He was unable to ascertain if there was even a passenger in the truck. At best, "all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." *Peele*, 196 N.C. App. at 674, 675 S.E.2d at 687.

Under the totality of the circumstances, Deputy Franks lacked reasonable suspicion to conduct a warrantless traffic stop of Mr. Griekspoor's truck. *See Kincaid*, 147 N.C. App. at 97, 555 S.E.2d at 297-98. Nothing in the anonymous tip would have indicated *this* truck was the one that had pulled the car out of the ditch. The truck was merely driving along a public highway and not committing any driving infractions. Deputy Franks' stop of Mr. Griekspoor was nothing more than a warrantless search and seizure based upon a mere suspicion or a hunch. *Horton*, at *12.

The State concedes the anonymous tip, without more, was insufficient to justify the warrantless stop. The trial court erred in concluding Deputy Franks had a reasonable suspicion to stop the truck and in denying Defendant's motion to suppress.

VI. Conclusion

The anonymous tip was insufficient to provide reasonable suspicion for Deputy Franks to stop Mr. Griekspoor's truck travelling on a highway. Deputy Franks did not have reasonable suspicion to conduct this warrantless seizure and search. Based on our determination that the trial court's conclusion of law was error, we need not address Defendant's arguments concerning the trial court's findings of fact.

The trial court erred in denying Defendant's motion to suppress. We reverse and remand for entry of an order granting Defendant's motion. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissenting with separate opinion.

BERGER, Judge, dissenting.

I respectfully dissent.

> "Reasonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000)). "The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) (citations and quotation marks omitted). "Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645.

State v. Jones, ___ N.C. App. ___, ___, 825 S.E.2d 260, 264 (2019). The "reasonable suspicion standard simply requires that '[t]he stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.' " *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 117 (2016) (quoting *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)), *writ denied*, *review denied*, 369

N.C. 536, 797 S.E.2d 8 (2017). Generally, an anonymous tip is not sufficiently reliable to provide reasonable suspicion unless "it is buttressed by sufficient police corroboration." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000).

"Reasonable suspicion is a commonsense, nontechnical conception[ ] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Heien*, 366 N.C. 271, 280, 737 S.E.2d 351, 357 (2012) (*purgandum*). "The process of [determining reasonable suspicion] does not deal with hard certainties, but with probabilities . . . ." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

In determining whether reasonable suspicion exists, "context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 117 (quoting *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). "[T]he key determination is not the innocence of an individual's conduct, but the *degree of suspicion* that attaches to particular types of noncriminal acts." *Id.* at ___, 795 S.E.2d at 118 (citation and quotation marks omitted). For example, "driving substantially lower than the speed limit is a factor that may contribute to a police officer's reasonable suspicion in stopping a vehicle." *Id.*

Here, Officer Franks was dispatched to the area of Woodstock Road in Beaufort County at approximately 11:00 p.m. on January 8, 2016. Woodstock Road is in a remote, rural area. A concerned citizen had reported that a vehicle was in a ditch, and "the driver was attempting to get the vehicle pulled out by a truck." Officer Franks arrived approximately 10 minutes after being dispatched, and he observed an unoccupied Cadillac that was "catty-cornered" near a driveway. The Cadillac had mud on the driver's side. In addition, there were "gouges" in the road which caused Officer Franks to believe the Cadillac had left the roadway.

At the same time and place, Officer Franks also observed a truck approximately 200 feet in front of him on Woodstock Road. The truck was travelling fifteen to twenty miles per hour below the posted speed limit away from the Cadillac. Officer Franks did not encounter any other vehicles en route to Woodstock Road, or while he was on Woodstock Road that evening. Officer Franks pulled up behind the truck and initiated a traffic stop.

Standing alone, the tip from the concerned citizen was not sufficiently reliable to justify the stop. However, the tip was "buttressed by sufficient police corroboration." *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citation omitted). At approximately 11:00 p.m., Officer Franks observed "gouges" in the roadway on Woodstock Road near the Cadillac. There was mud on the left side of the Cadillac, suggesting that the vehicle may have been in a ditch as the caller reported. Based upon Officer Franks' observations, a reasonable officer could infer that the Cadillac had left the roadway when it was being driven.

Further, Officer Franks only encountered two vehicles on Woodstock Road that evening. The two vehicles matched the description provided by the caller: a truck and a vehicle that appeared to have left the roadway. There was a high probability that the truck and the Cadillac off the roadway on a desolate rural road at 11:00 p.m. were the ones referenced by the concerned caller. These were the only two vehicles Officer Franks encountered that evening on Woodstock Road. Moreover, when he observed the only truck on the road, that vehicle was driving away from the area at a speed "substantially lower than the speed limit." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 118. This evidence created a sufficient degree of suspicion for Officer Franks to stop the truck and investigate what appeared to be a single-car accident from an impaired driving offense.

While there are many innocent explanations for what took place on Woodstock Road that evening, Officer Franks' observations corroborated the information provided by the concerned caller that a driver that may have been impaired "was attempting to get the vehicle pulled out by a truck." The totality of the circumstances provided more than just a hunch that criminal activity was afoot. There was reasonable suspicion justifying the stop.

Because the trial court's findings of fact were supported by competent evidence, and those findings support the conclusions of law, I would affirm the trial court's order denying Defendant's motion to suppress.

STATE OF NORTH CAROLINA
v.
TYRONE CHURELL DAVIS, DEFENDANT

No. COA18-1017

Filed 21 May 2019

1. Rape—second-degree—jury instructions—no physical evidence or corroborating eyewitness testimony—referral to "the victim"

In a rape case in which there was no physical evidence of injury and no corroborating eyewitness testimony, the trial court did not erroneously express a judicial opinion by referring to the prosecuting witness as "the victim" during its jury charge. Even though it may have been the best practice for the trial court to say "alleged victim" or "prosecuting witness," defendant did not request this modification to the pattern jury instructions; furthermore, the trial court properly placed the burden of proof on the State.

2. Evidence—expert—rape prosecution—lack of physical evidence "consistent with" sexual abuse—plain error analysis

While it was improper for a nurse to testify that the lack of physical evidence of rape was "consistent with" sexual abuse, there was no plain error even assuming that the trial court erred by not intervening ex mero motu. The testimony was not improper vouching for the prosecuting witness's credibility, and the alleged error did not have a probable impact on the jury's verdict.

Judge BRYANT concurring in result only.

Appeal by Defendant from judgment entered 9 August 2017 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Defendant Tyrone Churell Davis appeals from a judgment finding him guilty of second degree rape and sexual battery.

On appeal, Defendant argues that he is entitled to a new trial based on portions of the jury charge and based on inadmissible testimony offered by one of the State's witnesses; namely, the nurse who examined Emma[1] and who was qualified as a "sexual assault nurse examiner" expert.

I. Background

Defendant was indicted and tried for two counts of second degree rape and one count of sexual battery against Emma.

The State's evidence showed as follows. On the night in question Emma and a friend went out drinking and then decided to go to Defendant's residence to purchase cocaine. While there, they snorted cocaine. Emma then fell asleep on a bed, fully clothed. Defendant and Emma's friend went back out. But at some point, Defendant returned to his residence by himself, where Emma was still asleep. Sometime later, early in the morning, Emma woke up with Defendant on top of her having sexual intercourse with her. Emma pushed Defendant off of her. She heard her friend knocking on the door. She opened the door and told her friend that she had been raped by Defendant. They called the police.

The only direct evidence of the rape *itself* offered by the State was Emma's testimony. The State also called Emma's friend; an emergency room physician and a nurse who treated Emma; and members of the police who were on duty early that morning. The physician testified that she did not perform a forensic exam of Emma, stating that she felt Emma was not sober enough to consent to an exam.

The nurse testified that she was able to physically examine Emma and question Emma, though Emma still smelled of alcohol and was sleepy. The nurse testified that her exam of Emma's pelvis was normal.

Defendant testified on his own behalf. He did not deny his sexual encounter with Emma, but he claimed that the encounter was consensual.

The jury found Defendant guilty as charged. Judgment was arrested on one count of second degree rape. Defendant was sentenced in the presumptive range for the remaining charges.

Defendant gave notice of appeal in open court.

---

1. A pseudonym is used to protect the individual's identity.

II. Analysis

Defendant makes two arguments on appeal. Defendant first argues that the trial court erred in referring to Emma as "the victim" during its jury instructions. Next, Defendant contends that the State's expert witness, the nurse who examined Emma, impermissibly vouched for Emma's credibility. We address each argument in turn.

We note that Defendant failed to object to these alleged errors at trial and, therefore, failed to preserve his arguments on appeal. Thus, we review Defendant's arguments for plain error. *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987). "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).

A. Trial Court's Labeling of Emma as "the Victim"

[1] Defendant argues that the trial court erroneously expressed a judicial opinion by referring to Emma as "the victim" during its charge to the jury. We disagree.

Defendant argues on appeal that the use of the term "the victim" in the jury instructions amounted to expression of a judicial opinion. An expression of judicial opinion is a statutory violation, and a "defendant's failure to object to alleged expressions of opinion by the trial court in violation of [a] statute[] does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). However, "where our courts have repeatedly stated that the use of the word 'victim' in jury instructions is not an expression of opinion," and the Defendant points to no other alleged instances of expression of judicial opinion, this issue is unpreserved. *State v. Phillips*, 227 N.C. App. 416, 420, 742 S.E.2d 338, 341 (2013). Therefore, we review for plain error.

It is well settled that when a "judge properly place[s] the burden of proof on the State[,]" referring to the complaining witness as "the victim" does not constitute plain error. *State v. McCarroll*, 336 N.C. 559, 566, 445 S.E.2d 18, 22 (1994); *see State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003) ("[I]t is clear from case law that the use of the term 'victim' in reference to prosecuting witnesses does not constitute plain error when used in instructions[.]"). However, our Supreme Court has stressed that "when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions *at defendant's request* to use the phrase 'alleged victim'

or 'prosecuting witness' instead of 'victim.' " *State v. Walston*, 367 N.C. 721, 732, 766 S.E.2d 312, 319 (2014) (emphasis added).

Here, it may have been the best practice for the trial court to "use the phrase 'alleged victim' or 'prosecuting witness' instead of victim' " during its charge to the jury. *Id.* However, a review of the trial transcript reveals that Defendant did not request such a change. *Id.* Moreover, the trial court properly placed the burden of proof on the State. *See McCarroll*, 336 N.C. at 566, 445 S.E.2d at 22. Thus, we conclude that it was not plain error for the trial court to refer to Emma as "the victim" in its jury instructions.

B. Expert Vouching for Credibility of Complaining Witness

[2] Defendant also contends that the State's expert witness impermissibly vouched for Emma's credibility. As Defendant did not object to the expert's testimony at trial, we also review this argument for plain error. *Bagley*, 321 N.C. at 211, 362 S.E.2d at 250.

It is well settled that an expert may not opine as to the credibility of a witness. *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986). For instance, an expert's testimony that a witness was *in fact* abused, absent physical evidence of said abuse, is inadmissible. *State v. Grover*, 142 N.C. App 411, 417, 543 S.E.2d 179, 183, *aff'd* 354 N.C. 354, 553 S.E.2d 679 (2001). However, an expert may testify that an alleged victim's physical injuries are consistent with the victim's testimony. *See State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (finding testimony that physical evidence was consistent with the alleged assault "vastly different from an expert stating on examination that the victim is 'believable' or 'is not lying.' "). Indeed, "otherwise admissible expert testimony is not rendered inadmissible merely because it enhances a witness's credibility." *In re Butts*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003) (citing *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1997) ("testimony based on the witness's examination of the child witness and expert knowledge . . . is not objectionable because it supports the credibility of the witness[.]")).

In the present case, the State's expert was a nurse who had interviewed and examined Emma. During her examination of Emma, Emma did not act distraught and she denied counseling. Further, the nurse testified that Emma showed no physical signs of penetration or other sexual contact. On re-direct, the expert testified that the lack of physical indicators was still consistent with someone who had been sexually assaulted, testifying as follows:

STATE: Now, in your training and experience, was this a consistent – was – was her exam consistent with people reporting of sexual abuse?

EXPERT: Yes.

STATE: Okay. And [defense counsel] had asked you about the previous – different times you had actually examined other people in your training and experience, that they had had some physical findings; correct?

EXPERT: Correct.

STATE: But you just told us that her exam was consistent with someone reporting a sexual assault; correct?

EXPERT: Correct.

STATE: Can you explain that.

EXPERT: Some patients who have been assaulted may not have physical findings or there may not be physical evidence to suggest an assault took place. Sometimes it – there could be physical findings and sometimes there is not.

STATE: Okay. In – in the times that you have been doing this, for the years you have been doing this, how many times have people come in with physical – actual physical – cuts, abrasions, all of that, that report this kind of complaint?

EXPERT: I can't really give a number, but it's less than those that do not have physical findings.

STATE: So most that come that report being sexually assaulted, especially in the manner that she talked about . . . don't present with physical findings like you are talking about?

EXPERT: That's correct.

STATE: And that's why this is consistent; is that right?

EXPERT: That's correct.

Defendant takes issue with these statements and likens them to those that have been found as inadmissible vouching. *See State v. Keen*, 309 N.C. 158, 164, 305 S.E.2d 535, 538-39 (1983) (ordering a new

trial where an expert went beyond the scope of the question asked and opined that "an attack occurred . . . this was reality[,]" which amounted to an opinion as to the guilt of the defendant); *see also State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (ordering a new trial where an expert's written report, which stated that the victim's disclosure "was credible[,]" was impermissibly admitted into evidence). In the present case, though, the State's expert did not explicitly state that Emma was in fact assaulted or that she was credible.

The expert did, however, state that Emma's "exam was consistent with someone reporting a sexual assault[,]" solely on the grounds that she did *not* have physical evidence of sexual abuse. But we note that this lack of physical evidence observed by the nurse is also consistent with someone who has *not* been sexually abused. *See State v. Towe*, 366 N.C. 56, 61-64, 732 S.E.2d 564, 567-69 (2012) (finding an expert's testimony to be improper where "she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse"); *see also State v. Frady*, 228 N.C. App 682, 685-87, 747 S.E.2d 164, 167-68 (2013) (holding expert testimony that the victim's disclosure was "consistent with sexual abuse" prejudicial). In other words, this portion of the expert's testimony – in which she affirmatively stated that a *lack* of physical evidence is consistent with someone who has been sexually abused – should not have been allowed, as this testimony did not aid the trier of fact in any way. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017).

Even if an opinion of the nature offered by the State's expert would be helpful to a jury, there is nothing in the record to indicate a proper basis for the nurse's opinion. Such testimony should generally be based on the science of how and why the human body does not always show signs of sexual abuse. *Id*. The nurse's testimony here was not based on any science or other medical knowledge she may have possessed. Rather, she based her testimony on her assumption that all of the people that she had ever interviewed and examined were telling the truth, that they had all been sexually abused.

While it is impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse, it may permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred. Such testimony might aid the trier of fact to understand that the lack of physical evidence does not necessarily mean that the defendant is not guilty. But again, here, there was nothing in the record to indicate that the nurse was qualified to give an opinion in this regard.

As we find that the nurse's opinion testimony was improper, we must determine whether its admission had a prejudicial effect on Defendant's trial. *Bagley*, 321 N.C. at 211, 362 S.E.2d at 250. A prejudicial effect is one that, but for the error in question, "a different result would have been reached at the trial[.]" *Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167 (quoting N.C. Gen. Stat. § 15A-1443 (2017)).

Assuming that the trial court committed error by admitting the testimony without intervening *ex mero motu*, we conclude that any such error did not rise to the level of plain error. To be sure, Emma's testimony was the only direct evidence of Defendant's guilt. But the State elicited testimony from several other witnesses regarding the night and the event in question. Moreover, the nurse's testimony was *not* an expert opinion that Emma was telling the truth, which has been held in some cases to constitute plain error. Rather, the testimony was an expert opinion that a lack of physical evidence is consistent with sexual abuse. We cannot say that there is a reasonable probability that the jury assigned any great weight to this particular opinion as evidence corroborating Emma's testimony. We also cannot say that it is reasonably probable that the jury, using their common sense, did not understand that a lack of physical evidence can also indicate that no sexual abuse occurred. Certainly, it may be reasonably probable that a jury may find a complaining witness more credible where an expert testifies that the complaining witness is telling the truth. *See O'Connor*, 150 N.C. App. at 712, 564 S.E.2d at 297. But we conclude that it is not reasonably probable that the jury, here, found Emma's testimony more credible simply because the nurse stated that a lack of physical evidence is consistent with sexual abuse.

III. Conclusion

Judge Holt did not commit plain error when referring to Emma as the "victim" during its charge to the jury. And she did not commit plain error by failing to intervene *ex mero motu* and prevent the State's expert from testifying that a lack of physical evidence was "consistent with someone reporting a sexual abuse." Defendant received a fair trial, free from plain error.

NO PLAIN ERROR.

Judge ARROWOOD concurs.

Judge BRYANT concurs in result only.

STATE OF NORTH CAROLINA
v.
ALPHONSO DAWKINS, JR., DEFENDANT

No. COA18-1101

Filed 21 May 2019

1. Criminal Law—tactical decisions—impasse between defendant and counsel—stipulation to felon status

In a prosecution for possession of a firearm by a felon, the trial court properly denied the stipulation proposed by defendant's trial counsel regarding defendant's status as a convicted felon. Defendant had rejected his counsel's recommendation to sign the stipulation, creating an impasse on the matter, so the trial court was required to abide by defendant's wishes.

2. Appeal and Error—preservation of issues—objection outside presence of jury—failure to argue plain error

Where defendant objected outside of the jury's presence to the admission of a form showing his prior felony and misdemeanor convictions but failed to object when the form was offered into evidence, the issue of the form's admissibility was not preserved for appellate review. Defendant also waived plain error review by failing to specifically and distinctly argue that the alleged error amounted to plain error. The appellate court declined to invoke Rule 2 to consider the merits of the unpreserved objection because defendant refused to stipulate to the prior felony, effectively forcing the State to prove its case by publishing the form to the jury.

Appeal by Defendant from judgment entered 5 July 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jane Atmatzidis, for the State-Appellee.

The Epstein Law Firm PLLC, by Drew Nelson, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon jury verdicts finding him guilty of possession of a firearm by a felon and misdemeanor

possession of marijuana, following a jury trial on 5 July 2018. Defendant contends that the trial court erred by (1) rejecting Defendant's trial counsel's attempt to stipulate to the fact that Defendant was a convicted felon and (2) allowing the State to introduce evidence of Defendant's prior felony conviction, which showed evidence of Defendant's prior misdemeanor convictions. Finding no error, we affirm.

I. Background

On 10 March 2017, Defendant crashed his vehicle into the front yard of a residence in Charlotte. Law enforcement officers arrived on the scene within minutes in response to a call describing the scene and informing dispatch that the driver of the vehicle had placed something inside a trash can next to the crashed vehicle.

Upon arrival, Defendant told the officers that he had lost control while driving. The officers received consent from the owner of the residence to search her trash cans, and found a half-empty bottle of alcohol and a firearm therein. The owner of the residence said that neither item belonged to her. One of the officers ran Defendant's information through the police database and learned that Defendant was a convicted felon, and arrested Defendant for possession of a firearm by a felon. After being placed under arrest, Defendant admitted to the officers that the firearm belonged to him and that he had placed it in the trash can.

The officers took Defendant to the police station and placed him in an interview room, which was monitored with audio and visual recording equipment. Once alone in the interview room, Defendant reached into his groin area, and the officers watched as he removed something from his person and placed it into his mouth. The officers reentered the interview room and demanded Defendant spit out what he had placed into his mouth. Defendant complied, and spit out three small plastic bags containing marijuana.

On 12 June 2017, Defendant was indicted for possession of a firearm by a felon, a violation of N.C. Gen. Stat. § 14-415.1 (2017), and misdemeanor possession of marijuana, a violation of N.C. Gen. Stat. § 90-95(d)(4) (2017). On 2 July 2018, Defendant pled not guilty to all charges, and trial commenced.

Prior to the beginning of trial, the State and Defendant's trial counsel agreed to stipulate that Defendant had previously been convicted of a felony. Defendant's trial counsel conferred with Defendant and read him the proposed stipulation, and then told the trial court that Defendant did not wish to sign the stipulation. Defendant's trial counsel stated that

he believed the stipulation to be in Defendant's best interest, and that he believed the decision of whether to stipulate was his to make, rather than Defendant's. Ultimately, the trial court rejected the proposed stipulation. The trial court noted that the State would be able to introduce the Judgment and Commitment form for Defendant's prior felony and misdemeanor convictions (the "Form") to prove Defendant's status as a convicted felon. The trial court also indicated that it might require certain portions of the Form to be redacted, and recommended that the parties confer about proposed redactions.

The following day, the parties and the trial court again discussed the Form. Defendant objected to the admission of the Form because it reflected Defendant's prior convictions for two misdemeanors, which Defendant argued would be prejudicial to him. The trial court conducted a balancing analysis under N.C. Gen. Stat. § 8C-1, Rule 403 (2018), and ruled that the evidence of the misdemeanors was not "overly prejudicial." Defendant did not specifically object to the evidence of the two prior misdemeanors, nor move the trial court to redact the evidence of the misdemeanors from the Form. The only content Defendant asked the trial court to redact was the "sentence imposed" on the Form for the felony and misdemeanor convictions combined, which the trial court declined to do because it found the sentence not "overly prejudicial." Defendant did not object further to the Form. The trial court thus allowed the Form's admission, subject to the redaction of the offenses charged, the prior record level, and the prior record points, but not the evidence of the misdemeanor convictions altogether.

At trial, the State called the Assistant Clerk of Superior Court of Mecklenburg County as a witness, who identified the Form. The redacted Form was shown to the jury, and the Assistant Clerk testified that it showed Defendant had been convicted of a felony and two misdemeanors. Defendant did not object to the Form's admission, or to the Assistant Clerk's testimony regarding the Form, when said evidence was offered at trial.

On 5 July 2018, the jury convicted Defendant of both offenses charged, and the trial court entered judgment sentencing Defendant to 22-36 months' imprisonment. Defendant timely appealed.

II. Appellate Jurisdiction

This Court has jurisdiction to hear Defendant's appeal of the judgment under N.C. Gen. Stat. § 7A-27(b)(1) (2018).

III. Analysis

Defendant contends that the trial court erred by (1) rejecting Defendant's trial counsel's attempt to stipulate to the fact that Defendant was a convicted felon and (2) allowing the State to introduce evidence of Defendant's prior felony conviction, which showed evidence of Defendant's prior misdemeanor convictions. We address each argument in turn.

a. Stipulation

[1] Defendant first argues that the trial court erred by denying the stipulation proposed by the State and Defendant's trial counsel regarding Defendant's status as a convicted felon, a proposed stipulation that the record reflects Defendant refused to sign when asked. By rejecting the stipulation proposed by his trial counsel, Defendant argues, the trial court failed to heed Defendant's trial counsel's decision, and as a result, Defendant was deprived of his right to effective counsel guaranteed by the Sixth Amendment to the United States Constitution. Because the trial court deprived Defendant of his right to effective counsel, the argument continues, the trial court committed reversible error and Defendant's subsequent convictions must be set aside.

Defendant's argument is premised upon the proposition that, where a defendant and his lawyer reach an impasse regarding a tactical decision to be made at trial—here, the decision of whether to require the State to prove that Defendant was a convicted felon, or to stipulate to that fact—it is the defendant's lawyer's desired tactical decision that controls, rather than the defendant's. This premise has been specifically rejected by our Supreme Court. In *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), the Court held:

> While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure, and, in the absence of special authority, ordinarily a stipulation operating as a surrender of a substantial right of the client will not be upheld. . . . [W]hen counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship. In such situations, however, defense counsel should make a record of the circumstances, her advice to

> the defendant, the reasons for the advice, the defendant's decision and the conclusion reached.

Id. at 403-04, 407 S.E.2d at 189 (citation omitted).

The record reflects the following: (1) the circumstances leading to the disagreement between Defendant and his trial counsel regarding the proposed stipulation; (2) that, in conference with Defendant, Defendant's trial counsel advised Defendant to sign the proposed stipulation; (3) that Defendant's trial counsel so advised Defendant because the Form that the State otherwise would almost certainly use to prove that Defendant was a convicted felon contained evidence which Defendant's trial counsel believed ran the risk of prejudicing Defendant, and Defendant's trial counsel thus believed stipulating was in Defendant's best interest; (4) that, after receiving his trial counsel's advice, Defendant refused to sign the proposed stipulation; (5) that Defendant's trial counsel petitioned the trial court to accept the proposed stipulation despite Defendant's unwillingness to stipulate (creating the "absolute impasse" contemplated by *Ali*); and (6) the trial court rejected the proposed stipulation.

Defendant argues that *Ali* is inapplicable here because he was not "fully informed" regarding the stipulation and because his "refusal to sign the stipulation should be seen as a refusal to participate in the trial process and a knee-jerk refusal of his counsel's recommendation" rather than the "absolute impasse" between a defendant and his trial counsel contemplated by *Ali*.

Defendant's statement that he "refus[ed] his counsel's recommendation"—in "knee-jerk" fashion or otherwise—is a concession that Defendant understood his trial counsel's recommendation and that he could take it or leave it. If at that point Defendant did not feel adequately informed by his trial counsel to make the decision he faced, Defendant could have expressed a lack of understanding to his trial counsel or to the trial court and sought further explanation. The record nowhere reflects that Defendant had such a lack of understanding regarding the stipulation, that he asked his trial counsel or the trial court for more information, or that he took any other steps to inform himself. To the contrary, the record reflects that Defendant specifically told his trial counsel that he did not want to sign the stipulation. It is Defendant's burden to demonstrate to this Court that his trial counsel was ineffective and prejudiced his case, *State v. Banks*, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014), and without supporting evidence in the record, we cannot conclude that Defendant was not "fully informed" within the meaning of *Ali*.

Defendant's argument that his refusal to sign the stipulation was a "refusal to participate in the trial process" rather than an impasse with his trial counsel is unavailing. Defendant was faced with a choice: to heed his counsel's recommendation to sign the stipulation, or to reject his counsel's recommendation and refuse to sign the stipulation. Defendant chose the latter course, and because Defendant's trial counsel maintained his insistence upon the former, an impasse was created within the meaning of *Ali*, which controls our analysis.

Because we hold that Defendant's decision not to stipulate was controlling under *Ali*, the trial court was required to abide by Defendant's wishes and reject the stipulation. *State v. Freeman*, 202 N.C. App. 740, 746, 690 S.E.2d 17, 22 (2010) ("It was error for the trial court to allow counsel's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention."). We accordingly conclude that the trial court did not violate Defendant's Sixth-Amendment right to effective counsel or otherwise err by rejecting the proposed stipulation sought by Defendant's trial counsel.

b. Misdemeanors

[2] Defendant also argues that by allowing the State to introduce the Form[1] as evidence of Defendant's prior felony conviction, when the Form also contained evidence of Defendant's prior misdemeanor convictions, the trial court erred by admitting irrelevant evidence that unfairly prejudiced Defendant.

The record reflects that Defendant objected to the Form's admission on the day of the trial on the grounds of prejudice, during a colloquy with the trial court and the State that took place outside of the presence of the jury and before the Form was offered into evidence, and that Defendant's objection was overruled at that time. The record does not reflect that Defendant (1) objected during the colloquy to the Form's

---

1. In his arguments, Defendant fails to acknowledge that he objected only to the admission of the Form *as a whole* during his preliminary colloquy with the trial court and the State. Defendant never specifically objected to those portions of the Form reflecting the misdemeanor convictions, or asked the trial court to redact those portions. Defendant's argument on appeal that "the misdemeanor convictions should have been redacted" because "[t]rial counsel for [Defendant] objected to the inclusion of the misdemeanor convictions and requested that they be redacted from the form" fails both for (1) Defendant's failure to cite to any authority setting forth a duty to redact prejudicial evidence from relevant documents admitted and (2) the fact that the record does not reflect that Defendant's trial counsel made the objection that Defendant suggests.

admission on relevance grounds, or (2) objected to the Form's admission on any ground when it was actually offered into evidence.

Where a defendant objects to evidence at trial outside of the presence of the jury, but fails to object when the evidence is actually admitted, the issue of the evidence's admissibility is not preserved for appellate review. *See State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) ("a trial court's evidentiary ruling on a pre-trial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial"); *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995) ("A motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial."). Since Defendant failed to object to the Form when it was offered into evidence, the issue of the Form's admissibility was not preserved.

We may review unpreserved evidentiary errors in criminal cases for plain error. *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018). Under plain error review, 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." *Id.* at 563, 819 S.E.2d at 370 (citation omitted). However, a defendant must "specifically and distinctly" contend on appeal that the error amounted to plain error. N.C. R. App. P. 10(a)(4) (2018). As the State argues, Defendant does not contend that the trial court committed plain error, but merely states that Defendant was prejudiced by the trial court's purported error. By failing to "specifically and distinctly" argue that the purported error amounted to plain error, Defendant has waived plain error review. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (holding defendant "waived appellate review of [unpreserved] arguments by failing specifically and distinctly to argue plain error").

Finally, Defendant asks us to suspend the requirements of Appellate Rule 10 and consider the merits of his unpreserved objection to "prevent manifest injustice to a party[.]" N.C. R. App. P. 2 (2018). But because the record shows that Defendant was able but refused to stipulate that he was a convicted felon, and by so doing effectively required the State to prove its case by publishing the Form (and potentially the evidence of his prior misdemeanor convictions reflected thereupon) to the jury, we discern no manifest injustice to prevent. *See* N.C. Gen. Stat. § 15A-1443(c) (2018) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *State v. Eason*, 336 N.C. 730, 741, 445 S.E.2d 917, 924 (1994) ("When a party invites a

course of action, he is estopped from later arguing that it was error."). We therefore decline to invoke Appellate Rule 2.

IV. Conclusion

Because Defendant refused to sign the proposed stipulation regarding his status as a convicted felon, the trial court did not err in rejecting the proposed stipulation. Defendant's failure to object to the admission of the Form when it was offered into evidence at trial means that his objection is unpreserved, and Defendant's failure to argue that the trial court's admission of the Form had a probable impact upon the jury's decision to convict him constitutes a waiver of plain error review. We accordingly find no error.

NO ERROR.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
DAVID ALAN KELLER, DEFENDANT

No. COA17-1318

Filed 21 May 2019

Criminal Law—jury instructions—defenses—entrapment—solicitation of a minor

Defendant failed to prove he was entitled to a jury instruction on the defense of entrapment for his charge of solicitation by computer or electronic device of a person believed to be fifteen or younger for the purpose of committing an unlawful sex act and appearing at the meeting location, where the evidence supported defendant's predisposition and willingness to commit the crime. He responded to an online posting entitled "Boy Needing a Man," repeatedly stated he was looking for a "boy," and attempted to meet the online poster (an undercover officer) to engage in sexual acts after being told the poster was fifteen years old.

Judge INMAN dissenting.

STATE v. KELLER

[265 N.C. App. 526 (2019)]

Appeal by defendant from judgment entered 26 September 2016, by Judge Eric L. Levinson in Lincoln County Superior Court. Heard in the Court of Appeals 6 September 2018.

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

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

BERGER, Judge.

On August 23, 2016, a Lincoln County jury found David Alan Keller ("Defendant") guilty of solicitation of a minor by computer or electronic device and appearing at a meeting location for the purpose of committing an unlawful sex act. Defendant timely appeals, arguing that the trial court erred when it did not submit the defense of entrapment to the jury. We find no error.

Factual and Procedural Background

On May 11, 2015, Detective Brent Heavner ("Detective Heavner") of the Lincolnton Police Department went undercover online as a fifteen-year-old boy with the fictitious name "Kelly." As part of a year-and-a-half-long operation targeting online sexual predators, "Kelly" posted a personal advertisement titled "Boy Needs a Man" on Craigslist's adults-only "Personal Encounters" section, which read:

> Okay. I never, never did this so here it goes. I'm wanting to experience a man. Never had tried I but want to. I have been with a girl and I want to try a man. Am posting here because I want a complete stranger so no one will find out about this. I would like an older man that is not shy and knows what to do because I will probably be a little nervous. I would prefer a pic and a number so we can, so we cannot use e-mail. I will be picky so be patient but would like to do this soon. You would have to come to me. Would like to try anything. And I am a white male open to anyone.

The next day, at 6:07 a.m., Defendant responded to "Kelly's" advertisement as follows:

> Hey[.] I am a 44 white male looking for a young guy to take care of and spoil[.] I am 175 pounds, 32/32 pants, 6.5 cut,

> DD free. If you would like to be a daddy's boy and have your every need provided for you let me know I am looking for a boy to treat very special.

At 10:52 a.m., "Kelly" responded, "whats your number and what do you like[?]" Defendant e-mailed his phone number. When "Kelly" did not answer immediately, Defendant sent the following three emails later that day:

> 2:43 p.m.: I sent you my number. I look like a 44 year old guy. Not fat and not ugly.
>
> 9:38 p.m.: Are u still needing a man. I am still looking for a boy[.]
>
> 9:51 p.m.: This man is still looking for his boy toy[.]

Over the next few days, "Kelly" and Defendant exchanged a series of text messages all detailing Defendant's desire for "Kelly" to live with him. After initial introductions, Defendant stated, "I could offer you a home. Car to drive[,] phone[,] clothes[, and] money to spend. Pretty much what ever you need." "I have had 3 boys. They never had to work and got everything they ever asked for[.]" When Defendant and "Kelly" exchanged photos (Detective Heavner used a photo from Google images), Defendant stated, "I would love to make you my boy," "I would take really good care of you," "I think you're a little hottie," and "I could have sex 5 times a day." "Kelly" responded that he could move in that day, but he was afraid that he may be too young for Defendant.

> [Detective Heavner]: I may be too young but I am needing a place to go, my aunt is about to put me back in foster care and I will run away if she does[.]
>
> [Defendant]: How old are u[?] If your 17 it's legal[.]
>
> [Detective Heavner]: I am not quiet (*sic*) 16 and actually 16 is the legal age[.]
>
> [Defendant]: Send me a pic I can see your face please[.]
>
> [Detective Heavner]: I am scared to show my face right now.
>
> [Defendant]: Well. I could let you live here with me and take care of you. But we could not have sex till you was old enough[.] . . . I do not want to go to jail[.] I had one boy I played with when he was 16 but turned 17 the next week[.]

. . . .

> [Defendant]: You know my son got on line and thought he was talking to a girl it turned out to be a cop and when he went to meet her he got arrested and went to jail for 3 years[.]
>
> [Detective Heavner]: For real?
>
> [Defendant]: Yes for real he really went to jail for 3 years and now has to register as a sex offender[.]

Knowing the consequences of talking online to a stranger and knowing that "Kelly" was not yet sixteen-years-old, Defendant continued the conversation, agreeing to have sexual relations with "Kelly."

> [Detective Heavner]: I am very curious[.]
>
> [Defendant]: Curious about what[?]
>
> [Detective Heavner]: I don't know how to say it[.]
>
> [Defendant]: Just say it. I won't judge you[.]
>
> [Detective Heavner]: How do I know if I am[.] And if I come there and we can't be sexual it might be a mistake[.]
>
> [Defendant]: I said we could[.]
>
> [Detective Heavner]: You said we could when I am old enough for u[.]
>
> [Defendant]: Well like I said don't want to talk through text. But will talk to you in person about it[.]
>
> [Detective Heavner]: You said I said we could so does that mean yes cuz if not I may have to find someone else first to see what its like[.]
>
> [Defendant]: Don't find anyone else. Please[.]
>
> [Detective Heavner]: Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it[.]
>
> [Defendant]: Yes[.]

. . . .

> [Defendant]: I have been looking for a boy for a long time[.]

After exchanging numerous texts, Defendant agreed to meet "Kelly" and take him back to Defendant's home. When Defendant arrived at the meeting location, officers were on scene and placed Defendant under arrest.

On August 18, 2016, Defendant was indicted for solicitation by computer or electronic device of a person believed to be fifteen or younger for the purpose of committing an unlawful sex act and appearing at the meeting location where he was to meet the person whom he believed was a child. At trial, Defendant testified that he began using Craigslist's personal advertisements in 2006. He stated that over the course of eleven years, he had met multiple men on the website and three even lived with him for extended periods of time. Defendant testified that he responded to "Kelly's" advertisement because he and his live-in companion were having problems and Defendant wanted to make him jealous. After repeatedly claiming that he just wanted to "make sure Kelly was okay," Defendant finally conceded that sex is a part of what he gets in return for his generosity.

On August 23, 2016, the jury found Defendant guilty as charged. On September 26, 2016, the trial court sentenced Defendant to ten to twenty months imprisonment and mandatory registration as a sex offender for thirty years. Defendant filed a petition for a writ of certiorari, which was granted by this Court. Defendant argues on appeal that the trial court erred when it failed to instruct the jury on entrapment.

Analysis

"Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo." *State v. Ott*, 236 N.C. App. 648, 651, 763 S.E.2d 530, 532 (2014) (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment, for that of the lower tribunal." *Id.* at 651, 763 S.E.2d at 533 (citation and quotation marks omitted).

"In determining whether a defendant is entitled to a jury instruction on entrapment, the trial court must view the evidence in the light most favorable to the defendant." *State v. Morse*, 194 N.C. App. 685, 690, 671 S.E.2d 538, 542 (2009) (citation omitted). "Before a [t]rial [c]ourt can submit [an entrapment] defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment. . . ." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d

191, 197 (1955) (citations omitted). "The issue of whether or not a defendant was entrapped is generally a question of fact to be determined by the jury, and when the defendant's evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment." *Ott*, 236 N.C. App. at 651-52, 763 S.E.2d at 533 (*purgandum*).

"Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him." *State v. Davis*, 126 N.C. App. 415, 417, 485 S.E.2d 329, 331 (1997) (citation omitted). "Entrapment is a complete defense to the crime charged." *Morse*, 194 N.C. App. at 689, 671 S.E.2d at 542 (citation and quotation marks omitted). The defendant has the burden of proving the affirmative defense of entrapment. *State v. Luster*, 306 N.C. 566, 579, 295 S.E.2d 421, 428 (1982).

"The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies." *State v. Hageman*, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982) (citations omitted). "We note that this is a two-step test and the absence of one element does not afford the defendant the luxury of availing himself of the affirmative defense of entrapment." *Morse*, 194 N.C. App. at 690, 671 S.E.2d at 542. Under this test, "[t]he defendant must show that the trickery, fraud or deception was practiced upon one who entertained no prior criminal intent." *Hageman*, 307 N.C. at 28, 396 S.E.2d at 449 (*purgandum*).

"A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. The determinant is the point of origin of the criminal intent." *Morse*, 194 N.C. App. at 690, 671 S.E.2d at 542. When analyzing whether a defendant was predisposed to commit the crime, our Supreme Court has stated: " '[w]illing' is a synonym of the word 'predisposed.' " *Hageman*, 307 N.C. at 26, 396 S.E.2d at 447 (citation omitted). Therefore, "[p]redisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.* at 31, 396 S.E.2d at 450-51 (citations omitted).

"It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence." *Id.* at 29, 396 S.E.2d at 449.

> The fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution, nor will the mere fact of deceit defeat a prosecution, for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the [g]overnment's deception *actually implants the criminal design* in the mind of the defendant that the defense of entrapment comes into play.

State v. Salame, 24 N.C. App. 1, 7, 210 S.E.2d 77, 81-82 (1974) (citation and quotation marks omitted) (emphasis added).

This Court was presented with a similar legal and factual scenario in *State v. Morse*. *State v. Morse*, 194 N.C. App. 685, 671 S.E.2d 538. In *Morse*, the defendant entered an adults-only online chat room and began speaking with an undercover law enforcement officer. *Id.* at 694, 671 S.E.2d at 539-41. As part of an undercover operation, the officer posted as a fourteen-year-old girl claiming that "she was inexperienced and looking for an older 'friend.' " *Id.* at 687, 671 S.E.2d at 540. When Morse went to meet the officer in person, he was arrested. *Id.* at 687, 671 S.E.2d at 540.

Morse appealed his conviction and argued that the trial court erred when it refused to submit the defense of entrapment to the jury. *Id.* at 689, 671 S.E.2d at 541-42. In concluding that the trial court did not err in not submitting the entrapment defense to the jury, the *Morse* Court held that "[a]lthough defendant did not have a criminal record, record of molestation, or record of other similar offensive acts, uncontroverted record evidence shows that defendant had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one of those users to engage in sexual contact." *Id.* at 692, 671 S.E.2d at 543.

Here, Defendant failed to prove he was entitled to an instruction on entrapment. The evidence supports Defendant's predisposition and willingness to engage in the crime charged. Defendant responded to a posting entitled "*Boy* Needing a Man" with messages that (1) inquired if Kelly wanted to by a "daddy's *boy*," (2) stated Defendant was "looking for a *boy*," and (3) repeated that Defendant was "still looking for a *boy*" when Kelly failed to respond quickly enough for Defendant. (Emphasis added). Even after "Kelly" told Defendant he was fifteen-years-old and may be too young, Defendant continued to speak with Kelly, and Defendant asked Kelly to send him a picture. Defendant then sent sexually explicit

messages to someone he believed was fifteen years old and attempted to meet "Kelly" for the purpose of engaging in sexual acts. Thereafter, he readily agreed to have oral and anal sex with "Kelly" when they were to meet.

Additionally, Defendant failed to sufficiently demonstrate that he was not predisposed to committing the act. As in *Morse*, it is irrelevant that Defendant did not have a criminal record, never solicited a child for sex, never had sex with a child, or never brought a child into his home. Contrary to Defendant's assertion, Detective Heavner did not manipulate Defendant into the ongoing conversation, nor did he "actually implant [ ] the criminal design" in Defendant's mind. *Salame*, 24 N.C. App. at 7, 210 S.E.2d at 81-82. Detective Heavner merely afforded Defendant the opportunity to commit the offense in which he willingly engaged.

Moreover, Defendant had a nine-year history of responding to personal advertisements on Craigslist. He brought three of the men he had interacted with over the years into his home. One of the three, with whom he had engaged in sexual conduct, was sixteen-years-old. Furthermore, even after "Kelly" informed Defendant that he may be too young, Defendant continued to speak with him. After Defendant told Detective Heavner that he could come live with Defendant and that Defendant could take care of "Kelly," Defendant readily agreed to have oral and anal sex with "Kelly" the following day. At trial, Defendant even admitted that sex is a part of what he receives in return for his generosity to the people he met online.

Even when viewed in the light most favorable to Defendant, he has failed to demonstrate that he was entitled to an instruction on entrapment.

Conclusion

The trial court did not err when it declined to submit the defense of entrapment to the jury.

NO ERROR.

Judge TYSON concurs.

Judge INMAN dissents in separate opinion.

INMAN, Judge, dissenting.

Because the evidence required the trial court to instruct the jury on Defendant's defense that he was entrapped by Detective Heavner, I respectfully dissent.

"It is the duty of the court to charge the jury on all substantial features of the case arising on the evidence . . . [a]nd all defenses presented by defendant's evidence are substantial features of the case[,]" *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted). This duty is particularly important when the defense concerns the conduct of State actors.[1] I would hold the trial court committed prejudicial error in denying Defendant's request for an instruction on entrapment, vacate his conviction, and remand for a new trial. I express no opinion regarding whether Defendant is guilty or innocent—that question is reserved for a jury.

I. FACTUAL HISTORY

As the majority rightly points out, although Defendant bears the burden of proof in seeking an entrapment instruction,[2] resolution of this appeal requires us to consider the evidence introduced at trial in the light most favorable to the Defendant. We also, "[f]or purposes of the entrapment issue, . . . must assume that [D]efendant's testimony is true." *State v. Foster*, 235 N.C. App. 365, 374, 761 S.E.2d 208, 215 (2014); *see also State v. Ott*, 236 N.C. App. 648, 652, 763 S.E.2d 530, 533 (2014). Given this standard of review, examination of Defendant's evidence not addressed in the majority opinion, including Defendant's testimony, is necessary.

Defendant testified at trial that he sought personal relationships with men via Craigslist, as opposed to other online services, because children frequented other websites and Craigslist requires each user to verify

---

1. The defense of entrapment is itself a check on unwarranted government intrusion into the lives of the citizenry and a limitation on the misallocation of State resources: "[L]aw enforcement tactics that seek to induce persons who are not predisposed to crime to engage in criminal activity are intolerable for two reasons. First, individuals have a strong interest in privacy: law-abiding people should be left alone by the government. Second, law enforcement resources are wasted when the subjects of investigation are not predisposed to commit crimes." *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122, 1130-31 (1982) (footnotes omitted).

2. Defendant bears "the burden of proving entrapment to the satisfaction of the jury." *State v. Davis*, 126 N.C. App. 415, 418, 485 S.E.2d 329, 331 (1997). The measure of proof that satisfies this burden is for the jury to determine, and may be as low as a bare preponderance of the evidence. *State v. Miller*, ___ N.C. App. ___, ___, 812 S.E.2d 692, 695 (2018).

that he is eighteen or older. Defendant posted "off and on" to Craigslist, sometimes looking to "meet somebody" on the Casual Encounters section of the site, which largely, but not exclusively, featured people looking for sex. He testified that after meeting someone online, he would "take care of them and help them out until they move on, . . . that's just what I do." He further explained that he "enjoy[s] having somebody to take care of. Not for sex. . . . That, that's not what it's about. It's about just being needed and taking care of somebody." Defendant characterized these relationships as offering "[c]ompanionship," admitting that sex "[o]ccasionally" factored into them but also insisting that "[i]t's not every time, no. . . . [It] wasn't a primary objective." Instead of sex, Defendant testified, the common element was simply helping the person until he could get back on his feet by offering a free place to stay, assistance with employment or school, and money for clothes and transportation.

Defendant met hundreds of men on Craigslist; some of the men moved in with Defendant and "[s]ome just bec[a]me friends." For example, Defendant, after responding to ads in the Casual Encounters section of Craigslist, met two young men and allowed them to move into his house. Defendant bought the men clothes and gave them money, but he never had sex with either of them.[3] Although Defendant testified that he had sex with four men who had previously lived with him—only one of whom he met on Craigslist—each was eighteen or older.[4] Defendant flatly denied ever soliciting a minor on Craigslist or otherwise.

Defendant testified that he responded to Detective Heavner's Craigslist ad not because he was seeking sex with a minor, but because he wanted to make his boyfriend jealous. Defendant admitted that his first response to Detective Heavner's Craigslist ad was sexual in nature.

---

3. Despite their Craigslist personals referring to them as "boys," both of these men were eighteen years old or older. Defendant testified that he "call[ed] everybody 'boy'[,]" particularly people under the age of 25, and another witness who testified at trial corroborated Defendant's testimony that he used the word to refer to adult men younger than him. Defendant further testified that he understood Detective Heavner's use of the phrase "boy toy" to refer to a younger man with an older man, but that Defendant did not believe it carried a sexual connotation. Defendant also testified that he used the word "boy" in correspondence with Detective Heavner to mean "[a] person that I take care of."

4. The majority asserts Defendant had sex with a sixteen-year-old boy who moved into Defendant's home after interacting with him on Craigslist. This fact is simply not supported by the evidence when viewed in the light most favorable to the Defendant. Although Defendant admitted texting Detective Heavner that he "had one boy I played with when he was 16 but turned 17 the next week[,]" he testified that this referred to a sexual encounter he had at the age of nineteen, 33 years earlier. In any event, sixteen is the age of consent in North Carolina. N.C. Gen. Stat. §§ 14-27.25 and 14-27.30 (2017).

He also testified, however, that he believed he was responding to an ad placed by an adult. Defendant admitted to discussing sex with Detective Heavner in their early text messages back and forth, but these text messages all occurred before Detective Heavner disclosed "Kelly's" age. After these initial messages, Detective Heavner texted the following: "I may be to[o] young but I am needing a place to go, my aunt is about to put me back in foster care and I will run away if she does[.]" Defendant replied by asking how old "Kelly" was and stated "[i]f you're 17 it's legal." "Kelly" responded: "I am a good kid, just my parents are shit bags and are in prison and I am the one suffering, I am not quiet [sic] 16 and actually 16 is the legal age."

Defendant testified he did not recall seeing a reference to "Kelly" being under sixteen at the time he was texting with Detective Heavner, but that he "was under the impression" from the text messages that "Kelly" was seventeen years old and under the age of eighteen, not fifteen years old and under the age of consent. Defendant also testified that he would not have sex with anyone under eighteen. Defendant's next mention of sex confirms this: "Well. I could let you live here with me and take care of you[.] . . . But we could not have sex till [sic] you was [sic] old enough." Defendant then reiterated his desire not to have sex with "Kelly" if he was underage: "But I do not want to go to jail. . . . So I could not have sex till [sic] you was [sic] old enough."

As pointed out by the majority, Defendant continued to interact with "Kelly" after learning he was under eighteen. He did so, per his testimony, to "make sure this person is okay[,]" because "when ['Kelly'] started talking about [how] he was living with his aunt and she didn't want him, his parents [were] in jail, he was going to run away, he was going to find the next available guy, I remember telling him that's dangerous, you know, you could get hurt." His testimony continued:

> [DEFENDANT:] I still kept talking to ["Kelly"] because he said, "If you don't quit talking to me, I'm going to go ahead and get somebody else."
>
> I said, "No, no, no. Don't do that."
>
> So now I'm really concerned. You know, there's crazy people out there.
>
> . . . .
>
> [DEFENDANT'S COUNSEL:] Okay. And after you had texted that, "We can wait until you are old enough," who brought up the idea of any other sexual act or –

> [DEFENDANT:] Detective [Heavner] is the only one that brought up anything sexual.
>
> . . . .
>
> Sex was not on my mind at this time. The only thing that was on my mind was that this person was really going to go out and meet somebody else. Was he really without food? Was he really without clothes? Was he really in a situation where his aunt didn't want him? His parents are in prison. If all this is true, it's all the factors for danger.

Following Defendant's expression of his unwillingness to have sex with "Kelly" as a minor because he did not want to go to prison, it was Detective Heavner, and not Defendant, who re-initiated the discussion of sex. Ensuing responses from Defendant certainly could be construed by a jury—which, unlike this Court, is not bound by any presumption favorable to Defendant—to indicate sexual interest in "Kelly." At trial, however, Defendant offered non-sexual explanations for many of these comments, which our precedents require us to take as true. *Foster*, 235 N.C. App. at 374, 761 S.E.2d at 215; *Ott*, 236 N.C. App. at 652, 763 S.E.2d at 533.

Defendant's text messages included a request for a picture of "Kelly's" face, which Defendant testified he asked for in order to try and verify "Kelly's" age, and a statement that "[w]e could do all you wanted to do if you was my boy[,]" which Defendant described as offering "Kelly" a place to live without the fulfillment of any sexual desires.[5] At one point in the conversation, "Kelly" stated he wanted Defendant to be the first man with whom he had sex; four messages later, Defendant replied, "Ok. Well we can fix that. We will go slow[,]" a remark not inconsistent with an intent to wait until "Kelly" was older.

Shortly after Defendant's message to "Kelly" that they would "go slow," Officer Heavner proposed meeting immediately. Defendant responded with an offer to meet the following day. "Kelly" replied by texting: "Ok. . . . I want to perform oral sex on [you] really bad for some reason can we do that[?]" Defendant demurred, texting he did not want to talk about sex; he testified at trial that it was his practice to refrain from talking about sex via text message on his phone because he found

---

5. As recounted *supra*, Defendant testified that he used the word "boy" with Detective Heavner to describe men he takes care of, a relationship he explained elsewhere in his testimony as not necessarily involving sex.

it vulgar. The issue did not arise again until several messages later, when "Kelly" expressed a fear that he might not be gay, and was therefore unsure if he should move in with Defendant without having sex together first. Defendant responded that he had previously said they could have sex; "Kelly" replied, "[y]ou said we could when I am old enough for [you.]" Defendant once more requested that they not discuss sex through text messages. That statement was followed by this exchange:

> [DETECTIVE HEAVNER:] You said ["]I said we could["] so does that mean yes [because] if not I may have to find someone else first to see what its like[.]
>
> [DEFENDANT:] Yes[.]
>
> . . . .
>
> [DEFENDANT:] Don't find anyone else. Please[.]
>
> [DETECTIVE HEAVNER:] Only if we can have oral sex and anal tomorrow so I will know, just give me a yes or no and I will shut up about it[.]
>
> [DEFENDANT:] Yes[.]

Defendant testified he made these statements because he did not want "Kelly," in an effort to escape a desperate home life, to find another man who might be dangerous, and that he "just said 'yes' to shut ['Kelly'] up." Detective Heavner issued his ultimatum after Defendant had warned "Kelly" that other men might try to harm him. After the ultimatum, Defendant did not engage in any sexually explicit conversation or discuss any sex acts with "Kelly," despite Detective Heavner repeatedly doing so; indeed, Defendant again asked "Kelly" to "[s]top talking about sex stuff."

The text messages eventually returned to the topic of the logistics of meeting, with Defendant agreeing to meet the following day around lunchtime. Defendant testified that he agreed to that arrangement because it would offer him the chance:

> to sit down and speak with ["Kelly's"] aunt and [a neighbor Detective Heavner had mentioned in an earlier message], [to] make sure everybody knew what was going on. If he did need a place, I would take him back. I had the room. I would give him a place to live and t[ake] care of him and provide[] him things.
>
> . . . .

That's why I wanted to talk to his aunt and the neighbor[.]

Following further discussion about picking up "Kelly," Defendant travelled to Lincolnton and was arrested at the meeting spot.

II. ANALYSIS

A. Defendant's Intent

The majority holds that Defendant had the requisite intent to solicit a minor for sex, so that an entrapment instruction was improper. The majority's position, however, is based on several assertions that are not supported by the evidence when it is considered in the light most favorable to the Defendant, as required by the applicable standard of review. *Ott*, 236 N.C. App. at 651-52, 763 S.E.2d at 533.

First, the majority states that "after 'Kelly' told Defendant he was fifteen-years-old and may be too young, Defendant continued to speak with Kelly[,]" later "sen[ding] sexually explicit messages to someone he believed was underage[.]" The evidence presented at trial, when considered in the light mandated by our precedents, does not support this contention. Defendant testified that he initially believed he was conversing with someone eighteen or older. When "Kelly" texted that he was not eighteen, Defendant testified, he did not actually understand that "Kelly" was fifteen, but was instead "under the impression" he was seventeen. Defendant testified that he did *not* "sen[d] sexually explicit messages to someone he believed was underage," as asserted by the majority. Although the jury might not have believed this testimony and rejected Defendant's entrapment defense, our precedents require that, when considering whether the instruction was mandated, *i.e.*, whether the jury should decide this issue, we must take Defendant at his word. *Foster*, 235 N.C. App. at 374, 761 S.E.2d at 215; *Ott*, 236 N.C. App. at 652, 763 S.E.2d at 533.

Second, the majority writes that Defendant "attempted to meet 'Kelly' for the purpose of engaging in sexual acts" and "[t]hereafter . . . readily agreed to have oral and anal sex with 'Kelly' when they were to meet." But Defendant testified that once he suspected "Kelly" was under eighteen, he expressly refused to have sex with him until he was older, ceasing further sexual comments until the subject was brought back up by Detective Heavner. Although Defendant sent additional messages after that point, those messages are not inconsistent with an intent to have sex only once "Kelly" was of age. Defendant provided non-sexual explanations for many of those texts. Defendant also testified that he did not attempt to meet "Kelly" "for the purpose of engaging in sexual

acts[,]" and that he only agreed to have sex with "Kelly" to get him to "shut up" for fear that he would be left to a damaging home life or end up in physical danger. The majority's assertion that Defendant "readily agreed to have oral and anal sex with 'Kelly' " and travelled to Lincolnton for that purpose is not supported by this evidence when considered in a light favorable to Defendant.

This Court has previously held a defendant presented evidence sufficient to merit an entrapment instruction where, according to his testimony, he first expressed disinterest in committing the criminal act but was later induced by acts of law enforcement that "involved emotional manipulation[,] including creating a false relationship and then taking advantage of the defendant's desire to maintain that relationship." *Foster*, 235 N.C. App. at 375, 761 S.E.2d at 215. Similarly, Defendant's testimony, considered in the light most favorable to him, establishes that he did not "readily" assent to engage in sex with "Kelly" as a person under the age of sixteen. Defendant testified in pertinent part:

> Sex was not on my mind at this time. The only thing [that] was on my mind was that this person was really going to go out and meet somebody else. Was he really without food? Was he really without clothes? Was he really in a situation where his aunt didn't want him? His parents are in prison. If all this is true, it's all the factors for danger.

We are required to accept as true Defendant's testimony that he did not intend to commit a crime prior to Detective Heavner's inducement and only agreed to commit the crime, to the extent he did so, once Detective Heavner "implant[ed] the criminal design." *State v. Salame*, 24 N.C. App. 1, 7, 210 S.E.2d 77, 82 (1974) (citation and internal quotation marks omitted).

B. Predisposition

I also disagree with the majority's conclusion that, viewed in the light most favorable to Defendant, the evidence shows he was predisposed to commit the crime charged absent inducement by Detective Heavner. The majority characterizes the evidence as showing that Defendant: (1) had a history of interacting with men on Craigslist; (2) invited three such men to live with him in his home, including a sixteen-year-old with whom he had sex; (3) continued to converse with "Kelly" after Detective Heavner disclosed his age; (4) promised to take care of "Kelly" and later agreed to have sex with him; and (5) acknowledged he had sex with men who previously lived with him in his home. As recounted *supra*, this view simply overlooks evidence favorable to Defendant.

Most notably, Defendant did not testify that he had ever hosted or engaged in sex with a sixteen-year-old in his home. Rather, he testified that more than three decades earlier, when he was nineteen and living in another state, he and a sixteen-year-old boy engaged in mutual fondling. Also, when considered in the light required by our precedents, Defendant's evidence shows that: (1) three adult men moved in with Defendant after meeting him on Craigslist, only one of whom had sex with Defendant; (2) Defendant has lived with four boyfriends, all over the age of eighteen, including the one he met on Craigslist;[6] (3) Defendant believed "Kelly" was seventeen, not fifteen, and immediately refused sex with "Kelly" if he was under eighteen; (4) Defendant's offer to "take care of 'Kelly' " did not necessarily include sex; and (5) Defendant agreed to have sex with "Kelly" not with the intent to have sex with him, but out of a concern that a refusal would leave "Kelly" in danger.

The evidence in this case is in stark contrast to *State v. Morse*, 194 N.C. App. 685, 671 S.E.2d 538 (2009), the authority relied upon by the majority. Although the majority correctly notes that the defendant in *Morse*, like Defendant here, "had previously engaged in sexually explicit communications with other users in adults only chat rooms and even met with one . . . to engage in sexual contact[,]" 194 N.C. App. at 692, 671 S.E.2d at 543, that was but one factor in a multi-faceted analysis by this Court:

> Furthermore, *defendant admitted that he had previously chatted with underage juveniles*. Defendant was familiar, not only with the ease with which an underage juvenile could access the adults only chat room, but also with the idea that other users can and often do falsely represent their names, age, and appearance. At trial, defendant *admitted that he had looked at baywatch142000's profile, which listed her age as "114" and included . . . "Actually 14."* Defendant testified, however, that he looked at the profile merely to view baywatch142000's photograph and thus initially overlooked her age. Defendant further contended that *he was not thinking about age at all, but rather was in a "sexual mindframe" when chatting with baywatch142000*.

6. I would not hold, as a matter of law, that a man's prior sexual experiences with consenting male partners, all above the age of consent, indicate that he is predisposed to engaging in sexual activity with a child.

> In spite of this testimony, defendant admittedly *did not hesitate to initiate sexually charged conversation* with baywatch142000 within the first few minutes of chatting, *or to begin making arrangements to meet for sexual contact*. Furthermore, *defendant did not*, *at any time during their chats*, *express reluctance to meet with baywatch142000*, *despite baywatch142000's repeated references to her age*. Baywatch142000 made it clear that she was a fourteen-year-old high school student, a virgin, and interested in finding an older friend in order to gain sexual experience. . . . *Throughout their chats*, *baywatch142000 was*, *for the most part*, *merely responsive to defendant's suggestions*, *while defendant took the more active role in both the sexually charged conversation and in planning their meeting*.

Id. at 692-93, 671 S.E.2d at 543-44 (emphasis added).

From that evidence, we determined that the defendant in *Morse* was not entitled to an entrapment instruction on his solicitation of a child charge, the same crime at issue in this case:

> Solicitation . . . elementally involves some impetus on defendant's part, rather than mere acquiescence. . . . Our precedent indicates that a trial court may properly refuse to instruct a jury on entrapment when defendant required little urging before acquiescing to requests by undercover officers. Here, the record contains ample evidence which tends to show that defendant did *more* than merely acquiesce and cooperate with a plan formed by police. . . . Such initiative goes far beyond the mere compliance, acquiescence in, or willingness to cooperate which is sufficient to show predisposition.

Id. at 693-94, 671 S.E.2d at 544 (citations and quotation marks omitted) (emphasis in original).

Here, unlike the defendant in *Morse*, Defendant did not have advance notice of "Kelly's" age when he responded to Detective Heavner's Craigslist ad; instead, Defendant initially believed "Kelly" was at least eighteen based on Craigslist's age verification requirement. Nor did the State present any evidence Defendant had ever before engaged in sexually explicit conversations with anyone underage; rather, Defendant unreservedly testified he had never done so. Also unlike the defendant in *Morse*, Defendant repeatedly stated his refusal to have sex with "Kelly"

once he suspected he was under eighteen. It was Detective Heavner, only after Defendant expressed that refusal, who reintroduced sex into the conversation; it was also Detective Heavner who repeatedly pressed Defendant to meet "Kelly."[7] Finally, Defendant testified "sex was not on my mind" when he agreed to meet "Kelly" after learning he was under eighteen, expressly disclaiming the "sexual mindframe" the defendant in *Morse* admitted to holding.

In short, *Morse* is distinguishable. Defendant's evidence, taken in the light most favorable to him, would allow a reasonable juror to infer that he was not predisposed to commit the crime for which he was convicted, and that he assented to Detective Heavner's plan after repeated denials and only when he believed the alternative would place "Kelly" in danger. Defendant was entitled to the entrapment instruction so the jury could evaluate and determine for itself whether Defendant was entrapped.

C. The Availability of the Defense

The State argues that Defendant could not claim the entrapment defense because he denied possessing the necessary criminal intent to convict him of soliciting a child. The majority does not address this argument; because I would vacate Defendant's conviction and remand for a new trial, I address this issue.

Both the State and Defendant cite *State v. Neville*, 302 N.C. 623, 276 S.E.2d 373 (1981), each asserting it supports their respective positions. In *Neville*, the defendant denied committing the acts alleged and was denied an entrapment instruction. 302 N.C. at 626, 276 S.E.2d at 375. Our Supreme Court rejected the defendant's argument that such a denial was error, holding "[t]he defense of entrapment presupposes the existence of the acts constituting the offense. Where a defendant claims he has not done an act, he cannot also claim that the government induced him to do that act." *Id.* (citations omitted). The Supreme Court distinguished denials of acts from denials of criminal intent, plainly rejecting the argument advanced by the State here: "[T]he entrapment

7. Detective Heavner first requested they meet before disclosing "Kelly's" age, a request that Defendant did not address. Detective Heavner again raised the issue after further conversation, asking "[s]o when ya wanna do this[?]" When Defendant did not respond to the question a second time, Detective Heavner reiterated "Kelly's" desire to meet immediately: "Look I am serious if [you are], I can leave[.] [A]ll I got to do is tell my aunt I found somewhere to go, she will be happy." Defendant responded that he was serious, to which "Kelly" replied "I really want to do this like today[.] . . . Seriously come get me[.]" It was at that point that Defendant offered to meet "Kelly" the following day.

defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Id.* (citation omitted); *see also State v. Sanders*, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989) ("[A] defendant who denies an essential element *which deals with intent* but who admits committing the acts underlying the offense with which he is charged *may employ an entrapment defense*." (emphasis added)).

At trial, Defendant's counsel acknowledged he had admitted to committing the acts constituting the offense for which he was charged—*i.e.*, exchanging messages via computer regarding plans to engage in sex with "Kelly" and driving to Lincolnton to meet him. He only denies possessing the requisite criminal intent to engage in a sex act with a minor. Following *Neville* and *Sanders*, I would hold the State's argument on this question unavailing.

D. Prejudice

Defendant has demonstrated that the trial court's error in denying an entrapment instruction prejudiced him. Almost two hours into deliberations and after an initial request for reinstruction on the elements, the jury sent the following note to the trial judge: "Please define intent to have sex with a minor. Does it matter if the defendant's intent is to have sex when the boy is underage *or if his intent is to wait until—is to wait to have sex until the boy is of age?*" (Emphasis added). The trial court, during a hearing outside the jury's presence, told counsel that "what I would tell them is . . . it would not be a violation of the law to have intent to have sex after he's of age." When jurors returned to the courtroom, the trial court instructed them as follows: "It would constitute a violation of the law to have intent with a boy who is underage. It would not be a violation of the criminal code to . . . intend to have sex with someone who is not underage." Ten minutes later, the jury requested reinstruction on the elements of the crime charged. Four minutes after that reinstruction was given, the jury informed the trial court that it had reached a verdict, which resulted in this rather irregular dialogue:

> THE COURT: . . . You have a unanimous decision?
>
> THE FOREPERSON: We have made a decision.
>
> THE COURT: And is it a unanimous decision?
>
> THE FOREPERSON: It was not a unanimous decision.
>
> THE COURT: Okay. And is it by majority vote . . . ? Because the decision must be unanimous.

. . . .

THE FOREPERSON: Oh, it was unanimous.

THE COURT: Okay.

THE FOREPERSON: I'm sorry.

. . . .

THE COURT: . . . "Unanimous" meaning all 12 are in agreement with this decision?

THE FOREPERSON: No. No.

JURORS: No. No.

THE FOREPERSON: I think we are confused.

THE COURT: All right. . . . [T]he decision must be unanimous. If you have not completed your discussions, then we need to decide when you are coming back because we will be closing court this afternoon. There's no timetable. There's no—

THE FOREPERSON: We're done. I just—I think that maybe we are misunderstanding what you're trying to ask us.

THE COURT: Well, the decision of whether or not an individual is guilty or not guilty must be unanimous. Must be the decision that 12 believe guilty or 12 believe not guilty. That's what we mean by "unanimous."

THE FOREPERSON: Oh. Then, no, we are not unanimous.

THE COURT: Okay. Then I'm going to send you back to the jury room.

. . . .

So I'm not sure I understand where we are.

THE FOREPERSON: Everyone has made their own personal decision.

The trial court then reiterated the necessity of a unanimous decision but recessed court until the following morning. After more than an hour of deliberations the next day, the jury returned a unanimous verdict of guilty.

As noted above, Defendant admitted to the acts constituting the crime and only denied possessing the requisite criminal intent. With Defendant's mindset being the only element at issue before it, the jury's multiple requests for additional instructions on the elements—and specifically as to Defendant's intent—coupled with its apparent difficulty in arriving at a unanimous verdict demonstrate "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 (2017).

III. CONCLUSION

Respecting the limitations of appellate review, I dissent not because I conclude that Defendant has established the defense of entrapment, but because the law requires us to take his testimony to be true for the limited purpose of determining whether a jury might find that Defendant has proven that defense to its satisfaction.

Following controlling precedents, I would vacate Defendant's conviction and remand for a new trial.

STATE OF NORTH CAROLINA
v.
DANIEL YAIR MARINO

No. COA18-1135

Filed 21 May 2019

Jurisdiction—entry of final judgment on a Class D felony—after entry of prayer for judgment continued—jurisdiction not divested

Despite a nineteen-month delay in entering judgment on defendant's Class D drug trafficking conviction, the trial court's noncompliance with N.C.G.S. § 15A-1331.2—which prohibits a trial court from entering judgment more than twelve months after ordering a prayer for judgment continued (PJC) for a Class D felony—did not divest the trial court of jurisdiction to enter a final judgment in the case. By enacting section 15A-1331.2, the legislature intended to prevent trial courts from entering indefinite PJC's for high-level crimes rather than to limit the trial courts' jurisdiction if they violated the statute. Moreover, under common law principles, the trial court retained jurisdiction to enter its final judgment because it did

so within a reasonable period of time and defendant suffered no actual prejudice from the delay.

Appeal by Defendant from an Order entered 26 January 2018 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 28 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

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

HAMPSON, Judge.

Factual and Procedural Background

This matter involves a Motion for Appropriate Relief (MAR) filed by Daniel Yair Marino (Defendant) on 25 October 2017, seeking relief from criminal convictions. The Record based upon the proceedings on the MAR below tends to show the following relevant facts:

On 16 September 2013, a Guilford County Grand Jury indicted Defendant for one count of Trafficking in Cocaine, a Class D felony; two counts of Trafficking in Marijuana, Class H felonies; one count of Possession with Intent to Sell or Deliver Marijuana, a Class I felony; and one count of Maintaining a Dwelling for the Keeping or Selling of Marijuana and Cocaine, a Class I felony. Pursuant to a plea arrangement, Defendant entered an *Alford* plea to the charged offenses on 11 June 2015. The terms and conditions of the parties' plea agreement provided:

> 1. That the charges shall be consolidated [under the Class D Trafficking in Cocaine charge] for judgment purposes.
>
> 2. That prayer for judgment shall be continued until on or after the criminal term beginning pursuant to [N.C. Gen. Stat. §] 90-95(h)(5). That the defendant agrees, if called upon by the State, to provide truthful testimony against any charged co-defendant in these matters.
>
> 3. That upon the State's prayer for judgment, the Court shall impose any additional terms deemed appropriate.

Approximately 19 months later, the State prayed for entry of judgment against Defendant. The trial court held Defendant's sentencing

hearing on 4 January 2017. At this hearing, the State and defense counsel were given the opportunity to present arguments regarding Defendant's sentence. The State informed the trial court that Defendant had provided the State with "substantial assistance" within the meaning of N.C. Gen. Stat. § 90-95(h)(5),[1] and Defendant's counsel urged the trial court to consider Defendant's efforts when sentencing Defendant.

After finding Defendant provided substantial assistance to the State, the trial court sentenced Defendant to an active term of a minimum of 48 months and a maximum of 70 months, and ordered Defendant to pay a $25,000 fine. This sentence was substantially lower than the sentence Defendant would have received had he not provided substantial assistance to the State, which the trial court acknowledged was a minimum of 175 months and a maximum of 222 months, plus a $250,000 fine. The written Judgment was entered on 6 January 2017; however, there was a clerical error in this Judgment, which was corrected by written Judgment on 27 February 2017.

On 25 October 2017, Defendant filed a MAR requesting the trial court set aside the sentence imposed on Defendant. According to Defendant's MAR, the trial court lacked jurisdiction to enter the sentence because of N.C. Gen. Stat. § 15A-1331.2, which requires the trial court enter final judgment on certain high-level felonies, including Class D felonies, within 12 months of the trial court entering a prayer for judgment continued (PJC). After hearing arguments from the State and defense counsel, the trial court issued an Order denying Defendant's MAR (MAR Order) on 26 January 2018. In its MAR Order, the trial court concluded Section 15A-1331.2 does not mention jurisdiction and that a violation of this statute does not divest the trial court of jurisdiction to enter judgment on a PJC after 12 months. Defendant petitioned this Court for a Writ of *Certiorari* to review the MAR Order. We granted Defendant's Petition for the purpose of granting Defendant an appeal. Defendant has prosecuted his appeal, and we now review the merits of his argument.

Issue

The sole issue on appeal is whether Section 15A-1331.2 of our General Statutes divested the trial court of jurisdiction to enter Judgment on Defendant's plea to Class D Trafficking in Cocaine.

---

1. N.C. Gen. Stat. § 90-95(h)(5) authorizes a trial court to deviate from the mandatory sentencing guidelines under Section 90-95 if the trial court finds the defendant provided the State with "substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals[.]" N.C. Gen. Stat. § 90-95(h)(5) (2017).

Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted). This Court has stated, "If the issues raised by Defendant's challenge to [the trial court's] decision to deny his [MAR] are primarily legal rather than factual in nature, we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *State v. Jackson*, 220 N.C. App. 1, 8, 727 S.E.2d 322, 329 (2012) (first and third alteration in original) (citation and quotation marks omitted).

Here, Defendant challenges the trial court's MAR Order on legal rather than factual grounds, asserting that N.C. Gen. Stat. § 15A-1331.2 divested the trial court of jurisdiction to enter Judgment on Defendant's plea to Class D Trafficking in Cocaine. *See, e.g.*, *State v. Hayes*, ___ N.C. App. ___, ___, 788 S.E.2d 651, 652 (2016) ("Issues of statutory construction are questions of law which we review *de novo* on appeal[.]" (citation omitted)); *Powers v. Wagner*, 213 N.C. App. 353, 357, 716 S.E.2d 354, 357 (2011) ("This Court's determination of whether a trial court has subject matter jurisdiction is a question of law that is reviewed on appeal *de novo*." (citation and quotation marks omitted)). Therefore, we employ a *de novo* review.

Analysis

A. Background Law on PJCs

"Once a guilty plea is accepted in a criminal case, a trial court may continue the case to a subsequent date for sentencing." *State v. Watkins*, 229 N.C. App. 628, 631, 747 S.E.2d 907, 910 (2013) (citing *State v. Absher*, 335 N.C. 155, 156, 436 S.E.2d 365, 366 (1993)); *see also* N.C. Gen. Stat. § 15A-1334(a) (2017) (allowing "continuance of the sentencing hearing"); *id.* § 15A-1416(b)(1) (2017) (allowing the State to move for imposition of sentence when prayer for judgment has been continued). "This continuance is frequently referred to as a 'prayer for judgment continued' . . . [and] vests a trial judge presiding at a subsequent session of court with the *jurisdiction* to sentence a defendant for crimes

previously adjudicated." *State v. Degree*, 110 N.C. App. 638, 640-41, 430 S.E.2d 491, 493 (1993) (emphasis added); *see also Miller v. Aderhold*, 288 U.S. 206, 211, 77 L. Ed. 702, 705-06 (1933) ("[W]here verdict has been duly returned, the jurisdiction of the trial court . . . is not exhausted until sentence is pronounced, either at the same or a succeeding term." (citations omitted)).

Under our common law, a PJC may be for a definite or indefinite period of time, as long as it is entered "within a reasonable time"; otherwise, the trial court loses jurisdiction. *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (citation and quotation marks omitted). Our Supreme Court has clarified that "[a]s long as a prayer for judgment is not continued for an unreasonable period, . . . and the defendant was not prejudiced, . . . the court does not lose the jurisdiction to impose a sentence." *Absher*, 335 N.C. at 156, 436 S.E.2d at 366 (citations omitted). "Deciding whether sentence has been entered within a 'reasonable time' requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." *Degree*, 110 N.C. App. at 641, 430 S.E.2d at 493 (citation omitted); *see also State v. Lea*, 156 N.C. App. 178, 180, 576 S.E.2d 131, 133 (2003) (upholding as reasonable a sentence entered over five years after defendant was convicted).

B. N.C. Gen. Stat. § 15A-1331.2

In 2012, the Legislature enacted N.C. Gen. Stat. § 15A-1331.2, titled "Prayer for Judgment Continued for a Period of Time that Exceeds 12 Months Is an Improper Disposition of a Class B1, B2, C, D, or E Felony," which provides:

> The court shall not dispose of any criminal action that is a Class B1, B2, C, D, or E felony by ordering a prayer for judgment continued that exceeds 12 months. If the court orders a prayer for judgment continued in any criminal action that is a Class B1, B2, C, D, or E felony, the court shall include as a condition that the State shall pray judgment within a specific period of time not to exceed 12 months. At the time the State prays judgment, or 12 months from the date of the prayer for judgment continued order, whichever is earlier, the court shall enter a final judgment unless the court finds that it is in the interest of justice to continue the order for prayer for judgment continued. If the court continues the order for prayer for judgment continued, the order shall be continued for a specific period

> of time not to exceed 12 months. The court shall not continue a prayer for judgment continued order for more than one additional 12-month period.

N.C. Gen. Stat. § 15A-1331.2 (2017). Whether, and to what extent, N.C. Gen. Stat. § 15A-1331.2 imposes stricter jurisdictional requirements on a trial court for these high-level felonies than at common law presents a question of first impression for this Court.[2]

Here, Defendant's plea to a Class D felony and the trial court's 27 February 2017 Judgment unquestionably failed to comply with the requirements of N.C. Gen. Stat. § 15A-1331.2, which provides that if a trial court orders a PJC for a Class D felony, the trial court must include a condition that the State pray for judgment "within a specific period of time not to exceed 12 months." *See* N.C. Gen. Stat. § 15A-1331.2. Here, Defendant's plea agreement contained no such provision. Approximately 19 months after Defendant's conviction, the State prayed for judgment, and Defendant's Judgment was entered. No further order was entered during this 19-month time period continuing the case for up to the additional 12 months under the statute. As a result, the ultimate issue presented for our consideration in this case is whether the fact that Defendant's PJC failed to comply with the time-limit requirements set out in N.C. Gen. Stat. § 15A-1331.2 deprived the trial court of jurisdiction to enter Judgment against Defendant.

It is axiomatic that "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (citation and quotation marks omitted). "The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions." *State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017) (citation omitted).

Under North Carolina law, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best

---

2. *Watkins* represents the only published opinion from either of our appellate courts that mentions the statute in question; however, we did not address this statute's impact on our previous case law. 229 N.C. App. at 631 n.2, 747 S.E.2d at 910 n.2 ("[W]e do not reach the issue of how this statute affects the rules laid out in *Degree* and *Absher* as the statute [is inapplicable in this case].").

indicia of [the legislative] intent are the language of the statute . . . , the spirit of the act[,] and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted).

> If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. Conversely, where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.

Mazda Motors v. Southwestern Motors, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (citations and quotation marks omitted). Although we generally construe criminal statutes against the State, "[a] criminal statute is still construed utilizing 'common sense' and legislative intent." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *State v. Jones*, 358 N.C. 473, 478, 598 S.E.2d 125, 128 (2004)); *see also Darby v. Darby*, 135 N.C. App. 627, 628, 521 S.E.2d 741, 742 (1999) ("[T]he courts in reading our statutes must import common sense to the meaning of the legislature's words to avoid an absurdity." (citation omitted)).

We acknowledge the language of N.C. Gen. Stat. § 15A-1331.2 is unambiguous in prohibiting a trial court from entering an indefinite PJC for these high-level crimes. However, nothing in Section 15A-1331.2 suggests its provisions should be construed as jurisdictional in nature. On its face, the statute in question fails to mention jurisdiction or any consequences for not adhering to its directives. We therefore must look to the Legislature's intent in enacting this statute to determine whether noncompliance strips the trial court of jurisdiction to enter final judgment. *See Brice*, 370 N.C. at 251, 806 S.E.2d at 37.

After reviewing the legislative history of this statute, which we acknowledge is scant, it is apparent that the purpose of Section 15A-1331.2 is to ensure those charged with the highest level offenses under our statutes do not escape punishment by receiving an indefinite PJC.[3]

3. The Bill creating this statute originated in the House of Representatives and read as follows:

> The court shall not dispose of any criminal action that is a Class B, C, D, or E felony by ordering a prayer for judgment continued that exceeds 12 months. If the court orders a prayer for judgment continued in any criminal action that is a Class B, C, D, or E felony, the court shall

By only limiting the trial court's ability to enter indefinite PJCs in the most serious offenses, the Legislature evinces an intent to expedite entry of final judgment for high-level crimes and guarantee that defendants convicted of these high-level crimes do not avoid sentencing for extended periods of time, which was and still is possible for defendants convicted of less serious offenses. *See, e.g.*, *State v. Pelley*, 221 N.C. 487, 496-98, 20 S.E.2d 850, 856-57 (1942) (upholding a delay of almost seven years between PJC and entry of final judgment).

Defendant contends a violation of Section 15A-1331.2 relinquishes the trial court of jurisdiction under the plain language of the statute, which used mandatory language. However, although the provisions of this statute are couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature. *See, e.g.*, *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 662 (1978) (stating the words "must" or "shall" in a statute does not always "indicate a legislative intent to make a provision of the statute mandatory[] and a failure to observe it fatal to the validity of the purported action").[4]

> include as a condition that the State shall pray judgment within a specific period of time, not to exceed 12 months, and the court shall enter a final judgment at the time the State prays judgment or 12 months from the date of the prayer for judgment continued order, whichever is earlier.

H.R. 852, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 6, 2011) (originally proposed bill). After passing a first reading in the House, this Bill was referred to the House Committee on Judiciary Subcommittee B, where it was amended to its current version. *See* H.R. 852, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 27, 2011) (edition 2). The Minutes from this Subcommittee shed little light on the discussions regarding the changes to this Bill. *See Minutes of H. Comm. on Judiciary Subcomm. B*, 2011 Gen. Assemb., Reg. Sess. (N.C. Apr. 26, 2011).

When this Bill was read for the second time in the House, the sponsor of the Bill, Rep. Timothy Spear, and three other Representatives spoke in support of it, describing it as an attempt to ensure that a PJC is not a final disposition in these high-level felony cases and to be "tougher on crime." *See* House Audio Archives, 2011 Gen. Assemb., Reg. Sess. (Apr. 28, 2011), https://www.ncleg.gov/DocumentSites/HouseDocuments/2011-2012%20Session/Audio%20Archives/2011/04-28-2011.mp3 (remarks by Reps. Guice, Spear, Engle, and Faircloth at 3:59:00 to 4:05:00). These brief remarks constitute the only substantive discussions of this Bill. Eventually, the exact language of this Bill was placed in Senate Bill 707, which became law in 2012. *See* School Violence Prevention Act of 2012, 2012 N.C. Sess. Law 149, § 11 (N.C. 2012); *see also* 2012 N.C. Sess. Law 194, § 45.(e) (N.C. 2012) (recodifying Section 11 of Session Law 149 as N.C. Gen. Stat. § 15A-1331.2).

4. Our view of Section 15A-1331.2 is analogous to the treatment of N.C. Gen. Stat. § 7B-1109(e), which provides strict timelines for entry of orders in termination of parental rights proceedings. *See* N.C. Gen. Stat. § 7B-1109(e) (2017). This Court has recognized the failure to enter an order within the statutory timelines does not automatically result in the order being vacated. *See In re J.L.K.*, 165 N.C. App. 311, 316, 598 S.E.2d 387, 391 (2004). Our Supreme Court has further held the remedy to enforce these statutory timelines is

The effect of adopting the construction of N.C. Gen. Stat. § 15A-1331.2 espoused by Defendant, which would prohibit a trial court from entering judgment on an indefinite PJC after 12 months (or 24 months if either party obtains an extension) for our State's most serious offenses, cannot be squared with the likely legislative intent motivating the enactment of this statutory provision. *See Mazda Motors*, 296 N.C. at 361, 250 S.E.2d at 253 (holding where an interpretation of a statute would "contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control" (citations omitted)). As previously discussed, it is apparent our Legislature never intended that a violation of Section 15A-1331.2 would strip the trial court of jurisdiction to enter judgment on these high-level offenses. Because the intent of the Legislature controls, we hold that noncompliance with N.C. Gen. Stat. § 15A-1331.2 does not automatically divest the trial court of jurisdiction to enter a final judgment. *See id.* Rather, whether the trial court retained jurisdiction must be assessed using the standards set out in *Absher* and *Degree*.

Applying these principles, we hold the trial court's delay in sentencing Defendant was not unreasonable nor was Defendant prejudiced by this delay. First, the Record shows, and Defendant concedes, that Defendant did not object to the trial court's PJC entered upon Defendant's *Alford* plea, and thereafter Defendant never requested the trial court enter judgment on his conviction. His failure to do either is "tantamount to his consent to a continuation of" judgment during that time period. *Degree*, 110 N.C. App. at 641-42, 430 S.E.2d at 493. Secondly, the length of Defendant's delay, approximately 19 months, is well within the range of delays previously upheld by our courts. *See Pelley*, 221 N.C. at 496-98, 20 S.E.2d at 856-57 (approximately seven-year delay upheld); *see also Lea*, 156 N.C. App. at 180, 576 S.E.2d at 133 (five-year delay upheld); *State v. Mahaley*, 122 N.C. App. 490, 491-93, 470 S.E.2d 549, 550-52 (1996) (four-year, six-month delay upheld).[5]

Lastly, Defendant suffered no prejudice as a result of this delay. The purpose for Defendant's PJC was to allow Defendant time to provide

---

through *mandamus*. *In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) ("In cases such as the present one in which the trial court fails to adhere to statutory time lines, mandamus is an appropriate and more timely alternative than an appeal.").

5. We further note had (1) Defendant's plea agreement included a condition that the State pray for judgment within a specific period of time not to exceed 12 months and (2) the State moved for an additional 12-month continuance within the first 12-month period, the 19-month period in this case would have complied with the statutory requirements of Section 15A-1331.2. *See* N.C. Gen. Stat. § 15A-1331.2.

substantial assistance to the State in accordance with his plea agreement. Because of this delay in sentencing, Defendant was able to provide substantial assistance, and as a result, Defendant received a significantly lower sentence than he would have had he not been able to provide assistance to the State. Further, Defendant does not argue he was prejudiced in any way by the trial court's failure to enter judgment within 12 months.

Accordingly, we hold that the Judgment was entered within a reasonable period of time and that Defendant suffered no actual prejudice thereby. Because the trial court did not lose jurisdiction to enter Judgment against Defendant, the trial court correctly denied Defendant's MAR.

Conclusion

For the foregoing reasons, we conclude the trial court retained jurisdiction to enter Judgment on 27 February 2017. Therefore, we affirm the trial court's MAR Order.

AFFIRMED.

Judges ZACHARY and BERGER concur.

STATE OF NORTH CAROLINA
v.
GREGORY K. PARKS

No. COA18-520

Filed 21 May 2019

1. Evidence—expert opinion—forensic pathologist—inference from blood loss—Rule 702—reliability

In a murder prosecution, the trial court properly exercised its discretion in allowing opinion testimony from two forensic pathologists who stated that the amount of blood found in defendant's house was consistent with blood loss from an injury to the victim (whose body was never found) severe enough to cause death absent immediate medical attention. The opinions were sufficiently reliable where the experts drew on their experience to compare the information from this case to numerous other cases—a common method used in forensic pathology—in order to form a medical opinion.

2. Constitutional Law—motion to suppress—evidence collected under search warrant—supporting affidavit—truthfulness

Defendant was not entitled to the suppression of evidence collected from his house as part of a murder investigation where evidence supported at least some version of each statement contained in the affidavit accompanying the search warrant, and defendant failed to show the affiant acted in bad faith or in reckless disregard of the truth.

3. Homicide—first-degree—sufficiency of evidence—victim's body not found

In a trial for the killing of a victim whose body was never found, the State's evidence, though circumstantial, was sufficient to support a reasonable inference of defendant's guilt of first-degree felony murder, kidnapping, and obtaining property by false pretenses to survive defendant's motion to dismiss. The victim was last seen with defendant at defendant's house before she disappeared, the victim's blood was found in defendant's house in a quantity which suggested a serious injury requiring immediate medical attention, defendant removed blood-stained carpet from his home, he was in possession of the victim's ring which had blood on it, and his explanations to law enforcement changed over time.

Judge MURPHY concurring in a separate opinion.

Appeal by defendant from judgments entered 15 November 2017 by Judge Wayland J. Sermons, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 16 January 2019.

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

Marilyn G. Ozer for defendant.

ARROWOOD, Judge.

Gregory K. Parks ("defendant") appeals from judgments entered upon his convictions for first degree murder, obtaining property by false pretenses, and obtaining habitual felon status. For the following reasons, we affirm.

I. Background

A warrant for defendant's arrest was issued and defendant was arrested on 19 August 2015 for the first degree murder and first degree kidnapping of Isabel Calvo Palacios, who was last seen on 31 July 2015. A Wilson County Grand Jury indicted defendant on one count of first degree murder and one count of first degree kidnapping on 12 October 2015. On 11 January 2017, the Grand Jury additionally indicted defendant for obtaining the status of a habitual felon and on one count of obtaining property by false pretense.

Pretrial hearings took place in Wilson County Superior Court before the Honorable Wayland J. Sermons, Jr., on 5 and 19 October 2017 to address the many procedural and evidentiary motions filed by the parties, including motions by defendant to exclude expert opinion testimony and motions to suppress evidence. The case was then tried in Pitt County Superior Court before Judge Sermons between 23 October 2017 and 15 November 2017.[1]

The evidence at trial tended to show that Palacios, a 20-year-old-woman, went to defendant's house on the night of 30 July 2015 to do drugs with defendant. Except for leaving with defendant several times to obtain cocaine, Palacios spent the night of 30 July 2015 and the early morning hours of 31 July 2015 smoking crack cocaine with defendant at defendant's house. During that same time period, Ronald Parker was exchanging text messages with Palacios about meeting to hang out and smoke weed together. Sometime between 3:00 and 5:00 a.m. on 31 July 2015, Parker arrived at defendant's house. Only Palacios' vehicle was in the driveway. Palacios responded to Parker at the door under the carport, but Palacios was unable to let him in because the deadbolt on the door was locked and could only be opened with a key. Parker testified that Palacios was locked in the house. Parker asked Palacios if she wanted to get out but she said she didn't. Parker then left and came back later on Palacios' instructions.

Parker returned between 5:00 and 6:00 a.m. before the sun had risen. Both Palacios' and defendant's vehicles were in the driveway. There were also two men, referred to as Black and Harold, outside of defendant's house. Defendant stated that the men were trying to collect. Defendant called police about the men, but because Palacios did not want to be involved with the police, she exited the house and got

1. Both defendant and the State filed motions for change of venue, which the trial court previously granted on 13 July 2017.

into Parker's vehicle. Parker and Palacios drove around until defendant notified them that it was all clear. When they returned to defendant's house, defendant let them in through the door under the carport and locked the deadbolt as he closed the door behind them. Parker recalled that Palacios and defendant were smoking crack cocaine in the bedroom on the left-hand side of the hallway. Parker and Palacios then went into another bedroom across the hallway, smoked marijuana, and had sex. After they were finished, Palacios left the bedroom and Parker slept in the room for approximately four hours until Palacios and defendant woke him up around 10:00 a.m. Parker left approximately 30 minutes later through the carport door; defendant let him out and locked the deadbolt after he left. There was a baseball bat inside the house behind the door.

Parker drove around that afternoon smoking and selling marijuana with his cousin, Matthew Jones. They drove by defendant's house several times and Parker thought it was unusual that Palacios' vehicle was still there because Palacios had a little daughter that she usually went home to. At 2:45 p.m., Parker called Palacios. Parker testified that "[a]s soon as it rung she answered and she was screaming for her life, help, help; somebody help me please; he's hurting me; he's hurting me; he's hurting me. . . . I heard a man which I think was [defendant] got on the phone and said, we was just playing; she's all right; she's all right, and they hung the phone up." Parker drove around for a couple more hours and continued to call Palacios; those calls went straight to voicemail.

Parker and his cousin later went back to defendant's house to check on Palacios. Palacios' vehicle was still there. Parker got out, knocked on the door, and spoke to defendant through the door. Defendant told Parker that some Mexican guys took Palacios. Parker then walked around the back of the house and noticed a broken window and stains on the curtain that Parker said "looked like to me would be blood, smear stains." Parker called 911 at that time and told the operator about the earlier phone call when he heard Palacios screaming, that Palacios' vehicle was still at defendant's house but defendant said she was not there, and that they noticed a busted out window with blood at the back of the house. Parker and his cousin did not wait for police because they were high and had marijuana on them.

Two Wilson police officers, Edwards and McKenzie, responded to the 911 call and arrived at defendant's house just before 6:00 p.m. on 31 July 2015 to do a welfare check. Defendant let the officers inside and they spoke with defendant in the kitchen area. Defendant told the officers that Palacios left with a Hispanic guy in a pickup truck. Defendant

also told the officers that Palacios left her vehicle there because it was running hot. While the officers were talking with defendant, Parker and his cousin returned and Officer Edwards stepped outside to speak with them. Parker said that he told the officer that Palacios was missing and showed them the busted out window and what he thought was blood. Officer McKenzie, who remained inside, asked defendant if they could look around to make sure Palacios was not there. Defendant agreed and, after Officer Edwards came back inside, led the officers through the house allowing them to look in the rooms. It was not a thorough search; they were not "pulling up, getting on the ground, looking under beds or anything like that, just looking in rooms making sure we didn't see anyone." They were not looking for blood evidence or any other kind of evidence. Officer McKenzie recalled there was carpet in the bedroom on the left-hand side of the hallway and that a broken window in the bedroom was covered. Defendant told the officers that earlier that day, someone tried to break into his house so he broke the window in an attempt to get out of the house. Officer McKenzie also noticed bedding soaking in the hallway bathtub. Once the officers exited defendant's house, they spoke with Parker. The officers walked around the back of the house and noticed the broken window. The officers, Parker, and Parker's cousin then left.

Later that same evening, at approximately 10:40 p.m., Parker returned to defendant's house with some guys from Palacios' neighborhood to look for Palacios. Palacios' vehicle was still at defendant's house. Both defendant and one of the guys with Parker separately called 911. Two Wilson police officers, Harrison and Sherrill, responded to the call between 10:45 p.m. and 11:00 p.m. Officer Harrison spoke with the guys outside while Officer Sherrill spoke to defendant inside defendant's house. Officer Sherrill asked defendant where Palacios went and defendant told him that "she had lost her keys and that she had left looking for them." Defendant again walked with the two officers around the house as they performed a welfare check looking for Palacios. The officers looked everywhere they thought a human being could be: in bedrooms, bathrooms, closets, under beds; they were not looking for other evidence. Officer Sherrill recalled that there was red carpet in the bedroom on the left-hand side of the hallway. The officers told the men outside that Palacios was not in the house, and everyone left.

Both sets of officers who responded to 911 calls on 31 September 2015 noted that defendant was cooperative and calm. The officers also recalled that defendant never mentioned Palacios bleeding in his house, or that he found Palacios' keys.

The following morning, on 1 August 2015, defendant picked up Shannon Dunn to smoke crack cocaine. They went and got a crack rock, went back to Dunn's house, and then went to "Quick Pawn," a pawn shop on Tarboro Street. Dunn waited in the car as defendant went inside and pawned a 10 karat gold cluster ring for $25.00 in cash. The ring was later identified as a ring given to Palacios in July 2015 and testing on the ring was positive for blood and Palacios' DNA. After pawning the ring, defendant and Dunn got a second crack rock and went to defendant's house. Defendant locked the deadbolt on the door under the carport behind them and they went back to the bedroom on the left-hand side of the hallway to smoke crack. Dunn recalled that the bedroom stunk and defendant told her a woman threw up in the room the night before. Dunn testified that she wanted to pick up pieces of the crack rock from the floor after defendant broke the rock, but defendant did not want her on the floor. Defendant told her there was glass on the floor. Dunn also testified that defendant did not want her to use the hallway bathroom. Defendant and Dunn spent all of 1 August 2015 searching for and smoking crack cocaine. On 2 August 2015, defendant called Dunn to ask if her brother would help him put down new carpet. Defendant told Dunn that he had been up all night tearing the carpet out of the bedroom because he was tired of cutting his feet on glass in the carpet.

At approximately 1:00 p.m. on 4 August 2015, Detective Tant of the Wilson Police Department went to defendant's house to follow up on a missing person's report for Palacios. Defendant arrived minutes after the detective arrived and invited the detective into the house. They spoke inside in the kitchen area. Defendant told the detective that he and Palacios smoked crack cocaine together and that she left to go find money but could not find her keys. Defendant never mentioned that Palacios cut her foot at his house. Detective Tant testified that he told defendant they would do whatever it takes to find Palacios and at that moment, defendant "started shaking so hard that he had to set [a] cup down before he dropped the cup."

Defendant voluntarily went to the Wilson Police Department main office around 4:45 p.m. on 4 August 2015. Detective Godwin of the Wilson Police Department interviewed defendant. Defendant told Detective Godwin about smoking crack cocaine with Palacios on 30 and 31 July 2015 and that Palacios left around 2:30 p.m. on 31 July 2015. Defendant stated that Palacios lost her keys and that is why her vehicle was still there, which detective Godwin noted was different from what defendant initially told Officer McKenzie. When specifically questioned, defendant stated that he tried to have sex with Palacios but he could not

get an erection. After initially stating police would find no blood in his house, defendant shifted his story and said they may find a small amount of Palacios' blood from stepping on glass. Defendant also stated that he broke the window at his house while trying to get out of the window when Black and Harold were at his house on 31 July 2015. Detective Godwin did not notice any injuries to defendant's hands. Defendant did not mention to Detective Godwin that he had removed carpet from his house or that he had cleaned blood from his house.

That same evening following the interview, on 4 August 2015, a search warrant was obtained and executed on defendant's house. Defendant's house was seized for purposes of the search and defendant never returned to the house. Defendant was cooperative at the time.

During the search of defendant's house, it was discovered that defendant had removed the carpet from the bedroom on the left-hand side of the hallway. Red carpet fibers were found leading from the door under the carport onto the driveway and in the trunk of defendant's vehicle. The carpet padding was discovered in a trashcan outside of defendant's house and tests on the padding were positive for blood with Palacios' DNA. A candlestick, a lamp, and a bath mat were also found in a trashcan outside of defendant's house and they tested positive for blood and Palacios' DNA. Blood spots or spray with Palacios' DNA were discovered inside defendant's house on several walls in the bedroom on the left-hand side of the hallway, the deadbolt lock on the bedroom door, pieces of flooring, and on a window. A shirt, clothes hamper, newspaper, and ashtray recovered from defendant's house also tested positive for blood and Palacios' DNA. Palacios' car keys were found behind a statue figurine on a built-in bookcase between the kitchen and living room area. Cleaning supplies including Ammonia, bleach and carpet cleaner were also discovered during the search. The baseball bat seen in defendant's house was never recovered.

When detectives took medicine to defendant on 6 August 2015 at the motel the police department put him in, they asked defendant about the carpet. Defendant said he put the carpet in his trunk and took it down to a corner where people drop stuff off. Detectives did not find carpet fibers at the corner identified by defendant and were never able to locate the carpet.

During an interview of defendant on 19 August 2015, after defendant was arrested and charged, defendant told detectives for the first time that he noticed blood in his house on the afternoon of 31 July 2015 and that he cleaned up the blood. Defendant also claimed to detectives

for the first time that Palacios had smoked marijuana laced with another drug and cut her hand near the broken window. Defendant asked questions to detectives about the amount of blood discovered in his house after the detectives mentioned luminol was used to find blood evidence. Defendant specifically asked if they "found eight pints of blood in his house[,]" while indicating that he knew the human body had eight pints of blood. When questioned whether Palacios was killed in the bedroom, defendant indicated that she could have been because anything is possible; but he did not know about it.

Defendant also admitted to detectives that he traded drugs for sex from girls that came to his house; and that he felt he was justified in hitting the girls if they did not uphold their end of the bargain. The State presented evidence under Rule 404(b) that defendant had been violent with a number of women in the past who had used drugs with defendant and refused sex.

Palacios was never found despite extensive search efforts by foot, vehicle, helicopter, dogs, dive teams, and internet. No one, including Palacios' family, has heard from Palacios since 31 July 2015. There were, however, several possible reported sightings.

At the close of the State's evidence, defendant moved to dismiss the first degree murder charge, the first degree kidnapping charge, and the obtaining property by false pretense charge. The trial court found insufficient evidence of premeditation and deliberation to allow the State to proceed on that theory of first degree murder; but found sufficient evidence to allow the State to proceed on the theory of first degree felony murder. The trial court also found sufficient evidence to support the first degree kidnapping and obtaining property by false pretense charges. Therefore, the trial court denied defendant's motion to dismiss.

On 15 November 2017, the jury returned verdicts finding defendant guilty of first degree felony murder by the commission of attempted second degree rape and by the commission of second degree kidnapping, first degree kidnapping, obtaining the status of an habitual felon, and obtaining property by false pretense. The trial court arrested judgment on the first degree kidnapping conviction, entered a judgment on the first degree felony murder conviction sentencing defendant to life imprisonment without parole, and entered a judgment for obtaining property by false pretense and obtaining habitual felon status sentencing defendant to a consecutive term of 128 to 166 months imprisonment to begin at the expiration of the life sentence. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant challenges the trial court's admission of expert testimony, the trial court's denial of a motion to suppress, and the trial court's denial of a motion to dismiss the charges.

1. Expert Testimony

[1] Defendant first contends the trial court erred in allowing two forensic pathologists to testify as to their expert opinions regarding the amount of blood discovered in defendant's house. Defendant asserts that the trial court's decision to allow their testimony was improper under Rule 702.

It is the trial court's role to decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2017). "[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). "The trial court's decision regarding what expert testimony to admit will be reversed only for an abuse of discretion." *State v. Alderson*, 173 N.C. App. 344, 350, 618 S.E.2d 844, 848 (2005). However, "[w]here the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp., P.A.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008).

Rule 702 of the North Carolina Rules of Evidence governs testimony by experts. Pertinent to defendant's argument, the rule currently provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702 (2017).

In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), our Supreme Court discussed Rule 702 at length. The Court first explained the history of Rule 702 of the Federal Rules of Evidence and how an amendment to Federal Rule 702 adopted in 2000 incorporated the exacting standards of reliability established in the United States Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). *McGrady*, 368 N.C. at 884-85, 787 S.E.2d at 6. The Court in *McGrady* then explained that, although the original text of North Carolina's Rule 702 and the original text of Federal Rule 702 were largely identical, judicial construction of North Carolina's Rule 702 took a different path with our courts initially concluding that " 'North Carolina is not, nor has it ever been, a *Daubert* jurisdiction' " and noting that North Carolina has adopted a less mechanistic and rigorous approach than the federal approach. *McGrady*, 368 N.C. at 886, 787 S.E.2d at 6-7 (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004). However, in 2011, the General Assembly amended North Carolina's Rule 702 to incorporate the three reliability requirements now at the end of Rule 702(a) by adopting language virtually identical to the 2000 amendment to the federal rule. *McGrady*, 368 N.C. at 887, 787 S.E.2d at 7; *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a). The Court explained in *McGrady* that "[b]y adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well. In other words, North Carolina's Rule 702(a) now incorporates the standard from the *Daubert* line of cases." *Id.* at 888, 787 S.E.2d at 7-8. Thus, "the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* at 884, 787 S.E.2d at 5.

Upon establishing that North Carolina now followed the *Daubert* standard, the Court explained that "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (footnote omitted). First, the relevance inquiry requires that "the area of proposed testimony must be based on 'scientific, technical or other specialized knowledge' that 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Id.* (quoting N.C.R. Evid. 702(a)). Second, the witness must be competent to testify as an expert in the field of the proposed testimony; that is "the witness must be 'qualified as an expert by knowledge, skill, experience, training, or education.' " *Id.* at 889, 787 S.E.2d at 9. Third, "the testimony must meet the three-pronged reliability test that is new to the amended rule [included in subsections (1) through (3) of Rule 702(a)]." *Id.* at 890, 787 S.E.2d at 9.

As stated above, in this case defendant specifically challenges the trial court's admission of expert opinion testimony from two forensic pathologists concerning the amount of blood discovered in his house.

The expert testimony was brought to the attention of defendant when the State filed supplemental discovery and notices of expert witnesses on 2 October 2017. The notices indicated the State would call two forensic pathologists to testify to an opinion they reached in a report prepared jointly with a third forensic pathologist after a two-hour meeting with the detectives and the assistant district attorney, during which the pathologists reviewed photographs of the blood evidence discovered in defendant's residence, including photographs of a blood stain on carpet padding removed from a bedroom, reviewed SBI lab reports, and discussed the crime scene with detectives. The opinion the State sought to introduce from the report was that Palacios suffered injuries that caused her to bleed in defendant's home and the amount of blood lost, given her small size, was sufficient to cause her death and would have caused her death if she did not receive immediate medical attention.

On 4 October 2017, defendant filed a motion *in limine* to exclude the opinion testimony of the pathologists on the basis that the testimony was improper under *Daubert* and *McGrady*. The motion *in limine* was first addressed before the trial court at the pretrial hearing on 5 October 2017. At that time, defense counsel argued there was nothing showing the experts had conducted any testing or done anything to qualify them to testify about the blood. Defense counsel remarked, "[j]ust because you're a pathologist doesn't mean you can step out here and all of a sudden talk about quantification and [the] amount of blood you see at a scene through photographs and hear somebody tell you about what color blood it is." Upon hearing defendant's concerns, the trial court indicated it would conduct a pretrial hearing on the qualifications of the State's expert witnesses after jury selection but before the witnesses testify.

That pretrial hearing was held on 24 October 2017, at which time the trial court considered the *voir dire* testimony of the State's expert witnesses, Dr. M.G.F. Gilliland and Dr. Karen L. Kelly, and considered arguments. Noting defendant's objection, the trial court announced its decision in open court as follows:

> In this case I'm going to rule that the exact language of the opinion as contained in the August – or October 2nd, 2017 written opinion does go beyond the scope of *Daubert* in its last sentence. However, I am going to find that the experts may testify that based upon their training and experience

> the amount of blood loss observed in the crime scene information in this case is significant -- I'm going do [sic] let them say that -- it is consistent with other amounts of blood loss in cases which the victim would require immediate medical attention to survive. And that's as far as I'm going to let them go.

Thereafter at trial, in addition to offering unchallenged testimony regarding blood evidence found in different areas and on different objects in defendant's house, the trial court allowed Dr. Gilliland and Dr. Kelly to testify, over defendant's objections, to their opinions as to the amount of blood. Dr. Gilliland testified that based on all the evidence that she saw in this case, and based on her prior training and experience, she was able to form a medical opinion in this case. Dr. Gilliland then testified, "[m]y opinion is that based on the amount of blood loss that I estimated[,] that this individual had suffered a significant blood loss. . . . In my opinion individuals who have suffered this kind of blood loss are in need of medical attention." Dr. Gilliland further testified that she has been involved in cases in the past where she has seen individuals with similar amounts of blood loss and those victims had required immediate medical attention. Dr. Kelly similarly testified, "[s]o with all the things that we have seen and the presence of the stain in the padding, it's my opinion that there was a significant amount of blood present at the scene." Dr. Kelly then stated, "[b]ased on my training and experience at scenes of death[,] that there was a significant amount of blood at the scene and that it's consistent with other scenes that I have seen in the past, and that if the victim had not received, that the victim would have required medical attention very quickly."

Just as defendant argued below, defendant now argues that the admission of this expert opinion testimony was improper under *Daubert* and *McGrady* because the testimony violated every reliability requirement for admission under Rule 702. Defendant does not challenge the relevance of the testimony or the qualifications of the witnesses. Defendant only contests the reliability.

As noted above, the three-pronged reliability test added to North Carolina Rule 702 by the 2011 amendment requires all of the following: "(1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3). Relying on *Daubert*, *Joiner*, and *Kumho*, the Court explained in *McGrady* as follows:

> The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate. However, conclusions and methodology are not entirely distinct from one another, and when a trial court conclude[s] that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

McGrady, 368 N.C. at 890, 787 S.E.2d at 9 (citations and quotation marks omitted). The Court further pointed out that cases have "articulate[d] particular factors that may indicate whether or not expert testimony is reliable" and that, "[i]n its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3)." *Id.*

In arguing the admission of the testimony violated every reliability requirement of Rule 702(a), defendant points to many of those factors identified in *McGrady*. It is clear from the pathologists' *voir dire* testimony that their opinions on the amount of blood loss were not based on published reports, were not subject to peer review, and had not been tested for a potential rate of error. One of the pathologists explicitly agreed with the court that the opinion was "not based on any type of peer review authorized formulas, extrapolations or anything that can be objectively quantified and tested and held up against other researches who may have different opinions[.]" It is also clear that the pathologists' opinions in this case were formed specifically for the purpose of litigation and based on information gathered during the meeting with detectives and the assistant district attorney.

However, even with these factors generally weighing against the admission of expert testimony, we are mindful that

> [t]he precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether* that expert's relevant testimony is reliable.

McGrady, 368 N.C. at 890, 787 S.E.2d at 9 (citations and quotation marks omitted) (emphasis in original).

Here, it is evident that the trial court understood the reliability requirements and limited its decision to allow the testimony based on the type of testimony being offered and nature of the pathologists' work. We hold it was within the trial court's discretion to do so.

The court specifically explained to the witnesses that "the inquiry of the [c]ourt is that the methodology that you used in coming up with your opinions have to be based on reliable data and scientific methods[,]" and expressed concern that the opinion in the report that the State sought to admit was a subjective opinion "about somebody with this amount of loss that we observed would have died." The court directly acknowledged defendant's concern that the pathologists could not quantify the amount of blood loss in volume from crime scene photographs and questioned the State about how the opinion testimony based on experience was admissible after "*Daubert* . . . tightened up [the] requirement that opinions be based upon reliable, scientific methods . . . ." The trial court indicated it was having trouble with the opinion testimony that Palacios would have died from the blood loss, but believed it was proper for the pathologists to testify that the blood loss was "consistent" with blood loss observed in other cases where the person suffering the blood loss would have died without immediate medical attention. The court explained that the difference between the two opinions was that the opinion comparing the blood loss to other cases was clearly based upon the training and experience of the pathologists.

In response to the trial court's questions, the defense argued that the problem with the opinion the State sought to admit was that the "opinion goes too far. It is beyond what they should and could be able to testify to." Defendant, however, acknowledged that the pathologists could testify to what they see and that our law "seems to allow language in questions being asked to experts about something being consistent. That question would be closer to allowing them to answer that question than it would be to receive an opinion such as what [the State sought to admit from the report.]"

As shown in the trial court's decision, set forth above, the court refused to allow the pathologists to testify to the opinion the State sought to admit from the report, holding that the opinion went beyond the scope of *Daubert*. The trial court instead limited the pathologists' opinion testimony to comparing the blood loss in this case to blood loss in other cases, which the defense accepted was more proper.

We agree with the trial court that the opinion testimony allowed into evidence is in line with the nature of forensic pathology work. While the

pathologists are trained medical doctors and educated on the amount of blood in a human body and statistics for blood loss, the pathologists testified that that information served only as a base of knowledge from which they must use their training and experience as doctors and forensic pathologists. The pathologists testified that it is impossible to measure the amount of blood, in terms of volume, at a crime scene; therefore, they did not provide any numbers to quantify the amount of blood loss in this case. Instead, the pathologists explained that doctors are trained to look at blood loss, compare different amounts, and determine if medical attention is needed; and as a forensic pathologist, they have dealt with many cases involving the determination of whether blood loss was a cause of death.

Here, the pathologists' testimony was based on photographs of the crime scene, SBI lab results, and discussions with the detectives involved in the case. Without objection, the pathologists testified on the blood evidence discovered in defendant's house based on what they observed in the photographs and lab reports, and discussed with detectives. The pathologists testified that it was routine in the field of forensic pathology to rely on such data and information from other sources and that they use photographs a couple hundred times each year to form medical opinions. The testimony was that it was less common for them to actually go to a crime scene because of the large area that their office covers. The pathologists also explained how they compare the data and observations with what they have experienced at other crime scenes to form an opinion. Both pathologists testified that it was common in the field of forensic pathology to form opinions based on comparisons with other cases and acknowledged they deal with blood loss and render opinions as to a cause of death on a daily basis. Testimony was given that it was "absolutely" a normal part of forensic pathology to determine if someone has died or needed medical attention as a result of blood loss. Dr. Kelly added that experience is an accepted form of methodology in the field of forensic pathology.

Both pathologists in this case testified that they have been involved in hundreds of cases where they have had to look at crime scene photographs of blood and a body, to which they could compare the data and observations in this case. Based on their experience, the pathologists responded to the trial court's inquiry that they were able to testify that the amount of blood in this case would be consistent with a person who would need immediate medical attention. Dr. Gilliland added that her opinion was to a reasonable degree of medical certainty.

Upon review of the *voir dire*, we hold the trial court understood the reliability standard and properly formulated a test in this case to judge the reliability of the pathologists' opinion testimony based on the nature of that testimony. That inquiry showed that the pathologists' testimony was based on the facts and data typically relied on in the field of forensic pathology, and that the pathologists compared the information presented to hundreds of other cases which they have seen to form an opinion that the blood loss in this case was significant. Thus, we hold the trial court properly determined that the pathologists' testimony was based on sufficient facts or data, was the product of reliable principles and methods, and that they reliably applied those principles and methods in this case. The trial court did not abuse its discretion in this case in admitting the limited opinion testimony of the pathologists.

Moreover, we emphasize that the only testimony that defendant challenges is the pathologists' opinions that the amount of blood loss was consistent with blood loss in other cases where the victim required immediate medical attention. Defendant does not challenge the admissibility of the pathologists' testimony as to what they observed in the crime scene photographs. That evidence was properly admitted and put before the jury. It is not clear to this Court that, even if the opinion testimony was improper, that the testimony would rise to the level of prejudice requiring a new trial given the other evidence in the case.

2. Motion to Suppress

[2] Defendant next claims that the trial court's denial of his motion to suppress violated his constitutional rights against unreasonable search and seizure. Defendant filed numerous motions to suppress on 4 October 2017, but now specifically challenges the denial of his motion to suppress evidence collected during the search of his residence pursuant to the warrant issued on 4 August 2015. Defendant contends evidence collected during the search must be suppressed because the search warrant was issued based on an affidavit containing false and misleading information.

In *Franks v. Delaware*, the United States Supreme Court addressed whether "a defendant in a criminal proceeding ever [has] the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant[.]" 438 U.S. 154, 155, 57 L. Ed. 2d 667, 672 (1978). The Court recognized that "[t]here is . . . a presumption of validity with respect to the affidavit supporting the search warrant[,]" *id.* at 171, 57 L. Ed. 2d at 682, but held that,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56, 57 L. Ed. 2d at 672. In reaching its holding, the Court emphasized that the Fourth Amendment requirement of a showing of probable cause is premised on the assumption that there will be a "*truthful* showing," *id.* at 164-65, 57 L. Ed. 2d at 678 (emphasis in original); but explained that

> [t]his does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Id. at 165, 57 L. Ed. 2d at 678.

Applying the analysis set forth in *Franks* in *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), our Supreme Court explained that

> [u]pon any evidentiary hearing, the only person whose veracity is at issue is the affiant himself. A claim under *Franks* is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

Fernandez, 346 N.C. at 14, 484 S.E.2d at 358 (citations omitted). As our courts have recognized, N.C. Gen. Stat. § 15A-978 codifies the rule enunciated in *Franks* and provides, in pertinent part, as follows:

> (a) A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. The defendant may contest the truthfulness of the testimony by cross-examination or by offering evidence. For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

N.C. Gen. Stat. § 15A-978(a) (2017).

In defendant's motion to suppress, defendant went through each paragraph of the affidavit submitted in the search warrant application and took issue with certain statements. The trial court heard and denied defendant's motion to suppress on 19 October 2017, and later filed a written order on 13 November 2017. In the order, the trial court addressed each of defendant's assertions, but found that only one paragraph in the affidavit could not be considered for issuance of the search warrant. The trial court further found that the defendant's other allegations were simply disagreements with the averments made in the affidavit and determined that, with the exclusion of the one paragraph that could not be considered, the remainder of the affidavit was sufficient to support the necessary finding of probable cause to issue the search warrant.

Now on appeal, just as defendant did below, defendant identifies statements in the affidavit that he contends are false or unrelated to the case, and identifies omissions from the affidavit that he asserts were misleading. Defendant, however, does not specifically attack the veracity of the affiant; defendant simply asserts that given the number of false or misleading statements and the misleading omissions, "the only possible conclusion is that the affidavit was written with reckless disregard for the truth or because the officers acted in bad faith . . . ." Upon review of the evidence, we are not convinced.

Although not all statements in the affidavit are entirely accurate, the evidence supports some version of those challenged statements and defendant has not met his burden to establish by the preponderance of the evidence that the affiant made those statements in reckless disregard to the truth or in bad faith. *See State v. Haymond*, 203 N.C. App. 151, 159, 691 S.E.2d 108, 117 (2010) ("[A] defendant must 'establish facts

from which the finder of fact might conclude that the affiant alleged the facts in bad faith.' He cannot rely on evidence that merely 'contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements.' ") (quoting *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358). Thus, the trial court did not err in denying defendant's motion to suppress.

3. Motion to Dismiss

[3] In the final issue on appeal, defendant contends the trial court erred in denying his motions to dismiss made at the close of the State's evidence and renewed at the close of all of the evidence. As detailed in the background above, the trial court determined there was insufficient evidence of premeditated first degree murder, but determined there was sufficient evidence for the State to proceed on first degree felony murder and the kidnapping and obtaining property by false pretense charges.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Defendant contends the evidence in this case falls short of substantial evidence and raises only a suspicion that defendant murdered, kidnapped, or raped Palacios; or that defendant was not in lawful possession of the ring that he sold to the pawn shop. More specifically, defendant asserts that although there was evidence of Palacios' disappearance, there was little evidence that she was dead or that defendant caused her death. Defendant further asserts the State failed to produce evidence that Palacios was restrained in the house or desired to leave; that defendant and Palacios engaged in nonconsensual sexual activities; or that Palacios did not give defendant the ring in exchange for drugs.

The State concedes that, because this is a no body case, its case is based primarily on circumstantial evidence. Citing *State v. Sokolowski*, 351 N.C. 137, 147, 522 S.E.2d 65, 71 (1999) (comparing circumstantial evidence to strands in a rope in that "no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond reasonable doubt") (quoting *State v. Austin*, 129 N.C. 534, 535, 40 S.E. 4, 5 (1901)), the State argues that the combined circumstantial evidence presented in this case was sufficient to prove defendant's guilt.

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted) (emphasis in original).

Here, the State directs this Court's attention to the following circumstantial evidence: Palacios was last seen at defendant's residence in defendant's company on 31 July 2015; no one has heard from Palacios since 31 July 2015, not even her family; extensive efforts by law enforcement to find Palacios have been unsuccessful; Palacios sounded distressed during a phone call with Parker on 31 July 2015, in which Parker heard Palacios yell "he's hurting me," followed by defendant stating they were just playing before hanging up the phone; Palacios' cellular phone pinged a tower near defendant's residence during the call between Palacios and Parker and last pinged a tower near defendant's residence before it "went dark"; Palacios' vehicle was left in defendant's driveway after she disappeared; defendant maintained control over who entered and left his house, and when they entered and left his house, by locking deadbolts and maintaining control of the keys; defendant traded drugs for sex with girls and would become violent when the girls refused sex after he provided drugs; defendant possessed a ring belonging to Palacios, which had blood on it, and pawned it for cash the day after she disappeared; there was a bad odor in defendant's residence the day after Palacios went missing; defendant did not want Dunn to

touch his bedroom carpet or use the hallway bathroom the day after Palacios disappeared; defendant removed his bedroom carpet within days of Palacios' disappearance and it was never found; defendant removed blood stained carpet padding from his bedroom; evidence of blood, including drips, spray, and smears, was found in defendant's residence; lab tests on blood evidence discovered in defendant's house indicated that it contained Palacios' DNA; the amount of blood discovered in defendant's residence was consistent with cases in which the victims needed immediate medical attention; defendant cleaned his house after Palacios' disappearance and cleaning products were discovered; a baseball bat seen in defendant's residence as recently as the morning of Palacios' disappearance was never found; Palacios' car keys were found in defendant's house; defendant's explanations shifted once more evidence was discovered; and defendant appeared nervous to a detective.

Defendant attempts to explain this evidence, and highlights evidence that is favorable to his defense. However, when the evidence is viewed in the light most favorable to the State, as it must be, we agree with the State that the circumstantial evidence is sufficient to support a reasonable inference of defendant's guilt on each charge to survive defendant's motion to dismiss the charges. Thus, the trial court did not err in allowing the jury to decide the case.

III. Conclusion

For the reasons discussed, we find no error and hold the defendant received a fair trial.

NO ERROR.

Judge DILLON concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

I concur fully with Majority's analysis in Parts II-2 and II-3. However, I concur in Part II-1 solely because our review of the trial court's decision is strictly for an abuse of discretion. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

STATE v. THOMPSON

[265 N.C. App. 576 (2019)]

STATE OF NORTH CAROLINA
v.
KOLTON JAMES THOMPSON, DEFENDANT

No. COA18-885

Filed 21 May 2019

1. Evidence—character—assault—implication in prior narcotics activity—Rule 404(b)

In a prosecution for assault with a deadly weapon, an officer's testimony that he had previously encountered defendant in connection with a narcotics case—to explain how he could identify defendant—constituted error to the extent the reference to narcotics did not add to the reliability of the officer's identification of defendant. However, any error did not rise to the level of plain error where defendant was caught on a surveillance video as the perpetrator of the shooting.

2. Appeal and Error—error already corrected—objection to negative character evidence sustained

Defendant's argument that an officer's testimony—suggesting defendant may have been involved in gang activity—was improperly admitted was resolved when the trial court sustained his objection at trial.

3. Evidence—character—assault—witness intimidation—Rule 404(b)

In a prosecution for assault with a deadly weapon, no plain error occurred from a detective's testimony suggesting defendant intimidated the victim because the testimony was relevant as an explanation for why the victim did not identify his shooter or participate in the trial.

4. Constitutional Law—right to remain silent—prosecutor's questions—eliciting improper testimony

Although a prosecutor elicited impermissible testimony from a detective regarding defendant's decision not to speak further during an investigative interrogation, the admission of the testimony did not amount to plain error given the substantial evidence of defendant's guilt where defendant was identified on a surveillance video as the perpetrator of a shooting.

5. Appeal and Error—preservation of issues—waiver—constitutional right to remain silent—closing argument—prosecutor's statements

Defendant's argument on constitutional grounds that a prosecutor's statements at closing improperly referenced defendant's right to remain silent was waived for failure to object, and he failed to preserve for appellate review that the statements violated N.C.G.S. § 15A-1230 by not raising that ground on appeal.

Appeal by defendant from judgments entered 5 April 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.

James F. Hedgpeth, Jr., for defendant-appellant.

ARROWOOD, Judge.

Kolton James Thompson ("defendant") appeals from judgments entered on his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon. For the reasons stated herein, we find no error in part, and dismiss in part.

I. Background

A New Hanover County Grand Jury indicted defendant for assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon on 31 July 2017. The matter came on for trial on 4 April 2018 in New Hanover County Superior Court, the Honorable Richard Kent Harrell presiding. The State's evidence tended to show as follows.

On 7 May 2017, the Wilmington Police Department responded to a report that a shooting had taken place at a nightclub called the Sportsman's Club. One of the responding officers, Officer Wade Rummings, testified that "[a] lot of people" were "hanging around the parking lot, walking out of the club[,]" but "[e]veryone said they didn't see or hear anything." However, when he canvassed the scene, Officer Rummings "located a spent shell casing on the sidewalk leading north to the back parking lot." He also found a shell about five to ten feet from the shell casing. Eventually, the officers were able to determine the

victim, Angeleos Williams, had been transported to the hospital to be treated for "a gunshot wound to his leg or thigh."

The officers obtained a copy of the nightclub's security video that recorded the shooting. The video depicts "[a] subject[ ] walking . . . down the northwest side of the building towards the front of the . . . business. And then, again, shortly thereafter with the victim, walking alongside of the victim, and then the shooting occurred." Based on the video, Detective Lonnie Waddell ("Detective Waddell") identified the shooter as defendant. Detective Jeremy David Barsaleau ("Detective Barsaleau") and one other detective used this information to create a photo lineup that included defendant. The lineup was shown to the victim, who did not confirm the shooter's identity. However, Detective Barsaleau testified the victim's demeanor "appeared [as though] he wanted not to really identify the suspect, that -- that he knew who he was, but has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well."

Based upon the videotape evidence, defendant was arrested on 9 June 2017. After his arrest, he underwent a custodial interrogation with Detective Barsaleau, a recording of which was entered into evidence at trial. During the interview, defendant acknowledged being present at the club the night of the shooting, but denied shooting the victim. When Detective Barsaleau showed defendant still photos of the surveillance video, he "dropped his head and basically said he was done."

The jury found defendant guilty of both charges. The trial court imposed an active sentence of 110 to 114 months for the offense of assault with a deadly weapon with intent to kill inflicting serious injury, and 19 to 32 months for the offense of possession of a firearm by a felon, to run consecutively.

Defendant appeals.

II. Discussion

On appeal, defendant contends the trial court committed plain error by allowing the State: (1) to present inadmissible character evidence; and (2) to elicit improper testimony and make improper comments during closing argument related to defendant's exercise of his right to remain silent.

A. Character Evidence

Defendant argues the trial court plainly erred by allowing the State to present character evidence of criminal conduct that was inadmissible

under Rule 404(b) of the North Carolina Rules of Evidence, including evidence defendant had a history of gang membership, narcotics activity, and witness intimidation. We review for plain error because defendant did not object on this basis at trial.

> 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) (2019).

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). For our Court to find "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." *Id.* (citations and internal quotation marks omitted); *see also State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (explaining plain error arises when an error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" (citation and quotation marks omitted)).

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part,

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). Significantly, "the Rule 404(b) list of other purposes is nonexclusive," as "Rule 404(b) is a rule of inclusion of relevant evidence with but one exception, that is, the evidence must be excluded if its *only* probative value is to show that [the] defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Weldon*, 258 N.C. App. 150, 158, 811 S.E.2d 683, 689-90 (2018) (citations and internal quotation marks omitted) (emphasis in original).

i. Narcotics

[1] Defendant first argues the trial court erred when it failed to exclude Detective Waddell's testimony that he knew defendant and "had . . . direct observations of [ ] defendant as an interest in part of [his] job" "around the end of 2013, 2014 time period" when he "was working vice/narcotics, and it was a narcotic-related case" pursuant to Rule 404(b).

Defendant supports his argument with *State v. Weldon*. In *Weldon*, an officer testified that he had seen the defendant when he "was dealing with a complaint about [a] house on Blatent Court. It was a drug complaint that I got from the citizens. While investigating that I saw the defendant come out of the house and get into the vehicle." *Weldon*, 258 N.C. App. at 158, 811 S.E.2d at 689 (alteration in original). Although the Court determined the "challenged portions of [the officer's] testimony were relevant in that they established [his] familiarity with defendant's appearance[,]" it also determined that the inclusion of the detail that the officer was investigating "a drug complaint" did not add to the reliability of the officer's identification of defendant, and was thus inadmissible under Rule 404(b). *Id*. at 158-59, 811 S.E.2d at 690. Nonetheless, *Weldon* determined this error did not constitute plain error because:

> [n]otwithstanding the character implications of the admission of testimony that defendant was seen exiting a house that was being investigated in response to "a drug complaint," the State presented the testimony of three witnesses familiar with defendant who identified him as the individual shooting a weapon in the surveillance video. This testimony was strong enough to have supported the jury's verdict on its own.

Id. at 159, 811 S.E. 2d at 690.

Similarly, here, the challenged testimony was relevant to establish Detective Waddell's familiarity with defendant's appearance, providing the basis for his identification of defendant as the shooter in the surveillance video. However, the testimony also contains the detail that Detective Waddell encountered defendant related to a narcotics case, which has negative character implications, but does not add to the reliability of the detective's identification of defendant. Therefore, although the testimony admitted tending to show Detective Waddell was familiar with defendant's appearance was admissible under Rule 404(b) as relevant for a purpose other than to establish defendant's character, the detail that Detective Waddell encountered defendant related to a narcotics case constituted error.

Even so, this error does not constitute plain error. The State presented surveillance video of an individual shooting the victim, and a witness familiar with defendant, Detective Waddell, identified him as the individual in the video. As in *Weldon*, this evidence is sufficient to support the jury's verdict on its own. Thus, defendant cannot establish plain error because he cannot show the error at issue had a probable impact on the jury's finding that the defendant was guilty.

ii. Gang Membership

[2] Next, defendant argues the trial court plainly erred by admitting improper character evidence of criminal conduct under Rule 404(b) of defendant's purported gang membership. This argument challenges the following excerpt of Detective Waddell's testimony:

> [DETECTIVE WADDELL]: Immediately after I saw [the surveillance video], I -- I said, "That's Kolton Thompson."
>
> [THE STATE]: So it was immediate?
>
> [DETECTIVE WADDELL]: Yes, sir.
>
> [THE STATE]: And -- and why was it so immediate for you?
>
> [DETECTIVE WADDELL]: Because the multiple times I've dealt with [defendant], of me knowing him, and it is my job to know him by who's related to any type of gang activity in the city.
>
> [DEFENDANT]: Objection.
>
> THE COURT: Sustained.

As evidenced by the transcript, defendant objected to the statement regarding gang activity at trial, and the trial court sustained the objection. Therefore, the trial court corrected any error, and we need not address this allegation of error on appeal.

iii. Witness Intimidation

[3] Defendant also challenges the following testimony of Detective Barsaleau, which defendant argues constitutes inadmissible character evidence based on his intimidation of the victim.

> [THE STATE]: What did you do after speaking with Detective Waddell and looking at that [surveillance] video?
>
> [DETECTIVE BARSALEAU]: I put a photo lineup together and went out to the hospital with another detective, who

> wasn't familiar with the case, showed the victim -- the other victim -- or, excuse me -- the other detective showed the victim the photo lineup out at the hospital.
>
> [THE STATE]: And after doing that, did you have any success in further identifying --
>
> [DETECTIVE BARSALEAU]: No --
>
> [THE STATE]: -- who the shooter was?
>
> [DETECTIVE BARSALEAU]: -- I was not.
>
> [THE STATE]: Do -- how would you describe Mr. Williams' demeanor as you were interacting with him?
>
> [DETECTIVE BARSALEAU]: He appeared he wanted not to really identify the suspect, that -- that he knew who he was, but has had personal dealings with a brother of his in the past that had been killed because he had snitched and didn't want to become part of that as well.
>
> [THE STATE]: On May 23rd, did you again meet with the victim and kind of run into the same behavior that you had done -- done before?
>
> [DETECTIVE BARSALEAU]: Yes, sir.

Assuming *arguendo* this testimony suggested defendant intimidated the victim, the testimony was not admitted in violation of Rule 404(b) because it was relevant as an explanation for why the victim did not identify the shooter, and for why the victim did not testify at trial. Therefore, it was admissible for a purpose other than its negative character implications. As a result, we hold the trial court did not plainly err by admitting this testimony into evidence.

B. Right to Remain Silent

Defendant argues the trial court plainly erred by allowing the prosecutor: (1) to elicit improper testimony, and (2) to make improper comments during closing argument related to defendant's exercise of his right to remain silent.

i. Detective Barsaleau's Testimony

[4] We first address defendant's allegation that the trial court plainly erred by allowing the prosecutor to elicit improper testimony from Detective Barsaleau concerning defendant's constitutional right to remain silent.

Defendant did not object to the admission of this testimony; therefore, he did not preserve a constitutional question which would have entitled him to have the error examined under the constitutional harmless beyond a reasonable doubt framework. However, a defendant who argues that testimony to which he did not object violated his constitutional rights is entitled to have the admission of this testimony reviewed for plain error. *State v. Moore*, 366 N.C. 100, 105-106, 726 S.E.2d 168, 173 (2012) (citing N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.")) (citations omitted).

To establish the trial court plainly erred, 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) (citations and internal quotation marks omitted). "In order to ensure plain error is reserved for the exceptional case, . . . plain error requires a defendant to show that the prejudicial error was one that seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 321 (2015) (citation and internal quotation marks omitted).

We afford the right to silence, enshrined in the Fifth Amendment of the Constitution of the United States, a "liberal construction in favor of the right it was intended to secure." *Moore*, 366 N.C. at 105, 726 S.E.2d at 172-73 (citations and internal quotation marks omitted). Thus, "[e]xcept in certain limited circumstances, any comment upon the exercise of [the right to remain silent], nothing else appearing, [is] impermissible. An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." *Id.* at 105, 726 S.E.2d at 172 (citations and internal quotation marks omitted) (alterations in original).

Detective Barsaleau testified as follows concerning his interview with defendant:

> [THE STATE]: Can you describe after you read him his rights what you said and how he answered?
>
> [DETECTIVE BARSALEAU]: More or less he said that, yes, he was at the Sportsman's Club that night for a birthday party of a friend, but denied to the shooting. I told him that we had the whole thing on video from the Sportsman's

> Club. He asked to see the video. I told him I -- I couldn't show him the video, but to hang tight where I came back with some still shots from the video. I showed him the still shot from the video, and he just dropped his head and basically said he was done.
>
> . . . .
>
> [THE STATE]: So these were the [still photos] where you said after you showed them to the defendant, he ultimately put his head down and said that he was done talking?
>
> [DETECTIVE BARSALEAU]: Yes, sir.
>
> [THE STATE]: Your Honor, permission to publish defendant's interview to the jury.
>
> . . . .
>
> THE COURT: You can publish that to the jury.

The interview of the defendant that was published to the jury showed that, after Detective Barsaleau read defendant his *Miranda* rights and showed him the photographs, defendant twice stated, "I don't want to talk" while being interrogated.

Assuming *arguendo* the prosecutor elicited improper evidence concerning defendant's invocation of his right to silence, the testimony did not constitute plain error. To assess plain error in this context, our Court considers the following factors, none of which are determinative:

> (1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

State v. Richardson, 226 N.C. App. 292, 302, 741 S.E.2d 434, 442 (2013) (footnote omitted).

Here, the prosecutor directly elicited the testimony. Further, the prosecutor impermissibly used this evidence in closing argument to attack defendant's credibility based on his decision to invoke his constitutional right to silence. Defendant's credibility was not otherwise successfully attacked. These factors weigh in favor of a plain error determination; however, we must also consider the substantial evidence of defendant's guilt in the record. *See id.*

In the instant case, the evidence tends to show defendant acknowledged being at the club the night of the shooting. Law enforcement obtained a copy of security video footage from the club that showed the shooting take place. As Detective Barsaleau testified, the video showed: "[a] subject[ ] walking . . . down the northwest side of the building towards the front of the . . . business. And then, again, shortly thereafter with the victim, walking alongside of the victim, and then the shooting occurred." Detective Waddell was able to immediately identify the subject in the video as defendant. Both the video and still shots from the video were admitted into evidence. The strength of this evidence weighs strongly against a plain error determination.

In weighing the *Richardson* factors it is the duty of this Court to weigh all the factors. No one of the four *Richardson* considerations is determinative. In addition, the fact that three factors support the defendant and only one factor supports the State is also not determinative. Where, as in the situation we have here, there is such strong uncontroverted evidence against defendant, the strength of the evidence may still support a determination of no plain error even though all the other factors weigh in defendant's favor. After an examination of the entire record, we hold that, given the video surveillance evidence described herein, the error alleged did not constitute plain error.

ii. Closing Argument

[5] We now turn to defendant's argument that the trial court plainly erred by allowing the prosecutor to make improper comments during closing argument related to defendant's exercise of his right to remain silent. Specifically, the prosecutor referenced defendant's decision to remain silent after seeing the stills of the surveillance video, and asked the jury,

> The defendant puts his head down after that, didn't he? He put his head down on the table because he knew he was done. He even said, "I'm done talking."
>
> At that point, the game was over for him. What does he do after that? Now, he has a perfect right not to say anything,

> not to be interviewed, not to testify, and every defendant enjoys that right in our court system.
>
> But if you were in an interview room and a detective was accusing you of committing this shooting and you didn't do it, how would you react? Would you put your head down and go to sleep?

However, we are unable to review this issue on appeal.

Our Supreme Court has held that constitutional arguments regarding closing arguments which are not objected to at trial are waived. *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011). Although the Supreme Court declined to review the constitutional argument in *Phillips* because of defendant's failure to object, the Court did review for violations of N.C. Gen. Stat. § 15A-1230 (2017) in this context. *Id.* Here, unlike the defendant in *Phillips*, defendant did not make an argument under N.C. Gen. Stat. § 15A-1230 on appeal. Accordingly, we cannot review on this basis. Thus, defendant failed to preserve this argument for appellate review. We decline to review this argument for the first time on appeal.

III. Conclusion

For the forgoing reasons, we find no error in part, and dismiss defendant's argument that the trial court plainly erred by allowing the prosecutor to make improper comments on his exercise of his right to remain silent during closing argument.

NO ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and DILLON concur.

TAYLOR v. PERNI

[265 N.C. App. 587 (2019)]

CORTNEY TAYLOR AND CALISTA KAJ BURTON TAYLOR, PLAINTIFFS
v.
MARK PERNI, D.O.; JENNIFER ANGELILLI; BESTPRACTICES OF WEST VIRGINIA, INC.; AND BESTPRACTICES, INC., DEFENDANTS

No. COA18-602

Filed 21 May 2019

Civil Procedure—motion to quash subpoena—Rule 45—reliance on affidavit—independent review of basis

In a medical malpractice action, the trial court abused its discretion in granting a motion to quash a subpoena pursuant to Civil Procedure Rule 45(c)(3)(b) solely on the basis that an employment separation agreement prohibited the disclosure of the information sought—without examining the agreement itself, and instead relying on the motion's accompanying affidavit, which contained mere allegations.

Appeal by Plaintiffs from Order entered 17 February 2018 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 30 January 2019.

Wyrick Robbins Yates & Ponton LLP, by Paul J. Puryear, Jr., and Bordas & Bordas, PLLC, by J. Zachary Zatezalo, for plaintiffs-appellants.

Poyner Spruill LLP, by J. Nicholas Ellis and Dylan J. Castellino, for nonparty-appellee Daniel G. Kirkpatrick.

MURPHY, Judge.

The trial court abused its discretion by granting a motion to quash a subpoena under Rule 45(c)(3)(b) of the North Carolina Rules of Civil Procedure when it failed to review an outside contract that allegedly protected the information sought under the subpoena and granted the motion solely on the basis of the moving party's assertion that the contract protected the information. We reverse and remand for further proceedings.

BACKGROUND

Plaintiffs, Cortney Taylor and Calista Burton Taylor ("the Taylors"), brought several claims in a medical malpractice action in West

Virginia against numerous Defendants, including BestPractices, Inc. ("BestPractices"). BestPractices provided "emergency and hospitalist staffing and management solutions to hospitals and healthcare institutions." When the events underlying the Taylors' medical malpractice action occurred, Daniel G. Kirkpatrick ("Kirkpatrick") was then employed in a corporate position by BestPractices, and subsequently EmCare, Inc. ("EmCare") following its acquisition of BestPractices. In his role as Vice-President of Operations, Kirkpatrick "worked with the financial team with emphasis on business and financial aspects of the company's operations."

Kirkpatrick was not a party to the civil action against Best Practices and other Defendants; however, on 21 September 2017, the Nash County Superior Court[1] issued a subpoena ordering Kirkpatrick to appear and testify at a deposition and produce various documents related to his employment with Best Practices and, later, EmCare. Kirkpatrick's deposition was scheduled to take place on 16 October 2017. That morning, Kirkpatrick filed a *Motion to Quash Subpoena* in Nash County Superior Court. Kirkpatrick claimed that, when he ended his employment with EmCare in 2013, he signed a separation agreement that "precluded him from disclosing non-public information acquired by virtue of his employment." As such, Kirkpatrick argued the subpoena should be quashed under Rule 45(c)(3)(b) of the North Carolina Rules of Civil Procedure, as it required disclosure of privileged or other protected matter and that no exception or waiver applied to the privilege or protection.

The sole document attached in support of Kirkpatrick's motion to quash was his own affidavit, attempting to serve as parol evidence of the alleged agreement. It stated, in relevant part:

> 15. At the time of execution, it was my understanding and expectation that the Separation Agreement precluded me from disclosing any and all information that I acquired by virtue of my employment with BestPractices or EmCare which was not otherwise available to third parties.
>
> 16. At the time of execution of my Separation Agreement, it was my understanding and expectation that the contents of the document itself were confidential.

1. While the underlying civil action was filed and ongoing in West Virginia, Kirkpatrick was a resident of Nash County.

> 17. At the time of execution, it was my understanding and expectation that the obligation to maintain confidentiality of proprietary information and the contents of the Separation Agreement survived the general term of the Separation Agreement and the termination of my employment with EmCare.

The trial court held a hearing on the motion to quash on 2 January 2018. Kirkpatrick's counsel informed the trial court that he had a copy of the separation agreement should the trial court wish to review the agreement and its non-disclosure terms *in camera*. However, the trial court did not review the separation agreement and later issued its order on 23 February 2018 granting the motion to quash pursuant to Rule 45(c)(3) and (5). The Taylors timely appeal.

ANALYSIS

The Taylors argue the trial court abused its discretion in granting the motion to quash. Specifically, they argue the trial court abused its discretion by determining Kirkpatrick's separation agreement with EmCare rendered the information sought under the subpoena non-discoverable solely on the basis of Kirkpatrick's affidavit. We agree.

"When reviewing a trial court's ruling on a discovery issue, [we] review[] the order of the trial court for an abuse of discretion." *Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 175, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010). Abuse of discretion occurs upon a showing that the trial court's ruling "was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, 370 N.C. 235, 241, 805 S.E.2d 664, 669 (2017) (citation and internal quotation marks omitted).

Rule 45 of the North Carolina Rules of Civil Procedure requires the trial court to "quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection." N.C.G.S. § 1A-1, Rule 45(c)(5) (2017). Rule 45(c)(3) states in relevant part:

> (3) Written objection to subpoenas. – . . . Each of the following grounds may be sufficient for objecting to a subpoena:

> (b) The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.

N.C.G.S. § 1A-1, Rule 45(c)(3)(b) (2017).[2]

We have not directly addressed what a party objecting to a subpoena under Rule 45(c)(3)(b) must show or what the trial court must review in a situation where the movant is claiming that the subpoena requires disclosure of matters protected by an outside contract, if ever possible. In the discovery setting, generally, "[t]he decision to conduct *in camera* review rests in the sound discretion of the trial court." *Lowd v. Reynolds*, 205 N.C. App. 208, 213, 695 S.E.2d 479, 483 (2010) (citation and internal quotation marks omitted). Thus, the trial court is not required to conduct an *in camera* review in all circumstances involving allegedly privileged documents. However, our caselaw makes clear that mere assertions of the existence of a privilege or protection, without more, do not establish such.

In *Miles v. Martin*, 147 N.C. App. 255, 555 S.E.2d 361 (2001), we addressed the burden of a party seeking to assert the recognized attorney-client privilege in response to a motion to compel documents. We noted that "[m]ere assertions by a party or its attorneys" of the existence of the attorney-client privilege is insufficient to establish the attorney-client privilege. *Id.* at 260, 555 S.E.2d at 364 (citation, alterations, and internal quotation marks omitted). We held, "the party asserting the privilege can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances." *Id.* at 259-60, 555 S.E.2d at 364 (citation and internal quotation marks omitted) (emphasis in original). We believe the same showing of objective indicia is required when a movant objects to a subpoena under Rule 45(c)(3)(b) by asserting that the subpoena requires disclosure of matters alleged to be privileged or protected by an outside contract and that no exception or waiver applies to the privilege or protection. To hold otherwise would allow a party to invoke Rule 45(c)(3)(b) with a "mere utterance" of privilege or protection. *See Multimedia Pub'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 576, 525 S.E.2d 786, 792 (2000).

Here, the trial court did not conduct an *in camera* review of the separation agreement between Kirkpatrick and EmCare, and the contents of the agreement were never disclosed to the trial court. The trial court

---

2. Rule 45(c)(3)(b) is the only ground under subsection (3) under which Kirkpatrick objected to the subpoena.

thus based its decision to grant the motion to quash solely on the affidavit Kirkpatrick submitted in support of his motion. Of course, affidavits may be used in demonstrating the existence of a privilege or protection. *See Estate of Ray v. Forgy*, 245 N.C. App. 430, 441-42, 783 S.E.2d 1, 9 (2016). Kirkpatrick's affidavit, however, did not demonstrate objective indicia that the separation agreement protected the information to be disclosed under the subpoena.

Kirkpatrick provided no testimony in his affidavit about the content of the separation agreement, claiming, "It was my understanding and expectation that the contents of the separation agreement itself would be confidential." There was no showing before the trial court regarding the content of the separation agreement, its specific terms, its scope, the intent of the agreement, or how such language would be privileged beyond the contracting parties' desire for it be so. Instead, the only showing Kirkpatrick made as to the separation agreement's applicability to the information sought under the subpoena was his "*understanding and expectation*" that the separation agreement would preclude employees from disclosing any and all information acquired by virtue of their employment.

A party's personal interpretation of what a contract precludes without any showing as to the actual contents of the contract is not objective indicia, nor is it a sound legal basis for a privilege. It is the functional equivalent of a mere allegation. *See Hammond v. Saini*, 367 N.C. 607, 611, 766 S.E.2d 590, 592 (2014) ("Instead, the affidavit merely recites the language of the statute and offers the conclusory assurance that each requirement has been satisfied."). To allow a party's motion to quash under Rule 45(c)(3)(b) based only upon his or her claim that the mere existence of a contract protects information to be disclosed, without more, would be to allow a party's incantation of protection as an "abracadabra to which [we] must defer judgment." *See Multimedia Pub'g of N.C., Inc.*, 136 N.C. App. at 576, 525 S.E.2d at 792 (quoting *MacLennan v. American Airlines, Inc.*, 440 F. Supp. 466, 472 (E.D. Va. 1977).

Kirkpatrick cites a line of cases where we have held the trial court did not abuse its discretion in failing to review documents sought to be discovered *in camera*, arguing a similar outcome is required here. *Midkiff v. Compton*, 204 N.C. App. 21, 693 S.E.2d 172, *cert. denied*, 364 N.C. 326, 700 S.E.2d 922 (2010); *Lowd v. Reynolds*, 205 N.C. App. 208, 695 S.E.2d 479 (2010); *State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990). The question before us in those cases, however, is not that which is before us here.

In *Midkiff*, for example, the plaintiff had waived the physician-patient privilege, a legally recognized privilege, and was challenging the trial court's failure to conduct an *in camera* review "to prevent disclosure of *irrelevant* or causally *unrelated* evidence." *Midkiff*, 204 N.C. App. at 35, 693 S.E.2d at 181 (emphasis added); *see also Lowd*, 205 N.C. App. at 213-14, 695 S.E.2d at 483-84 (citing the rationale in *Midkiff* for why the trial court did not abuse its discretion in refusing to review the documents for relevancy). In *Love*, we stated, "there is no requirement that a trial court review the *records and files* of non-parties sought pursuant to a subpoena *duces tecum* prior to quashing . . . ." *Love*, 100 N.C. App. at 231, 395 S.E.2d at 432 (emphasis added). The question before us in those cases was, therefore, whether the trial court abused its discretion in failing to: (1) review the documents sought under the subpoena (2) for their relevancy. Neither is the issue before us. Here, the trial court was not ruling on the relevancy of actual documents sought under the subpoena, but, rather, whether an outside contract rendered these documents protected. Defendant's citation to these holdings and his subsequent argument is misplaced.

Accordingly, the trial court abused its discretion in granting Kirkpatrick's motion to quash pursuant to Rule 45(c)(3)(b) solely on the basis of Kirkpatrick's affidavit containing no more than mere allegations that the separation agreement as an outside contract protected the information sought under the subpoena. We need not address the Taylors' remaining alternative arguments or whether such a private agreement can create such a privilege or protection.

CONCLUSION

Kirkpatrick's affidavit contained no more than mere allegations that the separation agreement protected the information sought under the subpoena and thus provided no objective indicia that this separation agreement protected the information. The trial court, without reviewing the contents of the separation agreement, abused its discretion in granting the motion to quash pursuant to Rule 45(c)(3)(b) solely on this basis. We reverse and remand to the trial court for further proceedings on the motion to quash not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges DILLON and ARROWOOD concur.

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST III, PLAINTIFF

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR ACOPIA, LLC, SOUTHAMPTON COMMONS HOMEOWNERS ASSOCIATION, INC., ROSSABI BLACK SLAUGHTER, PA, KEITH H. PROPERTY, LLC, KEITH LAMANCE HARRELL, IH6 PROPERTY NORTH CAROLINA, LP AND DOE DEFENDANTS A-Z, DEFENDANTS

No. COA18-1060

Filed 21 May 2019

Mortgages and Deeds of Trust—recordation—priority—purported satisfaction recorded by unauthorized third party—notice of pending litigation

Where an unauthorized third party recorded a purported satisfaction of a deed of trust, plaintiff (mortgagee and assignee) was entitled to step into the shoes of its assignor and predecessors-in-title to have its status as priority lienholder restored over an innocent purchaser for value—regardless of plaintiff's notice of the pending litigation concerning priority.

Appeal by plaintiff from orders entered 4 December 2017 and 16 January 2018 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 2019.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, Mark S. Wierman and G. Benjamin Milam, for plaintiff-appellant.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for defendant-appellee IH6 Property North Carolina, LP.

TYSON, Judge.

Wilmington Savings Fund Society ("Plaintiff") appeals from an order granting IH6 Property North Carolina, LLC's ("Defendant") motion for judgment on the pleadings pursuant to Rule 12(c) of the N.C. Rules of Civil Procedure and an order denying Plaintiff's motion for reconsideration. We reverse and remand.

I. Background

Keith Harrell purchased property located at 9007 Holland Park Lane in Charlotte, North Carolina, in February 2009. Harrell borrowed $171,830 from Acopia, LLC, as evidenced by a promissory note. To secure the note, Harrell executed a deed of trust in favor of Mortgage Electronic Registration Systems ("MERS"), solely as nominee for Acopia and its successors and assigns. Through a series of assignments, LSF9 Master Participation Trust ("LSF9") acquired the note and deed of trust in July 2015. Harrell subsequently defaulted on payments due under the terms of the note and deed of trust.

The Southampton Commons Homeowners Association, Inc. ("HOA") filed a lien against Harrell's property at 9007 Holland Park Lane for unpaid assessments. Following a hearing in August 2015, the property was sold at auction to Keith H. Property, LLC ("Keith Property"). The HOA conveyed the property via a quitclaim deed with title expressly "subject to any and all superior liens," which was recorded in the Mecklenburg County Public Registry on 18 December 2015.

Kondaur Capital Corporation ("Kondaur") acquired the note and deed of trust on 28 October 2015 through assignment from LSF9. This assignment was recorded on 3 December 2015. A purported satisfaction of the deed of trust was executed by a vice president of MERS, without any authority, and was recorded on 2 December 2015 in the Mecklenburg County Public Registry.

Keith Property conveyed its interest in the property to Defendant via general warranty deed, recorded on 7 March 2016. Kondaur initiated action against Defendant; MERS; the HOA; the substitute trustee that handled the HOA sale; Harrell; and Keith Property on 15 September 2016. Kondaur's complaint requested the trial court to issue a judgment declaring, *inter alia*, the deed of trust remained a valid, enforceable first priority lien on the property, and that Defendant had acquired its interest in the property subject to Kondaur's prior lien. A notice of *lis pendens* was filed 26 September 2016. Defendant served its affirmative defenses, answer, and counterclaim on 21 November 2016, seeking to quiet the title of the property pursuant to N.C. Gen. Stat. §§ 41-10 and 1-253.

Plaintiff acquired the note and deed of trust from Kondaur in a pool of loans it purchased on or about 25 November 2016. An assignment evidencing the transaction was executed on 8 December 2016 and recorded on 21 July 2017. Plaintiff filed a motion to substitute as a party and an answer to Defendant's counterclaim on 10 January 2017.

The trial court entered a consent final judgment concerning MERS on 3 April 2017. The court's consent judgment found and concluded MERS no longer held any interest in the deed of trust at the time the purported satisfaction was executed and recorded, it was without authority to execute the satisfaction, and the satisfaction was void.

Following discovery, Plaintiff filed a motion for summary judgment in August 2017. In September 2017, Defendant filed a motion for judgment on the pleadings. After a hearing, the trial court entered an order granting Defendant's motion for judgment on the pleadings on 4 December 2017. Plaintiff made a motion for reconsideration, which was denied without a hearing on 16 January 2018. Plaintiff timely appealed both orders.

II. Jurisdiction

The order granting judgment on the pleadings and the order denying reconsideration were interlocutory, as they only disposed of the claim between Plaintiff and Defendant. Subsequently, Plaintiff voluntarily dismissed all remaining claims against the other defendants, and Defendant voluntarily dismissed its counterclaim against Plaintiff. As all other parties and claims have been disposed of, the orders concerning Plaintiff and Defendant are now final, and are appealable as a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Plaintiff argues the trial court erred by granting Defendant's Rule 12(c) motion for judgment on the pleadings. It asserts the trial court disregarded the Rule 12(c) standard of review and improperly drew all inferences in favor of Defendant. Plaintiff also argues the trial court erred in balancing the equities in favor of Defendant.

IV. Standard of Review

"Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal citations and quotations omitted). All facts and inferences are to be viewed in the light most favorable to the non-movant. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.*

This Court reviews a 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).

V. Analysis

The order included in the record is limited, merely concluding, after review of the pleadings, that Defendant was entitled to judgment as a matter of law and all Plaintiff's claims against Defendant are dismissed without prejudice. Prior to ruling on Plaintiff's motion for reconsideration, the trial court sent an e-mail, which concluded with the following paragraph:

> [P]lease prepare a summary order without any findings of fact or anything along the lines of what I've described above and send the same with a SASE to my office in the Mecklenburg County Courthouse within ten (10) days. This is a legal determination subject to *de novo* review, of course, and nothing is required other than a summary order. I do wish, however, for you to attach a copy of this email to the order so that it will make it into the record. As opposed to sending you a one-line email with a decision, I wanted to let counsel and the parties know the reasons I have decided to grant the Rule 12(c) motion.

When asked at oral arguments how this Court should view the e-mail included in the record, Defendant argued the e-mail should be disregarded, and this Court should only review the orders. Defendant asserted the trial court had later recanted and sent a subsequent e-mail directing the previous e-mail not to be included in the record. If such an e-mail was sent, and either party felt the record would be insufficient without it being included, the record should have supplemented. N.C. R. App. P. 9(b)(5). Further, Defendant cites to this earlier e-mail contained in the record in its brief.

This Court's scope of review is limited by what is included in the record, the transcripts, and any other items filed pursuant to Rule 9, all of which can be used to support the parties' briefs and oral arguments. N.C. R. App. P. 9(a). As part of the record on appeal, the trial court's e-mail is included in our *de novo* review. *See id.*

A. Plaintiff as Assignee

The trial court's e-mail purports to distinguish between an "assignment" and an "acquisition." The trial court reasoned Plaintiff was not a successor-in-interest of Kondaur because it "acquired" the note and deed of trust, and is thus unable to stand in the shoes of Kondaur and its

predecessors-in-interest to maintain the original priority of its interest. The trial court appears convinced by Defendant's argument, asserting only the original victim, in this case Kondaur, is eligible to seek the equitable remedy to maintain its priority under *Union Cent. Life Ins. Co. v. Cates*, 193 N.C. 456, 137 S.E. 324 (1927), and its progeny. We disagree.

In the priority of deed recordation, North Carolina is classified as a "pure race" state. N.C. Gen. Stat. § 47-18(a) (2017); *Bourne v. Lay & Co.*, 264 N.C. 33, 35, 140 S.E. 2d 769, 770 (1965). As a pure race state, the first person to record the conveyance of an interest in property takes priority, whether or not there is notice of other conveyances. *Schuman v. Roger Baker & Assocs., Inc.*, 70 N.C. App. 313, 316, 319 S.E.2d 308, 310 (1984) (citing *Bourne* 264 N.C. at 35, 140 S.E. 2d at 771) ("Our Supreme Court has repeatedly held that no notice, however full or formal, will supply the want of registration of a deed."). "The General Assembly, by enacting these laws, clearly intended that prospective purchasers should be able to safely rely on the public records." *Schuman*, 70 N.C. App. at 316-17, 319 S.E.2d at 311.

Under pure race priority recordation, Defendant, if found to be an innocent purchaser for value, would be able to rely upon an examination of the Mecklenburg County Public Registry, which included a satisfaction of the note, recorded on 2 December 2015. An equitable exception exists to this general rule:

> As between a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible, and a person who has been induced by such cancellation to believe that the mortgage has been canceled in good faith, and has dealt with the property by purchasing the title, or accepting a mortgage thereon as security for a loan, the equities are balanced, and the lien of the prior mortgage, being first in order of time, is superior.

Union Cent. Life Ins. Co., 193 N.C. at 462, 137 S.E. at 327.

Defendant argues this equitable exception can only apply to parties who are true, innocent victims. The trial court appears to have concluded, as a matter of law on the pleadings, that Plaintiff, by acquiring the note with notice of the pending litigation asserting priority, cannot claim to be an innocent victim of the void satisfaction. Defendant argues this notice deprives Plaintiff of the exception in *Union Central*:

> If, however, the owner of the mortgage is responsible for the mortgage being released of record, as when the entry of satisfaction is made possible by his own neglect, or misplaced confidence, or his own mistake, or where he is shown to have received actual satisfaction, or to have accepted the benefit of the transaction which resulted in the release, he will not be permitted to establish his lien to the detriment of one who has innocently dealt with the property in the belief that the mortgage was satisfied.

Id.

No evidence supports a finding that Plaintiff or Kondaur was responsible for the release of the mortgage; was neglectful; misplaced confidence; received actual satisfaction; or benefitted from the transaction, which resulted in the purported release. In fact, the consent judgment on MERS' purported action shows otherwise. Additionally, Defendant has failed to show that North Carolina common law and statutes do not allow Plaintiff to step into the shoes of Kondaur and its predecessors-in-interest and avail itself of the pure race exception set out in *Union Central. Id.* ("a mortgagee, whose mortgage has been discharged of record solely through the act of a third person, whose act was unauthorized by the mortgagee, and for which he is in no way responsible. . . the lien of the prior mortgage, being first in order of time, is superior").

North Carolina law concerning the assignments of contracts is well established.

> The general rule is that contracts may be assigned. The principle is firmly established in this jurisdiction that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that a contract for money to become due in the future may be assigned.

Hurst v. West, 49 N.C. App. 598, 604, 272 S.E.2d 378, 382 (1980) (citation and quotation marks omitted).

"Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course." N.C. Gen. Stat. § 25-3-203(b) (2017). Our Supreme Court long ago established "the assignee stands absolutely in the place of his assignor[.]" *Smith v. Brittain*, 38 N.C. 347, 354 (1844).

Further, "if an innocent purchaser conveys to one who has notice, the latter is protected by the former's want of notice and takes free of the equities." *Morehead v. Harris*, 262 N.C. 330, 342, 137 S.E.2d 174, 185 (1964).

The fact Plaintiff purchased the note and deed of trust from Kondaur while litigation concerning priority was pending does not foreclose Plaintiff's ability to avail itself of the protections of *Union Central*. Kondaur's assignment of the deed of trust to Plaintiff allowed Plaintiff to step into the shoes of Kondaur and its predecessors-in-interest. Defendant's argument that subsequent purchasers of negotiable instruments cannot assert all the rights and defenses of the original holder, in the absence of fraud or other nefarious conduct, prejudices holders of negotiable instruments, and would chill or prevent the free and unfettered transferability of interests in property. Restraints or limitations on the free alienability, assignability, and transferability of property interests are disfavored in law. Defendant's argument is overruled.

B. Applicability of Union Central

Plaintiff argues the trial court improperly balanced the equities in favor of Defendant. We agree. Plaintiff stepped into the shoes of Kondaur and its predecessors-in-title and can avail itself of the exception to the pure race notice addressed in *Union Central* and its nearly 100 years of progeny.

The rule in *Union Central* was applied in *First Financial Savings Bank v. Sledge*: "The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value." *First Fin. Sav. Bank v. Sledge*, 106 N.C. App. 87, 88, 415 S.E.2d 206, 207 (1992) (citing *Union Central*, 193 N.C. at 462, 137 S.E. at 327).

Plaintiff argues Defendant cannot claim it is an innocent purchaser for value. Whether Defendant was an innocent purchaser for value or not, Plaintiff, the mortgagee, is entitled to have its priority status restored, if the mortgage was discharged by an unauthorized act of a third party.

The trial court entered a consent final judgment concerning MERS' purported satisfaction of the note and cancellation of the deed of trust on 3 April 2017. The consent judgment found and concluded MERS no longer held any interest in the deed of trust at the time the purported satisfaction was executed and cancellation recorded, had no authority to execute the satisfaction and record the cancellation, and its action

was void. That consent judgment is not challenged, and is now the law of the case.

VI. Conclusion

An assignee is able to step into the shoes of the assignor and its predecessors- in-title. The equitable exception to pure race notice in *Union Central* is available to restore priority to purchasers of negotiable instruments, whether or not they have notice of pending litigation. The trial court erred in concluding Plaintiff had no standing to enforce priority.

The purported satisfaction of the note and cancellation of the deed of trust is acknowledged and agreed in the consent judgment to be an unauthorized act of a third party. A balancing of the equities under *Union Central* restores Plaintiff's priority status over Defendant.

The trial court's order concluding Defendant was entitled to judgment on the pleadings as a matter of law is reversed. In light of our ruling and the 3 April 2017 consent order, we remand this matter for the trial court to enter summary judgment for Plaintiff on Plaintiff's pending summary judgment motion. *It is so ordered.*

REVERSED AND REMANDED.

Judges DIETZ and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2019)

EVANS v. CROFT No. 18-468	Onslow (16CVS4032)	Reversed and Remanded
FLORES v. FLORES No. 18-230	Lenoir (15CVD521)	Affirmed
IN RE A.R.-V. No. 18-584	Buncombe (17JB211)	Affirmed
IN RE A.S.T. No. 18-947	Alamance (17JT72)	Affirmed
IN RE N.B. No. 18-1087	Onslow (17JA193) (17JA194) (17JA195)	Affirmed in Part; Reversed in Part and Remanded.
IN RE W.A.B. No. 18-953	Gaston (13JT84-89)	Affirmed
LAYTON v. DEP'T OF STATE TREASURER No. 18-921	Davidson (13CVS1739)	Affirmed
MEDPORT, INC. v. SMITH No. 18-950	Mecklenburg (17CVS2595)	Affirmed
MURCHISON v. REG'L SURGICAL SPECIALISTS No. 18-297	Buncombe (15CVS106)	Affirmed
NELSON v. NELSON No. 18-937	Guilford (09CVD414)	Affirmed
O'NAN v. NATIONWIDE INS. CO. No. 18-990	McDowell (16CVS943)	Dismissed
PIGFORD v. PACE No. 18-1095	Onslow (16CVD4004)	Affirmed
STATE v. BLACKWELL No. 18-1040	Lincoln (14CRS52871) (16CRS93)	Dismiss in part, No plain error in part.
STATE v. DURHAM No. 18-630	Guilford (17CRS65728)	No Error

STATE v. HARDEN No. 18-999	Union (16CRS53981)	No Error
STATE v. HAWKINS No. 18-908	McDowell (15CRS284) (15CRS50145)	No Error
STATE v. JONES No. 18-893	Beaufort (16CRS50753)	Affirmed
STATE v. MARKS No. 18-933	Forsyth (15CRS61535)	No Error
STATE v. McGILL No. 18-911	New Hanover (16CRS51275) (17CRS5473)	Affirmed; No Error
STATE v. MEDLIN No. 18-20	Wake (13CRS201942-43) (13CRS201951-52) (13CRS202897)	No error in part; No plain error in part.
STATE v. MUTHE No. 18-1265	Haywood (17CRS430-431)	No Error
STATE v. ROSS No. 18-652	Forsyth (16CRS4719) (16CRS60525)	No Error
STATE v. SYDNOR No. 18-589	Chowan (14CRS50123)	No Error
STATE v. TREVINO No. 18-741	Onslow (16CRS50758)	No Prejudicial Error
WALSTON v. DUKE UNIV. No. 18-981	N.C. Industrial Commission (14-052758) (14-782354)	Affirmed
WOODY v. FLIGHTGEST, INC. No. 18-940	Wake (17CVS4557)	Affirmed

IN RE A.R.C.

[265 N.C. App. 603 (2019)]

IN THE MATTER OF A.R.C., K.M.W., C.W.S.W., A.S.W.

No. COA18-791

Filed 4 June 2019

Termination of Parental Rights—assistance of counsel—silence during hearing—inadequacy of record on appeal

An appeal from an order terminating a mother's parental rights to her children was remanded where the mother argued that she received ineffective assistance of counsel based on her counsel's failure to advocate on her behalf during the termination hearing—counsel made no objections, performed no cross-examinations, presented no evidence, and made no arguments. Remand was necessary because the record was silent as to the reason for the mother's absence from the termination hearing and any reasoning behind her counsel's actions, or lack thereof.

Appeal by respondent from orders entered 26 April 2018 by Judge Mary F. Paul in Davidson County District Court. Heard in the Court of Appeals 9 May 2019.

Assistant Davidson County Attorney Sheri A. Woodyard for petitioner-appellee Davidson County Department of Social Services.

Anné C. Wright for respondent-appellant mother.

Stephen M. Schoeberle for guardian ad litem.

INMAN, Judge.

Respondent Mother ("Mother") appeals from orders terminating her parental rights with respect to each of her four children, A.R.C. ("Amy"), K.M.W. ("Kim"), C.W.S.W. ("Connor"), and A.S.W. ("Amber," collectively "the children"),[1] arguing that she was denied effective assistance of counsel because her trial counsel failed to advocate for her in the termination hearing. After careful review of the record and applicable law, we remand for the trial court to determine whether Mother is entitled to relief or whether termination is proper in the absence of a further hearing on the merits.

1. Pseudonyms are used to protect the identities of the children and for ease of reading.

I. FACTUAL AND PROCEDURAL HISTORY

In June 2015, Connor, who was just a few months old, was diagnosed with failure to thrive. Connor was hospitalized and immediately gained significant weight. On 11 August 2015, Mother entered into a case plan with the Davidson County Department of Social Services ("DSS"), which required her to obtain a mental health assessment, obtain stable housing and employment, ensure that the children were adequately fed, and keep a clean family home. Approximately three weeks later, a DSS social worker visited Mother's home and observed that Amy, Kim, and Connor and the home were not being taken care of as agreed. DSS asked Mother to place them in kinship care, to which she consented to having them live with a maternal aunt and the aunt's fiancé. While in kinship care, Kim required medical care, but her parents could not be located to give permission for her treatment.

On 14 October 2015, after DSS filed petitions alleging that Amy, Kim, and Connor were neglected and dependent juveniles, the trial court awarded nonsecure custody of them to DSS. On 21 March 2016, the trial court entered an order adjudicating the three children as neglected based on stipulated facts. The children remained in DSS custody but were placed with their maternal great-aunt.

In July 2016, Mother gave birth to Amber. A few days later, DSS filed a petition alleging that Amber was a neglected and dependent juvenile, noting that Mother had open DSS cases with her other three children and had not made suitable progress on her case plan. DSS obtained nonsecure custody of Amber and placed her in foster care with her three siblings. The trial court entered an order adjudicating Amber as neglected on 14 September 2016.

On 20 February 2017, DSS filed petitions to terminate Mother's parental rights to the children on the grounds of neglect, failure to make reasonable progress, and failure to pay a reasonable portion of the children's cost of care. Following a hearing on 30 November 2017, the trial court determined that Mother required a guardian *ad litem* pursuant to N.C. Gen. Stat. § 1A-1, Rule 17. The trial court found that Mother "lack[ed] sufficient capacity to manage her own affairs and to communicate important decisions due to mental illness and inebriety." Mother was later hospitalized to receive mental health treatment.

On 24 January 2018, nearly a year after DSS filed the petitions to terminate Mother's parental rights, her guardian *ad litem* accepted service of process of the petitions on her behalf. Mother's guardian *ad litem* and

her attorney were notified of a hearing on the petitions scheduled for 29 March 2018.

On the morning of the hearing, Mother's attorney filed an answer denying many of DSS's allegations and a motion to dismiss the petitions. Mother did not personally attend the hearing, but her guardian *ad litem* and her court-appointed attorney were present on her behalf. The trial court did not inquire into Mother's absence. Throughout the hearing, Mother's attorney did not object to any evidence presented by DSS, cross-examine DSS's witnesses, or present any evidence or arguments challenging termination.

On 26 April 2018, the trial court entered orders terminating Mother's parental rights based on neglect and failure to pay a reasonable portion of the children's cost of care. N.C. Gen. Stat. §§ 7B-1111(a)(1), (4) (2017). The trial court further concluded that termination was in the children's best interests. Mother filed timely notice of appeal.

II. ANALYSIS

Mother's sole argument is that she received ineffective assistance of counsel because her attorney failed to advocate for her during the termination hearing. Because the record on appeal is insufficient for adequate appellate review, we conclude that further proceedings in the trial court are necessary to resolve this issue.

" 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,' which in North Carolina has been achieved in part through statutory provisions that ensure a parent's right to counsel[.]" *In re K.N.*, 181 N.C. App. 736, 737, 640 S.E.2d 813, 814 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982)). The statutory right to counsel "includes the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

A. Deficient Performance

Mother contends that her attorney was deficient because he failed to advocate on her behalf during the termination hearing. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their

clients."). The transcript reflects that, as the termination hearing was about to begin, Mother's absence was acknowledged, but no reasons for the absence were discussed. On the morning of the hearing, Mother's attorney had filed answers to the termination petitions and moved for the trial court to consider them, which it did.

But once the hearing began, Mother's attorney ceased to advocate. While he remained present in the courtroom, Mother's attorney did not object during the testimony of DSS's witnesses, did not cross-examine those witnesses, and did not present any evidence.[2] At the conclusion of both the adjudication and dispositional phases of the hearing, Mother's attorney did not make any argument on her behalf.

The transcript and the remainder of the record on appeal is insufficient for this Court to adjudicate Mother's ineffective assistance of counsel claim. As an appellate court, we can only know what is included in the record before us. *See State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it."), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985). The record here provides only limited evidence regarding Mother's relationship with her attorney, and neither the parties nor the trial court addressed the issue on the record with sufficient enough detail at the termination hearing.

Of particular concern here is the period between when Mother was appointed a substitutive guardian *ad litem* and the termination hearing. Mother attended the hearing that resulted in an order appointing a guardian *ad litem*; however, she did not attend the only permanency planning hearing conducted between that appointment and the termination hearing. The order entered in the permanency planning hearing indicated that Mother "was admitted to High Point Regional Hospital after November 30, 2017, due to her severe mental health needs, depression, and suicidal ideations." But neither the termination order nor any other trial court order addresses what happened to Mother between her hospital admission and the termination hearing.

On this record, we cannot determine why Mother did not attend the termination hearing, or what her condition was on the date of the

---

2. Mother's Rule 17 guardian *ad litem* was also given the opportunity to question witnesses and offer arguments on Mother's behalf, but declined to do so. This Court has held that "Rule 17 contemplates active participation of a GAL in the proceedings for which the GAL is appointed." *In re A.S.Y.*, 208 N.C. App. 530, 538, 703 S.E.2d 797, 802 (2010). However, because Mother does not present any issues regarding her guardian *ad litem*'s conduct on appeal, we will not address it further.

hearing. Nor can we determine whether Mother had contact with her attorney or her guardian *ad litem* or what instructions she may have given them about her cases. Mother's attorney did indeed file answers denying the allegations in the petitions on the morning of the termination hearing, suggesting that the attorney had some reason to believe that she wanted to contest the termination and that the attorney believed there was a good faith basis to do so. Yet Mother's attorney did nothing to advocate for Mother once the termination hearing began. Nothing in the record explains this discrepancy.

Mother's attorney's general silence during the termination hearing is puzzling, but without knowing the reasons for this silence, we cannot determine whether this lack of advocacy constituted deficient representation. At best, we can only engage in speculation as to the reasons why counsel did not advocate for Mother. *Cf. State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 ("While we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant."), *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986).

Because additional facts regarding the reasons behind counsel's actions are needed to resolve Mother's claim that she was denied a fair hearing, the appropriate remedy is to remand to the trial court so that it may find those facts and make a determination as to the adequacy of counsel's representation. *See In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("[W]e remand for determination by the trial court regarding efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing and whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding."); *cf. State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). On remand, the trial court should inquire into "efforts by [Mother's] counsel to contact and adequately represent [her] at the termination of parental rights hearing" and determine "whether [she] is entitled to appointment of counsel in a new termination of parental rights proceeding." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79; *see also In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) ("[B]efore . . . relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts

made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.").

B. Prejudice

Both DSS and the children's guardian *ad litem* encourage us to hold that Mother's ineffective assistance claim must fail because, even if her counsel was deficient, she cannot show prejudice from her counsel's allegedly deficient conduct. If we were to follow this argument, then counsel's total lack of advocacy throughout the termination hearing would be immaterial as not even the most compelling advocate would have changed the outcome and stopped the trial court from terminating Mother's parental rights. This is not a conclusion we can reach from the sparse record before us. *See In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("We are mindful that the record is replete with evidence which casts doubt on Respondent's ability to parent. Nonetheless, Respondent is entitled to procedures which provide him with fundamental fairness in this type of action."). We decline to speculate about what trial counsel "could have" argued or presented below or how it would have affected the outcome of the case without being privy to counsel's knowledge of the underlying facts. If a prejudice determination is necessary, it should be made by the trial court, after it is in full possession of all the facts surrounding counsel's and Mother's conduct and the facts of the case.

III. CONCLUSION

This Court has made clear that certain "procedural safeguards . . . must be followed to ensure the fundamental fairness of termination proceedings." *Id.* (quotations omitted). Because the record before us is silent as to Mother's attorney's justification for his actions during the termination hearing, the appropriate remedy is to remand to the trial court for a hearing to determine whether counsel's actions were deficient, and, if so, whether those deficiencies deprived Mother of a fair hearing. *See In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) ("[T]his Court has consistently vacated or remanded [termination of parental rights] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards." (citation omitted)). Accordingly, this case is remanded to the trial court to determine whether Mother received ineffective assistance of counsel.

REMANDED.

Judges STROUD and ZACHARY concur.

IN RE C.D.H.

[265 N.C. App. 609 (2019)]

IN THE MATTER OF C.D.H.

No. COA18-601

Filed 4 June 2019

Termination of Parental Rights—assistance of counsel—silence during hearing—inadequacy of record on appeal

An appeal from an order terminating a mother's parental rights to her child was remanded where the mother argued that she received ineffective assistance of counsel based on her counsel's failure to advocate on her behalf during the termination hearing—counsel made no objections, performed no cross-examinations, presented no evidence, and made no arguments. Remand was necessary because the record was silent as to the reason for the mother's absence from the termination hearing and any reasoning behind her counsel's actions, or lack thereof.

Appeal by respondent from order entered 7 March 2018 by Judge Lora C. Cubbage in District Court, Guilford County. Heard in the Court of Appeals 9 May 2019.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Sean P. Vitrano for respondent-appellant mother.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by James T. Williams, Jr., and Sarah M. Saint, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from an order terminating her parental rights[1] to C.D.H. ("Connor").[2] Because the record before this Court is silent on the reasons for mother's absence from the hearing and from mother's counsel's justification for her actions during the termination hearing, we remand for further proceedings.

1. Connor's father relinquished his parental rights and is not a party to this appeal.

2. A pseudonym is used to protect the identity of the minor child and for ease of reading.

I. Background

On 8 September 2016, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging that Connor was a neglected and dependent juvenile. DHHS detailed Mother's history of substance abuse, mental health issues, and unstable housing. Because of these problems, Mother agreed to allow Connor to reside in a kinship placement with his maternal great-uncle and great-aunt beginning in May 2016. These relatives later asked for Connor to be removed from their home, and, on 11 October 2016, DHHS placed him in foster care.

On 14 September 2016, the trial court held a hearing to determine the need for continued nonsecure custody of the child. Mother attended this hearing, and the trial court set the next hearing for 9 November 2016. On that date, the trial court held a hearing for pre-adjudication, adjudication, and disposition; Mother did not attend. At the pre-adjudication hearing, Mother's counsel made an oral motion to continue due to Mother's absence. The trial court denied the motion, finding that Mother was present in court on 14 September 2016 when the case was set for hearing for 9 November; the social worker had spoken to mother on the phone on 8 November 2016 to remind her of the hearing; Mother had not maintained contact with her counsel since the prior court date; and, there was no valid reason to excuse her absence. On 7 December 2016, the trial court filed its order based upon the 9 November hearing adjudicating Connor as a neglected juvenile. Mother was ordered to enter into and cooperate with a case plan addressing her issues with housing, employment, parenting skills, mental health, and substance abuse. Mother was granted one hour of supervised visitation per week.

On 16 December 2016, the trial court held a Juvenile Court Infant/Toddler Initiative ("JCITI") status review hearing and entered an order noting Mother's noncompliance with her case plan; again, Mother was not present. The trial court noted that Mother had attended only two of six visits with the child and that she was "in the process of complying" with the "parenting/psychological evaluation" and obtaining employment, but she had failed to comply with any other requirements.

On 13 January, 2017, the trial court held another JCITI status review hearing; once again, Mother did not attend. The court found her level of compliance with her plan had decreased since the prior hearing, although she continued to visit with Connor erratically and maintained some contact with DSS.

On 8 February 2017, the trial court held a permanency planning hearing; once again, Mother did not attend, although her counsel was

present on her behalf. On 10 March 2017, the trial court entered its permanency planning order which found that Mother had still not entered into her required case plan. The court set the primary permanent plan as adoption with a secondary plan of reunification and ordered DHHS to seek to terminate Mother's rights within 60 days.

On 13 April 2017, DHHS filed a motion in the cause to terminate Mother's parental rights on the grounds of neglect, failure to pay a reasonable portion of Connor's cost of care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1),(3),(6) (2017). Hearings on the motion to terminate were scheduled and continued several times, usually due to the court's inability to hear the case due to other cases in progress.

On 26 July 2017, the trial court held a permanency planning hearing; once again, Mother was not present in court but her counsel was present on her behalf. The trial court found that Mother still had not entered into her case plan. She was visiting with the child some, although inconsistently, but she did "for the most part" maintain "contact with the Court, The Department, and the Guardian ad Litem."

The motion for termination was scheduled for hearing on 5 December 2017. Mother's counsel made a motion to continue the hearing, but the trial court denied her motion, finding that "Respondent Mother represented to her attorney that she has a Court date today in High Point to address a traffic matter. The Court reviewed the Court database and there is no matter scheduled for [Mother] today." However, the trial court did continue the hearing for other reasons, noting that "extraordinary circumstances making it necessary to extend the 90 day trial requirement for the proper administration of justice[,]" and the hearing was set for 30 January 2018. On 10 January 2018, the trial court held another permanency planning hearing. Again, Mother was not present but her counsel was present.

The motion for termination was heard on 13 February 2018. Mother was not present in court but was represented by her court-appointed attorney. Mother's counsel did not advise the trial court of any attempts to contact Mother, move to continue the hearing, object to any evidence presented at the hearing, cross-examine DHHS' witnesses, and or present evidence or arguments on Mother's behalf.

On 7 March 2018, the trial court entered an order terminating Mother's parental rights to Connor. The court concluded that all three grounds for termination alleged by DHHS existed and that termination was in Connor's best interest. Mother timely filed notice of appeal.

II. Ineffective Assistance of Counsel

Mother's sole argument is that she received ineffective assistance of counsel ("IAC") because her trial counsel did nothing to advocate on her behalf during the termination hearing.

"When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982)). North Carolina provides indigent parents facing the termination of their parental rights with a statutory right to the assistance of counsel "unless the parent waives the right." N.C. Gen. Stat. § 7B-1101.1(a) (2017). This statutory right "includes the right to effective assistance of counsel." *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). "To prevail in a claim for ineffective assistance of counsel, respondent must show: (1) her counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) her attorney's performance was so deficient she was denied a fair hearing." *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005).

A. Deficient Performance

Mother first contends that her counsel's failure to advocate for her at the termination hearing constituted deficient performance. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their clients."). The transcript reflects that when the termination hearing began, Mother was not present, and neither counsel nor the trial court addressed Mother's absence.[3] Mother's attorney remained present in the courtroom while the hearing was conducted, but she did not object during the testimony of DHHS' witnesses, did not cross-examine those witnesses, and did not present any evidence. At the conclusion of both the adjudication and dispositional phases of the hearing, Mother's counsel declined to make any argument on her behalf. Mother contends that counsel's lack of advocacy fell below any "objective standard of reasonable representation."

The record on appeal contains insufficient information to allow us to review Mother's claim, because it is silent on the reasons why counsel acted as she did. As an appellate court, we can only know what is

3. We recognize the possibility that the trial court and counsel discussed Mother's absence off the record, but we can review only what is shown by the transcript and record on appeal.

included in the record before us. *See State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984) ("[T]his Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it."). The record here provides very limited evidence regarding Mother's relationship with her counsel. The orders entered by the trial court indicate Mother attended only one hearing in the entire case, the nonsecure custody hearing on 9 September 2016. After that, she did not attend court for any of the hearings conducted throughout this case. The orders also show she was consistently represented by the same trial counsel at each hearing, but except for her counsel's motions to continue on 9 November and 5 December 2017, there is no other information about Mother's reasons for her absence or her counsel's communication with her about attending court. The orders did contain findings that Mother generally stayed in contact with DHHS and engaged in visits with Connor while the case progressed, including after the motion for termination was filed. In fact, her last visit with Connor was on 17 December 2017, less than three months before the termination hearing.

Because of her failure to attend any court hearings since the first hearing in September 2016, Mother may have waived her right to effective counsel through her own actions. *See In re R.R.*, 180 N.C. App. 628, 636, 638 S.E.2d 502, 507 (2006); *Bishop*, 92 N.C. App. at 666-67, 375 S.E.2d at 679-80 (holding that counsel will not be deemed ineffective when their alleged deficiencies are attributable to their client's conduct); *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 ("[A] lawyer cannot properly represent a client with whom he has no contact."). Perhaps Mother's cooperation with her counsel was no better than her cooperation with her case plan, but the record does not compel that conclusion, so we cannot determine whether she waived her right to representation or undermined her counsel's ability to advocate for her. We can only engage in speculation on the reasons why counsel did not advocate on Mother's behalf.

Counsel's failure to advocate for Mother is not necessarily an indication of ineffective assistance of counsel. Counsel certainly said nothing negative regarding Mother, and it is possible that "resourceful preparation reveal[ed] nothing positive to be said for" Mother. *See State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985). But we cannot make any determination from this record.

Since we do not have a sufficient record to determine if Mother waived her right to effective counsel by her failure to participate or other potential reasons for counsel's lack of advocacy, the appropriate remedy is to remand to the trial court so it may find those facts. *See In*

re S.N.W., 204 N.C. App. at 561, 698 S.E.2d at 79 ("[W]e remand for determination by the trial court regarding efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing and whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding."); *cf. State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) ("Indeed, because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."). On remand, the trial court should inquire into "efforts by Respondent's counsel to contact and adequately represent Respondent at the termination of parental rights hearing" and determine "whether Respondent is entitled to appointment of counsel in a new termination of parental rights proceeding." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79; *see also In re D.E.G.*, 228 N.C. App. 381, 386-87, 747 S.E.2d 280, 284 (2013) ("[B]efore . . . relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.").

B. Prejudice

Both DHHS and the guardian *ad litem* encourage us to hold that Mother's ineffective assistance claim must fail because, even if her counsel was deficient, she cannot show prejudice from her counsel's allegedly deficient conduct. Under this theory, counsel's total lack of advocacy throughout the termination hearing is immaterial, because even the most compelling advocacy would not have changed the outcome and stopped the trial court from terminating Mother's parental rights. This is not a conclusion we can reach from the sparse record before us. We decline to speculate about what trial counsel "could have" argued below or how it would have affected the outcome, without being privy to counsel's knowledge of the underlying facts. If a prejudice determination is necessary, the trial court should make this determination after it has received evidence regarding the facts surrounding counsel's conduct, mother's participation in the case, and other relevant circumstances.

III. Conclusion

This Court has a duty to ensure that Mother received a fair hearing, and we must adhere to our prior admonition that "procedural safeguards . . . must be followed to ensure the 'fundamental fairness' of termination proceedings." *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 796. Since the record before us is silent on counsel's justification for

her actions during the termination hearing, the appropriate remedy is to remand to the trial court for a hearing to determine whether counsel's actions were deficient, and, if so, whether counsel's deficiencies deprived the parent of a fair hearing. *See In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) ("[T]his Court has consistently vacated or remanded [termination of parental rights] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards."). Accordingly, this case is remanded to the trial court to determine if Mother received ineffective assistance of counsel and for any further proceedings required depending upon the trial court's determination regarding assistance of counsel.

REMANDED.

Judges INMAN and ZACHARY concur.

THE NORTH CAROLINA REINSURANCE FACILITY, PETITIONER
v.
MIKE CAUSEY, COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF INSURANCE, AND ALLSTATE INDEMNITY COMPANY, RESPONDENTS

No. COA18-1303

Filed 4 June 2019

Administrative Law—reinsurance—petition for reimbursement—discretionary authority

The trial court and the hearing officer for the Commissioner of Insurance erred by interpreting Rule 5.C.2 of the N.C. Reinsurance Facility Standard Practices Manual as not allowing any discretionary authority to reimburse an automobile insurer for an excess judgment. The plain language of the agency rule required the Facility's Board to consider a petition for reimbursement, but granted discretion to the Board regarding whether to reimburse any or all of the amount requested. Where the parties stipulated that petitioner insurer was not guilty of gross or willful or wanton mishandling of the claim, and the Board did not find otherwise, the sole exception to the Board's discretionary authority did not apply.

Appeal by petitioner from order entered 6 September 2018 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 May 2019.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Angela Farag Craddock, for petitioner-appellant.

Parker Poe Adams & Bernstein LLP, by Catharine Biggs Arrowood, for respondent-appellee.

ARROWOOD, Judge.

The North Carolina Reinsurance Facility ("petitioner" or "the Facility") appeals from the superior court's order denying petitioner's petition for review and affirming an order of the North Carolina Commissioner of Insurance ("the Commissioner") that reversed petitioner's denial of a reimbursement to Allstate Indemnity Company ("respondent" or "Allstate"). For the reasons that follow, we reverse and remand.

I. Background

On 25 October 2007, Allstate issued an automobile insurance policy to Mr. Jason T. Crouse ("Mr. Crouse") that was ceded to the Facility, "a nonprofit unincorporated legal entity . . . consisting of all insurers licensed to write and engaged in writing within this State motor vehicle insurance or any component thereof[,]" N.C. Gen. Stat. § 58-37-5 (2017), "which insures drivers who the insurers determine they do not want to individually insure." *Discovery Ins. Co. v. N.C. Dep't of Ins.*, 255 N.C. App. 696, 698, 807 S.E.2d 582, 585 (2017) (citation and internal quotation marks omitted).

Mr. Crouse purchased this policy through Allstate agent Ms. Jeannie Scott ("Ms. Scott") in North Carolina. Less than a month later, on 2 November 2007, Mr. Crouse was involved in an automobile accident in Clearwater, Florida. Mr. Crouse's vehicle collided with a bicycle operated by a minor, Mr. Matthew R. Hanna ("Mr. Hanna"). Mr. Hanna suffered traumatic brain damage and other serious injuries.

Mr. Crouse reported the accident to Ms. Scott on 5 November 2007. She informed him that he had to call a 1-800-Allstate telephone number to report the loss. However, there is no indication in the record that Mr. Crouse ever called the 1-800-Allstate telephone number, nor that Allstate received any additional notice of the claim until after Mr. Hanna's parents had hired counsel. The Hannas filed a complaint against Mr. Crouse in Florida state court on 15 January 2008, seeking damages from the accident.

On 18 January 2008, a paralegal in the law office representing the Hannas called the 1-800-Allstate telephone number to report the claim,

but did not notify Allstate that legal action had commenced against Mr. Crouse. Allstate opened a claim file and began investigating the claim that same day. The adjuster assigned to the case interviewed Mr. Crouse, hired counsel to represent him, and created an accident reconstruction. Within five days, Allstate authorized the tender of the policy limit of $50,000.00 to the Hannas on 23 January 2008. Allstate formally tendered this offer on 1 February 2008. The Hannas rejected this offer on 14 February 2008.

Mr. Crouse entered into a stipulated settlement with the Hannas on 6 September 2012, whereby he consented to the entry of a $13,800,000.00 judgment against him and assigned his "claims, rights, and interests in the policy . . . as against Allstate . . . for any failure to settle or otherwise administer his automobile claims arising out of the Accident." As part of this settlement, the Hannas agreed not to take affirmative actions to record or execute the judgment against Mr. Crouse. The final judgment was entered on 7 September 2012.

The Hannas filed a complaint against Allstate in the Middle District of Florida on 10 September 2012. The complaint alleged Allstate breached its duty of good faith to Mr. Crouse by failing to: (1) timely and reasonably affirmatively seek out a settlement of the claims in the Hanna matter; (2) communicate the exposure Mr. Crouse faced, and to offer advice on how to minimize this exposure; and (3) adopt and implement standards and procedures for timely and proactive investigation and resolutions of claims and/or failing to follow such standards Allstate had adopted. The matter went to trial, and the jury returned a verdict on 3 March 2014 that determined Allstate had acted in bad faith by failing to settle the claims arising out of the Hanna matter. The trial court entered a $13,800,000.00 judgment against Allstate on 4 February 2014. Allstate appealed the judgment, but eventually settled the matter on 29 September 2015 for $11,000,000.00.

Allstate filed a petition for reimbursement with the Facility on 30 October 2015. The Facility's claims committee heard the matter on 1 February 2017. On 9 May 2017, the claims committee recommended the denial of Allstate's petition. Allstate objected to the claims committee's recommendation, and requested a hearing before the Facility's Board ("the Board"). The Board heard the matter, and denied the petition for reimbursement on 14 July 2017.

Allstate appealed to the Commissioner pursuant to N.C. Gen. Stat. § 58-37-65(a) (2017). The matter came on for hearing before the Commissioner's designated hearing officer, Hearing Officer A. John

Hoomani, Esq., on 30 October 2017. The Commissioner ordered the Board to reconsider its ruling because its denial of Allstate's petition was not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual.

The Facility petitioned for judicial review of the Commissioner's order on 21 December 2017, and named both Allstate and the Commissioner as a respondent on appeal. The Commissioner moved to dismiss himself as a party.

The matter came on for hearing before the Honorable R. Allen Baddour, Jr. on 31 July 2018 in Wake County Superior Court. The trial court granted the Commissioner's motion to dismiss, entered an order denying the Facility's petition for review, and affirmed the Commissioner's order.

The Facility appeals.

II. Discussion

Petitioner argues the trial court erred by affirming the Commissioner's order because the Commissioner: (1) failed to apply paragraph C.2. of Section 5 of the Facility's Standard Practice Manual ("Rule 5.C.2.") according to its plain meaning; and (2) erroneously determined petitioner's grounds for the denial of Allstate's petition were not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual. We agree with petitioner that the superior court's affirming the Commissioner was error due to failure to apply Facility Rule 5.C.2. according to its plain meaning. Therefore, we reverse and remand, and do not reach the second issue on appeal.

A. Standard of Review

All of the Commissioner's rulings or orders made pursuant to N.C. Gen. Stat. § 58-37-65 of the Facility Act are "subject to judicial review as approved in G.S. 58-2-75." N.C. Gen. Stat. § 58-37-65(f) (2017). N.C. Gen. Stat. § 58-2-75 (2017) provides that, generally, "[a]ny order or decision made, issued or executed by the Commissioner" is "subject to review in the Superior Court of Wake County on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Commissioner upon such person." N.C. Gen. Stat. § 58-2-75. "N.C. Gen. Stat. § 58-2-75 is to be read in conjunction with N.C. Gen. Stat. § 150B-51 of the Administrative Procedure Act[.]" *Discovery Ins. Co.*, 255 N.C. App. at 701, 807 S.E.2d at 587 (citing *N.C. Reinsurance Facility v. Long*, 98 N.C. App. 41, 46, 390 S.E.2d 176, 179 (1990)).

N.C. Gen. Stat. § 150B-51(b) provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). Our Court reviews errors asserted "pursuant to subdivisions (1) through (4) of subsection (b) of this section . . . using the de novo standard of review." N.C. Gen. Stat. § 150B-51(c). With regard to errors asserted "pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court" reviews "the final decision using the whole record standard of review." *Id.*

> Under the whole record test, [the reviewing court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

Discovery Ins. Co., 255 N.C. App. at 701, 807 S.E.2d at 587 (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004)) (internal quotation marks omitted) (alteration in original). "Substantial evidence means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2017) (internal quotation marks omitted).

B. The Plain Meaning of Facility Rule 5.C.2.

The Facility argues the superior court's judgment is erroneous because the Commissioner had committed an error of law by failing to apply Rule 5.C.2. of the Facility's Standard Practice Manual according to its plain meaning. Additionally, the Facility contends the judgment appealed from is erroneous because the Commissioner exceeded his statutory authority by committing this error of law.

We review questions of law in cases appealed from administrative tribunals *de novo*. N.C. Gen. Stat. § 150B-51(c); *Discovery Ins. Co.*, 255 N.C. App. at 701, 807 S.E.2d at 587. "When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning." *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) (citation omitted).

The Facility's Standard Practice Manual was established pursuant to N.C. Gen. Stat. § 58-37-35(g)(8), which provides:

> (g) Except as may be delegated specifically to others in the plan of operation or reserved to the members, power and responsibility for the establishment and operation of the Facility is vested in the Board of Governors, which power and responsibility include but is not limited to the following:
>
> . . . .
>
> (8) To establish fair and reasonable procedures for the sharing among members of any loss on Facility business that cannot be recouped under G.S. 58-37-40(e) and other costs, charges, expenses, liabilities, income, property and other assets of the Facility and for assessing or distributing to members their appropriate shares. . . .

N.C. Gen. Stat. § 58-37-35(g)(8) (2017). Section 5 of the Standard Practice Manual contains general information about a member company's responsibility regarding claims management. Subsection C of Section 5 addresses the procedure for presenting excess judgments or other legal actions against companies to the Facility, such as the excess judgment in the instant case.

Rule 5.C.2. of this section provides, in pertinent part:

> The Governing Board shall consider the petition, and may at any time prior to judgment against the petitioner or thereafter authorize the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner, unless it is the determination of the Board of Governors that the petitioner was guilty of gross or willful or wanton mishandling, in which event the petition shall be denied.

N.C. Reinsurance Facility Standard Practice Manual 5-1, Rule 5.C.2. (2014).

Here, the superior court affirmed the Commissioner holding that "the only reasonable interpretation of" this Rule, "when read in conjunction with the enabling legislation," "is that a petition for reimbursement will be approved by the Facility unless the member company has engaged in 'gross or willful or wanton mishandling' of the claim." Therefore, the superior court agreed with the Commissioner's reasoning that because the Facility and Commissioner had agreed and found Allstate was not guilty of gross or willful or wanton mishandling of the claim, Rule 5.C.2. required the Facility to reimburse Allstate for the $11,000,000.00 settlement.

On appeal, petitioner contends the superior court's and the Commissioner's interpretation is contrary to the plain meaning of Rule 5.C.2. Specifically, petitioner argues under Rule 5.C.2., the Board has full discretionary authority to approve or deny Allstate's petition for reimbursement. We agree.

The first clause of the disputed text provides: "The Governing Board *shall* consider the petition" for reimbursement. (Emphasis added). "It is well established that the word 'shall' is generally imperative or mandatory." *Puckett v. Norandal USA, Inc.*, 211 N.C. App. 565, 573, 710 S.E.2d 356, 362 (2011) (citation and internal quotation marks omitted). Here, "shall" is an auxiliary verb to the main verb, "consider[.]" Therefore, this clause mandates that the Board must consider each petition for an excess judgment or other legal action against the member companies.

After the first clause, there is a comma, and the conjunction "and" begins the second clause; thus, the second clause still refers to the action taken by the Board upon consideration of the petition. The second clause states: "and *may* at any time prior to judgment

against the petitioner or thereafter *authorize* the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner." (Emphasis added).

Here, "may" is the auxiliary verb to the main verb, "authorize." "The use of the word 'may' has been interpreted by our Supreme Court to connote discretionary power, rather than an obligatory one." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 250-51, 652 S.E.2d 713, 717 (2007) (citing *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402-403, 584 S.E.2d 731, 737 (2003); *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)) (citation omitted). Because "may" is auxiliary to "authorize[,]" the plain language of this rule mandates that the Facility's power to "authorize the Facility to contribute any part of sums required to satisfy the excess judgment against the insured or the judgment or potential judgment against the petitioner" is discretionary and not mandatory.

The phrase "to *contribute any part of sums* required to satisfy the . . . judgment" clearly authorizes the Facility with the discretionary power to contribute any part of sums required to satisfy the excess judgment. (Emphasis added). "Contribute[,]" used as a transitive verb, means "to give or supply in common with others[.]" Merriam-Webster Dictionary (2014).

Rule 5.C.2. explains that "*any* part of sums required to satisfy . . . the judgment" may be contributed. (Emphasis added). "Any" is an adjective that describes "some, no matter how much or how little, how many, or what kind[.]" *Id.* These words read together plainly provide that the Facility has full discretion to authorize a full or partial contribution, or no contribution.

After the second clause, there is a comma, followed by the final clause of the sentence: "*unless* it is the determination of the Board of Governors that the petitioner was guilty of gross or willful or wanton mishandling, in which event the petition *shall* be denied." (Emphasis added). The word "unless" signals that this clause contains an exception. The plain language of this clause states that this exception limits the Facility's discretion: the Facility "shall" deny the petition for reimbursement if the Board determines "the petitioner was guilty of gross or willful or wanton mishandling."

In sum, the plain language reading of Rule 5.C.2. provides that, although the Board must consider all petitions for reimbursement, it has full discretionary authority to approve or deny these petitions, unless the Board determines "the petitioner was guilty of gross or willful or wanton mishandling." Because the parties stipulated and the Board did

not find petitioner guilty of gross or willful or wanton mishandling, the Board had full discretionary authority to approve or deny Allstate's petition for reimbursement in whole or in part.

Despite the plain language in Rule 5.C.2., respondent contends the General Assembly could not have intended for the Board to have such discretion because it would not intend for the Board to make arbitrary determinations without determining principles. The superior court's judgment affirming the Commissioner's order is based in part on this argument, and concludes that reading Rule 5.C.2. as granting the Board full discretionary authority over all petitions wherein the petitioner was not guilty of gross or willful or wanton mishandling of a claim would create arbitrary results because the Facility's discretion is "unfettered[.]" The respondent and the Commissioner relies on *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 710 S.E.2d 350 (2011) to support this assertion, which "held that when an administrative body establishes certain requirements without the use of any determining principles from its guidelines, then the administrative body's decision is clearly arbitrary." (Emphasis in original).

Sanchez involved a superior court order that affirmed a Board of Adjustment's decision to reverse a town's Historic Preservation Commission ("Historic Commission")'s decision to deny an application for a certificate of appropriateness. *Sanchez*, 211 N.C. App. at 575, 710 S.E.2d at 351. The Historic Commission denied the application because it determined "structure[s] on [the petitioner's] property over twenty-four feet in height would be incongruous with the historic district[.]" *Id.* at 580, 710 S.E.2d at 354 (footnote omitted). The Board of Adjustment held this requirement was arbitrary and capricious, and our Court agreed, explaining that the whole record did not contain substantial evidence to support the twenty-four feet height requirement because:

> While there was evidence presented before the [Historic Commission] that there were other one-and-one-half story structures in the historic district that ranged between twenty and twenty-two feet in height, there was also evidence presented that the residences closest to the [petitioner's] property ranged from twenty-six to thirty-five feet in height. N.C. Gen. Stat. § 160A-400.9 does not permit the [Historic Commission] to "cherry pick" certain properties located within the historic district in order to determine the congruity of proposed construction; instead, the [Historic Commission] must determine congruity

> contextually, based upon "the total physical environment of the Historic District."

Id. at 580-81, 710 S.E.2d at 354-55 (citation omitted). The Court held: "An administrative ruling is deemed arbitrary and capricious when it is whimsical, willful, and an unreasonable action without consideration or in disregard of facts or law or without determining principle." *Id.* at 580, 710 S.E.2d at 354.

In the respondent's view, the plain reading of Rule 5.C.2. as described by this Court, is contrary to *Sanchez* because it empowers the Facility with the discretion to make arbitrary decisions, in disregard of facts or law or without determining principle. However, the Facility Act and Rule 5.C.2. in the instant case is distinguishable from the ordinance in *Sanchez* in that it involves a remedial statutory scheme. *See Discovery Ins. Co.*, 255 N.C. App. at 703, 807 S.E.2d at 588 ("The Facility Act is remedial in nature and is to be construed liberally" "in a manner which assures fulfillment of the beneficial goals for which it is enacted and which brings within it all cases fairly falling within its intended scope.") (citations and internal quotation marks omitted).

Therefore, our Court's analysis in *Henry v. N.C. Dep't of Transp.*, 44 N.C. App. 170, 260 S.E.2d 438 (1979), a case interpreting a remedial statute's grant of authority to an agency to reimburse expenses of persons displaced as a result of public works programs within its discretion, is instructive. The statute, N.C. Gen. Stat. § 133-8(a), provides: "Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency *may* make a payment to any displaced person, upon application as approved by the head of the agency . . . ." N.C. Gen. Stat. § 133-8(a) (1979) (emphasis added).[1] Our Court held:

> Quite plainly, [N.C. Gen. Stat. § 133-8] commit[s] the matter of relocation assistance payments absolutely and solely to the discretion of the officials of the agency involved. The use of the auxiliary verb "may" connotes "permission, possibility, probability or contingency", and, "[o]rdinarily, when a statute employs the word 'may,' its provisions will

1. This statute was subsequently amended by S.L. 2005-331, § 1, eff. Aug. 26, 2005, and now provides: "Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency *shall* make a payment to any displaced person, upon application as approved by the head of the agency." N.C. Gen. Stat. § 133-8 (2017) (emphasis added).

> be construed as permissive and not mandatory." We are of the opinion that [N.C. Gen. Stat.] § 133-8 confers no right either to receive such payments or to demand that the amount of payments, if granted, be calculated other than as the agency officials determine.

Henry, 44 N.C. App. at 172-73, 260 S.E.2d at 440 (citations omitted). Accordingly, our Court held the statute "creates neither right nor remedy pursuant to which plaintiff can press a claim against defendant. The statute bestows no more than a gift." *Id.* at 173, 260 S.E.2d at 440. Thus, under the pre-amended statute, the agency had complete discretion, without determining principles.

Similarly, here, we consider a remedial act that uses similar discretionary language, and provides that an agency "may" make a reimbursement. Additionally, Facility members do not have an automatic right of reimbursement for extra-contractual losses under the Facility Act; the only "right" of reimbursement a facility member has when it cedes a policy is the right to receive reimbursement from the Facility for contractual losses. *See* N.C. Gen. Stat. § 58-37-35(b). While respondent does not have a right to reimbursement, it does have a right to have its request considered. *See* N.C. Gen. Stat. § 58-37-35(g)(12) (authorizing the Board with discretionary authority to adopt rules such as Rule 5.C.2., as necessary to accomplish the purpose of the Facility).

Thus, Rule 5.C.2.'s clear provision that the Facility may exercise discretion over all petitions wherein the petitioner was not guilty of gross or willful or wanton mishandling of a claim is permissible, and distinct from *Sanchez*, a case involving a town's police powers related to planning and regulation of development.

Therefore, we reverse the superior court's judgment, which affirmed the Commissioner's order to the extent it is inconsistent with the plain reading of Rule 5.C.2., as discussed herein. Accordingly, we need not reach petitioner's contention that the Hearing Officer's erroneous interpretation of this statute exceeded his statutory authority.

We also do not reach the second issue on appeal. The superior court's affirming the Commissioner's determination that petitioner's grounds for the denial of Allstate's petition were not in accordance with the Facility Act, the Facility's Plan of Operation, and the Facility's Standard Practice Manual were made in light of its erroneous interpretation of Rule 5.C.2. Therefore, we remand to the superior court for further remand to the Commissioner for reconsideration consistent with this opinion.

III. Conclusion

For the foregoing reasons, we reverse the superior court's judgment and remand to that court for further remand to the Commissioner for reconsideration consistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and MURPHY concur.

GERALDINE PATTERSON, PLAINTIFF
v.
TAYLOR NICOLE WORLEY, DEFENDANT

No. COA18-977

Filed 4 June 2019

Negligence—contributory negligence—pedestrian crossing busy road—summary judgment

Where a pedestrian darted into a busy road and was immediately struck by a motorist, there was no genuine issue of material fact that defendant motorist owed any duty to yield to plaintiff pedestrian, that plaintiff's actions constituted contributory negligence, or that the last clear chance doctrine applied—therefore, summary judgment was properly granted to defendant motorist.

Appeal by plaintiff from judgment entered 5 June 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 28 February 2019.

Everett, Womble & Lawrence, L.L.P., by Ronald T. Lawrence II and Kristy J. Jackson, for plaintiff-appellant.

Simpson Law, PLLC, by Caroline P. Stutts, for defendant-appellee.

BERGER, Judge.

Geraldine Patterson ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Taylor Nicole Worley ("Defendant"). Because Plaintiff was unable to show through pleadings, depositions, or other evidence that Defendant owed her a duty

recognized by North Carolina law, that her contributory negligence would not defeat her claim, or that the doctrine of last clear chance would apply, Defendant was entitled to judgment as a matter of law. We therefore affirm the order of the trial court granting summary judgment to Defendant.

Factual and Procedural Background

On March 28, 2017 at approximately 6:11 p.m., Plaintiff, a pedestrian, left her apartment and began walking eastbound on Spence Avenue towards the Wal-Mart shopping center located in Goldsboro, North Carolina. Defendant was returning home from work, driving northbound in her Lexus sedan. It was a bright, clear, sunny day, and Defendant was traveling approximately thirty-five miles per hour on Spence Avenue in Goldsboro. Spence Avenue is a five-lane road, with two lanes on each side, a turn lane in the middle, and a paved median.

As Plaintiff made her way towards Wal-Mart, she crossed the two southbound lanes of Spence Avenue, and then stopped at the paved median. A vehicle had entered the turning lane, but had come to a stop to allow Plaintiff to cross. In a northbound lane adjacent to the turning lane, a Ford Explorer had also come to a stop because of traffic backed up in its lane. Plaintiff stepped into the road in front of the Explorer and looked around the vehicle to see if the last lane of travel was clear. The Explorer driver blew its horn, and Plaintiff began running across the road. Plaintiff was then immediately hit by Defendant's car and injured.

Plaintiff filed her complaint on August 3, 2017, alleging Defendant had been negligent in the operation of her vehicle when she hit Plaintiff on Spence Avenue. Defendant responded September 21, 2017, alleging, *inter alia*, the affirmative defense of contributory negligence. On January 31, 2018, Defendant moved for summary judgment. After a May 29, 2018 hearing, Defendant's motion for summary judgment was granted by the trial court in a June 5 order. It is from this order that Plaintiff timely appeals.

Standard of Review

On a motion for summary judgment, our standard of review of the trial court's ruling is well-established:

> Under [the North Carolina Rules of Civil Procedure], Rule 56(a), summary judgment is properly entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

> that any party is entitled to a judgment as a matter of law. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, and must be viewed in a light most favorable to the non-moving party. We review a trial court's order granting or denying summary judgment *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.
>
> 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.

Blackmon v. Tri-Arc Food Sys., Inc., 246 N.C. App. 38, 41-42, 782 S.E.2d 741, 743-44 (2016) (*purgandum*).

Analysis

On appeal, Plaintiff argues that summary judgment was improperly granted because there remain genuine issues of material fact concerning Defendant's negligence, Plaintiff's contributory negligence, and the application of the last clear chance doctrine. We disagree.

> As our appellate courts have long recognized, negligence claims and allegations of contributory negligence should rarely be disposed of by summary judgment. This is because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. Yet, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury.

Sims v. Graystone Ophthalmology Assocs., P.A., 234 N.C. App. 65, 68, 757 S.E.2d 925, 927 (2014) (*purgandum*). Initially, a plaintiff bears

the burden of proving the essential elements of negligence: "that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff's injury was proximately caused by the breach." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (citation omitted). "Even if evidence of negligence is presented, plaintiff cannot prevail if the evidence reveals plaintiff was contributorily negligent." *Sims*, 234 N.C. App. at 68, 757 S.E.2d at 927.

Our General Statutes provide that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." N.C. Gen. Stat. § 20-174(a) (2017). "[P]edestrians have a duty to maintain a lookout when crossing an area where vehicles travel and a duty to exercise reasonable care for their own safety." *Corns v. Hall*, 112 N.C. App. 232, 237, 435 S.E.2d 88, 90 (1993).

> The mere fact that the pedestrian is oblivious to danger does not impose a duty on the motorist to yield the right of way. That duty arises when, and only when, the motorist sees, or in the exercise of reasonable care should see, that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to peril.

Jenkins v. Thomas, 260 N.C. 768, 769, 133 S.E.2d 694, 696 (1963) (citations omitted). "Although a violation of [Section] 20-174(a) is not contributory negligence *per se*, a failure to yield the right-of-way to a motor vehicle may constitute contributory negligence as a matter of law." *Meadows v. Lawrence*, 75 N.C. App. 86, 89, 330 S.E.2d 47, 49 (1985) (citation omitted). It is for this reason that

> the court will nonsuit a plaintiff-pedestrian on the ground of contributory negligence when all the evidence so clearly establishes his failure to yield the right of way as one of the proximate causes of his injuries that no other reasonable conclusion is possible.
>
> The law imposes upon a person *sui juris* the duty to use ordinary care to protect himself from injury. It [is] plaintiff's duty to look for approaching traffic before she attempt[s] to cross the highway. Having started, it [is] her duty to keep a lookout for it as she crosse[s]. Having chosen to walk diagonally across a [multi-]lane highway, vigilance commensurate with the danger to which plaintiff [has] exposed herself [is] required of her.

Blake v. Mallard, 262 N.C. 62, 65, 136 S.E.2d 214, 216-17 (1964) (citations omitted).

Contributory negligence will not bar an award of damages for Plaintiff if she can prove that Defendant had the last clear chance to avoid the collision, but failed to take action. "The doctrine of last clear chance presupposes antecedent negligence on the part of the defendant and antecedent contributory negligence on the part of the plaintiff, such as would, but for the application of this doctrine, defeat recovery." *Clodfelter v. Carroll*, 261 N.C. 630, 634, 135 S.E.2d 636, 638 (1964).

> Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance . . . doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Id. at 634-35, 135 S.E.2d at 639. "The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident; it must have been such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E.2d 633, 635 (1964) (citation omitted). Last clear chance is "inapplicable where the injured party is at all times in control of the danger and simply chooses to take the risk." *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66 (1988).

Here, no duty was imposed on Defendant requiring her to yield her right-of-way merely because Plaintiff was oblivious to her danger. Even if Defendant had been able to see Plaintiff coming across Spence Avenue, Defendant owed her no duty unless and until it became apparent that Plaintiff was "not aware of the approaching danger and for that

reason [was going to] continue to expose [her]self to peril." *Jenkins*, 260 N.C. at 769, 133 S.E.2d at 696. Defendant was driving thirty-five miles per hour and only saw Plaintiff "immediately" before the collision, and without "enough time to slow down or anything." The depositions of two witnesses, Dr. Diane Sutton and Ms. Samantha Lauderdale, support Defendant's memory of the collision. Dr. Sutton testified that Plaintiff had "simply darted out into the road" immediately in front of Defendant's sedan. Ms. Lauderdale confirmed this by testifying that Plaintiff had unexpectedly run out into the middle of the road as Defendant approached.

Plaintiff is not only unable to establish a duty owed her by Defendant, but the evidence also establishes a duty she owed Defendant. The evidence tends to show that Plaintiff was contributorily negligent when she "darted out into the road" and failed to yield the right-of-way, a duty she owed Defendant. When Plaintiff has an affirmative duty "to yield the right-of-way and all the evidence so clearly establishes the plaintiff-pedestrian's failure to yield the right-of-way as one of the proximate causes of [her] injuries that no other reasonable conclusion is possible, summary judgment should [be] entered in favor of the defendant." *Gaymon v. Barbee*, 52 N.C. App. 627, 628, 279 S.E.2d 91, 92 (1981).

Finally, the last clear chance doctrine is inapplicable here. Defendant did not have "such a chance as would have enabled a reasonably prudent man in like position to have acted effectively." *Mathis*, 261 N.C. at 639, 135 S.E.2d at 635 (citation omitted). Plaintiff was "at all times in control of the danger and simply [chose] to take the risk." *Williams*, 90 N.C. App. at 704, 370 S.E.2d at 66. On facts similar to those *sub judice*, our Supreme Court ruled in favor of a defendant-driver who had collided with a pedestrian. *McCullough v. Amoco Oil Co.*, 310 N.C. 452, 312 S.E.2d 417 (1984). In *McCullough v. Amoco Oil Co.*, the Court found that the defendant was entitled to summary judgment because the plaintiff could not contradict the testimony of the three eyewitnesses and the driver, who "could not have reasonably been expected to anticipate plaintiff's movement, thereby avoiding the accident." *Id.* at 459, 312 S.E.2d at 421.

Such is the case here. Defendant could not see Plaintiff, or therefore predict Plaintiff's movement, because, just before she darted into the street, she was standing out of view in front of the Ford Explorer. "Assuming [Defendant]'s negligence *arguendo* and [P]laintiff's contributory negligence as shown by the affidavits and deposition[s], there has been no forecast of evidence of a last clear chance on the part of the [Defendant] to avoid the collision." *Id.*

Conclusion

Because there is no genuine issue of material fact as to Defendant's negligence, Plaintiff's contributory negligence, or whether the last clear chance doctrine would apply, the trial court did not err in granting summary judgment in favor of Defendant.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY CALVIN DENTON, DEFENDANT

No. COA18-742

Filed 4 June 2019

Evidence—lay opinion—accident reconstruction—expert unable to form opinion

In a felony death by vehicle prosecution, in which defendant and the alleged victim were both thrown from the vehicle, the trial court abused its discretion by admitting lay opinion testimony identifying defendant as the driver where the expert accident reconstruction analyst was unable to form an expert opinion based on the same information available to the lay witness. The error was not harmless because the identity of the driver was the only issue in serious contention at trial.

Appeal by defendant from judgment entered on or about 22 September 2017 by Judge Mark E. Powell in Superior Court, Madison County. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

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

STROUD, Judge.

Defendant appeals his conviction for felony death by vehicle. The trial court erred by admitting lay opinion testimony identifying defendant as the driver of the vehicle at the time of an accident in which an occupant of the car was killed where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness. We therefore reverse defendant's conviction and grant defendant a new trial.

I. Background

On 1 August 2014, defendant and Danielle Mitchell were both in a car when it ran off the road and wrecked; both were ejected from the car and Ms. Mitchell died at the scene from her injuries. Defendant was indicted for felony death by vehicle. The primary factual issue at trial was whether defendant was driving at the time of the accident.

The State's evidence showed that on the morning of 1 August 2014, defendant and Ms. Mitchell decided to go to Asheville to find some "[w]hite lightning" liquor in a "[k]ind of an old and red, burgundy looking" car that "might've been a Dodge" that defendant drove. Defendant and Ms. Mitchell spent time together often during the year preceding the wreck, either at her home or the home of Ms. Mitchell's father, Mr. Daniel Seay, where they would "hang out, talk . . . drink, smoke, watch football games, baseball games." Ms. Mitchell and her father lived about a quarter of a mile from each other, and defendant's understanding was that Ms. Mitchell did not have her own car.

On 1 August 2014, defendant and Ms. Mitchell left before lunch and defendant was driving as they left Mr. Seay's house, and Mr. Seay testified that he had "never seen nobody else ever drive [defendant's] car." Mr. Seay recalled that "[defendant] wouldn't let nobody behind the wheel of that car[,]" and "[t]here was a few times that he, he had to move to let somebody out, and he would always move the car. Nobody touched his car." Mr. Seay testified that his daughter, Ms. Mitchell, had ridden in the car before but she always sat in the front passenger seat.

Shortly before 10:00 p.m. that evening, defendant and Ms. Mitchell called Mr. Seay from a gas station and told him that the car was overheating. Defendant told Mr. Seay, "She's flipping out," and reassured Mr. Seay they were all right and would "be there in a few minutes." Shortly thereafter, Mr. Seay heard sirens close to the house. Around 10:10 p.m., Trooper Jason Fox of the North Carolina State Highway Patrol received a dispatch call regarding a vehicle crash at US 25-70 near the Brush Creek area. After arriving at 10:22 p.m., Trooper Fox spoke with EMS

who advised that two occupants had been ejected from the vehicle. One of the occupants, later identified as Ms. Mitchell, was already deceased. Defendant suffered from a severe head injury in the accident and had no memory of what happened on the day of the accident.

Defendant was also seriously injured, and EMS called for a helicopter to transport him to the hospital. EMS stabilized defendant's neck in a "C" collar and placed him on a backboard. While EMS was working with defendant, he was screaming, hyperventilating, and combative; he was ultimately sedated for flight.

Since the crash resulted in a fatality, Trooper Fox notified his supervisor. Trooper Fox also found a witness to the wreck, Mr. David Martin. Mr. Martin reported that he was traveling on the highway toward Hot Springs when an "orange-ish, reddish" car came up behind him "extremely fast" such that Mr. Martin "did not see it coming before it was basically on top of [him]." Mr. Martin estimated that the car was traveling twice as fast as he was. The car passed Mr. Martin on the left side in a no-passing zone, "started . . . a left turn and . . . ran off the right side of the road, and when it did, dust and rocks and stuff started flying." At that point, Mr. Martin saw "just headlights and taillights. Looked like [the car] was rolling, flipping." Mr. Martin stopped immediately to help and call 911. Mr. Martin saw a woman, apparently deceased, and a man further up the road, moving a little but incoherent.

Troopers Sorrells and Carver, along with First Sergeant Bray, went to the scene to assist Trooper Fox with his investigation and completion of the field sketch. Trooper Fox took photographs of the scene. The vehicle involved in the crash, a red or burgundy 2001 Dodge Neon registered to defendant's mother, was off the left shoulder of the roadway facing towards Hot Springs. Trooper Fox found a sealed beer bottle by Ms. Mitchell's body, a Miller Highlife can and an empty Corona box in the debris path, and Corona beer bottle caps inside the vehicle and near Ms. Mitchell's body. Trooper Fox believed the crash involved alcohol use because of "the bottle caps located in the vehicle, the still-closed beer bottle that was located in the debris path . . . there was a strong odor of alcohol coming from the vehicle itself." Based upon a blood test from the hospital, Defendant's blood alcohol level was .182, and benzodiazepine and cannabinoid were present in his urine.

Trooper Fox determined that the Neon had been traveling north at a high rate of speed in a forty-five mile per hour zone, lost control and ran off the right shoulder of the roadway, struck a road sign, proceeded into a ditch and struck a rock which caused it to overturn and roll four

or five times, traveled across the highway and back off the other side, and came to rest on all four wheels after striking a small block building. Neither defendant nor Ms. Mitchell had been wearing a seatbelt prior to being ejected, as each seatbelt was in a locked position near the respective door frames. The airbags did not deploy. Long strands of "brown[] or dark colored" hair were trapped in the passenger side of the vehicle and in windshield glass. Ms. Mitchell's hair was dark brown.

Trooper Fox measured the distance from the front edge of the driver's seat to the acceletor pedal as 1 foot 9 inches; from the back of the driver's seat to the pedal as 3 feet 6 inches; and from the top edge of the driver's seat to the center of the steering wheel as 2 feet 8 inches. Defendant is 5'11" tall according to the DMV database, and Ms. Mitchell was measured at approximately 5'2" by the medical examiner. Over defendant's objection, Trooper Fox testified he believed defendant was driving at the time of the crash because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals."

But Trooper Fox acknowledged that he was not an expert in accident reconstruction, although one was called to the investigation. Trooper Daniel Souther of the North Carolina Highway Patrol was the accident reconstruction expert who analyzed the accident. He could not reach a conclusive expert opinion about who was driving at the time of the accident, although he had three different theories of how the accident happened, one of which he deemed the most plausible in which defendant was the driver.

Trooper Souther testified "the only way it makes sense to me is that Theory 1" in which defendant was the driver of the vehicle, but Trooper Souther clarified "I'm not saying 100 percent this is right, but this makes the most sense to me[,]" and ultimately he testified that he could not "conclusively state [defendant] was operating th[e] vehicle." Later Trooper Souther was asked, "And so you are telling us that as an expert in the field of accident reconstruction you do not have an opinion satisfactory to yourself within any reasonable degree of certainty as to who was driving this car on August 1st, 2014?" to which he responded, "Not [that] I can prove." Ultimately, defendant was found guilty by a jury, sentenced accordingly, and now appeals.

II. Opinion Testimony

Defendant's only argument on appeal is that "the trial court erred by overruling defendant's objections to testimony from State Trooper Jason Fox, who admittedly was not an expert, that it was his opinion that

defendant . . . was driving the car at the time of the collision." (Original in all caps.) "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). The trial court abused its discretion in allowing Trooper Fox to testify, over defendant's objections, to his opinion as to who was driving the vehicle. *See, e.g.*, *Shaw v. Sylvester*, 253 N.C. 176, 179–80, 116 S.E.2d 351, 354–55 (1960).

North Carolina Rule of Evidence 701 provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2017).

> Opinion evidence is generally inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. If either of these conditions is absent, the evidence is admissible.
>
> Although a lay witness is usually restricted to facts within his knowledge, if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion.

State v. Lindley, 286 N.C. 255, 257–58, 210 S.E.2d 207, 209 (1974) (citations and quotaiton marks omitted).

Accident reconstruction analysis requires expert opinion testimony; we can find no instance of *lay* accident reconstruction analysis testimony in North Carolina. *See State v. Maready*, 205 N.C. App. 1, 17, 695 S.E.2d 771, 782 (2010) ("Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."). Accident reconstruction by its very nature requires expert analysis of the information collected from the scene of the accident and falls under Rule of Evidence 702,

> Subsection (a)(1) of Rule 702 calls for a quantitative rather than qualitative analysis. That is, the requirement that expert opinions be supported by sufficient facts or data means that the expert considered sufficient data to employ the methodology.
>
> Consequently, as a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility. In other words, this Court does not examine whether the facts obtained by the witness are themselves reliable-whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.
>
> Additionally, experts may rely on data and other information supplied by third parties even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others. An expert may rely on deposition statements made by other witnesses in developing the factual basis of his opinion.

Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (2015) (citations, quotation marks, ellipses, and brackets omitted).

Trooper Fox was not a witness to the accident; he assisted in collecting the measurements and information regarding the scene used by the accident reconstruction expert, Trooper Souther, to try to determine who was driving the car. Although he had three theories of who was driving the vehicle, Trooper Souther admitted he did not have the necessary information to come to an expert opinion to a sufficient degree of certainty and he could not identify the driver of the car. Trooper Fox was basing his lay opinion upon the very same information used by Trooper Souther, but without the benefit of expert analysis.

This case is similar to *Shaw* in that the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701. *See Shaw v. Sylvester*, 253 N.C. 176, 179–80, 116 S.E.2d 351, 354–55 (1960). As explained in *Shaw*,

> The known facts in this case leave too many unknowns and imponderables to permit anyone to say with any degree of certainty who was the driver. This

> case furnishes a good illustration why courts look with disfavor upon attempts to reconstruct traffic accidents by means of expert testimony, owing to the impossibility of establishing with certainty the many factors that must be taken into consideration.
>
> As a general rule, a witness must confine his evidence to the facts. . . . The jury is just as well qualified as the witnesses to determine what inferences the facts will permit or require.
>
> The qualified expert, the nonobserver, may give an opinion in answer to a proper hypothetical question in matters involving science, art, skill and the like. The plaintiff contends Sgt. Etherage placed himself in this expert category by having investigated more than 400 wrecks. There is no evidence that wrecks follow any set or fixed pattern. An automobile, like any other moving object, follows the laws of physics; but which door came open first during the movement would depend upon the amount and direction of the physical forces applied, and the place of their application. There was no evidence the witness ever investigated an accident when both doors were open and both occupants thrown out. In this case neither the nonobserver nor the jury could tell who was the driver.
>
> The ruling of the trial court that Sgt. Etherage was not qualified to testify that Becker was thrown through the left door and, therefore, was the driver is in accordance with our decisions. The evidence at the trial was insufficient to raise a jury question.

Id. at 179–80, 116 S.E.2d at 354–55 (citations and quotation marks omitted); *see also Maready*, 205 N.C. App. at 17, 695 S.E.2d at 782 ("We hold that the admission of the officers' opinion testimony concerning their purported accident reconstruction conclusions was error. Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury."); *State v. Wells*, 52 N.C. App. 311, 314, 278 S.E.2d 527, 529 (1981) ("Our State Supreme Court has held in several cases that while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent. A case

almost directly on point is *Cheek v. Barnwell Warehouse and Brokerage Co.*, 209 N.C. 569, 183 S.E. 729 (1936). In that case the Supreme Court upheld the trial court's exclusion of opinion testimony by a nonexpert witness as to where a collision occurred based upon his examination of the scene sometime after the accident on the ground that its admission would invade the province of the jury. In the present case, the most crucial question for the jury on the manslaughter charge was whether defendant caused the collision which resulted in decedent's death by crossing the center line into decedent's lane of travel. By testifying that his investigation revealed the point of impact between the two cars to be in decedent's lane of travel, Trooper Parks stated an opinion or conclusion which invaded the province of the jury." (citations omitted)).

The State's brief addresses the general law on opinion testimony and cites to only *State v. Ray*, 149 N.C. App. 137, 560 S.E.2d 211 (2002), *aff'd per curiam*, 356 N.C. 665, 576 S.E.2d 327 (2003), and an unpublished case to support its argument on appeal. An unpublished opinion "does not constitute controlling legal authority[,]" and we need not address it because other cases do address the issues presented here. N.C.R. App. P. 30(e)(3). *Ray* does not support the State's argument, since there was expert testimony to the same opinion as presented by the lay witness, and the court assumed that "[e]ven if inclusion of [the lay opinion testimony] was erroneous" it was harmless based upon the expert testimony. 149 N.C. App. at 145, 560 S.E.2d at 217. In *Ray*, defendant argued

> the trial court erred in overruling his objection to Detective Hendricks' opinion testimony that the lacerations on Harrington's hand were not consistent with a traffic accident, because Detective Hendricks was not qualified as a medical expert under Rule 702 of the North Carolina Rules of Evidence. The State, however, did not tender Detective Hendricks as an expert witness. Detective Hendricks offered a lay witness opinion based on his personal observations at the scene and his investigative training background as a police officer. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (1999) (lay witness may testify as to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue). Even if inclusion of Detective Hendricks' opinion testimony was erroneous, it would be harmless error in light of Dr. Butts' expert testimony that the lacerations on Harrington's hand were consistent with defensive wounds

> and could have been caused by the utility knife. Thus, the trial court properly overruled defendant's objection to Detective Hendricks' testimony.

Id.

The circumstances of this case are basically the opposite of *Ray* because in *Ray* the expert opinion confirmed the testimony of the lay witness, rendering any potential error harmless; here, the expert was unable to form an opinion. *See id.* For the same reason, we cannot agree with the State's contention that Trooper Fox's testimony was harmless. Trooper Souther was the expert in accident reconstruction and while he believed that his theory which placed defendant as the driver made the "most sense[,]" he admitted this case was very challenging and he simply did not have sufficient information regarding the many variables involved to come to a conclusive determination.

Trooper Fox was in no better position than the jury to consider the evidence the State directs us to indicating defendant was the driver, including witness testimony that the car was owned by defendant's mother and only defendant drove that vehicle, the location of Ms. Mitchell's hair in the glass, and the position of the driver's seat. *See Wells*, 52 N.C. App. at 314, 278 S.E.2d at 529. The State's expert accident reconstruction analyst could not testify to a reasonable degree of certainty as to an opinion of who was driving. The only issue in serious contention at trial was who was driving the car; if Ms. Mitchell was driving, defendant could not be guilty. If defendant was driving, the evidence regarding speeding, reckless driving, alcohol consumption, defendant's high blood alcohol level, and evidence of other impairing substances in his blood at the time of the accident would essentially guarantee a guilty verdict. In this context, Trooper Fox's opinion testimony was not harmless. Therefore, defendant must receive a new trial. We also note that the State filed a motion for appropriate relief or alternatively a petition for a writ of certiorari asking us to review defendant's sentence, but because we are granting defendant a new trial, we need not address this issue.

III. Conclusion

We conclude defendant must receive a new trial.

NEW TRIAL.

Judges INMAN and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
KEVIN JAMES GAMBRELL, DEFENDANT

No. COA18-900

Filed 4 June 2019

Satellite-Based Monitoring—lifetime monitoring—as-applied challenge—reasonableness—sufficiency of evidence

On appeal from an order requiring defendant to submit to satellite-based monitoring (SBM) for the rest of his natural life, the Court of Appeals was bound to follow *State v. Griffin*, 260 N.C. App. 629 (2018), and hold that the State failed to meet its burden of showing the reasonableness of the SBM program as applied to defendant by failing to produce evidence—other than evidence that SBM would track defendant's movements—to show the efficacy of SBM in general, such as empirical studies or expert testimony. The State may not rely on the assumption that an offender would be less likely to reoffend if he knew he was being tracked by SBM.

Appeal by Defendant from order entered 7 February 2018 by Judge Joseph Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 10 April 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for the Defendant.

DILLON, Judge.

Defendant Kevin James Gambrell appeals from an order requiring him to submit to satellite-based monitoring ("SBM") for the rest of his natural life.

I. Background

Defendant was charged with and pleaded guilty to taking indecent liberties with a child. Defendant was sentenced in the presumptive range. The State also sought to have Defendant register as a sex-offender and to enroll in SBM. Defendant motioned to dismiss the State's petition for SBM and to declare such program unconstitutional. The trial court

denied Defendant's motion to dismiss and, in turn, ordered him to submit to SBM for the rest of his natural life. Defendant timely appealed.

II. Analysis

In his appeal, Defendant argues that the State's SBM program is both unreasonable as applied to him and facially unconstitutional. We review a trial court's determination that SBM is reasonable *de novo*. *State v. Bare*, 197 N.C. App. 461, 464, 677 S.E.2d 518, 522 (2009), *disc. review denied*, 364 N.C. 436, 702 S.E.2d 492 (2010). We also review alleged constitutional violations *de novo*. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001).

The United States Supreme Court has determined that the monitoring of an individual under North Carolina's SBM program constitutes a continuous warrantless search of that individual. *Grady v. North Carolina*, ___ U.S. ___, ___, 135 S. Ct. 1368, 1371 (2015). That Court did not state that monitoring an individual under the program was *per se* unconstitutional, recognizing that "the Fourth Amendment prohibits only *unreasonable* searches." *Id.* (emphasis in original). Rather, that Court stated that whether the enrollment of a particular individual for monitoring under the program constitutes a reasonable search "depends on the *totality of the circumstances*, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (emphasis added).

The "totality of the circumstances" calculus includes whether the sexual offender poses a threat to reoffend. The calculus also includes whether an SBM search would be effective in furthering the State interest in deterring the offender from reoffending. *See State v. Bowditch*, 364 N.C. 335, 351, 700 S.E.2d 1, 12 (2010) ("The SBM program is concerned with protecting the public against recidivist tendencies of convicted sex offenders.").

In the present case, Defendant motioned to dismiss the State's petition to enroll him in SBM. A hearing was held on Defendant's motion. At the hearing, the only evidence presented by the State was testimony from a probation officer regarding Defendant's criminal record and the logistics and procedure of SBM, namely that SBM would track the movement of Defendant. While Defendant's status as a recidivist was not disputed, Defendant argued that the State failed to meet its burden to show that SBM was a reasonable method to reduce recidivism in his case.

Indeed, preventing recidivism among sex offenders is a government interest. And while SBM is not 100% reliable to prevent recidivism, it

certainly acts as a deterrent to further criminal conduct. *See Bowditch*, 364 N.C. at 351, 700 S.E.2d at 12 (acknowledging that the SBM program does not prevent crime but does act as a deterrent); *Bare*, 197 N.C. App. at 476, 677 S.E.2d at 519 (stating that "SBM could have a deterrent effect. Presumably, sex offenders would be less likely to repeat offenses since they would be aware their location could be tracked and it would be easier to catch them.").

Thus, it could be argued that the probation officer's testimony that SBM would track the movements of Defendant constituted *some* evidence that Defendant would be less likely to reoffend or to go where he should not go, since he would know that his movements were being tracked. It follows that a trial judge, making a reasonableness determination, may not need further evidence, such as empirical data or expert testimony, in a particular case to conclude that SBM would be reasonable, based on the totality of the circumstances. Indeed, we have found such deterrents, like traffic checkpoints, reasonable without the aid of expert testimony, determining that a checkpoint "deter[s] driver's license violations" and that this "deterrence goal was a reasonable one." *State v. Jarrett*, 203 N.C. App. 675, 679-80, 692 S.E.2d 420, 425 (2010) (internal citations omitted).

However, our Court has recently held that to show the efficacy of SBM in deterring recidivism, the State may never rely on an assumption that an offender would be less likely to reoffend if he knew he was being watched: the State must produce other evidence to show the efficacy of SBM in general, *e.g.*, empirical studies or expert testimony. *See State v. Griffin*, ___ N.C. App. ___, ___, 818 S.E.2d 336, 340-42 (2018). In *Griffin*, the panel relied on the decision of our Court in *Grady* handed down after the matter had been remanded from the United States Supreme Court, *see State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018), and on the reasoning of a Fourth Circuit Court of Appeals opinion analyzing the constitutionality of an order restricting the travel of a sex offender, *see Doe v. Cooper*, 842 F.3d 833, 846-47 (4th Cir. 2016). While *Griffin* and some of its progeny are currently before our Supreme Court, the *mandates* of those cases have not been stayed by that Court. We are, therefore, compelled to continue following *Griffin*. Accordingly, we conclude that the State failed to meet its burden of showing the reasonableness of the SBM program in this case by failing to produce separate evidence concerning the efficacy of the SBM program.

We note that Defendant also facially challenges the constitutionality of the SBM program. However, as we have concluded that the order

requiring Defendant to submit to SBM was unreasonable as applied to him, we decline to address this argument.

III. Conclusion

As the State failed to prove the reasonableness of the SBM program as applied to Defendant, we reverse the order requiring him to submit to SBM for the remainder of his natural life.

REVERSED.

Judges MURPHY and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
REGINALD LEE JONES, DEFENDANT

No. COA18-748

Filed 4 June 2019

1. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—jury verdict conflating "dwelling" with "property"—charge referring to "property" as victim's "house"

The trial court's judgment finding defendant guilty of Class D discharging a firearm into an occupied *dwelling* was consistent with the jury verdict finding him guilty of "felonious discharging a firearm into an occupied *property*" where the indictment put defendant on notice that the State sought the Class D offense and the trial court's jury charge exclusively and repeatedly referred to the "occupied property" as the victim's "house," which is synonymous with "dwelling."

2. Indictment and Information—incorrect statutory reference—surplusage

An indictment was not fatally flawed where it charged defendant with discharging a firearm into an occupied dwelling (N.C.G.S. § 14-34.1(b)) but also referred to N.C.G.S. § 14-34.1(c) (discharging a firearm into an occupied dwelling *causing serious bodily injury*) as the statute that was violated—yet did not allege any injury. The body of defendant's indictment clearly identified the crime being

charged, and the statutory reference was surplusage that could be disregarded.

3. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—knowledge or reasonable grounds to believe dwelling was occupied—sufficiency of evidence

The State presented substantial evidence that defendant knew or had reasonable grounds to believe he was discharging his firearm into an occupied property where a witness testified that defendant had loudly "called out" the people inside the house, challenging them to come outside, before he fired at the house. Further, the homeowner had been standing in the doorway speaking with the witness just a few minutes before the shooting, when defendant drove slowly past, looking at the house.

4. Assault—multiple charges—sufficiency of evidence—two uninterrupted shots

Invoking Appellate Rule 2 to prevent manifest injustice, the Court of Appeals agreed with defendant's unpreserved argument that the evidence at trial supported only one—not two—assault charges, where defendant raised his gun and fired two shots in rapid succession, without interruption.

Appeal by Defendant from judgment entered 22 March 2018 by Judge Ebern T. Watson III in Onslow County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Oliver G. Wheeler, IV, for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

MURPHY, Judge.

Defendant argues the trial court erred in three ways regarding his prosecution and conviction for discharging a weapon into an occupied dwelling, but fails to show that the trial court erred (1) in entering its judgment against him for that offense, (2) proceeding based on the State's indictment, or (3) in failing to dismiss the charge for insufficient evidence. We find no error in the trial court's decisions relating to these three issues.

However, although not properly preserved for appeal, we invoke Rule 2 of our Rules of Appellate Procedure in order to prevent manifest injustice and vacate Defendant's conviction for assault by pointing a gun.

BACKGROUND

Defendant, Reginald Lee Jones, was found guilty of (1) discharging a firearm into an occupied dwelling, (2) assault with a deadly weapon, and (3) assault by pointing a gun. In a separate judgment, Defendant was found guilty of fleeing to elude arrest, but does not appeal any issues related thereto. The charges stem from an incident where Defendant fired multiple gunshots in the direction of an individual and his house.

On the evening of 6 July 2014, Defendant was seen slowly driving by and looking at a residence in Onslow County. Eventually, Defendant got out of his car and started yelling at an individual standing near the residence, "Teekay," and "calling out" the individuals inside the house, challenging them to come outside. The exchange escalated to the point where Defendant pulled out a handgun and fired two shots at Teekay. At least one of the two shots went into the exterior wall of the house, at which point the homeowner, Antonio Holley ("Holley"), went to the doorway and yelled that Defendant "ain't doing nothing" but firing shots into the air. Defendant responded by firing two shots at Holley, who was still standing in the doorway of his house, one of which hit him in the arm. Shortly thereafter, a second man inside the house returned fire in Defendant's direction, and Defendant drove away. Upon investigating the scene, police noted damage to Holley's house and the surrounding area.

Defendant was indicted by a Grand Jury for (1) littering, (2) fleeing to elude arrest with a motor vehicle, (3) assault with a deadly weapon with the intent to kill inflicting serious injury, (4) assault by intentionally pointing a gun at a person without legal justification, and (5) discharging a firearm into an occupied dwelling. At trial, the State abandoned the littering charge. The jury returned guilty verdicts on the charges of fleeing to elude arrest, assault with a deadly weapon, assault by pointing a gun, and discharging a firearm into an occupied dwelling, and the trial court entered judgment accordingly. Defendant timely appeals and presents four arguments for our consideration.

ANALYSIS

A. The Trial Court's Judgment

[1] Defendant first argues the trial court's judgment finding him guilty of Class D discharging a firearm into an occupied dwelling is inconsistent

with the jury verdict finding him guilty of "felonious discharging a firearm into an occupied *property*."

N.C.G.S. § 14-34.1 sets out three levels of felony offense for "Discharging certain barreled weapons or a firearm into occupied property." N.C.G.S. § 14-34.1 (2017). It is a Class C felony to discharge a firearm into an occupied property where "the violation results in serious bodily injury to any person," a Class D felony where the weapon is discharged "into an occupied dwelling," and a Class E felony where the weapon is discharged "into any building, structure, vehicle, aircraft, [etc.]" *Id.* Defendant argues the jury only found him guilty of the Class E offense, so the trial court erred by entering judgment for the Class D offense under N.C.G.S. § 14-34.1. The record indicates otherwise.

Defendant was indicted for discharging "a firearm into an occupied dwelling, a building, . . . while it was actually occupied by [Holley] and [another man]." As such, Defendant was on notice from the commencement of this case that the State sought the Class D offense. On the indictment form, the State listed N.C.G.S. § 14-34.1(c) as the statute Defendant allegedly violated, but chose to abandon the "serious bodily injury" portion before charging the jury. After doing so, the State told the trial court it "should be able to proceed on the [charge of] discharging a weapon into an occupied *property or dwelling*." The trial court agreed and used the State's imprecise language, conflating property with dwelling, throughout the remainder of Defendant's trial.

During the jury charge, the trial court instructed, "[D]efendant has been charged with discharging a firearm into occupied property." However, the trial court went on to describe that property exclusively and repeatedly as Holley's "house[:]"

> The defendant has been charged with discharging a firearm into occupied property. For you to find the defendant guilty of this offense, the state must prove three things, beyond a reasonable doubt. First, that the defendant willfully or wantonly discharged a firearm into a *house* at [Holley's address]. . . . Second, that [Holley's] *house* . . . was occupied by one or more persons at the time that the firearm was discharged. Third, that the defendant knew that [Holley's] *house* . . . was occupied by one or more persons.

Based on that instruction, when the jury found Defendant guilty of "discharging a firearm into an occupied property[,]" the property to which they referred was Holley's "house" described throughout their instruction.

We have previously held that "dwelling" under N.C.G.S. § 14-34.1(b) is synonymous with "apartment," *State v. Bryant*, 244 N.C. App. 102, 107-08, 779 S.E.2d 508, 512-13 (2015), and "residence." *State v. Curry*, 203 N.C. App. 375, 382, 692 S.E.2d 129, 136 (2010). Similarly, Black's Law Dictionary defines "house" as "[a] dwelling;" and the word "dwelling" is itself shorthand for "dwelling-house." Black's Law Dictionary (9th ed. 2009). Furthermore, in *Curry* we held a verdict sheet finding the defendant "guilty of discharging a firearm into occupied property" —the same as the verdict sheet here—was a sufficient basis for the trial court to enter judgment for the Class D offense under N.C.G.S. § 14-34.1(b). *Curry*, 203 N.C. App. at 382-83, 692 S.E.2d at 136. The trial court's judgment sentencing Defendant for the Class D felony of discharging a firearm into an occupied dwelling is consistent with the record and the jury's guilty verdict.

B. Indictment

[2] Defendant next argues we "should arrest the judgment against [Defendant] for discharging a weapon into an occupied dwelling due to a fatal defect in the indictment." Defendant argues the indictment was fatally flawed because it charged him with discharging a weapon into occupied property causing serious bodily injury, but "failed to allege that any injury resulted from the discharging of the firearm into the occupied property." We disagree.

Defendant's argument is based on the indictment's reference to "[N.C.G.S. §] 14-34.1(c)" as being the violated statute. However, we have previously held that the statutory reference on an indictment "is surplusage and can be disregarded." *State v. Jones*, 110 N.C. App. 289, 292, 429 S.E.2d 410, 412 (1993). The body of Defendant's indictment charges him, in relevant part, with "unlawfully, willfully, and feloniously [discharging] . . . a firearm into an occupied dwelling . . . ." "[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). Here, Defendant's indictment clearly identifies the crime being charged. Furthermore, as was the case in *Jones*, "Defendant cannot complain that [he] was unaware of the acts for which [he] was charged and if anything . . . benefited by the State's decision to proceed [under N.C.G.S. § 14-34.1(b)] because it reduced [his] level of punishment from a Class C to a Class D felony." *Jones*, 110 N.C. App. at 292, 429 S.E.2d at 413. The indictment was not fatally defective, and we need not arrest judgment.

C. Dismissal for Insufficient Evidence

1. Discharging a Firearm into an Occupied Dwelling

[3] Defendant's third argument is that the trial court "erred by failing to dismiss the charge of discharging a weapon into an occupied property." Specifically, Defendant argues the State "failed to demonstrate that [Defendant] knew the property was occupied when he fired the first two shots" into Holley's house and that the charge should have been dismissed for insufficient evidence.

"When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (internal quotation marks omitted). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

One is guilty of felony discharging a firearm into an occupied dwelling where he intentionally discharges a firearm into a building that he knows, or "has reasonable grounds to believe," is occupied by one or more persons. *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973). Eyewitness Gary John ("John") testified that, before discharging his firearm, Defendant stepped out of his car and loudly "called out" the individuals inside Holley's house, challenging them to come outside. John had been standing in the doorway of Holley's house and speaking with Holley just a few minutes earlier when Defendant slowly drove past, looking at the dwelling. Viewed in the light most favorable to the State, a reasonable mind might certainly accept the above evidence as adequate to support the conclusion that Defendant knowingly discharged a firearm into a dwelling he knew to be occupied.

Substantial evidence indicates Defendant intentionally discharged a firearm into a dwelling he knew or had reasonable grounds to believe was occupied at the time, and the trial court did not err in declining to dismiss this charge for insufficient evidence.

2. Assault by Pointing a Gun

[4] In his final argument on appeal, Defendant contends the trial court erred in failing to dismiss one of the assault charges against him because the evidence presented at trial "supported only a single assault charge." At trial, Defendant's counsel never moved to dismiss the assault charges against him, which renders this argument unpreserved for appellate

review. N.C. R. App. P. 10(a)(1) (2019). Nevertheless, Defendant argues we should invoke Rule 2 to reach this error and "prevent manifest injustice."

In urging us to invoke Rule 2, Defendant argues he could not properly be charged for two separate assaults on Holley—one by pointing a gun and the other with a deadly weapon (as a result of the gunshots)—based on the evidence presented at trial. These charges are related but distinct, and Defendant was indeed convicted of both based upon his actions directed toward Holley.

After careful review of the record, we agree with Defendant's contention that the only evidence regarding the two alleged assaults came from John's testimony that, "the victim . . . Holley, comes out yelling, 'You ain't doing nothing. You're just shooting in the air.' That was—the reaction from that was two more bam bams, quick double taps, from the shooter." This testimony is the sole evidence for Defendant's two assault convictions. The State does not argue otherwise, or point us to any other facts from which a reasonable mind might infer Defendant assaulted Holley. We invoke Rule 2 in order to reach this issue and prevent manifest injustice to Defendant.

We have held, "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. This requires evidence of a distinct interruption in the original assault followed by a second assault." *State v. Maddox*, 159 N.C. App. 127, 132-33, 583 S.E.2d 601, 604-05 (2003) (internal citation and quotation marks omitted) (declining to find multiple distinct assaults where the evidence "indicate[d] that all five shots were fired in rapid succession"); *see also State v. Brooks*, 138 N.C. App. 185, 190, 530 S.E.2d 849, 852-53 (2000) (allowing only one assault charge where three gunshots were fired almost simultaneously). "The elements of the offense of assault by pointing a gun are: (1) pointing a gun at a person; (2) without legal justification." *State v. Dickens*, 162 N.C. App. 632, 638, 592 S.E.2d 567, 572 (2004); *see* N.C.G.S. § 14-34 (2017). "The elements of the offense of assault with a deadly weapon are: (1) an assault of a person; (2) with a deadly weapon." *Id.*; *see* N.C.G.S. § 14-33(c)(1) (2017). An individual could be charged with both substantive offenses for acts broken up by a distinct interruption—such as keeping the gun aimed at the victim for a brief period or taking a moment of contemplation before firing the gun at the victim and thereby committing a distinct assault with the deadly firearm—but the cold record in this case evinces no such interruption.

Defendant's two assault charges arise out of two acts that occurred in rapid succession and seemingly without interruption: raising his gun

and firing. The evidence here is not sufficient to allow a reasonable mind to conclude there was any interruption in Defendant's act of raising his gun and firing at Holley such that he could have been convicted of two separate assaults. We vacate the trial court's judgment as to the assault by pointing a gun conviction in order to prevent a manifest injustice.

During sentencing, the trial court ordered, "under the Class D felony of discharging a weapon into occupied property, assault by pointing a gun and assault with a deadly weapon, all of those are consolidated for one judgment, under the Class D[.]" Defendant's prior felony record level was I, and he was sentenced to an active sentence, near the top of the presumptive range, of 60 to 84 months. Where multiple convictions are consolidated into one judgment "but one of the convictions was entered in error, the proper remedy is to remand for resentencing when the appellate courts are unable to determine what weight, if any, the trial court gave each of the separate convictions in calculating the sentences imposed upon the defendant." *State v. Hardy*, 242 N.C. App. 146, 160, 774 S.E.2d 410, 420 (2015) (internal alterations and citation omitted). As we are unable to determine what weight, if any, the trial court gave to the erroneously entered assault conviction, we must remand for resentencing.

CONCLUSION

Defendant fails to show that the trial court erred in entering its judgment against him for discharging a firearm into an occupied dwelling, proceeding based on the State's indictment, or in failing to dismiss the charge of discharging a firearm into an occupied dwelling. Although not properly preserved for appeal, we invoke Rule 2 to vacate the charge of assault by pointing a gun in order to prevent a manifest injustice, and remand for resentencing.

NO ERROR IN PART; VACATED IN PART; REMANDED FOR RESENTENCING.

Judges DILLON and ARROWOOD concur.

STATE v. MARSH

[265 N.C. App. 652 (2019)]

STATE OF NORTH CAROLINA
v.
BOYD DOUGLAS MARSH, DEFENDANT

No. COA18-808

Filed 4 June 2019

Sentencing—plea agreement—sentence different from plea agreement—right to withdraw guilty plea

The trial court erred by imposing a sentence inconsistent with defendant's plea agreement where the plea agreement called for a single consolidated sentence and the trial court entered two separate, concurrent sentences. Even though the amount of time served under the concurrent sentences was materially the same as the single consolidated sentence in the plea agreement, the trial court was required to inform defendant of his right to withdraw his guilty plea, pursuant to N.C.G.S. § 15A-1024, because the sentences imposed differed from the plea agreement.

Appeal by Defendant from judgment entered 29 November 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Kimberly P. Hoppin for the Defendant.

DILLON, Judge.

Defendant Boyd Douglas Marsh appeals the trial court's denial of his motion to withdraw his guilty plea. Alternatively, he appeals the sentence imposed by the trial court, alleging that it was inconsistent with the sentence outlined in his plea agreement with the State. After careful review, we vacate the trial court's judgment and remand for further proceedings.

I. Background

Defendant was charged with multiple counts of rape, kidnapping, and a number of related offenses, involving multiple victims and occurring between 1998 and 2015. In March 2017, Defendant was tried by a jury.

On the third day of trial, Defendant negotiated a plea agreement with the State whereby he pleaded guilty to a number of offenses. Based on the plea agreement, Defendant would receive a single, consolidated active sentence of two hundred ninety (290) to four hundred eight (408) months imprisonment.

Over the next four weeks, and prior to sentencing, Defendant wrote two letters to the trial court. In them, he proclaimed his innocence to some of the charges and suggested his desire to withdraw from his plea agreement. The trial court acknowledged receipt of the letters and forwarded them to Defendant's attorney.

Several months later, in November 2017, Defendant appeared before the trial court for sentencing. During the hearing, he formally moved to withdraw his guilty plea. The trial court denied Defendant's motion. The trial court, then, proceeded with sentencing. Though the plea agreement called for a single, consolidated judgment imposing a single sentence, the trial court entered *two* judgments, one for the 2015 offenses and one for the 1998 offenses, based on the fact that the sentencing grid in use in 1998 was different from the grid in use in 2015. Specifically, the trial court entered a judgment, sentencing Defendant to a term of two hundred ninety (290) to four hundred eight (408) months for the 2015 offenses, a sentence which matched the sentence Defendant agreed to in his plea agreement with the State. And for the 1998 offenses, the trial court entered a separate judgment with a slightly shorter sentence of two hundred eighty-eight (288) to three hundred fifty-five (355) months imprisonment. The trial court did, though, order that the two sentences would run concurrently, such that Defendant would not actually serve any longer than contemplated in his plea agreement with the State.

Defendant gave oral notice of appeal in open court.[1]

II. Analysis

Defendant makes two arguments on appeal. First, Defendant argues that the trial court erred by denying his motion to withdraw his guilty plea prior to being sentenced. Defendant made it known to the trial court quickly that he did not like the plea agreement into which he had

1. Defendant's oral notice of appeal adequately preserved his arguments with respect to the trial judge's denial of his motion to withdraw his guilty plea. *See* N.C. R. App. P. 4(a). However, Defendant failed to object to any portion of the trial judge's sentencing at trial, and further did not make any reference to sentencing procedures in his notice of appeal. Contemporaneous with this appeal, Defendant filed a motion for writ of *certiorari* asking that we address his arguments as to sentencing despite errors in preservation. We elect to grant Defendant's motion to reach the merits of Defendant's appeal.

entered. But his attorney did not formally move on his behalf to withdraw the plea until much later. Our Supreme Court has instructed that a defendant's burden is low when his motion is made soon after entering his plea. *See State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 162-63 (1990). In any event, because we conclude that Defendant is entitled to relief based on his *second* appellate argument, we do not need to decide this first issue.

In his second argument, Defendant contends that the trial court erred in imposing a sentence inconsistent with the sentence set out in his plea agreement without informing Defendant that he had a right to withdraw his guilty plea. For the following reasons, since we conclude that the concurrent sentences imposed by the trial court differed from the single sentence agreed to by Defendant in his plea agreement, we agree with Defendant.

Section 15A-1024 of our General Statutes provides that a defendant must be informed and allowed to withdraw his plea where the sentence to be imposed differs from what was agreed upon:

> If at the time of sentencing, the judge for any reason determines to impose a sentence *other than* provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2017) (emphasis added).

Here, Defendant's plea arrangement for all his 1998 and 2015 offenses which stated, in relevant part, that Defendant would "receive a consolidated active sentence of 290 to 408 months." The trial court judge, though, determined that Defendant's 1998 offenses fell under a different sentencing grid than his 2015 offenses, where the 1998 offenses warranted lesser minimum and maximum sentences. In an apparent effort to accommodate this difference, the judge entered two separate, but concurrent, sentences.

The State contends that, though the sentences entered were objectively different than the sentence described in the plea agreement, any possible error was harmless because the judge's sentence was practically the same. That is, the time Defendant will serve under the concurrent sentences is the same as he would have served if he had received the single sentence contemplated in his agreement with the State.

Much of our precedent where relief has been granted under Section 15A-1024 involves instances where the sentence imposed by the judge was *significantly* different from or more severe than that agreed upon in the defendant's plea agreement.[2] However, our precedent is clear that any change by the trial judge in the sentence that was agreed upon by the defendant and the State, even a change benefitting the defendant, requires the judge to give the defendant an opportunity to withdraw his guilty plea. For instance, our Supreme Court has suggested the meaning of Section 15A-1024 to include situations where the sentence imposed is merely "different from" the sentence agreed to:

> The equally unambiguous language of 15A-1024 discloses that this statute applies in cases in which the trial judge does not reject a plea arrangement when it is presented to him but hears the evidence and at the time for sentencing determines that a sentence *different from* that provided for in the plea arrangement must be imposed. Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term.

State v. Williams, 291 N.C. 442, 446-47, 230 S.E.2d 515, 517-18 (1976) (emphasis added).

And our Court has held that Section 15A-1024 is implicated even where the sentence imposed may be more favorable to the defendant that that which he had agreed to. *State v. Wall*, 167 N.C. App. 312, 316, 605 S.E.2d 205, 208 (2004). In *Wall*, the trial judge sentenced the defendant to a sentence less than the sentence described in the defendant's plea agreement. *Id.* Our Court held that the plain language of Section 15A-1024 applied when any sentence "different from" the plea agreement was imposed and vacated the defendant's judgment accordingly. *Id.* at 317-18, 605 S.E.2d at 208-09. Further, in *Wall*, we noted that the Official Commentary to Section 15A-1024 demonstrates that our General

---

2. *See e.g.*, *State v. Puckett*, 299 N.C. 727, 730-31, 264 S.E.2d 96, 98-9 (1980) (vacating the trial court's sentence because the court inappropriately sentenced the defendant to two *consecutive* two-year sentences, inconsistent with the plea deal agreeing to a sentence of no more than two years total); *State v. Carricker*, 180 N.C. App. 470, 471-72, 637 S.E.2d 557, 558-59 (2006) (vacating the trial court's sentence because it revoked the defendant's nursing license, where her plea agreement did not include license revocation); *State v. Rhodes*, 163 N.C. App. 191, 195, 592 S.E.2d 731, 733 (2004) (vacating the sentence because the trial court sentenced the defendant to an active sentence of twenty-one (21) to twenty-six (26) months incarceration, inconsistent with the plea agreement for a sentence of twenty-one (21) to twenty-six (26) months incarceration to be suspended for three years).

Assembly intended for the statute "to apply if there is *any change at all* concerning the substance[]" of the sentence imposed, rejecting to use the phrase "more severe than" in the statutory language. *Wall*, 167 N.C. at 316, 605 S.E.2d at 208 (quoting N.C. Gen. Stat. § 15A-1024) (emphasis added)).

We conclude that the two separate judgments/sentences imposed by the trial judge are different than the single, consolidated judgment/sentence that Defendant had agreed to. *See State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 247 (2002) ("A plea agreement is treated as contractual in nature[.]"). Though the total amount of time served in the concurrent sentences is materially the same as the single consolidated sentence in Defendant's plea agreement, Defendant is still liable for two separate judgments and two separate sentences. This is not what he agreed to. And, for example, if for any reason one of the judgments was later vacated, Defendant would still be left with an outstanding judgment and corresponding sentence.

We recognize that, ordinarily, "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). However, our review of the case law shows no instances where a harmless or prejudicial error standard has been applied in cases involving Section 15A-1024, as plea arrangements are *contractual* in nature.

III. Conclusion

We hold that the trial court was required to inform Defendant of his right to withdraw his guilty plea pursuant to Section 15A-1024. We, therefore, must vacate the trial court's judgments and remand the matter for further proceedings consistent with this opinion. Since Defendant was entitled to withdraw his plea based on the sentencing, we conclude that Defendant is no longer bound by the plea arrangement; but neither is the State. *See Puckett*, 299 N.C. at 731, 264 S.E.2d at 99 (remanding under Section 15A-1024 with instructions "that the judgments of the trial court be vacated, that defendant's plea of guilty be stricken, and that the cases be reinstated on the trial docket"). On remand, the State and Defendant are, of course, free to enter into a new plea arrangement.

VACATED AND REMANDED.

Judges BRYANT and ARROWOOD concur.

STATE v. WILLIAMS

[265 N.C. App. 657 (2019)]

STATE OF NORTH CAROLINA
v.
TAMORA WILLIAMS

No. COA18-994

Filed 4 June 2019

Damages and Remedies—criminal restitution award—embezzlement—not precluded by prior civil settlement agreement and release

In a case of first impression, the Court of Appeals determined that a release clause in a civil settlement agreement—in which an employee agreed to repay funds she misappropriated from her employer—did not preclude an award of criminal restitution in an embezzlement prosecution based on the same underlying conduct. The civil settlement and release—to which the State was not a party—and restitution award represented separate, distinct remedies that served different purposes.

Appeal by defendant from judgment entered 12 April 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 7 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Madeline G. Lea, for the State

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

TYSON, Judge.

Tamora Williams ("Defendant") appeals from a criminal judgment ordering her to pay restitution. We affirm the trial court's order.

I. Background

Defendant was employed as an office manager at GCF, Incorporated ("GCF") from March 2014 to February 2016. GCF is a general construction company located in Burlington and owned by Charles Clifton Fogleman ("Fogleman"). Defendant's duties with GCF included managing billing, collections, bids, quotes, bank accounts, and payroll.

Other than Fogleman, Defendant was the only person with GCF who was authorized to use the business checking account and debit card.

In January 2016, Fogleman asked Defendant to collect documents relating to the business checking account so that he could prepare GCF's corporate tax filing. In response to Fogleman's request, Defendant allegedly admitted that she had been misappropriating funds from GCF's business account. Fogleman discovered that the GCF debit card had been used for personal purchases at various retail establishments over the previous seventeen months. Fogleman terminated Defendant's employment with GCF.

Fogleman prepared a spreadsheet listing 354 unauthorized expenditures and misappropriations by Defendant. The spreadsheet included the amount, date, and nature of each allegedly improper expenditure. Fogleman reported Defendant's actions and turned over the itemized spreadsheet to the Burlington Police Department.

Defendant was arrested for embezzlement on 5 March 2016. On 25 May 2016, Defendant filed a civil complaint against Fogleman for claims of slander and defamation. On 10 August 2016, Fogleman filed an answer and asserted counterclaims for embezzlement and employee theft.

Defendant and Fogleman mediated their claims. On 13 February 2017, the parties entered into a settlement agreement. Defendant agreed to pay Fogleman $13,500.00 as part of the settlement agreement resolving the civil claims. The settlement agreement contained the following release clause:

> The parties hereby release and fully discharge each other of and from any and all claims, causes of actions, demands and damages, known and unknown, asserted and unasserted, from the beginning of time to the date hereof, except as set forth herein.

On 26 February 2018, the State charged Defendant by information for embezzlement. That same day, Defendant entered an *Alford* plea to one count of embezzlement. As part of Defendant's plea arrangement, the State agreed to dismiss four counts of forgery, four counts of uttering a forged instrument, and two counts of embezzlement. The State also consented to a probationary sentence to allow Defendant to make restitution payments. Both Defendant and the State expressly agreed to the trial court holding a hearing to determine the amount of restitution.

The restitution hearing was held on 27 February 2018. Fogleman contended he had signed the settlement agreement with the understanding that the civil settlement had "nothing to do with the criminal matter." The State sought restitution of $41,204.85. Defendant asserted she did

not owe any restitution because her settlement payment of $13,500.00 to Fogleman in the civil action was payment in full under the terms of the settlement agreement and no further restitution was due.

On 23 March 2018, the trial court entered a written order containing findings of fact and conclusions of law. The trial court's order concluded, in relevant part:

> 2. The Settlement Agreement entered in the Civil action does not prohibit the Court in the Criminal action from determining an amount of restitution to be paid from the Defendant to the victim in this Criminal action.
>
> 3. The Defendant is entitled to a credit against the gross amount of restitution determined by this Order in the amount of $13,500.00, representing the amount paid by the Defendant in connection with the Settlement Agreement in the Civil action.

The trial court determined the gross amount of restitution owed by Defendant was $41,204.85. The trial court credited Defendant for paying $13,500.00 under the civil settlement agreement and set the balance of restitution due at $27,704.85.

On 12 April 2018, the trial court sentenced Defendant to six to seventeen months imprisonment, which was suspended for a period of thirty-six months of supervised probation, and ordered Defendant to pay $27,704.85 in restitution. The trial court's judgment imposed the payment of restitution as a condition of Defendant's probation. Defendant gave notice of appeal and filed a petition for writ of certiorari with this Court.

II. Issue

Defendant argues the trial court erred in ordering her to pay criminal restitution because the civil settlement agreement between her and Fogleman contained a binding release clause.

This issue presents a question of first impression in North Carolina of whether a civil settlement agreement containing a release clause can bar a party to the settlement agreement from later receiving restitution in a criminal action relating to the civil claim.

III. Jurisdiction

A defendant entering an *Alford* plea has no statutory right to appeal the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2017).

Defendant has petitioned this Court to issue a writ of certiorari to review her arguments regarding the trial court's judgment, which ordered restitution, on the merits. *See id.* (a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari"); N.C. R. App. P. 21(a)(1) (granting this Court authority to issue a writ of certiorari "in appropriate circumstances" to review lower court judgments and orders).

The Supreme Court of North Carolina has held: "The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016).

After considering the arguments presented in Defendant's principal and reply briefs, the State's response, and in Defendant's petition for writ of certiorari, we determine Defendant's challenge to the trial court's judgment presents "good and sufficient cause" to review. *Id.* We exercise our discretion to issue a writ of certiorari in order to review the trial court's judgment ordering restitution. *See id.*

IV. Standard of Review

We review *de novo* whether the release clause in the civil settlement agreement bars an award of criminal restitution. *See Williams v. Habul*, 219 N.C. App. 281, 289, 724 S.E.2d 104, 109 (2012) ("A settlement agreement is a contract governed by the rules of contract interpretation and enforcement"(citations omitted)); *Price & Price Mech. of N.C., Inc. v. Miken Corp.* 191 N.C. App. 177.,179, 661 S.E.2d 775, 777 (2008) ("questions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*" (citation omitted)). With regard to the trial court's judgment, "awards of restitution are reviewed *de novo*." *State v. Buchanan*, __ N.C. App. __, __, 818 S.E.2d 703, 709 (2018).

V. Analysis

Defendant argues the settlement agreement terminating her and Fogleman's civil lawsuit barred the trial court from ordering further restitution in her criminal prosecution because the settlement agreement contains a general release clause. Defendant contends: "[t]he release clause discharged all claims *between the parties* and barred all

subsequent rights to recover with respect to the offense." (Emphasis supplied). Defendant concedes the release clause did not bind the State from prosecuting her for embezzlement, nor did the settlement payment of $13,500.00 to Fogleman absolve Defendant her crimes. *See State v. Pace*, 210 N.C. 255, 257-58, 186 S.E. 366, 368 (1936) ("the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment, and conviction for such larceny or embezzlement" (citation omitted)).

Defendant also contends the State could not obtain an award of restitution in the course of the criminal proceedings. We disagree because civil settlement agreements and restitution awards are separate and distinct remedies, pursued for different ends.

A. Issue of First Impression

When this Court reviews an issue of first impression, it is appropriate to look to decisions from sister state jurisdictions for persuasive guidance. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law"), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

The Supreme Court of Florida reviewed an analogous issue in *Kirby v. Florida*, 863 So.2d 238 (Fla. 2003). In *Kirby*, a police officer caused a traffic accident by driving under the influence which resulted "in the serious bodily injury to another." *Id.* at 240. The police officer settled the civil claims with the victim. *Id.* The terms of the settlement agreement released the officer from any civil liability in exchange for "the payment by [the police officer's] insurance company of $25,000- the insurance policy limits." *Id.*

A jury found the officer guilty of driving under the influence and sentenced him to five years of probation, a downward departure from the sentencing guidelines. *Id.* The trial court justified the downward departure by concluding that " 'the need for payment of restitution to the victim outweigh[ed] the need for a prison sentence.' " *Id.* at 241. The trial court awarded the victim "restitution for the out-of-pocket medical expenses, deductibles, and lost wages" beyond the $25,000 the police officer owed "pursuant to the settlement agreement." *Id.* at 241.

The officer-defendant challenged the restitution imposed and asserted the settlement agreement as a bar. The prosecution contended

"the settlement agreement contained a release of all liability, but argued that because the [s]tate was not a party to the agreement the victim could not prevent the [s]tate from exercising its statutory right to seek restitution." *Id.* at 241. The trial court rejected the prosecution's argument and refused to order restitution. *Id.*

When the case reached the Supreme Court of Florida, the court evaluated "whether a settlement and release of liability between a victim and a defendant on a civil claim for damages prior to the disposition of a criminal case based on the same incident prohibits the trial court as a matter of law from ordering restitution." *Id.* at 240. The Court concluded "[b]ecause civil settlements and criminal restitution are distinct remedies with differing considerations," a civil settlement does not bar the trial court from exercising its statutory authority to order restitution in criminal matters. *Id.*

The court in Florida recognized restitution in criminal cases promotes "distinct societal goals" including: "(1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." *Id.* at 242 (citations omitted). Furthermore, restitution "forces the defendant to confront, in concrete terms, the harm his actions have caused." *Id.* at 243 (citations omitted).

That court also noted civil settlements do not "reflect the willingness of the People to accept that sum in satisfaction of the defendant's rehabilitative and deterrent debt to society." *Id.* at 243 (citations omitted). Circumstances which lead a party to settle a civil claim "should have no bearing on the court's statutory duty to order restitution for the damage or loss caused by the defendant's criminal conduct." *Id.* at 244 (citations omitted).

Several other states comport with the Supreme Court of Florida's holding. *See New Jersey v. DeAngelis*, 747 A.2d 289, 294 (N.J. Super. Ct. App. Div. 2000) ("civil settlement or release does not absolve the defendant of criminal restitution"); *Fore v. Alabama*, 858 So. 2d 982, 985 (Ala. Crim. App. 2003) ("[p]rivate parties cannot settle a civil claim and thereby agree to waive the subsequent application of the criminal statute"); *Haltom v. Indiana*, 832 N.E.2d 969, 972 (Ind. 2005) ("allowing a civil settlement to preclude restitution altogether would infringe upon the State's power to administer criminal punishment"); *People v. Bell*, 741 N.W.2d 57, 60 (Mich. Ct. App. 2007) ("restitution must be paid…regardless of the existence of the civil settlement").

Our research determined one jurisdiction disagrees with the above line of cases. *See Minnesota v. Arends*, 786 N.W.2d 885, 889 (Minn. Ct.

App. 2010). The Minnesota Court of Appeals concluded "that when an alleged victim has made a complete, valid civil settlement of all claims resulting from a criminal offense, the state is precluded from seeking restitution." *Id.* No other state has followed the *Arends* line of cases.

B. Civil Release Does Not Bar Restitution

We find the reasoning of the Supreme Court of Florida and the other similar noted state courts as persuasive. As in *Kirby*, the restitution order gives Defendant the opportunity "to confront, in concrete terms" the harm caused by her misappropriating employer funds through the personal use of the GCF debit card at various retail establishments. *Kirby*, 863 So.2d at 243. Here, the trial court considered the value of the property taken minus the value of the property that Defendant has previously returned via a civil settlement in order to reach the conclusion that she owed Fogleman restitution of $27,704.85.

The trial court's order reflects "the People['s]" satisfaction in resolving the issue and absolving the debt. *Kirby*, 863 So.2d at 243. Although the circumstances which gave rise to the agreement have no bearing, here the settlement agreement specifically states that "the civil matter has been fully resolved."

In addition, trial courts maintain the statutory right to order restitution "as a condition of probation . . . to an aggrieved party." N.C. Gen. Stat. § 15A-1343(d) (2017). Similar to the officer's sentence's downward deviation in *Kirby*, as part of Defendant's plea agreement, the State dismissed several other charges in exchange for the restitution payment. The State also consented to a "probationary sentence to allow Defendant to make restitution payments."

Defendant argues that under the plain terms of the settlement agreement, Fogleman could not seek more recovery from Defendant than the $13,500.00 he undisputedly agreed to accept in order to settle the civil actions. To hold otherwise, according to Defendant, would deprive her of the benefit of the bargain she obtained from the valid settlement agreement. Although the plain terms of the settlement agreement suggest Fogleman could not seek more recovery from Defendant than the $13,500.00 he undisputedly agreed to accept, the plain language of the settlement agreement expressly limited its application to the parties "releas[ing] and fully discharg[ing] each other." The agreement also specifically states that "the civil matter has been fully resolved," limiting the release clause strictly to the parties to the civil matter, and not including the State.

Fogleman also testified the settlement agreement he signed "had nothing to do with the criminal matter." His testimony that the settlement agreement pertained solely to the civil matter may show ambiguity in the terms of the agreement. Where there is ambiguity, the court "look[s] beyond the terms of the contract to determine the intentions of the party." *Stovall v. Stovall*, 205 N.C. App. 405, 410, 698 S.E.2d 680, 684 (2010). The State points to Fogleman's testimony at the restitution hearing regarding his intention in signing the settlement agreement:

> [Prosecutor]: And [would] you tell the Court what your understanding was of this civil issue?
>
> [Fogleman]: Yeah, it was a civil matter.
>
> [[Prosecutor]: And what do you mean by that?
>
> [Fogleman]: It has nothing to do with the criminal matter that we're here with – about today.
>
> [Prosecutor]: Was that your understanding when you signed the agreement?
>
> [Fogleman]: That was the only way that I was going to sign the agreement.

The intention of the parties at the time of execution determines the meaning of a release. *McGaldrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 711, 375 S.E.2d. 689, 691 (1989). "[T]heir intention is determined from the language used, the situation they were in, and the objects they sought to accomplish." *Id.* Fogleman and Defendant were the exclusive parties to that agreement. The settlement agreement did not involve or bind the State of North Carolina. The State brought criminal charges for crimes committed against the peace of the state.

Adopting the persuasive authority set forth above, "because the State was not a party to the agreement[,] the victim could not prevent the State from exercising its statutory right to seek restitution." *Kirby*, 863 So. 2d at 241. Private settlement or reimbursement agreements neither usurp the State's ability to uphold criminal statutes nor impede on the State's "distinct societal goals" of the criminal justice system. *Id.* at 243.

Restitution is characterized as a "*reparation* to an aggrieved party . . . for the damage or loss caused by the defendant arising out of" the criminal offense. *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003) (citing N.C. Gen. Stat. § 15A-1343(d) (2001)) (emphasis supplied).

Here, the trial court ordered Defendant to pay $41,204.85 to compensate Fogleman for his losses due to Defendant's embezzlement, less than the amount Fogleman claimed was taken. The court allowed Defendant a $13,500.00 credit for what she has already paid under the civil settlement agreement towards making Fogleman whole. To compensate for losses, the trial court properly ordered Defendant to pay the balance of restitution of $27,704.85. The intention of the restitution order is to restore what Defendant took and make Fogleman whole for his losses. Defendant's arguments are overruled.

VI. Conclusion

The State is not precluded from seeking restitution on a victim's behalf in a subsequent criminal prosecution. The trial court correctly concluded that "[t]he Settlement Agreement entered in the Civil action does not prohibit the Court in the Criminal Action from determining an amount of restitution to be paid from the Defendant to the victim in this criminal action."

The civil settlement and release and the criminal restitution represent separate, distinct remedies. The trial court's restitution order is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and ARROWOOD concur.

BRUCE TAYLOR AND SUSAN A. TAYLOR, PLAINTIFFS
v.
THOMAS HIATT, THOMAS R. HIATT AND JEWEL HOLLARS, DEFENDANTS

No. COA18-864

Filed 4 June 2019

Easements—private access road—construction of gates— "open" requirement

In a dispute involving the construction of a gate on an easement, where the land began as a single tract but was divided into six tracts over the years, a later-in-time map contained no language requiring a private road to remain "open," so plaintiffs were permitted to build a gate across that later easement, so long as it did not materially impair or unreasonably interfere with defendants' right

of ingress and egress. However, an earlier-in-time map required a different private road to remain "open," so plaintiffs were not permitted to build a gate across that earlier easement (even if they provided defendants with access codes). Since the record was unclear as to where exactly the gates were located and other facts, summary judgment was inappropriate for either party.

Appeal by Plaintiff from order entered 8 March 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 13 February 2019.

Oertel, Koonts & Oertel, PLLC, by Geoffrey K. Oertel, for the Plaintiffs-Appellants.

Pittman & Steele, PLLC, by Timothy W. Gray, for the Defendants-Appellees.

DILLON, Judge.

Plaintiffs brought this action seeking a declaration and other relief concerning an easement extending across Plaintiffs' property to Defendants' property. Plaintiffs appeal the trial court's order granting summary judgment to Defendants. After review of the materials before the trial court, we reverse and remand.

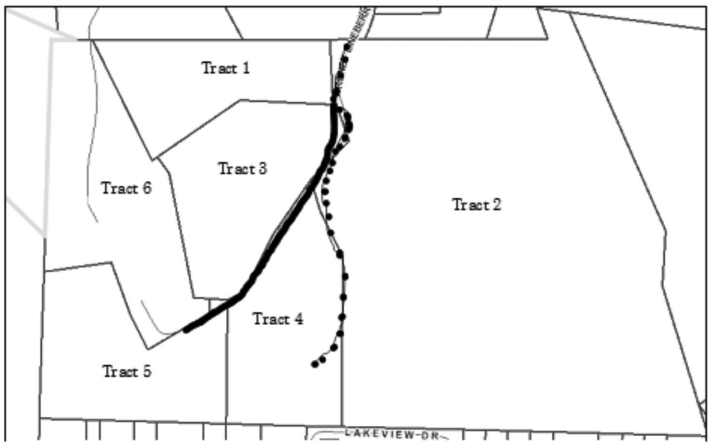
I. Background

Plaintiffs and Defendants own adjacent tracts of land in rural Alamance County. Defendants access a nearby State road via easements (private roads) which span across Plaintiffs' land. Plaintiffs built two gates and fencing somewhere along these private roads to fence in their horses. These gates do not prevent Defendants from being able to access the public road, as Plaintiffs have provided Defendants with the access code for the gates. However, Defendants contend that, based on language in the chain of title concerning the easements, Plaintiffs are not allowed to construct the gates on the easement. Plaintiffs commenced this action, seeking a declaration of their right to construct and maintain the gates in question. Defendant counterclaimed, seeking a declaration that Plaintiffs have no right to erect and maintain the gates and an order directing Plaintiffs to remove the gates.

A. Title History and Creation of the Easements

The chain of title at issue is described herein. The map below is included for clarity. The map depicts six tracts of land, referenced in

this opinion as Tracts 1-6. Plaintiffs own Tracts 1 and 3. Defendants own Tract 4. The other tracts, Tracts 2, 5, and 6, are not subject to this present dispute. Defendants access Roney Lineberry Road (a public road shown at the top of the map just above Tract 2) via two private roads. These private roads are depicted on the map below as a dotted line and a thick line, respectively. The location of these roads, as shown on the map, is approximate. The record before us is not clear as to the precise location of these roads.



The history of these tracts, including Plaintiffs' and Defendants' tracts, is as follows:

As of 1989, Tracts 1-6 were all part of a *single tract* (approximately one hundred nine (109) acres in area) and were owned by the Estate of C.R. Roney (the "Estate"). Over the years, there have been four maps filed to subdivide this large tract, ultimately into six tracts. And over the years, two easement roads have been created to provide access to these tracts as they were being created: the dotted-line road depicted above was created by a map recorded in 1989, and the solid line road depicted above was created by a map that was recorded in 2000.

1. 1989: Division of Large Tract into Two Tracts; Creation of First Easement

In 1989, the Estate recorded a map (the "1989 Map") that divided the one hundred nine (109) acre tract into *two* separate tracts: one tract consisting of approximately sixty-six (66) acres, which today comprises

Tracts 1 and 2; and another tract consisting of approximately forty-three (43) acres, which today comprises Tracts 3-6.

Through the filing of this 1989 Map, an easement was created (the "1989 Easement"), depicted above as the dotted-line road, to provide access points of egress and ingress to various parts of *both* large tracts. That is, the 1989 Easement provides more than one access point to each of the two large tracts, as it meanders at or near the border dividing the two tracts.

Of significance to this present dispute, the 1989 Map indicates that this 1989 Easement is to remain "open for egress and regress" for the benefit of the owner of the newly formed sixty-six (66) acre and forty-three (43) acre tracts created by the division, stating as follows:

> Note: The existing private road shall remain open for egress and regress to [the sixty-six (66) acre and forty-three (43) acre tracts formed by the 1989 Map]. Road shall be maintained by the "owner" or "owners" of [the two tracts].

2. 1996: Division of 66-Acre Tract into Two Tracts

In 1996, the owner of the sixty-six (66) acre tract filed a map (the "1996 Map") subdividing that tract into two tracts, depicted above as Tract 1 (nine acres) and Tract 2 (fifty-seven (57) acres). The 1996 Map depicts the 1989 Easement, the dotted-line road depicted above, in essentially the same location as depicted on the 1989 Map, reiterating that the easement is to remain open for the benefit of the adjacent forty-three (43) acre tract as well as the newly formed Tracts 1 and 2, which had made up the sixty-six (66) acre tract.

3. 2000: Division of 43-Acre Tract into Three Tracts

In 2000, the owner of the forty-three (43) acre tract filed a map (the "2000 Map") subdividing that tract into three tracts, depicted above as Tract 3, Tract 4, and a tract now comprised of Tracts 5 and 6.[1] The 2000 Map depicts the top portion of the 1989 Easement, but also depicts a *new private road* (the "2000 Easement"), shown in the above map as the solid line, to provide access from the 1989 Easement to the three newly formed tracts, Tracts 3, 4 and what are now 5 and 6.

The 2000 Easement is described on the 2000 Map as a "30' R/W [right-of-way] EASEMENT." The 2000 Map, however, does not contain

1. The 2000 Map did not create Tracts 5 and 6 as two separate tracts, but as one tract. The subdivision of Tracts 5 and 6 occurred later, but that subdivision is not relevant to this present matter.

any other language concerning this new 2000 Easement. That is, unlike the 1989 Map's description of the 1989 Easement, there is *no* language in the 2000 Map indicating that the 2000 Easement is to remain "open."

B. Plaintiffs' Construction of the Gates

In 2017, Plaintiffs, who own Tracts 1 and 3, erected two access gates to keep their horses secured on their tracts. There is nothing in the record indicating exactly *where* on Plaintiffs' tracts the gates were installed. In other words, there is nothing in the record to indicate whether the gates were installed on the 1989 Easement or the 2000 Easement, as some portion of both easements are on Plaintiffs' land.

Plaintiffs provided Defendants with the access code to the gates so that Defendants could still access Roney Lineberry Road by way of the easements. But, over the course of time, a number of disputes between the parties arose concerning the gates.

C. Procedural History

In July 2017, Plaintiffs commenced this action requesting a declaratory judgment regarding their right to construct and maintain the gates. Defendants answered and counterclaimed, requesting removal of the access gates.

In March 2018, after a hearing on the matter, the trial court entered an amended judgment declaring that Plaintiffs were prohibited "from having gates, bars, fences and the like on the Private Road" *and* directing Plaintiffs to "remove the gates erected upon the Private Road[.]" The trial court certified its order for immediate appellate review. Plaintiffs timely appealed.

In April 2018, while their appeal was pending with our Court, Plaintiffs filed a motion for relief with the trial court, requesting that they be allowed to offer into evidence a new survey which purported to show where the gates were in fact located. Plaintiff contended that this survey constituted new evidence on which the trial court should reverse its prior order. The trial court indicated that it would likely deny the motion, but did not have jurisdiction to do so in light of Plaintiffs' pending appeal.

II. Analysis

Plaintiffs appeal an order granting Defendants summary judgment against Plaintiffs' claims. We review a grant of summary judgment *de novo*, to determine whether the record shows, in the light most favorable

to the nonmoving party, that there was no genuine issue of material fact remaining for the trial court to resolve. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). In our review, we may only consider the record on appeal, composed of the materials before the trial court at the time of the hearing. *Waste Mgmt. of Carolinas, Inc., v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986).

Typically, the owner of a servient estate "may erect gates across [an easement] when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere" with the purpose of the easement to the dominant estate. *Chesson v. Jordan*, 224 N.C. 289, 293, 29 S.E.2d 906, 909 (1944); *accord Merrell v. Jenkins*, 242 N.C. 636, 637-38, 89 S.E.2d 242, 243-44 (1955). However, our Supreme Court has held that the owner of a servient estate generally may *not* erect gates on an easement where the instrument granting the easement provides that the easement is to remain "open," stating as follows:

> Generally, the grant of a way without reservation of the right to maintain gates does not necessarily preclude the owner of the land from having them; *unless it is expressly stipulated that the way shall be an open one or it appears from the terms of the grant or the circumstances that such was the intention*, the owner of the servient estate may erect gates across the way if they are constructed so as not to interfere unreasonably with the right of passage.

*Setzer v. Anna*s, 286 N.C. 534, 539, 212 S.E.2d 154, 157 (1975) (emphasis added). Indeed, our Supreme Court has interpreted express language suggesting that an easement remain "open" to mean that it must be free of obstructions, such as fences or gates. *See Patton v. W. Carolina Educ. Co.*, 101 N.C. 408, 409-11, 8 S.E. 140, 141-42 (1888) (holding that "[a] street, with gates or fences across it, is not what was reserved" by a deed stating "that the street now opened up through to the college land . . . *shall be kept open*" (emphasis added)).

It is unquestioned that the 2000 Map creating the 2000 Easement and the 1989 Map creating the 1989 Easement are in Defendants' chain of title. Defendants acquired their property, Tract 4, in 2007 in fee simple via a general warranty deed. The deed expressly conveyed "a permanent access easement for ingress, egress, and regress over and upon the 30 ft right of way as shown on said plat of survey" recorded in "Plat Book 65 at Page 118," the location of the 2000 Map. It is true that the 2000 Map

contains no language requiring the easement to remain open, but it does refer to the "[r]ight of way along Existing Private Road as per Deed Book 1056, Page 56." Deed Book 1056, Page 56, contains the deed conveying all of Tracts 1 and 2 from the Roney family, "subject to the right of way of the private road shown on [Plat Book No. 39 at Page 160,]" which is the 1989 Map.

The trial court granted Defendants' summary judgment motion, determining that Defendants are entitled to have that portion of the private road upon which Plaintiffs constructed their gates to remain open and to require Plaintiffs to remove the gates. We conclude that Defendants were not entitled to summary judgment for the reasons stated below.

There is nothing on the 2000 Map or other documents in the chain of title which suggests that the parties intended that the private road comprising the 2000 Easement had to remain "open." Therefore, we conclude that Plaintiffs "may erect gates across [the 2000 Easement] when necessary to the reasonable enjoyment of [their] estate, provided they are not of such nature as to materially impair or unreasonably interfere" with the purpose of the easement to Defendants' tract. *Chesson*, 224 N.C. at 293, 29 S.E.2d at 909; *see Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992) (holding that the meaning of unambiguous language contained in an easement is a question of law). Whether the gates, if erected on the 2000 Easement, would actually materially impair or unreasonably interfere with Defendants' right of egress and ingress is not an issue before us.

We conclude further that Plaintiffs are, nonetheless, bound by the language contained in the 1989 Map with respect to the private road constituting the 1989 Easement: Plaintiffs must keep this easement "open." *See Setzer*, 286 N.C. at 539, 212 S.E.2d at 157. As such, we conclude that Plaintiffs are not allowed to install gates along the 1989 Easement. We further conclude that Defendants, as the owners of Tract 4, have the right to enforce this restriction.

We note that there is some discrepancy as to exactly whether some part of the 2000 Easement is actually part of the 1989 Easement as well. If so, that portion would be bound by the "open" requirement. Indeed, there is some discrepancy between the 1989 Map and the 1996 Map as to the exact location of the 1989 Easement.

In any event, the record shows that Plaintiffs' tracts, Tracts 1 and 3, contain portions of *both* the 1989 Easement and the 2000 Easement over which Defendants are allowed to travel to access Roney Lineberry Road

from Tract 4. And though Plaintiffs assert in their brief on appeal that the gates are on the 2000 Easement (and *not* the 1989 Easement), there is nothing in the record before us that either party points to which indicates upon *which* easement the gates are actually located. To be entitled to summary judgment, it was Defendants' burden to establish conclusively that the gates were on the 1989 Easement. Since Defendants have failed in meeting this burden, Defendants were not entitled to summary judgment.

Similarly, Plaintiffs are not entitled to summary judgment, as they failed to meet their burden of proving as a matter of law that their gates are on the 2000 Easement, and not on the 1989 Easement, and that the gates do not actually impair or otherwise unreasonably interfere with Defendants' use of that easement.

We, therefore, reverse the trial court's grant of summary judgment and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED.

Judges INMAN and COLLINS concur.

THOMAS RAYMOND WALSH, M.D. AND JAMES DASHER, M.D., PLAINTIFFS
v.
CORNERSTONE HEALTH CARE, P.A., DEFENDANT

No. COA18-925

Filed 4 June 2019

Discovery—sanctions—specific basis—lack of notice—abuse of discretion

In an action between two doctors and their former employer, where the doctors clearly moved for sanctions against the employer pursuant to Rule of Civil Procedure 26(g) for discovery violations, the trial court abused its discretion by striking the employer's answer as a sanction for a violation of Rule 26(e). The order imposing sanctions was based on erroneous findings, and the employer never received proper notice that it might be sanctioned under Rule 26(e).

WALSH v. CORNERSTONE HEALTH CARE, P.A.

[265 N.C. App. 672 (2019)]

Appeal by defendant from order entered 21 March 2018 by Judge Jeffery K. Carpenter in Davidson County Superior Court. Heard in the Court of Appeals 13 March 2019.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson and Lorin J. Lapidus, for plaintiffs-appellees.

Bennett Guthrie Latham, PLLC, by Rodney A. Guthrie, Roberta King Latham, and Mitchell H. Blankenship, for defendant-appellant.

ZACHARY, Judge.

Defendant Cornerstone Health Care, P.A. appeals from the trial court's order striking Defendant's answer as a sanction for discovery violations. We vacate and remand.

Background

Plaintiffs Thomas Raymond Walsh, M.D. and James Dasher, M.D. filed the instant action against Defendant, their former employer, on 20 November 2014 asserting claims for breach of the implied covenant of good faith and fair dealing, breach of contract, common law unfair competition, and quantum meruit. A protracted discovery dispute thereafter arose between the parties, which, for purposes of the instant appeal, primarily involves Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

As part of the basis of their claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs alleged that "[i]n recent years, defendant . . . became fundamentally unprofitable, and was able to pay its business debts only by arbitrarily reducing the compensation of certain disfavored physicians." Plaintiffs maintain that they were included among said group of "disfavored physicians," and that when Plaintiffs expressed dissatisfaction with their decreased compensation, Defendant retaliated by essentially demoting Plaintiffs in an effort to further reduce their compensation. On 20 September 2014, Plaintiffs voluntarily resigned from their employment with Defendant. Plaintiffs maintained that "Defendant's capricious, malicious, and retaliatory actions" constituted a breach of the implied covenant of good faith and fair dealing in their employment contracts.

Defendant served its initial response to Plaintiffs' First Set of Interrogatories and Request for Production of Documents on 4 May

2015. Interrogatory 7 directed Defendant to "[i]dentify, with specificity, all relevant documents that you or your attorney have which pertain to any issues or facts in this suit." Plaintiffs' Request 7 sought

> [a]ll statements, summaries of statements, correspondence, letters, memoranda, documents, records, notes, telephone logs, electronic mail, ms word documents, pdf files, or other papers, whether in written, printed, or electronic format, in your possession or control or to which you, your counsel, or representatives have access regarding or pertaining to the professional performance, competency, or personal opinions or views of either or both plaintiffs by [Defendant].

(Hereafter "professional and personal opinion documents"). Defendant objected to Request 7 on the grounds of privilege,[1] but nevertheless responded that it had nothing to produce.[2] Defendant's CEO verified under oath that the response to Request 7 was "true of her own knowledge and belief except those matters therein stated upon information and belief, and, as to those, she believe[d] them to be true."

On 26 July 2016, following the parties' fourth discovery-related motion, the Honorable Mark E. Klass entered an order requiring the parties to "confer and select . . . a qualified and capable forensic e-discovery vendor for the purpose of collecting and cataloging electronically stored communications, specifically e-mails, generated by" six of Defendant's corporate officers ("the e-discovery order"). According to Plaintiffs, when Defendant's e-discovery database became available to them in August 2017, Plaintiffs learned that Defendant had "intentionally withheld a vast number of highly relevant and damaging documents"—namely, e-mails between Defendant's officers—"which squarely pertain" to Defendant's professional and personal opinions of Plaintiffs, despite the CEO having attested, under oath, that no such documents existed. Accordingly, on 21 September 2017, Plaintiffs filed a motion for mandatory sanctions "pursuant to Rule 26(g) of the North Carolina Rules of Civil Procedure." Plaintiffs maintained that "[t]he discovery responses signed and attested to under oath by [Defendant's CEO] were interposed for the improper purpose of intentionally withholding a substantial cache of damaging

---

1. Defendant indicated that it would provide a Privilege Log in its second supplemental response.

2. Defendant answered "none" in its first supplemental response to Plaintiffs' Request for Production 7, to which Defendant had directed Plaintiffs in its answer to Interrogatory 7, pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure.

documents, which has served to harass plaintiffs, cause unnecessary delay, and has needlessly and exponentially increased the cost of litigation." Plaintiffs argued that "[a]t this juncture, only the severe sanction of striking [Defendant's] answer is appropriate."

Plaintiffs' motion came on for hearing on 2 October 2017. The professional and personal opinion documents that Plaintiffs alleged were responsive to Interrogatory 7 and Request 7 were presented to the trial court for *in camera* review. Plaintiffs argued:

> Rule 26(g) is cited in our brief in full. . . . [It] essentially addresses the issue of improper purpose and that is to use the discovery process for a number of different improper reasons, but in this case to use the discovery process to wear down the opponent to needlessly increase the cost of litigation so eventually the party collapses under its weight.
>
> We think that's exactly what has occurred in this case. . . . The discovery responses that were signed by the defendant's CEO, falsely, were for the clear purpose of improperly withholding a substantial number of damaging documents pertaining again to our claims for breach of implied covenant of good faith and fair dealing.
>
> . . . .
>
> They denied the existence of these documents under oath twice . . . .
>
> . . . .
>
> So what we say essentially is this; the defendant's discovery misconduct is one of the most egregious examples that a Court will find to justify severe sanctions of striking their answer; otherwise, this pattern of false swearing of recalcitrants in discovery, it goes unpunished. That's why wisely Rule 26(g) was placed into effect in this jurisdiction . . . .

In response, Defendant argued that it did not produce the e-mails that Plaintiffs presented for *in camera* review because they were neither relevant nor responsive to Interrogatory 7 or Request 7, in that they "have nothing to do, there's nothing regarding the professional competence of these doctors as surgeons. . . . We commend those [e-mails] to your reading . . . . That will shed a lot of light on why we did not consider those to be relevant and responsive to any issue in the case." "[N]evertheless," Defendant noted, "they have now been produced."

On 21 March 2018, more than five months after the hearing, the trial court entered its order, finding that Plaintiffs' motion was filed "specifically for failure to supplement as required under Rule 26(e) of the N.C. Rules of Civil Procedure." The trial court found that the documents that Plaintiffs presented for *in camera* review were both relevant and responsive to Interrogatory 7 and Request 7,[3] and concluded that "Defendant's failure to appropriately supplement its responses to the discovery requests of the Plaintiffs [under Rule 26(e)] justifies the imposition of sanctions." The trial court further concluded that "no lesser sanction than" striking Defendant's answer "would be effective in correcting the Defendant's conduct." Accordingly, the trial court struck Defendant's answer, leaving only the issue of damages remaining for consideration. Defendant filed written notice of appeal on 20 April 2018.

On appeal, Defendant argues, *inter alia*, that "the facts on which" the trial court granted Plaintiffs' motion to strike Defendant's answer were "so clearly erroneous" that the resulting sanctions constituted an abuse of discretion. We agree with Defendant that the order should be vacated on this ground, and therefore we need not address Defendant's remaining challenges.

Grounds for Appellate Review

Although Defendant's appeal is interlocutory, Defendant nevertheless maintains that it is entitled to an immediate appeal from the trial court's order because it affects a substantial right, in that it strikes Defendant's answer. *See Adair v. Adair*, 62 N.C. App. 493, 495, 303 S.E.2d 190, 192 ("An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment."), *disc. review denied*, 309 N.C. 319, 307 S.E.2d 162 (1983). Indeed, "[o]rders of this type have been described as affecting a substantial right." *Essex Grp., Inc. v. Express Wire Servs., Inc.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003); *see also Adair*, 62 N.C. App. at 495, 303 S.E.2d at 192. Accordingly, Defendant has a right to immediate appeal from the trial court's order.

Discussion

Defendant contends that the trial court's order imposing sanctions was based upon several erroneous findings, including that Plaintiffs'

---

3. Defendant does not challenge this finding by the trial court, and it is thus binding on appeal. *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.").

motion sought to sanction Defendant "specifically for failure to supplement as required under Rule 26(e)." Defendant maintains that this finding is simply "not true," and argues, among other things, that the trial court erred when it "*sua sponte*[] made additional legal arguments to grant [Plaintiffs] the relief sought." Defendant contends that this amounted to an abuse of discretion, and therefore, the order must be vacated. We agree.

Rule 26(g) of the North Carolina Rules of Civil Procedure provides:

> (g) Signing of discovery requests, responses, and objections. — Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in that attorney's name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state that party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection and that to the best of the knowledge, information, and belief of that attorney or party formed after a reasonable inquiry it is: . . . (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation . . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 26(g) (2017).

In other words, "Rule 26(g) provides that when an attorney or party signs a discovery document, he certifies to the best of his knowledge that it has not been served for an improper purpose and is not unreasonably burdensome or expensive." *Turner v. Duke University*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 713 (1989). "Such signature constitutes a certification parallel to that required by Rule 11," *Brooks v. Giesey*, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993), and thus "sanctions under Rule 26(g) may be applied following Rule 11 case law." *Id.* at 318, 432 S.E.2d at 347.

In the instant case, Plaintiffs moved for mandatory sanctions "pursuant to Rule 26(g)" on the basis of Defendant's initial discovery responses, in which Plaintiffs contended that Defendant had "necessarily failed to identify all documents which pertain to" Defendant's professional and personal opinions of Plaintiffs. Plaintiffs alleged that Defendant's response that it had no such documents was "interposed for the improper purpose of intentionally withholding a substantial cache of damaging documents, which has served to harass plaintiffs, cause unnecessary delay, and has needlessly and exponentially increased the cost of litigation." Plaintiffs reiterated this argument during the hearing on their motion, and Defendant defended against the same.

However, the trial court imposed sanctions against Defendant more than five months after the hearing, finding that Plaintiffs had filed their motion for sanctions "specifically for failure to supplement as required *under Rule 26(e)*." (Emphasis added). The trial court concluded that Defendant failed to supplement its discovery responses as required under Rule 26(e), and struck Defendant's answer on that basis. The effect of the trial court's erroneous finding is significant and requires that the sanctions be vacated.

It is well established that "the [party] against whom sanctions are to be imposed must be advised in advance of the charges against [it]." *Griffin v. Griffin*, 348 N.C. 278, 280, 500 S.E.2d 437, 439 (1998). While North Carolina does not require notice of the precise *type* of sanctions sought, a party is nevertheless entitled to "(1) notice of the bases of the sanctions and (2) an opportunity to be heard" thereon. *Egelhof v. Szulik*, 193 N.C. App. 612, 616, 668 S.E.2d 367, 370 (2008).

For example, in *Griffin*, "Charles Henderson had been given notice by the Bullocks that they would seek to have sanctions imposed upon him for filing a petition for an adoption." *Griffin*, 348 N.C. at 279-80, 500 S.E.2d at 438. "After the hearing, the court did not impose sanctions for the filing of the adoption petition"; instead, it "impose[d] sanctions for the filing of pleadings for which Mr. Henderson had not received notice that such sanctions would be sought." *Id.* at 280, 500 S.E.2d at 438. Our Supreme Court concluded that this was error:

> It is not adequate for the notice to say only that sanctions are proposed. The bases for the sanctions must be alleged. In this case, the notice actually misled Mr. Henderson as to what sanctions would be imposed. Mr. Henderson was notified that sanctions were proposed for filing the adoption proceeding, but sanctions were imposed for

> something else. The fact that the court made detailed findings of fact in the order for sanctions is not adequate. *In order to pass constitutional muster, the person against whom sanctions are to be imposed must be advised in advance of the charges against him.*

Id. at 280, 500 S.E.2d at 439 (emphasis added) (citations omitted). Accordingly, our Supreme Court ordered that the sanctions imposed without notice be vacated. *Id.*

Similarly, in this case, Defendant was not advised, prior to the hearing, that it might be sanctioned for failure to supplement its discovery responses pursuant to Rule 26(e); wholly absent from Plaintiffs' motion was any contention that Defendant should be sanctioned on that basis.[4] Plaintiffs' motion instead sought sanctions for a violation of Rule 26(g), and the substance of the parties' arguments at the hearing reflected the same. The mere fact that the parties made scattered references at the hearing to Defendant's "ongoing obligation" to supplement its discovery responses under Rule 26(e) does not demonstrate that Defendant received proper notice that sanctions might be imposed on that basis. *See id.* ("The fact that Mr. Henderson participated in the hearing and did the best he could do without knowing in advance the sanctions which might be imposed does not show a proper notice was given.").

Accordingly, in light of the lack of notice provided, we agree with Defendant that the trial court's order imposing sanctions for a violation of Rule 26(e) must be vacated and remanded for entry of an order that is consistent with the grounds upon which Plaintiffs moved to strike Defendant's answer.[5]

---

4. Plaintiffs' Rule 9(b)(5) supplement filed with this Court contains what purports to be a two-page excerpt from its "Brief in Support of Motion for Discovery Sanctions to Strike Answer," in which Plaintiffs argue that "[a]ssuming *arguendo*, that [Defendant']s verifications about the existence of the [professional and personal opinion documents] were accurate when made to the best of its knowledge at the time," Defendant still "failed to supplement its prior discovery responses pursuant to Rule 26(e)(2)." However, the excerpt indicates that the brief was signed on the same date as the hearing, and there is no certificate of service or other indication that Defendant received notice of this basis for sanctions prior to the hearing. Nor does the brief contain a file stamp demonstrating that it was filed with the trial court. In fact, at the hearing, the presiding judge commented to Plaintiffs that he did not have briefs.

5. During oral arguments before this Court, Plaintiffs contended that Defendant has abandoned any argument concerning notice because it did not raise that issue in its brief. *See* N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are

Conclusion

For the foregoing reasons, we vacate the trial court's 21 March 2018 order sanctioning Defendant by striking its answer and remand for the trial court to address the grounds for which the instant proceeding was initiated—that is, whether the trial court is mandated pursuant to Rule 26(g) to impose sanctions against Defendant for its initial certification that it possessed no documents pertaining to its professional or personal opinions of Plaintiffs, in response to Interrogatory 7 and Request 7.

VACATED AND REMANDED.

Judges STROUD and INMAN concur.

---

deemed abandoned."). Indeed, Defendant did not specifically phrase its challenges to the trial court's order in terms of "notice." Defendant did, however, argue the following:

> [The trial court] found that [Defendant] had failed to supplement its response to [Interrogatory] 7 under Rule 26(e) . . . and therefore sanctioned it pursuant to Rule 37. [Plaintiffs], however, *never moved the Court to exercise its discretionary authority to sanction [Defendant]. Instead, [Plaintiffs] moved for mandatory sanctions under Rule 26(g).* . . .
>
> Instead of ruling on the appropriateness of [Plaintiffs'] motion for mandatory sanctions under Rule 26(g), [the trial court] found as fact that "[Plaintiffs] filed the 21 September 2017 Motion seeking to sanction [Defendant] for discovery violations, specifically for failure to supplement as required under Rule 26(e) . . . ." *Nowhere in [Plaintiffs' motion] is there any reference whatsoever to Rule 26(e). The only reference to supplementation made by [Plaintiffs] was at [the hearing] in relation to the argument for mandatory sanctions under Rule 26(g). Rules 26(g) and 26(e) are fundamentally different from one another* . . . .
>
> Thus, [the trial court] either (1) declined to grant [Plaintiffs] relief on the grounds they requested and, *sua sponte*, made additional legal arguments to grant them the relief sought[,] or (2) [the trial court] fundamentally misunderstood the motion that [it] granted. Such a grave overreach or misapprehension of the matters before the Court cannot be considered anything but an abuse of discretion, particularly in light of the drastic sanction it ultimately led to in this matter.

(Emphases added) (original alterations omitted). Despite the omission of the word "notice," it is nevertheless clear that the substance of Defendant's argument is a challenge to the lack of notice of the grounds upon which the trial court imposed sanctions, albeit phrased in terms of abuse of discretion.

WYGAND v. DEUTSCHE BANK TR. CO.

[265 N.C. App. 681 (2019)]

JOHN E. WYGAND AND NORMA S. WYGAND, PLAINTIFFS
v.
DEUTSCHE BANK TRUST COMPANY AMERICAS AS INDENTURE TRUSTEE FOR THE REGISTERED HOLDERS OF SAXON ASSET SECURITIES TRUST 2004-1 MORTGAGE LOAN ASSET BACKED NOTES AND CERTIFICATES, SERIES 2004-1, OCWEN LOAN SERVICING, LLC, AND TRUSTEE SERVICES OF CAROLINA, LLC, DEFENDANTS

No. COA18-1073

Filed 4 June 2019

1. Arbitration and Mediation—arbitration rider—notice provision—no right to jury trial—N.C.G.S. § 22B-10—unconscionability

In a breach of contract action, the trial court erroneously concluded that the notice provision in an arbitration rider was unconscionable pursuant to the prohibition contained in N.C.G.S. § 22B-10 against contractual waivers of jury trials. The rider's explanation that a party who agreed to arbitration gave up the right to have a dispute resolved by jury did not run afoul of section 22B-10 because the statute expressly permitted arbitration agreements—which necessarily involve the private settlement of disputes. Even if the rider violated state law, the rider would still be enforceable pursuant to the Federal Arbitration Act as provided in the rider.

2. Arbitration and Mediation—motion to compel arbitration—denial—waiver of arbitration—pursuit of litigation

In a breach of contract action filed by two homeowners against multiple entities seeking to foreclose on their home, the trial court erred by denying defendants' motion to compel arbitration based on its conclusion that, even if an arbitration rider was enforceable, defendants had waived their right to compel by pursuing litigation in a way that prejudiced the homeowners. The filing of responsive pleadings and discovery by defendants did not constitute actions inconsistent with arbitration, defendants did not delay in seeking arbitration, and there was an insufficient showing that the homeowners were prejudiced where their affidavit of legal fees did not clearly delineate how much money they expended on filing this suit compared to what they spent on a related special proceeding.

Appeal by defendants from order entered 30 May 2018 by Judge Benjamin A. Alford in Craven County Superior Court. Heard in the Court of Appeals 9 April 2019.

Stubbs & Perdue, PA, by Trawick H. Stubbs, Jr., Matthew W. Buckmiller, and Joseph Z. Frost, for plaintiffs-appellees.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for defendants-appellants.

BERGER, Judge.

Deutsche Bank Trust Company Americas as Indenture Trustee for the Registered Holders of Saxon Asset Securities Trust 2004-1 Mortgage Loan Asset Backed Notes and Certificates, Series 2004-1, Ocwen Loan Servicing, LLC, and Trustee Services of Carolina, LLC ("Defendants") appeal the trial court's order, which denied their motion to compel John E. Wygand and Norma S. Wygand ("Plaintiffs") to submit to binding arbitration. Defendants argue in this interlocutory appeal that they have the contractual right to demand arbitration. For the reasons stated herein, we reverse and remand.

Factual and Procedural Background

On July 2, 1998, Plaintiffs executed a Note in favor of Saxon Mortgage Corporation, which called for monthly installment payments consisting of principal and interest. The Note was secured by a Deed of Trust on Plaintiffs' primary residence located in New Bern, North Carolina. In connection with the loan, Plaintiffs executed an Arbitration Rider, which supplemented the provisions of the Deed of Trust. The Arbitration Rider stated in pertinent part:

> ARBITRATION OF DISPUTES. All disputes, claims, or controversies arising from or related to the loan evidenced by the Note, including statutory claims, shall be resolved by binding arbitration, and not by court action, except as provided under "Exclusions from Arbitration" below. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act (9 U.S.C. §§ 1-14) and the Code of Procedure of the National Arbitration Forum as in effect as of the date of this agreement. . . . Any arbitration hearing shall be conducted in the jurisdiction in which the Borrower signs this agreement, unless a different location is agreed to by Borrower and Lender. . . .
>
> EXCLUSION FROM ARBITRATION. This agreement shall not limit the right of Lender to (a) accelerate or require

> immediate payment in full of the secured indebtedness or exercise the other Remedies described in this Security Instrument before, during, or after any arbitration, including the right to foreclose against or sell the Property . . . .
>
> NOTICE. BY SIGNING THIS ARBITRATION RIDER YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS DESCRIBED IN THE 'ARBITRATION OF DISPUTES' SECTION ABOVE DECIDED EXCLUSIVELY BY ARBITRATION, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL, DISCOVERY IN ARBITRATION PROCEEDINGS IS LIMITED IN THE MANNER PROVIDED BY THIS AGREEMENT. ("Notice Provision").

In February 2017, Trustee Services of Carolina, LLC commenced a special proceeding in Craven County seeking to exercise the power of sale provision in the Deed of Trust, and foreclose on Plaintiffs' real property. The foreclosure proceeding remains pending in Craven County.

On July 17, Plaintiffs filed suit in Craven County and demanded a jury trial against Defendants, alleging causes of action for breach of contract; violations of the North Carolina Debt Collection Act, North Carolina Unfair and Deceptive Trade Practices Act, North Carolina Mortgage Debt Collection and Servicing Act; defamation; and negligence. In addition, Plaintiffs sought a temporary restraining order, preliminary injunction, and permanent injunction. Defendants then filed a motion for an extension of time to file an answer or other responsive pleadings in response to Plaintiffs' complaint. On September 21, Defendants filed their answer and affirmative defenses. Plaintiffs then filed their First Set of Interrogatories and Requests for Production of Documents on September 27. After obtaining an extension of time to answer, Defendants provided their responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents on November 27. Also, on December 22, Defendants filed a motion for substitution of counsel, and an order was entered on January 10, 2018, granting this motion.

On March 16, 2018, Defendants filed a motion to dismiss, or in the alternative, to compel arbitration. Plaintiffs filed a response and memorandum of law in opposition to Defendants' motion on May 4. In support, Plaintiffs provided an Affidavit of Joseph Z. Frost ("Attorney's Affidavit"), which stated, among other things, that "through May 3, 2018,

Plaintiffs have incurred actual attorneys' fees, expenses, and costs in the amount of $40,164.51, relating to the preparation, filing, and prosecution of the above-captioned civil action, and defense of the special proceeding filed by Defendants, seeking to exercise the power of sale provision in the Deed of Trust." On March 21, the parties participated in a mediation, which resulted in a recess. Upon Defendants' request, on May 14, the trial date was moved from July 9 to August 8.

After a hearing was held on Defendants' motion to compel arbitration, the trial court entered an order on May 30, 2018, denying Defendants' motion ("Order Denying Arbitration"). In its Order Denying Arbitration, the trial court made the following pertinent findings and conclusions:

> 3. The Arbitration Rider is unconscionable and unenforceable pursuant to N.C. Gen. Stat. § 22B-10, as a matter of law, because it required that Plaintiffs, as the purported contracting parties, waive their right to jury trial. Although contractual provisions may provide procedural prerequisites or contractually limit the time, place, or manner or asserting claims, N.C. Gen. Stat. § 22B-10 expressly prohibits "any provision in a contract requiring a party to the contract to waive his right to a jury trial . . ." N.C. Gen. Stat. § 22B-10. The Arbitration Rider, which does not contain a severability clause, contains an unenforceable provision requiring Plaintiffs, as the contracting parties, to "GIV[E] UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL." In the absence of a severability clause, and based upon the explicit language of the Arbitration Rider requiring that Plaintiffs waive or "give up" their right to a jury trial, the Arbitration Rider is unconscionable and unenforceable, pursuant to N.C. Gen. Stat. § 22B-10, as a matter of law.
>
> 4. However, and even if the Arbitration Rider was not unenforceable as a matter of law pursuant to N.C. Gen. Stat. § 22B-10, Defendants—by and through its course of conduct and actions—have waived any purported right to compel or require arbitration of the claims for relief asserted in the Complaint filed by Plaintiffs. . . .

Defendants appeal, arguing that the trial court erred when it denied their motion to compel arbitration. We agree.

Analysis

We must initially note that Defendants' appeal is interlocutory. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments. It is, however, well established that an order denying a motion to compel arbitration [affects a substantial right and] is immediately appealable." *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16, 734 S.E.2d 870, 871 (2012) (citations and quotation marks omitted). Therefore, Defendants' appeal is properly before us.

> The standard governing our review of this case is that findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if ... there is evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. Because unconscionability is a question of law, this Court will review *de novo* the trial court's conclusion that the arbitration agreement contained in plaintiffs' loan agreements is unconscionable.

Tillman v. Commercial Credit Loans, Inc., 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (citations and quotation marks omitted).

[1] Defendants contend that the trial court erred in concluding that the Arbitration Rider was unconscionable pursuant to N.C. Gen. Stat. § 22B-10. We agree.

Section 22B-10 states:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

N.C. Gen. Stat. § 22B-10 (2017). Section 22B-10 cannot be read as equating contracts *with* an arbitration clause to those contracts *that do not contain* an arbitration clause. The language of this section could not be clearer: the proscription against contractual waivers of jury trials "*does not prohibit* parties from entering into agreements to arbitrate or

engage in other forms of alternative dispute resolution." N.C. Gen. Stat. § 22B-10 (emphasis added).

Moreover, "North Carolina has a strong public policy favoring arbitration of disputes between parties. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Miller v. Two State Constr. Co.*, 118 N.C. App. 412, 416, 455 S.E.2d 678, 680-81 (1995) (citations and quotation marks omitted). "Once an agreement to arbitrate is found, courts should compel arbitration on a party's motion and then step back and take a hands-off attitude during the arbitration proceeding." *Id.* at 415, 455 S.E.2d at 680 (citation and quotation marks omitted).

"An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury," and "there is no constitutional impediment to arbitration agreements." *Id.* at 416-17, 455 S.E.2d at 681. In *Miller v. Two State Construction Company*, this Court held that "the trial court erred in concluding that because the arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under North Carolina General Statutes § 22B-10, and in violation of Article I §§ 18 and 25 of the North Carolina Constitution." *Miller*, 118 N.C. App. at 416, 455 S.E.2d at 681.

Thus, Section 22B-10 expressly permits parties to enter into arbitration agreements. "Arbitration may be defined as a method for the settlement of disputes and differences between two or more parties, whereby such disputes are submitted to the decision of one or more persons specially nominated for the purpose, either instead of having recourse to an action at law, or, by order of the Court, after such action has been commenced." *Arbitration*, Black's Law Dictionary (10th ed. 2014) (quoting John P.H. Soper, *A Treatise on the Law and Practice of Arbitrations and Awards* 1 (David M. Lawrence ed., 5th ed. 1935)). Further, this Court has stated that arbitration is "a process to privately adjudicate a final and binding settlement of disputed matters quickly and efficiently, without the costs and delays inherent in litigation." *Canadian Am. Ass'n of Prof'l Baseball, Ltd. v. Ottawa Rapidz*, 213 N.C. App. 15, 18, 711 S.E.2d 834, 837 (2011) (citation and quotation marks omitted). Therefore, arbitration necessarily settles disputed matters without a jury trial.

Here, the Notice Provision simply explains that by agreeing to arbitration, any disputes would be settled without a jury. Such contractual provisions which define or explain arbitration do not run afoul of Section 22B-10, and including an explanation of what a party forfeits when it agrees to arbitrate any disputes in an arbitration agreement does not

render the arbitration agreement unenforceable. Accordingly, the trial court erred when it concluded that the Arbitration Rider was unconscionable pursuant to Section 22B-10.

Even if Section 22B-10 could be read as allowing arbitration clauses, yet precluding waivers of jury trials, here, the Arbitration Rider is still enforceable pursuant to the Federal Arbitration Act.

"[S]tate law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements." *Park v. Merrill Lynch*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 378 (2003). However, "[i]f the parties affirmatively chose the FAA to govern an agreement to arbitrate, then the FAA will apply to that agreement." *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 350, 780 S.E.2d 920, 924 (2015) (citation omitted) (determining that the FAA applied to any disputes arising from the parties' arbitration agreement after noting the trial court should have addressed this issue).[1] The FAA is "enforceable in both state and federal courts," *Park*, 159 N.C. App. at 122, 582 S.E.2d at 377, and "the FAA preempts conflicting state law, including any state statutes that render arbitration agreements unenforceable." *Sillins v. Ness*, 164 N.C. App. 755, 757, 596 S.E.2d 874, 876 (2004). More specifically, "[t]he FAA only preempts state rules of contract formation which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements ... with conditions on (their) formation and execution ... which are not part of the generally applicable contract law." *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378 (citations and quotation marks omitted).

> [T]he United States Supreme Court has issued two important opinions on the use of state law to set aside an arbitration agreement when that agreement is governed by the FAA: *AT&T Mobility v. Concepcion*, ___ U.S. ___, 179 L. Ed. 2d 742 (2011) (determining that the FAA preempted California's judicial rule prohibiting class waivers in consumer arbitration agreements contained within contracts of adhesion) and *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 186 L. Ed. 2d 417 (2013) (holding that the FAA does not permit courts to invalidate an arbitration agreement on the grounds that it does not permit class arbitration).

King v. Bryant, 369 N.C. 451, 459-60, 795 S.E.2d 340, 346, *cert. denied*, 138 S. Ct. 314, 199 L. Ed. 2d 233 (2017) (citation and quotation marks omitted).

---

1. On appeal, Plaintiffs do not dispute the applicability of the FAA.

Our Supreme Court then emphasized that, "[w]hile both *Concepcion* and *Italian Colors* dealt with class action waivers, *underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated*." *Id.* at 460, 795 S.E.2d at 346 (quoting *Torrence v. Nationwide Budget Finance*, 232 N.C. App. 306, 321, 753 S.E.2d 802, 811 (2014)) (emphasis added).

As stated above, Section 22B-10 does not burden the formation of contracts with arbitration clauses. However, even if we presume *arguendo* that it does, the contract dictates that FAA governs review of the Arbitration Rider. Because the FAA preempts state statutes that render arbitration agreements unenforceable, Section 22B-10 cannot be interpreted or used to set aside the parties' Arbitration Rider, and the trial court erred when it purported to interpret Section 22B-10 to render the Arbitration Rider unconscionable.

[2] In addition, the trial court's Order Denying Arbitration concluded that, even if the Arbitration Rider was enforceable, Defendants had waived their right to compel arbitration by utilizing the "litigation machinery," which in turn, prejudiced Plaintiffs. On appeal, Defendants argue these conclusions are erroneous. We agree.

As stated above, "state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements." *Park*, 159 N.C. App. at 122, 582 S.E.2d at 378. "Since the right to arbitration arises from contract, it may be waived in certain instances." *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 244 N.C. App. 330, 340, 780 S.E.2d 588, 595 (2015) (citation omitted).

> Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.
>
> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of

> delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 229-30, 321 S.E.2d 872, 876-77 (1984) (citations omitted).

"[T]he mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law[.]" *Id.* at 232, 321 S.E.2d at 878. Also, "[r]esponding to discovery requests promulgated by an opposing party—or . . . failing to respond to discovery requests—does not constitute making use of discovery not available in arbitration." *Herbert v. Marcaccio*, 213 N.C. App. 563, 568, 713 S.E.2d 531, 535 (2011). In addition, "inconveniences and expenses consistent with normal trial preparation" will not be considered detrimental spending. *Smith v. Young Moving & Storage, Inc.*, 141 N.C. App. 469, 473, 540 S.E.2d 383, 386 (2000) (citations and quotation marks omitted).

Moreover, "when considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration." *Herbert*, 213 N.C. App. at 568, 713 S.E.2d at 536. When the trial court fails to make findings indicating whether any legal fees incurred resulted from delay in demanding arbitration or whether they were incurred prior to a demand for arbitration, a trial court cannot conclude the party opposing arbitration was prejudiced by having expended significant expenses in litigation costs. *McCrary ex rel. McCrary v. Byrd*, 148 N.C. App. 630, 639-40, 559 S.E.2d 821, 827 (2002) (emphasizing that expenses incurred in pursuit of claims in a separate action cannot be calculated to support a finding of significant expense).

Here, the trial court made the following findings regarding Defendants' actions and conduct inconsistent with arbitration:

> A. The filing of multiple pleadings with this Court, including the Answer and requests for extensions of certain deadlines and continuances of the Trial, which neglected to raise any right to demand arbitration relief under the Arbitration Rider or otherwise requesting—at any point between service of the Complaint on July 21, 2017, through March 15, 2018—to compel arbitration of the claims for relief in the Complaint;

B. The commencement and continued prosecution of the Foreclosure Proceeding, seeking to foreclose on its purported interest, lien and encumbrance in the Property, which involved the same legal and factual issues as those affirmative claims asserted by Plaintiffs in the Complaint;

C. Agreeing to, and participating in, the Mediation, which was recessed and not declared an impasse by the Mediator;

D. Engaging in certain actions and pursuing a litigation strategy, in the above-captioned civil action, which resulted in Plaintiffs expending additional attorneys' fees, expenses, and costs associated with litigating the matter before this Court; and

E. Preparing and serving on Plaintiffs, through their counsel, the Ocwen Written Discovery Responses, which included production of thousands of pages of documents, materials, and items in connection therewith.

Although Defendants did file an answer in response to Plaintiffs' complaint, "the mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law[.]" *Cyclone Roofing Co.*, 312 N.C. at 232, 321 S.E.2d at 878. Moreover, Plaintiffs, not Defendants, initiated discovery when Plaintiffs filed their First Set of Interrogatories and Requests for Production of Documents on September 27, 2017. Because "[r]esponding to discovery requests promulgated by an opposing party . . . does not constitute making use of discovery not available in arbitration," *Herbert*, 213 N.C. App. at 568, 713 S.E.2d at 535, Defendants' responses cannot be considered making use of the litigation machinery. Furthermore, after moving for arbitration, "subsequent participation in mediation, absent a specific waiver of arbitration, is not 'inconsistent with arbitration' and does not constitute an implied waiver of arbitration." *O'Neal Constr., Inc. v. Leonard S. Gibbs Grading, Inc.*, 121 N.C. App. 577, 580-81, 468 S.E.2d 248, 250 (1996) (citation omitted). Because Defendants did not delay in moving for arbitration or act inconsistently with arbitration, the trial court erred in determining that Defendants had waived their right to arbitration under this factor.

The trial court also made the following findings regarding how Plaintiffs were prejudiced by its expenditure of $40,164.51 and 112 hours of legal services:

> 6. The delay by Defendants in electing to exercising *(sic)* their purported rights to demand arbitration under the Arbitration Rider, in addition to the foregoing inconsistent actions and steps that they undertook, were prejudicial to Plaintiffs, as they were required to expend significant time, resources, and expenses in prosecuting and litigating this action following the filing of the Complaint with this Court on July 17, 2017, which is the time at which Defendants' purported right to arbitration, under the Arbitration Rider, accrued.
>
> 7. All of the costs and expenses that Plaintiffs have incurred, including the substantial attorneys' fees and expenses reflected in the Attorney's Affidavit, totaling $40,164.51, were attributable solely to the positions taken by Defendants, were for naught if this action were to be abruptly sent to arbitration after engaging in pretrial discovery in this multi-proceeding litigation.

The Attorney's Affidavit indicated that a substantial amount of time and effort had been expended in "preparing the requisite pleadings, and attending the hearings held by the Court, preparation of written discovery and reviewing responses and any responsive documentation produced in connection therewith, both in the above-captioned civil action, and the related special proceeding." The Attorney's Affidavit further noted that "through May 3, 2018, Plaintiffs have incurred actual attorneys' fees, expenses, and costs in the amount of $40,164.51, relating to the preparation, filing, and prosecution of the above-captioned civil action, and defense of the special proceeding filed by Defendants, seeking to exercise the power of sale provision in the Deed of Trust."

Although the Affidavit indicates that 112 hours of legal services and $40,164.51 had been expended, the Affidavit does not distinguish how much time or expense was actually expended on filing suit and pursuing *this proceeding* as opposed to the special proceeding. The special proceeding was not only excluded from arbitration as stated in the Arbitration Rider, but it was also filed prior to July 17, 2017. Thus, any time or expense spent on that proceeding are immaterial to our determination of prejudice in this proceeding. *McCrary*, 148 N.C. App. at 639-40, 559 S.E.2d at 827. Because it is unclear how much money Plaintiffs have expended in legal fees prior to and after Defendants' demand for arbitration, the trial court erred in concluding Plaintiffs were prejudiced by having expended $40,164.51 in litigation costs.

Thus, the trial court also erred when it concluded that Defendants had waived their contractual right to compel arbitration by acting inconsistently with arbitration, and that as a result, Plaintiffs had been prejudiced. Accordingly, we reverse and remand the trial court's Order Denying Arbitration.

Conclusion

The trial court erred in concluding that the Arbitration Rider was unconscionable. The trial court also erred when it concluded in the alternative, that Defendants had waived their right to compel arbitration through their course of conduct, which in turn, prejudiced Plaintiffs. Therefore, we reverse and remand for entry of an order directing the parties to submit to arbitration consistent with the terms of the Arbitration Rider and the FAA.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2019)

DAY v. AM. AIRLINES No. 18-1125	N.C. Industrial Commission (16-021415)	Affirmed
HARR v. WRAL-5 NEWS No. 19-88	Wake (18CVS6382)	Affirmed
IN RE I.G.A. No. 18-1179	Henderson (17JA212) (17JA213)	Affirmed in part; Vacated in part and Remanded.
IN RE J.H.B. No. 18-1030	Ashe (17JA5)	Affirmed
IN RE L.B. No. 18-815	Polk (15JT22) (15JT23)	Affirmed
IN RE M.F. No. 18-1064	Mecklenburg (16JT290-291)	Affirmed
IN RE N.J.M. No. 18-1154	Craven (18JB23A)	Reversed and Remanded
LUKE v. WOODLAWN SCH. No. 18-1109	Iredell (17CVS3116)	Affirmed in part, Dismissed in part
MARTINSON v. MECKLENBURG CTY. DEP'T OF SOC. SERVS. No. 18-1313	Mecklenburg (18JRI10) (18JRI11)	Affirmed
McLAMB v. TOWN OF SMITHFIELD No. 18-1235	Johnston (17CVS3879)	Affirmed in part; reversed in part and remanded in part.
MECUM AUCTION, INC. v. McKNIGHT No. 18-1208	Mecklenburg (18CVS13202)	Affirmed
N.C. STATE BAR v. WECKWORTH No. 18-866	N.C. State Bar (16DHC22)	Affirmed in part; Reversed in part; and Remanded.
PANGEA CAPITAL MGMT., LLC v. LAKIAN No. 18-956	Macon (17CVS121)	Affirmed

STATE v. BENSON No. 18-732	Person (15CRS52053)	No Error
STATE v. CSEH No. 18-1288	Cherokee (16CRS50067) (16CRS50070-71)	No Error
STATE v. FORNEY No. 18-418	Mecklenburg (10CRS232870) (15CRS25910)	No Error
STATE v. HARRIS No. 18-910	Mecklenburg (16CRS20916) (16CRS217718-22) (16CRS217727-29) (16CRS217731-33) (16CRS217736)	No Error
STATE v. HOSKINS No. 18-1181	Mecklenburg (15CRS231863) (15CRS231865) (15CRS231868-74) (15CRS231879-81) (16CRS1677)	No Error
STATE v. McMAHAN No. 18-672	Buncombe (15CRS5521) (15CRS93241)	Vacated
STATE v. QUEEN No. 18-819	Gaston (16CRS63218) (17CRS2071) (17CRS2073)	No error in part; Reversed in part.
STATE v. STURDIVANT No. 18-1004	Guilford (88CRS52529-30)	New Trial

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ESTATES—Continued

inherited the property in fee simple absolute. The timber company's contract with the life tenant to cut the timber (which the life tenant had no right to cut and sell) did not excuse the company from liability. However, the company was not liable for double damages pursuant to N.C.G.S. § 1-539.1 since it was not a trespasser. **Jackson v. Don Johnson Forestry, Inc., 20.**

Life tenancy—timber harvesting—remaindermen—standing—A testator's grandchildren—to whom a tract of land passed in fee simple absolute upon the death of the testator's last living child, who had a life estate—had standing to sue for damages for the unauthorized cutting of timber during the preceding life tenancy. **Jackson v. Don Johnson Forestry, Inc., 20.**

Life tenancy—timber harvesting—third-party liability—indemnity—The estates of a life tenant and her husband were liable to indemnify a timber company for damages caused by unauthorized timber cutting where the husband acted as the life tenant's agent to contract for the timber cutting. **Jackson v. Don Johnson Forestry, Inc., 20.**

EVIDENCE

Authentication—copy of birth certificate—prima facie showing—A copy of a victim's Honduran birth certificate was properly authenticated for admission into evidence where nothing indicated that the document was forged or inauthentic, the school social worker testified that the school would not have made a copy of the birth certificate unless it had the original, and the police detective testified that the school's incident report identified the victim's birth date by the same day, month, and year as the birth certificate copy. **State v. DeJesus, 279.**

Character—assault—implication in prior narcotics activity—Rule 404(b)—In a prosecution for assault with a deadly weapon, an officer's testimony that he had previously encountered defendant in connection with a narcotics case—to explain how he could identify defendant—constituted error to the extent the reference to narcotics did not add to the reliability of the officer's identification of defendant. However, any error did not rise to the level of plain error where defendant was caught on a surveillance video as the perpetrator of the shooting. **State v. Thompson, 576.**

Character—assault—witness intimidation—Rule 404(b)—In a prosecution for assault with a deadly weapon, no plain error occurred from a detective's testimony suggesting defendant intimidated the victim because the testimony was relevant as an explanation for why the victim did not identify his shooter or participate in the trial. **State v. Thompson, 576.**

Evidence of gang membership—harmless error—At a trial for multiple crimes arising from a store robbery, the admission of testimony regarding defendant's gang affiliation was harmless where—even if the testimony had been inadmissible under Rules of Evidence 401 and 403—defendant failed to show a reasonable possibility of acquittal if the testimony had been excluded because there was overwhelming evidence of his guilt, including a co-conspirator's testimony and surveillance footage indicating defendant's participation in the robbery. **State v. Allen, 480.**

Expert opinion—forensic pathologist—inference from blood loss—Rule 702—reliability—In a murder prosecution, the trial court properly exercised its discretion in allowing opinion testimony from two forensic pathologists who stated that the amount of blood found in defendant's house was consistent with blood loss

ZONING—Continued

Permits—ordinance change—permit choice statute—timing of application's completion—An application for a permit to operate an asphalt plant was sufficiently complete prior to a temporary moratorium on the issuance of certain permit approvals to trigger the Permit Choice statute, N.C.G.S. § 153A-321.1. The county accepted and deposited the application fee after the application was submitted, and the remaining requirement to submit the state-issued air quality permit did not prevent the submission from triggering the Permit Choice statute. **Ashe Cty. v. Ashe Cty. Planning Bd., 384.**

Permits—permit choice statute—moratorium—new ordinance—An application for a permit to operate an asphalt plant, which was submitted before a temporary moratorium on the issuance on certain types of permits, was subject to the Permit Choice statute (N.C.G.S. § 153A-320.1) even though the county replaced the former permit ordinance with a new one when it lifted the moratorium. **Ashe Cty. v. Ashe Cty. Planning Bd., 384.**