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CASES

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COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BETHESDA ROAD PARTNERS, LLC, PLAINTIFF
v.
STEPHEN M. STRACHAN AND WIFE, DEBORA L. STRACHAN, DEFENDANTS

STEPHEN M. STRACHAN AND DEBORA L. STRACHAN, THIRD-PARTY PLAINTIFFS
v.
GEORGE C. MCKEE, JR. AND WIFE, ADRIANNE S. MCKEE, THIRD-PARTY DEFENDANTS

No. COA18-1170

Filed 20 August 2019

1. Assignments—validity—guaranty contract—individual guarantor-turned-purchaser—exceptions inapplicable

Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, the purchase constituted a valid assignment and not an extinguishment of debt—there was no evidence that the parties intended for the debt to be discharged, or that the assignment was prohibited by statute, public policy, or any other exception existing under contract law.

2. Appeal and Error—preservation of issues—breach of guaranty agreement—piercing the corporate veil—not pleaded in complaint

In a dispute between a guarantor and the purchaser of a promissory note, the guarantor's argument that the third-party entity which purchased the note was a mere instrumentality of another individual guarantor was not preserved for appellate review where it was not pleaded in the complaint.

3. Guaranty—breach—purchase of note—discharge of liability—mere instrumentality

In a dispute between a guarantor and the third-party entity (set up by a second guarantor) that purchased a promissory note, the second guarantor was not precluded from bringing breach of contract claims against his co-guarantors through the entity, because the first guarantor's argument that the purchase was actually a discharge of debt—based on the claim that the entity was a mere instrumentality of the second guarantor—had no merit.

4. Fiduciary Relationship—breach of duty—limited liability company—member manager—no duty to fellow members

Where one member from a group of individual guarantors of a promissory note (all members of a limited liability company (LLC)) formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of breach of fiduciary duty against the guarantor who set up the purchasing entity (who was also the sole member manager of the LLC) could not succeed since any fiduciary duty owed was to the limited liability company and not to the other members.

5. Fraud—constructive—elements—fiduciary duty and breach

Where one member from a group of individual guarantors of a promissory note formed a third-party entity to purchase the note from the lender after default, a co-guarantor's claim of constructive fraud against the guarantor who set up the purchasing entity failed where the co-guarantor could not demonstrate that he was owed a fiduciary duty or that any duty was breached.

6. Parties—motion to join—undue delay—trial court's discretion to grant

In a dispute between a guarantor and a third-party entity set up by a second guarantor for the purpose of purchasing a promissory note, the trial court did not abuse its discretion in denying a motion to join as a party the limited liability company in which both guarantors were members, where the motion was filed years after counterclaims were asserted and more than a month after an order of summary judgment disposed of the case.

7. Damages and Remedies—limitation of recovery—half the price of note purchased—not face value—abuse of discretion

In a dispute between a guarantor and the purchaser of a promissory note, the trial court abused its discretion in limiting damages

by the entity to half of the price paid to purchase the note, rather than the note's face value, since the purchase of the note was a valid assignment under contract law and not a discharge of any debt.

8. Damages and Remedies—doctrine of equitable contribution—valid assignment of guaranty—remedy at law available

In a dispute between a guarantor and the purchaser of a promissory note, the trial court erred in applying the doctrine of equitable contribution to reduce the guarantor's liability by half—where the purchase of the note was a valid assignment under contract law and an adequate remedy at law was available, there was no need to adopt an equitable remedy.

9. Equity—defenses—waiver—equitable remedy not available—mootness

In a dispute between a guarantor and the purchaser of a promissory note, where the remedy of equitable contribution was not available, the purchaser's argument on appeal that the guarantor had not waived defenses based on that remedy was dismissed as moot.

Appeal by plaintiff and third-party defendant, Bethesda Road Partners, LLC, from Judgment entered 26 February 2018, and by defendant and third-party plaintiff Stephen M. Strachan from Order entered 6 June 2017 and Order and Judgment entered 26 February 2018, by Judge John O. Craig, III, in Iredell County Superior Court. Heard in the Court of Appeals 5 June 2019.

Carruthers & Roth, P.A., by J. Patrick Haywood and Rachel Scott Decker, for plaintiff and third-party defendants.

Moore & Van Allen PLLC, by Nathan A. White and Mark A. Nebrig, for defendants and third-party plaintiffs.

YOUNG, Judge.

This appeal arises from a dispute between a guarantor of a promissory note and a third party entity, formed by another guarantor, which purchased the note. The trial court did not err in granting the note holder's Motions for Summary Judgment on its breach of guaranty claims against the guarantor where there were no issues of material fact. The guarantor did not preserve a piercing the corporate veil argument, and thus, we dismiss that argument. The trial court did not err in denying the guarantor's Motion to Join a limited liability company whose debt

was secured by his guaranty. The trial court did err in holding that the note holder was only entitled to recover half of the price of the guaranteed note. The trial court did err in applying the Doctrine of Equitable Contribution. Since Equitable Contribution is not an available remedy, we dismiss the argument that the defense was waived. We therefore affirm in part, reverse in part, dismiss in part and remand.

I. Factual and Procedural History

On 31 July 2007, George C. McKee, Jr. ("McKee"), Stephen M. Strachan ("Strachan"), William Allen ("Allen"), and Timothy Bruin ("Bruin") created ABMS Development, LLC ("ABMS") as a real estate venture. McKee was the sole member manager of ABMS, controlled all the books and records, and made all strategic decisions for ABMS. On 28 February 2008, ABMS executed a promissory note ("Note") to CommunityOne Bank ("C1 Bank") as a part of a project. C1 Bank required each ABMS member and his spouse to execute personal guaranties. The project failed, the Note matured, and ABMS defaulted on its obligations.

An attorney for ABMS ("ABMS Attorney") entered into negotiations with C1 Bank on a resolution. The bank said it would not sell the Note to any ABMS members/co-guarantors. ABMS Attorney communicated to C1 Bank that "a different buyer" may be interested in the purchase. ABMS Attorney told bank that "[t]he buyer is not ABMS and the potential investor LLC owners are different than the owners of ABMS." ABMS Attorney confirmed that ABMS and the guarantors would still be liable on the Note.

McKee, the sole member manager of ABMS, formed Bethesda for the sole purpose of purchasing the Note. At the time of purchase, Adrianne S. McKee, McKee's wife ("Mrs. McKee"), was the sole member manager of Bethesda, so it did not appear to have a direct connection to ABMS. However, shortly after closing, McKee was added as a member manager. While Bethesda held the Note, McKee, as managing member of ABMS, made no effort to pay down the debt.

In July 2014, Bethesda then commenced an action against Strachan, Allen, Bruin, and their spouses ("Defendants"), seeking damages under the Note for breach of guaranty agreements. In September 2014, Defendants denied the allegations and asserted claims against Bethesda and the McKees alleging violations of the Equal Credit Opportunity Act ("ECOA"), breach of fiduciary duty, constructive fraud, and violation of Chapter 75 of the North Carolina General Statutes. Bethesda and the McKees, as third-party defendants, denied those allegations and asserted claims against Strachan for breach of contract and unjust enrichment.

Allen, Bruin, and their spouses reached a settlement with Bethesda and were voluntarily dismissed with prejudice. Strachan and Appellees filed cross-motions for summary judgment. The trial court entered an order of summary judgment on 6 June 2017 in favor of Bethesda. In August 2017, Strachan filed a Motion to Join ABMS as a party, which the trial court denied. The trial court entered a final judgment on 26 February 2018. Strachan gave timely notice of appeal on 27 March 2018. Appellees timely cross-appealed on 2 April 2018. Both appeals are now before this Court.

II. Summary Judgment

A. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

B. Analysis

a. Liability Discharged

[1] In his first argument, Strachan contends that the trial court erred in granting summary judgment in favor of Bethesda. We disagree.

The North Carolina Supreme Court has stated that

> rights under a special guaranty–that is, a guaranty addressed to a specific entity–are assignable unless: assignment is prohibited by statute, public policy, or the terms of the guaranty; assignment would materially alter the guarantor's risks, burdens, or duties; or the guarantor executed the contract because of personal confidence in the obligee. This rule is consistent with the common law of contracts, accommodates modern business practices, and fulfills the intent of the parties to ordinary business agreements.

Self-Help Ventures Fund v. Custom Finish, LLC, 199 N.C. App. 743, 749, 682 S.E.2d 746, 750 (2009) (quoting *Kraft Foodservice, Inc. v. Hardee*, 340 N.C. 344, 348, 457 S.E.2d 596, 598-99 (1995)).

In *Self-Help Ventures Fund*, a lender made a loan which was guaranteed by the guarantors. The note and guaranties were assigned to a government agency, which in turn assigned the note to the creditor,

although the agency did not execute a separate reassignment of the guaranties. When the debtor defaulted on the note, the creditor sued the guarantors and obtained entry of default. The guarantors moved to set aside the default, but this Court held that the defendants did not provide legal support for the contention that the guaranties did not follow the note. The defendants asserted that the guaranties were not assigned, but did not provide evidence showing that the guaranties would "(1) violate a statute, public policy, or the terms of the Guaranties; (2) materially alter defendants' risks, burdens, or duties; or (3) violate personal confidence defendants placed in the obligee." *Id.* In *Self-Help*, this Court also held that upon the note's assignment to the plaintiff, the defendants "unconditionally guaranteed payment to plaintiff, whereupon plaintiff became a party in interest, as set forth in Rule 17(a) of the North Carolina Rules of Civil Procedure." *Id.* at 750, 682 S.E.2d at 751; N.C.R. Civ. P. 17.

Similarly, in *Gillespie*, this Court held that guaranty contracts may be assigned to a guarantor. *Gillespie v. De Witt*, 53 N.C. App. 252, 262, 280 S.E.2d 736, 743 (1981). A plaintiff guarantor took assignment of a note and guaranty from the bank assignor by providing plaintiff's own note in the full amount of the debt. *Id.* at 262, 280 S.E.2d at 743-44. This Court further held that in light of the written agreement, the plaintiff and the bank intended an assignment, not an extinguishment of debt. *Id.* If the parties had intended an extinguishment of debt, this Court reasoned, the parties would have cancelled or destroyed the documents. *Id.* at 262-63.

Here, McKee was a guarantor of the Note between ABMS and C1 Bank. Bethesda, a separate entity, purchased the Note from C1 Bank. At the time of purchase the guaranties were not cancelled or destroyed, nor was there any other evidence of intent to discharge the debt. There was also no evidence that the assignment would have been prevented by any of the exceptions provided in *Self-Help*. Therefore, this was a valid assignment based in contract law. The trial court did not err in granting summary judgment in favor of Bethesda.

b. Mere Instrumentality

[2] In his next argument, Strachan contends that the trial court erred in failing to conclude that the undisputed facts demonstrated Bethesda was a mere instrumentality of McKee, and therefore, the trial court failed to hold that McKee was the actual "purchaser" of a liability that caused him to be both creditor and debtor. We disagree.

To preserve an issue for appellate review, a party must present to the trial court a timely request, objection, or motion, stating the specific

grounds for the ruling the party desired the court to make, and the complaining party must obtain a ruling upon the party's request, objection, or motion. N.C.R. App. P. 10(a)(1). A party cannot raise on appeal issues which were not pleaded or raised below. *Whichard v. Oliver*, 56 N.C. App. 219, 224, 287 S.E.2d 461, 463 (1982).

Strachan failed to plead a piercing the corporate veil claim in his complaint. The trial court granted summary judgment in favor of Bethesda, regarding the issue of liability for breach of contract months before Strachan began arguing about piercing the corporate veil. There was no motion, objection, or ruling on a piercing the corporate veil defense. As such, this issue was not preserved for appeal. We decline to address this unpreserved issue and dismiss this argument.

c. Liability Discharged and Mere Instrumentality

[3] Furthermore, Strachan contends that the trial court erred in failing to conclude that upon McKee's attempted "purchase" of a liability where he was both creditor and debtor was, by law, not a purchase, but a discharge of the liability, and thereby precluded McKee from bringing breach of contract claims against his co-guarantors through his mere instrumentality. We disagree.

These arguments mirror those raised in Strachan's first two arguments. The trial court did not err in failing to conclude the purchase was a discharge. In *Gillespie*, the purchase of the note was an assignment, not a discharge of the debt, since there was no evidence preventing an assignment nor were any documents cancelled or destroyed to show intent of a discharge. And again, we decline to entertain Strachan's piercing the corporate veil or "mere instrumentality" argument, because Strachan failed to preserve that issue.

d. Breach of Fiduciary Duty

[4] Next, Strachan contends that the trial court erred in granting McKee's Motion for Summary Judgment on Strachan's breach of fiduciary duty claim. We disagree.

A member-manager of a limited liability company owes no fiduciary duty to the other members; rather, the fiduciary duty is owed to the company. *Kaplan v. O.K. Technologies, LLC*, 196 N.C. App. 469, 474, 675 S.E. 2d 133, 137 (2009). Therefore, individual members cannot maintain a claim of breach of fiduciary duty against the manager. *Id.*

Here, McKee and Strachan were both members of ABMS and McKee was the member manager. Any fiduciary duty that McKee owed would

be to ABMS rather than Strachan. Accordingly, Strachan cannot assert the existence of a fiduciary duty against McKee. Therefore, the trial court did not err in granting McKee's Motion for Summary Judgment on Strachan's breach of fiduciary duty claim. *Id.*

e. Constructive Fraud

[5] Next, Strachan contends the trial court erred in granting McKee's Motion for Summary Judgment on Strachan's constructive fraud claim. We disagree.

The elements for constructive fraud are: (1) a relationship of trust and confidence exists between the parties; (2) the relationship led up to and surrounded the consummation of the transaction in which defendant took advantage of its position; and (3) defendant sought to benefit from the transaction. *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 502, 764 S.E.2d 603 (2014). Further, to establish constructive fraud the plaintiff must show the existence of a fiduciary duty and a breach of that duty. *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 406, 653 S.E.2d 181, 186 (2007), *rev. denied*, 362 N.C. 361, 663 S.E.2d 316 (2008).

As we held above, there was no fiduciary duty, and therefore, such duty could not have been breached. As a result, the trial court did not err in granting McKee's Motion for Summary Judgment on Strachan's constructive fraud claim.

III. Motion to Join

A. Standard of Review

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

[6] Lastly, Strachan contends the trial court erred in denying his motion to join ABMS in the action. We disagree.

N.C. Gen. Stat. § 26-12 provides that "the law allows permissive or discretionary joinder." *High Point Bank & Trust Co.*, 368 N.C. 301, 308, 776 S.E.2d 838, 844 (2015). "[W]hen any surety is sued by the holder of the obligation, the court, on motion of the surety may join the principal

as an additional party defendant." *Id.* Strachan waited to file this motion years after asserting his counterclaims and more than a month after the trial court had entered summary judgment against him on the breach of contract claim, disposing of the case. The trial court found that joining ABMS would cause a delay in the entry of judgment against Strachan which was not necessary. The trial court has discretion to manage its dockets and deny a motion for joinder brought after undue delay. *United Leasing Corp. v. Miller*, 60 N.C. App. 40, 43, 298 S.E.2d 409, 411 (1982). As a result, the trial court did not abuse its discretion in denying the motion to join ABMS.

IV. Damages

A. Standard of Review

"The trial court's award of damages . . . is a matter within its sound discretion, and will not be disturbed on appeal absent abuse of discretion." *Helms v. Schultze*, 161 N.C. App. 404, 414, 588 S.E.2d 524, 530 (2003). "In order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of competent inquiry." *Id.*

B. Analysis

a. Recovery Amount

[7] On cross-appeal, McKee contends that the trial court erred in holding McKee was limited to recovering half of the price he paid to purchase the Note, instead of the face value of the Note. We agree.

In *Gillespie*, this Court affirmed the trial court's ruling that the defendant was liable to the plaintiff for the face value of the note in light of the assignment. *Gillespie*, 53 N.C. App. at 269, 280 S.E.2d at 747; *see also Yates v. Brown*, 275 N.C. 634, 641, 170 S.E.2d 477, 482 (1969) (holding that to refuse to allow plaintiff to recover the face value of the note is contrary to North Carolina law and that purchase of a note at a discount does not preclude recovery of the face value of the note); *Pickett v. Fulford*, 211 N.C. 160, 164, 189 S.E. 488, 490 (1937) (upholding as valid assignment of note and deed of trust, even where note and deed of trust acquired after maturity and for face value of the note).

Here, C1 Bank assigned the Note to Bethesda via a Note Sale and Assignment Agreement, which made it clear that the transaction was an absolute assignment rather than a discharge. Since Bethesda received an assignment, it is entitled to recover the full value of the Note from Strachan.

b. Equitable Contribution

[8] McKee further contends that the trial court erred in applying the Doctrine of Equitable Contribution to reduce Strachan's liability by half. We agree.

"The rights of the obligee to a guaranty contract may be assigned under the principles of general contract law." *Gillespie*, 53 N.C. App. at 262, 280 S.E.2d at 743. "Where no adequate remedy at law exists, a contract is enforceable through [equitable remedies]." *Condellone v. Condellone*, 129 N.C. App. 675, 681-82, 501 S.E.2d 690, 695 (1998).

Here, this Court has held that the C1 Note was assigned to Bethesda, and that the assignment was controlled by contract law. Consequently, an equitable remedy, such as equitable contribution, would be inappropriate since there is an adequate remedy at law. Therefore, we hold that the trial court erred in applying the Doctrine of Equitable Contribution to reduce Strachan's liability.

V. Waiver Defenses

A. Analysis

[9] Next on cross-appeal, McKee contends that the trial court erred in holding that Strachan had not waived defenses such as equitable contribution. Because we have held that equitable contribution is not an available remedy in this case, the waiver of equitable contribution as a defense is moot. Therefore, we dismiss this argument.

AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED.

Judges TYSON and INMAN concur.

IN RE J.D.

[267 N.C. App. 11 (2019)]

IN THE MATTER OF J.D.

No. COA18-1036

Filed 20 August 2019

1. Sexual Offenses—sexual exploitation of a minor—acting in concert—sufficiency of evidence—juvenile delinquency

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—there was insufficient evidence to convict defendant of second-degree sexual exploitation of a minor. Although the State argued that defendant and his cousin were acting in concert regarding the filming of the incident, the video showed defendant did not want to be filmed and explicitly asked his cousin to stop recording him. Moreover, there was no evidence that defendant was the one who distributed the video.

2. Sexual Offenses—forcible sexual offense—"sexual act"—sufficiency of evidence—juvenile delinquency

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, his cousin filmed the event, and the video was posted on social media—the trial court erred by denying defendant's motion to dismiss a charge of first-degree forcible sexual offense where the State presented insufficient evidence that defendant engaged in a "sexual act," as defined by N.C.G.S. § 14-27.20(4), with the victim. Specifically, the State could not prove that anal intercourse occurred where the victim testified that there was no penetration during the incident.

3. Juveniles—delinquency—admission of guilt—factual basis—sufficiency

In a juvenile delinquency case, the trial court erred by accepting defendant's admission of guilt to attempted larceny where it failed to find a sufficient factual basis to support the admission, as required by N.C.G.S. § 7B-2407(c), since the State failed to present evidence that defendant intended to steal someone else's bicycle or assist others in stealing it.

4. Juveniles—delinquency—right to confrontation—statutory mandate—prejudice

In a juvenile delinquency case—where defendant forcibly placed his private parts on the minor victim's bare buttocks during a sleepover, one of his cousins filmed the event, and the video was posted on social media—the trial court violated the statutory mandate in N.C.G.S. § 7B-2405 to protect defendant's constitutional right to confront witnesses by admitting his two cousins' out-of-court statements. Where the remaining evidence at trial—including the victim's testimony—indicated that no anal penetration took place that night, admission of the cousins' statements prejudiced defendant because his cousins said they thought he and the victim did have anal sex.

5. Juveniles—delinquency—disposition—higher level imposed—findings of fact—absent

Where the trial court adjudicated defendant a delinquent juvenile for committing two sexual offenses, the court erred by entering a level 3 disposition against him and committing him to a youth detention center where a court counselor recommended a level 2 disposition based on a report showing, among other things, that defendant's risk factors for engaging in future sexually harmful behaviors were in the "low to low moderate" range. The trial court failed to enter written findings explaining why it ignored the counselor's recommendations, nor did the court enter adequate findings required by N.C.G.S. § 7B-2501(c) to support a level 3 disposition.

6. Juveniles—delinquency—disposition—indefinite commitment to youth detention center—compelling reasons

At the disposition phase of a juvenile delinquency case, the trial court erred by indefinitely committing defendant to a youth detention center without entering written findings stating "compelling reasons" for the confinement, as required by N.C.G.S. § 7B-2605. Although some of the court's findings listed reasons supporting its disposition, the court phrased those reasons as contentions made by defense counsel and the State rather than as ultimate facts.

Judge DILLON dissenting.

Appeal by defendant from orders entered 13 November 2017 and 23 January 2018 by Judge Tabatha P. Holliday in Guilford County District Court. Heard in the Court of Appeals 13 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stephanie A. Brennan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ARROWOOD, Judge.

Defendant J.D. ("Jeremy[1]") appeals from an order finding him delinquent for the offenses of first-degree forcible sexual offense and second-degree sexual exploitation of a minor. For the following reasons, we reverse.

I. Background

This case arises from sexual misconduct by Jeremy towards a friend who was attending a sleepover at his house. The evidence tended to show as follows: On 18 November 2016, Jeremy hosted a sleepover for a friend, Zane. Two of Jeremy's cousins, Carl and Dan, also attended. All four boys were of middle-school age. During the night, Zane awoke to find his pants pulled down and Jeremy behind him. He believed someone was holding down his legs. Zane testified that he "felt [Jeremy's] privates on [his] butt" but that he did not feel them "go into [his] butt." Dan filmed much of the incident. In the video Jeremy can be heard saying "[Dan], do not record this." The video eventually ended up on Facebook.

A juvenile petition was filed against Jeremy based on the incident. A hearing on the matter was held in November 2017. Among the evidence presented were statements to the police from Dan and Carl, neither of whom testified at trial. Jeremy's motions to dismiss at the close of the State's evidence and at the close of all evidence were denied. Following the hearing, the trial court entered a written order adjudicating Jeremy delinquent based on the determination that Jeremy had committed first-degree forcible sexual offense for the assault and second-degree exploitation of a minor for his role in the recording of the assault.

The court, however, continued disposition until Jeremy could be assessed by the Children's Hope Alliance (CHA). The CHA report made numerous findings about Jeremy, including that his risk factors for

1. Pursuant to Rule 42 of the North Carolina Rules of Appellate Procedure, a pseudonym is used to protect the anonymity of each juvenile discussed in this case. N.C.R. App. P. 42 (2019).

sexually harmful behaviors were in the low to low moderate range. The court counselor recommended a level 2 disposition

Before the disposition hearing began, Jeremy admitted to an attempted larceny of a bicycle. On 23 January 2018, after considering Jeremy's assessments and his admission to larceny, the trial court entered an order punishing Jeremy at level 3 and committing him to a Youth Detention Center (YDC) indefinitely. Jeremy appealed and requested his release pending disposition of the appeal. A hearing was held on 20 February 2018 on the question of his release. The trial court entered an order concluding Jeremy would remain in YDC.

II. Discussion

Defendant argues the trial court erred by: (1) denying his motion to dismiss the second-degree sexual exploitation of a minor charge, (2) denying his motion to dismiss the first-degree forcible sexual offense charge, (3) accepting his admission to attempted larceny when there was an insufficient factual basis, (4) violating the statutory mandate to protect his confrontation right, and (5) failing to include findings and conclusions that a level 3 disposition was appropriate in the disposition order and committing him to YDC pending the outcome of the appeal without finding compelling reasons for the confinement. We address each of these issues in turn.

1. Second-Degree Sexual Exploitation of a Minor

[1] The trial court found defendant guilty of second-degree sexual exploitation of a minor. We find that the trial court erred in denying the motion to dismiss because the evidence was insufficient to support this charge as a matter of law.

Whether the trial court erred in denying a motion to dismiss is reviewed *de novo*. *In re A.N.C.*, 225 N.C. App. 315, 324, 750 S.E.2d 835, 841 (2013). In order to prevail on a motion to dismiss in a juvenile matter, the State must offer "substantial evidence of each of the material elements of the offense alleged." *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992). Taking the evidence in the light most favorable to the State, as we are required to do, *In re A.W.*, 209 N.C. App 596, 599, 706 S.E.2d 305, 307 (2011), evidence must be "sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986) (citation omitted).

Second-degree sexual exploitation of a minor requires evidence that *the defendant knowingly "film[ed]" or "[d]istribut[ed] . . . material* that contains a visual representation of a minor engaged in sexual

activity." N.C. Gen. Stat. § 14-190.17 (2017) (emphasis added). "[T]he common thread running through the conduct statutorily defined as second-degree sexual offense [is] that *the defendant [took] an active role in the production or distribution of child pornography* without directly facilitating the involvement of the child victim in the activities depicted in the material in question." *State v. Fletcher*, 370 N.C. 313, 321, 807 S.E.2d 528, 535 (2017) (emphasis added).

The State argues that the trial court properly concluded that Jeremy and Dan were acting in concert in regards to the filming of the incident and relies on *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), which found that:

> [i]t is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 357, 255 S.E.2d at 395.

The State contends the evidence shows that the boys' common plan or purpose was to humiliate the victim. There is nothing in the record to support this. In fact, from the evidence, it is clear that Jeremy does not want to be filmed, as he explicitly tells Dan to stop recording. Although he was in the video, Jeremy was being filmed against his will. "Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent." *State v. Holloway*, 250 N.C. App. 674, 685, 793 S.E.2d 766, 774 (2016) (citation omitted), *writ denied*, *discretionary review denied*, 369 N.C. 571, 798 S.E.2d 525 (2017). Furthermore, there was no evidence presented that Jeremy wished for this video to be made or that he was the one who distributed it.

Because there was no evidence that Jeremy took an active role in the production or distribution of the video, the trial court erred in denying Jeremy's motion to dismiss the charge of second-degree sexual exploitation of a minor. Jeremy's adjudication for this charge should be vacated.

2. First-Degree Forcible Sexual Offense

[2] In order to meet its burden to convict a defendant of first-degree sexual offense the State must show that defendant (1) "engage[d] in a sexual act with another person by force and against the will of the other

person," and (2) the existence of at least one of three additional factors. *See* N.C. Gen. Stat. § 14-27.26 (2017). Because the evidence is not sufficient to show that Jeremy engaged in a "sexual act" with Zane, we need not reach the additional factors.

A "sexual act" is defined as "[c]unnilingus, fellatio, analingus, or anal intercourse[.]" In order to have a sexual act there must be "penetration, however slight by any object into the genital or anal opening of another person's body." N.C. Gen. Stat. § 14-27.20(4) (2017). On the other hand, "sexual contact" is defined as the (i) "[t]ouching the sexual organ, anus, breast, groin, or buttocks of any person," (ii) "[a] person touching another person with their own sexual organ, anus, breast, groin, or buttocks . . ." N.C. Gen. Stat §14-27.20(5) (2017).

At trial, Zane denied that anal intercourse occurred. Zane testified that he only "felt [defendant's] privates on [his] butt" but, when asked if he felt defendant's privates go into his butt, however slightly, he responded "[n]ot that I know of." Furthermore, the prosecutor admitted at trial that, "there was not evidence of penetration."

This Court has found that a totality of the evidence, including substantial evidence of penetration, along with the victim's ambiguous statement that penetration may have occurred, is sufficient for a finding that penetration did occur. *See State v. Sprouse*, 217 N.C. App. 230, 237, 719 S.E.2d 234, 240 (2011); *State v. Estes*, 99 N.C. App. 312, 316, 393 S.E.2d 158, 160 (1990). However, in the instant case, the victim's statement is not ambiguous. Zane specifically states in his testimony that penetration did not occur. Thus, the State has failed to prove penetration, the central element of this crime.

To support its contention that intercourse occurred, the State relies upon the video taken by Dan. This video shows no more than two boys engaged in "sexual contact" not a "sexual act." While it may have been sufficient to have shown that defendant engaged in sexual contact by force against the will of Zane, which is sexual battery in violation of N.C. Gen. Stat. §14-27.33 (2017), it does not show a sexual act necessary to prove forcible sexual assault.

Given Zane's testimony that no sexual penetration occurred, this case is similar to *State v. Hicks*, 319 N.C. 84, 90, 352 S.E.2d 424, 427 (1987) where our Supreme Court reversed a sexual offense conviction, given the ambiguity of the victim's testimony as to whether anal intercourse had occurred. The dissent chooses to ignore Zane's denial of penetration and argues that, when taking the evidence in the light most favorable to the State, the trial court did not err. The fatal flaw in

the dissent's argument is that circumstantial evidence cannot be used to overcome a victim's direct testimony that no penetration occurred.

Because there was not substantial evidence for anal intercourse, even when looking at the evidence in the light most favorable to the State, the trial court erred in denying defendant's motion to dismiss the charge of first-degree sexual offense.

3. Attempted Larceny Admission

[3] The trial court found that there was a sufficient factual basis to support defendant's admission to attempted larceny. We disagree.

The trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, and this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011). This court has found that if the State fails to provide information in compliance with N.C. Gen. Stat. § 7B-2407(c) then the juvenile's admission of guilt must be vacated. *In re D.C.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. *See State v. Weaver*, 123 N.C. App. 276, 287 473 S.E.2d 362, 369 (1996) (setting forth the elements of attempted larceny).

The facts presented at trial do not support Jeremy's admission of guilt. The bicycle was stolen by two black males. Jeremy, a black male himself, was later found by officers biking down the road with two others who also matched the description. He was described by the prosecutor as "kind of off on his own" from the other two. When asked to stop by the officers, of the three, only Jeremy stopped. Jeremy told officers that he had not stolen the bicycle, that he knew who had, and admitted to having bolt cutters in his back pack.

There was not a showing of the requisite intent that defendant intended to steal, or assist others in stealing, the bicycle. Defendant's counsel argued that defendant loaned someone his book bag, who then placed bolt cutters inside it and left to "do their deed." The State presented no evidence, except to mention that "I believe the property was recovered." It is unclear where or from whom the bicycle was recovered.

Because the State failed to present sufficient evidence that defendant attempted to steal the bicycle, the trial court erred in accepting Jeremy's admission of attempted larceny. The adjudication for attempted larceny should be vacated.

4. Defendant's Right of Confrontation

[4] In addition to the video of the incident and testimony from Jeremy and Zane, the State offered out-of-court statements from Dan and Carl, statements which tended to support the charges against Jeremy. These statements are part of the circumstantial evidence which the dissent relies upon to try to overcome the victim's testimony that no penetration occurred. Jeremy argues that these statements were admitted in violation of his constitutional right to confront and cross-examine witnesses.[2] We agree and conclude that the error was prejudicial.

Errors affecting constitutional rights are presumed to be prejudicial and warrant a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Knight*, 245 N.C. App. 532, 548, 785 S.E.2d 324, 336 (2016) (citation omitted), *aff'd as modified*, 369 N.C. 640, 799 S.E.2d 603 (2017).

The State argues that the evidence was overwhelming where there was a videotape of the assault and testimony from the victim and defendant. However, the evidence presented at trial was not overwhelming. Zane denied that any penetration occurred and the video evidence was, at most, ambiguous. In order to attempt to overcome Zane's testimony, the State referenced Dan and Carl's statements numerous times in its closing argument (e.g., "all [Dan] know[s] about the video is that they was doing it;" "[Dan] showed a clear understanding of what he was seeing. He says, sex. He's asked, do you know what sex is? And he explains it, basically male penetrate another person, basically"). Even though Dan and Carl both stated they thought Zane and Jeremy were having sex, they also both stated that Zane consented, that it was Zane's idea, and that he pulled his own pants down. It cannot be said that this additional

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2. The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial. It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation and emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing, and has been considered a "statutory mandate." *Matter of J.B.*, 261 N.C. App. 371, 373, 820 S.E.2d 369, 371 (2018) (citations omitted). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

evidence that penetration occurred was not prejudicial to defendant's defense. Therefore, the State has failed to prove this testimony was harmless beyond a reasonable doubt.

5. Sentencing Errors

Although we find that the judgment must be reversed because of the errors set forth above, and therefore the disposition vacated, we feel it is also important to address the errors made by the trial court during the sentencing phase of the case.

i. Level 3 Disposition

[5] While the State argues that the trial court sufficiently found each of the five statutorily required factors from N.C. Gen. Stat. § 7B-2501(c) to support a level 3 disposition, we find that there are not adequate written reasons in the Disposition and Commitment Order to support its findings.

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

(1) The seriousness of the offense;
(2) The need to hold the juvenile accountable;
(3) The importance of protecting the public safety;
(4) The degree of culpability indicated by the circumstances of the particular case; and
(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c) (2017). "[A] trial court must consider each of the factors in Section 7B-2501(c) when entering a dispositional order." *Matter of I.W.P.*, 259 N.C. App. 254, 264, 815 S.E.2d 696, 704 (2018). Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516, 750 S.E.2d 548, 551 (2013) (citations omitted).

CHA found that Jeremy's risk factors for sexually harmful behaviors are in the low to low moderate range. Jeremy's evaluation from the court counselor indicated that he "is a low/moderate risk for reoffending." The counselor recommended a level 2 disposition. The recommended terms of level 2 include, but are not limited to: cooperating with the TASK program and group therapy, having a curfew, not participating in sleepovers, having electronic devices monitored, not being used as a babysitter, maintaining passing grades at school, and not having contact

with the victim. These suggested terms would have effectively satisfied the requirements of N.C. Gen. Stat. § 7B-2501(c).

The trial court found that the "[j]uvenile requires personal accountability for his actions [and] . . . requires more structure." It is unclear how the trial court reaches this conclusion as to why defendant must be committed at the YDC as his own home can provide him accountability and structure. The report from CHA indicated that defendant had a stable home life. The report further notes that defendant's family relationships are "noted to be 'close' and supportive" and that there was no reported history of Department of Social Services (DSS) visits or experiences with physical or sexual abuse.

The trial court also found that defendant's "level of regulation in the short term is low." CHA had Jeremy complete the Adolescent Self-Regulatory Inventory (ASRI), which indicated he had "some level" of self-regulation, "some level" of short-term self-regulation and a "moderate level" of long-term self-regulation. The lowest score for short-term self-regulation is 13, the middle score is 39, and 65 is the highest score. Jeremy scored a 36, which is much closer to the middle score than the lowest score. The trial court did not indicate why any potential issues with Jeremy's self-regulation could only be corrected by sending defendant to YDC instead of the recommended counseling sessions.

The trial court further found that "[j]uveniles [sic] YDC commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior." However, the order also noted that if there is not sex-specific individual or group therapy available at the YDC then he will complete it during his post-release supervision period. Having access to this therapy is essential towards the goal of N.C. Gen. Stat. § 7B-2501(c) to protect the public *and* meet the needs and best interests of defendant. It would be more appropriate to ensure that defendant received this counseling now, as opposed to when he is released from YDC.

This Court has stated it:

> cannot overemphasize the importance of the intake counselor's evaluation in cases involving juveniles alleged to be delinquent or undisciplined. The role of an intake counselor is to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action.

In re Register, 84 N.C. App. 336, 346, 352 S.E.2d 889, 894-95 (1987).

Furthermore, while the State attempts to reconcile the order's findings with the requirements of N.C. Gen. Stat. § 7B-2501(c), the trial court should have adequately explained its own reasoning.

> Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

Here, when taking into account the evaluations by the court counselor and CHA, the trial court failed to effectively explain its decision to ignore their evaluations and instead commit defendant to YDC, and it fails to further explain how its findings satisfied all of the factors required by N.C. Gen. Stat. § 7B-2501(c).

ii. Confinement Pending the Outcome of this Appeal[3]

[6] The State contends that the trial court did not err because it stated compelling reasons for its denial. However, the trial court did not state its own reasons for its denial and instead referenced reasons given by defense counsel and the State.

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. *For compelling reasons*

3. The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 116-17, 334 S.E.2d 779, 782-83 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot") (quoting *In re Lineberry*, 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249 (citation omitted)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

> *which must be stated in writing*, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (emphasis added).

The Appellate Entries form filed on 22 February 2018 did not list anything under "[c]ompelling reasons release is denied." The court then issued a separate order with Findings of Fact and Conclusions of Law about the matter on 19 March 2018. In pertinent part, the Findings of Fact are:

> 2. That the defense Attorney, Marcus Jackson, contends that the juvenile may be served by being home and under house arrest along with other conditions pending appeal.
>
> 3. That the State has raised issues of lack of structure in the home and continued delinquent behavior after being charged with a B1 felony. That the juvenile has been provided treatment as a result of the adjudication and the Youth Development Center program.

"The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations and internal quotation marks omitted) (finding that "stating a single evidentiary fact and adopting DSS and guardian *ad litem* reports" are not "specific ultimate facts").

In the instant case, there were no compelling reasons stated on the Appellate Entries form. There were supporting reasons among the Findings of Facts on the subsequent order, but they were phrased as contentions of defense counsel and the State. The trial court did not list independent compelling reasons on either the Appellate Entries form or the order, thus violating the provisions of N.C. Gen. Stat. § 7B-2605, and, as such, the trial court erred by committing defendant to YDC pending the outcome of this appeal. In this case, where we have reversed the determination of delinquency, it is especially disturbing that the trial court ignored the requirements of the statute thus causing the juvenile to be held in detention for a period of 17 months when his convictions were improper.

III. Conclusion

For all the foregoing reasons, we reverse this case and remand this matter to the district court.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

This appeal is from an order by the trial court adjudicating Jeremy delinquent based on the trial court's finding that Jeremy committed first-degree forcible sexual offense and second-degree sexual exploitation of a minor.

The evidence before the trial court was conflicting. To be sure, there was strong evidence suggesting that Jeremy did not commit these offenses. However, in a juvenile delinquency proceeding, it is the trial court judge – and not the judges on our Court – who resolves any conflicts in the evidence. I conclude that the evidence was sufficient to support the trial court's findings and its ultimate order. My vote, therefore, is to affirm the order of the trial court.

I. Summary of Evidence

A delinquency petition was filed against Jeremy, based on a sexual encounter he had with another boy, Zane, during a sleepover. Two of Jeremy's cousins, Carl and Dan, also attended the sleepover. Dan recorded a portion of the sexual encounter on a cellphone, a recording which was subsequently uploaded to the internet.

Based on the evidence presented during the adjudication phase, the trial court essentially found that Jeremy penetrated Zane's anal opening with his penis, at least slightly; with some degree of force and against Zane's will; while being aided and abetted by Carl and/or Dan; and that he participated in the recording and/or distribution of the video.

Most of the arguments on appeal concern whether there was sufficient evidence that Jeremy committed the offenses. A summary of the evidence is as follows:

A. The Video

The State offered Dan's cellphone recording into evidence. The video lasts less than a minute. For the entire recording, Jeremy and Zane are seen with their pants down; Zane is slumped over a piece of furniture; Jeremy is behind Zane; the front of Jeremy's pelvic area (including his penis) is pressed against Zane's buttocks; and Jeremy is engaged in a constant thrusting motion into Zane's buttocks.

In the video, Jeremy is seen turning his face towards Dan's cellphone and stating, "[Dan], don't record this." Dan responds in a joking voice that he is not recording, to which Jeremy states, "Yeah, right," in a sarcastic tone suggesting that he knows that Dan is recording. In any event, it appears that the cellphone was being held up by Dan where Jeremy could see it.

Jeremy then turns his head back towards the back of Zane's head. He continues his thrusting motion and begins to pull at the back of Zane's head and hair. Zane, whose eyes are open the entire time and who has otherwise been rather quiet and passive while Jeremy is thrusting, begins to show and express discomfort.

At the end of the video, Jeremy turns his face back towards Dan and the cellphone and gives a "thumbs up" gesture, as he continues his thrusting motion. The video then ends.

B. Zane's Testimony

Zane testified at the hearing as follows:

He was asleep. He awoke to discover himself on his knees slumped over a piece of furniture, his pants were down, and Jeremy was thrusting into his bare buttocks. He felt someone else holding down the bottom of his legs, restraining his movements. He could feel Jeremy's penis in his buttocks but did not believe that Jeremy's penis penetrated his anal opening. Once he fully realized what was happening to him, he struggled and was able to push Jeremy off of him. Shortly thereafter, he, Jeremy, and the other boys went to sleep. He reported the incident sometime later after the video had been uploaded to the internet.

C. Jeremy's Pre-trial Statement

Jeremy gave a statement during the investigation of the matter. He stated that the entire encounter was consensual. He described the encounter as "intercourse." He stated that he had a partial erection and that he could feel his penis pressing against Zane's anal opening as he

was thrusting, but did not believe that his penis actually penetrated Zane's anus.

D. Dan and Carl's Pre-trial Statements

Dan and Carl were each interviewed by investigators prior to the hearing. Their recorded interviews were offered into evidence by the State without objection.

Both testified that Zane had consented to the sexual encounter, that it was Zane's idea, and that Zane pulled his own pants down. Both stated that they were uncomfortable about what was happening. Dan stated he began recording the encounter because he thought Jeremy and Zane were just joking around. Carl stated that he stood off in the corner because he felt uncomfortable. Both stated that they thought Jeremy and Zane were having "sex." Dan stated that he understood that "sex" included "penetration." However, neither witness stated that he was actually able to see exactly where Jeremy's penis was in relation to Zane's anal opening.

Both described that they all went to sleep after the encounter.

II. Analysis

Jeremy makes a number of arguments on appeal contesting the trial court's order. I address each in turn.

A. Sufficiency of the Evidence

Jeremy argues, and the majority agrees, that there was insufficient evidence that he engaged in the criminal conduct alleged in the petition.

In determining whether there was sufficient evidence, our Court must view the evidence "*in the light most favorable to the State.*" *In re Eller*, 331 N.C. 714, 717, 417 S.E.2d 479, 481 (1992) (emphasis added). There was certainly conflicting evidence. But viewing the evidence in the light most favorable to the State, I conclude that there was sufficient evidence from which the trial court judge could find that Jeremy committed these offenses, as explained below.

1. First-Degree Forcible Sexual Offense

To prove first-degree forcible sexual offense, the State must prove (a) that the defendant "engage[d] in a sexual act with another person," (b) "by force and against the will of the other person," and (c) that there existed at least one of three certain aggravating factors. N.C. Gen. Stat. § 14-27.26 (2015).

a. Evidence of a Sexual Act

The petition in this case alleges that Jeremy committed "anal intercourse[]", which is a "sexual act" defined in Section 14-27.20(4) of our General Statutes. N.C. Gen. Stat. § 14-27.20(4) (2015) (defining "[s]exual act" as including "anal intercourse").

Jeremy argues, and the majority agrees, that there was insufficient evidence that Jeremy's penis actually penetrated Zane's anal opening. Indeed, "[a]nal intercourse requires *penetration* of the anal opening of the victim by the [defendant's] penis[.]" *State v. DeLeonardo*, 315 N.C. 762, 764, 340 S.E.2d 350, 353 (1986) (emphasis added). However, the State need not prove that total penetration occurred; penetration can be very slight to satisfy this element. *Id.*; N.C. Gen. Stat. § 14-27.36 (2015) ("Penetration, however slight, is . . . anal intercourse.")[1] .

There was certainly some evidence that penetration did not occur. For instance, Zane himself testified that he did not believe that Jeremy penetrated him. However, Zane also stated that he was not fully awake during much of the assault.

In any event, there was other evidence from which a fact-finder could find that slight penetration did occur, namely the cellphone video itself and Jeremy's own statement.

Regarding the cellphone video, it admittedly does not offer *direct* evidence of penetration, as the exact position of Jeremy's penis is obscured by his pelvis pressed against Zane's buttocks. The video, though, does constitute sufficient *circumstantial* evidence of penetration. Specifically, it shows the position and proximity of Jeremy to Zane and his constant thrusting motion towards Zane's anus. Our Supreme Court has held that penetration can be proven by *circumstantial* evidence alone. *See, e.g.*, *State v. Robinson*, 310 N.C. 530, 534, 313 S.E.2d 571, 574 (1984) (holding that penetration in a rape prosecution can be proven either by direct testimony "or by circumstantial evidence"); *State v. Santiago*, 148 N.C. App. 62, 70, 557 S.E.2d 601, 607 (2001) (holding that "circumstantial evidence may be utilized" to prove penetration). Indeed, it is axiomatic in jurisdictions across our country that "[e]vidence of the condition, position, and proximity of the parties as testified to by eyewitnesses may afford sufficient [circumstantial] evidence of penetration" even where a view of the genitals is obscured. 81 C.J.S. Sodomy § 11,

1. This section was previously codified at N.C. Gen. Stat. § 14-27.10. Recodified as cited effective 1 December 2015, after the events of this case transpired.

note 42 (1977).[2] Accordingly, the video itself was sufficient for the trial court to make a finding that penetration occurred.[3]

Jeremy's own statement, itself, is evidence of penetration: he admitted that he had a semi-erect penis; that his penis was pressing against Zane's anus; that he was thrusting; and he described the encounter as "intercourse." A fact-finder could infer from this statement that at least the tip of Jeremy's penis slightly penetrated Zane's anal opening, though his entire penis may not have penetrated.

The trial court weighed what it saw in the video and Jeremy's statements against the evidence suggesting that penetration did not occur, and the trial court found that at least slight penetration did occur. I see no error here. It is not our role to reweigh the evidence and make a different finding.[4]

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2. *See Taylor v. State*, 374 P.2d 786, 788-89 (Okla. Crim. App. 1962) (sustaining verdict based on circumstantial evidence of eyewitness, recognizing that "it has been held in several jurisdictions that the condition, position and proximity of defendants, as testified to by eyewitnesses, afford sufficient evidence of penetration . . . since it is very seldom that penetration can be observed in cases involving sex offenses"), *citing Commonwealth v. Bowes*, 74 A.2d 795 (Pa. Super. Ct. 1950), *and State v. Crayton*, 116 N.W. 597 (Iowa 1908). *See also Holmes v. State*, 20 So.3d 681, 683 (Miss. Ct. App. 2008) (holding that testimony of eyewitness who found the defendant in a compromising position with a minor, though not seeing the actual position of the defendant's genitals, was sufficient to prove penetration, stating "[w]hile penetration must be proved beyond a reasonable doubt, it need not be proved in any particular form of words, and circumstantial evidence may suffice"); *State v. Golden*, 430 A.2d 433, 435-37 (R.I. 1981) (concluding that testimony of police officer that the defendant was naked on top of victim was sufficient to prove penetration); *Marshall v. State*, 223 S.W.3d 74, 78 (Ark. Ct. App. 2006); *Knowlton v. State*, 382 N.E.2d 1004, 1008-09 (Ind. Ct. App. 1978) (holding that eyewitness testimony that the defendant had assumed a position appropriate for a sexual act with another, that the defendant was close enough to the other person to be touching, that the defendant's pants were unzipped, and that his penis was erect was sufficient circumstantial evidence to prove penetration); *Ryan v. Commonwealth*, 247 S.E.2d 698, 702 (Va. 1978) (holding that "evidence of condition, position, and proximity of the parties . . . may afford sufficient evidence of penetration"); *State v. Pratt*, 116 A.2d 924, 925 (Me. 1955) (holding that "the fact of penetration may be proved by circumstantial evidence as by the position of the parties and the like").

3. Our Supreme Court did hold that the circumstantial evidence in *Robinson* was *not* sufficient to establish penetration. However, in that case, no witness actually saw the defendant and the victim in a sexual position, but rather they were discovered unclothed after the assault. Accordingly, the Court ruled that this circumstantial evidence was sufficient to establish something "disgusting and degrading" was occurring, but not sufficient to establish that actual penetration of the victim's vagina by the defendant's penis had occurred. *Robinson*, 310 N.C. at 534, 313 S.E.2d at 574.

4. This case is different from cases like *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), where it was held that evidence of penetration was insufficient where the victim denied or was ambiguous as to whether penetration actually occurred. Specifically, in *Hicks*, there was *no* other evidence, direct or circumstantial, which *supported* a finding of

b. Evidence of Force and Lack of Consent

There was evidence that Zane had not given his consent to Jeremy's actions and that Jeremy used some degree of force. Specifically, Zane testified at the hearing that the video did not depict the entire assault and that he was asleep when the assault started. He testified that he fully awoke to Jeremy pulling on his hair while thrusting his bare pelvis into Zane's bare buttocks. Zane testified that he felt someone holding his legs down as the assault was occurring. Zane testified that he pushed Jeremy off of him soon after the recording stopped. There is nothing in the video itself which suggests *conclusively* that Zane was, in fact, participating willingly. And there is some evidence in the video that he was being subdued by Jeremy, as Jeremy is seen pulling on Zane's hair.

Admittedly, there was strong evidence that Zane was a willing participant. For instance, Jeremy, Carl, and Dan all stated during the investigation that the incident was Zane's idea and that Zane and Jeremy each pulled their own pants down.

But, again, factual discrepancies were for the trial court, and not our Court, to resolve. Therefore, I conclude that there was sufficient evidence to support that Jeremy acted with force and against Zane's will. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) ("Contradictions and discrepancies are for the [factfinder] to resolve and do not warrant dismissal.").

c. Evidence that Jeremy was Aided and Abetted

The petition alleges that Jeremy committed the sexual act while "aided and abetted by one or more other persons[,]" which is an aggravating factor enumerated in Section 14-27.26(a)(3). N.C. Gen. Stat. § 14-27.26(a)(3) (2015). The trial court so found; and for the following reasons, I conclude that there was sufficient evidence to support this finding.

Aiding and abetting has been described by our Supreme Court as follows:

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penetration which could be weighed by the finder of fact against the victim's exculpatory statement. *Id.* at 90, 352 S.E.2d at 427. *Hicks* and similar cases do *not* stand for the proposition that a victim's denial of actual penetration is conclusive if there is other evidence which supports a finding of penetration. Indeed, there are many reasons why a victim might not want to admit that he was actually penetrated. Of course, where the victim has denied actual penetration and where there is no evidence to the contrary, it is inappropriate for the fact-finder to speculate. But where there *is* evidence of penetration, the fact-finder, the trial court in the present case, is free to disbelieve the victim.

> A person aids when being present at the time and place he does some act to render aid to the actual perpetrator of the crime, though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages another to commit a crime.

State v. Holland, 234 N.C. 354, 358, 67 S.E.2d 272, 274-75 (1951). An individual's *mere presence* during the commission of a crime, though, does not typically constitute aiding and abetting. *State v. Hoffman*, 199 N.C. 328, 333, 154 S.E. 314, 316 (1930). However, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

When viewed in the light most favorable to the State, the evidence supports an inference that Jeremy was aided and abetted by his cousin Dan. Specifically, the video depicts them in conversation which could be inferred as joking about the recording being made. Further, towards the end of the video, Jeremy gives Dan a "thumbs up" signal. A fact-finder could certainly infer from their tone and actions that Dan and Jeremy were joking with each other during the assault and that Dan was not simply a passive bystander, but rather a source of encouragement.

Further, there was some evidence, though admittedly weak, from which one could infer that Carl aided Jeremy's assault. Specifically, Zane testified that he felt his legs being held down by someone that he believed was not Jeremy during Jeremy's assault, testimony which would support a finding that Carl was holding Zane down while Jeremy was engaged in the sexual assault.

2. Sexual Exploitation of a Minor

Sexual exploitation of a minor requires evidence that Jeremy "record[ed]" or "distribut[ed] . . . material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. § 14-190.17 (2017).

It is undisputed that Jeremy did not *personally* record the incident, and there is no direct evidence that Jeremy participated in the publishing of the recording. But again, the evidence *in the light most favorable to the State* supports an inference that Jeremy *acted in concert* with Dan to record the incident.

Under the acting in concert doctrine, an individual need not personally commit any portion of an alleged crime as long as he is (1) "present at the scene of the crime[,]" and (2) "acts [] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Our Supreme Court has held that a common plan or purpose may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook*, 279 N.C. 18, 42, 181 S.E.2d 572, 586 (1971). "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975).

Here, Jeremy was indisputably present. Though Jeremy is heard telling Dan not to video the incident, a fact-finder could certainly infer from Jeremy's tone and the position of the cellphone that Jeremy knew that he was being recorded and was in approval of the recording. Jeremy's "thumbs up" gesture at the end of the recording can reasonably imply knowledge and approval and that he was working with Dan to get a recording of the assault. Certainly other inferences could be made from the evidence, but the resolution of conflicting inferences is for the trial court to sort out.

B. Right of Confrontation

The State offered into evidence the recordings of interviews of Carl and Dan, Jeremy's cousins, by investigators. Jeremy did not object. Indeed, much of their testimony benefited Jeremy as they described the entire encounter as consensual. However, Jeremy argues that portions of their statements were harmful to him and that admission of these statements was in violation of his constitutional right to confront and cross-examine witnesses against him. Specifically, Jeremy contends that Carl and Dan provided some testimonial evidence that actual penetration by Jeremy's penis of Zane's anal opening occurred.

The State contends that this issue is not properly before us on appeal, as Jeremy failed to object to the entry of Dan and Carl's statements at trial.

It is true that "[t]he constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive expressly or by a failure to assert it in apt time even in a capital case." *Braswell*, 312 N.C. at 558, 324 S.E.2d at 246 (emphasis removed).

However, Section 7B-2405 of our General Statutes provides that our courts are to protect the rights of a juvenile defendant during a delinquency hearing and has been considered a "statutory mandate." *Matter of J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018); N.C. Gen. Stat. § 7B-2405 (2015). "The plain language of N.C. Gen. Stat. § 7B-2405 places an affirmative duty on the trial court to protect the rights delineated therein during a juvenile delinquency adjudication." *In re J.R.V.*, 212 N.C. App. 205, 210, 710 S.E.2d 411, 414 (2011). And, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Therefore, this issue is properly before this Court.

Section 15A-1443 provides that when a preserved issue is based on a statute, it is the defendant's burden on appeal to show that there is a reasonable possibility that, but for the error, a different result would have occurred. N.C. Gen. Stat. § 15A-1443(a) (2015). However, where the preserved issue is based on a constitutional right, the burden is on the State to show that the error was not harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

Of course, some errors may be based on both a constitutional right and a statutory right. And it could be argued that the error Jeremy complains of is technically statutory in nature, and, therefore, Jeremy is only entitled to "reasonable possibility" review. That is, Jeremy has waived his constitutional argument by not objecting; and, therefore, it is only Jeremy's statutory right under Section 7B-2405 that is preserved for appellate review.

But our jurisprudence compels us to review violations of the statutory right under Section 7B-2405 with "harmless beyond a reasonable doubt" review, which is otherwise reserved only for *preserved* constitutional errors. *See In re J.B.*, ___ N.C. App. ___, ___, 820 S.E.2d 369, 371 (2018) (holding that "failure to follow the statutory mandate when conducting an adjudication hearing constitutes reversible error unless proven to be harmless beyond a reasonable doubt").

But even based on the "harmless beyond a reasonable doubt" standard, I conclude that the inclusion of Dan and Carl's statements which suggested that penetration occurred does not justify a new hearing. Indeed, neither boy described in any detail that they saw Jeremy's penis actually penetrate Zane's anus. Dan stated that he thought Jeremy and Zane were just joking around. Carl stated that he stood away from the

action in the corner. Rather, I am convinced that the trial court made its finding regarding penetration based on the video itself, which provided no better view than the view Dan and Carl had, and based on Jeremy's own admission that he could feel his penis press against Zane's anal opening while he was thrusting, something that Carl and Dan could not see from their vantage points.

C. Attempted Larceny Admission

Sometime after the adjudication but before the disposition hearing, Jeremy allegedly stole a bicycle. At the disposition hearing, Jeremy admitted to attempting the theft, as he was caught with bolt cutters next to a bicycle. The trial court used Jeremy's admission to the attempted larceny to support its ultimate disposition.

Jeremy argues, and the majority agrees, that there was an insufficient factual basis to support the admission, and therefore the trial court should not have accepted Jeremy's admission. I disagree.

To be sure, the trial court must determine that there is a sufficient factual basis for a juvenile's admission of guilt before accepting the admission, though this factual basis may be based on statements presented by the attorneys. N.C. Gen. Stat. § 7B-2407(c) (2017); *In re C.L.*, 217 N.C. App. 109, 114, 719 S.E.2d 132, 135 (2011).

Attempted larceny requires proof that the defendant took affirmative steps, but did not succeed, to take another's property with no intent to return it. *See State v. Weaver*, 123 N.C. App. 276, 287, 473 S.E.2d 362, 369 (1996) (reciting elements of attempted larceny).

In this matter, the trial court heard a recitation of facts from the State regarding Jeremy's attempted theft of the bicycle before accepting Jeremy's admission of guilt. The recitation showed that two young males stole a bicycle using bolt cutters. Jeremy was later found by police in the company of two young males matching the description of the thieves. Jeremy admitted to knowing about the theft *and was found to be in possession of the bolt cutters which were used to facilitate the larceny*. The stolen bicycle was ultimately recovered.

I conclude that this recitation is sufficient to show that Jeremy directly participated, or at least acted in concert, in the commission of the attempted theft of the bicycle. Indeed, Jeremy's attorney and his parents each stated that Jeremy was present when the bicycle was stolen and was found in actual possession of the bolt cutters. *See State v. Agnew*, 361 N.C. 333, 336, 643 S.E.2d 581, 583 (2007) ("The [] sources

listed in [N.C. Gen. Stat. § 15A-1022(c)] are not exclusive, and therefore the trial judge may consider any information properly brought to his attention."); *In re Mecklenburg Cty.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008) (acknowledging the parallels between N.C. Gen. Stat. §§ 7B-2407 and 15A-1022).

D. Level 3 Order

Jeremy next makes essentially three arguments with respect to his Level 3 disposition. I address each in turn.

1. Sufficiency of the Findings

First, Jeremy contends that the trial court failed to make required findings of fact as to each of the factors listed in Section 7B-2501 of our General Statutes. Whether the trial court properly complied with its statutory duty to make findings is a question of law to be reviewed *de novo*. *See In re G.C.*, 230 N.C. App. 511, 516-17, 750 S.E.2d 548, 551 (2013).

Under Section 7B-2501, the trial court is required to make findings of fact as to a number of enumerated factors regarding the best interests of the delinquent child and the protection of the public, as follows:

> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;
>
> (3) The importance of protecting the public safety;
>
> (4) The degree of culpability indicated by the circumstances of the particular case; and
>
> (5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501 (2017). Further, "[t]he dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (2017). The trial court need not expressly track each of the factors enumerated in Section 7B-2501; rather, it need only enter "appropriate" findings. *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

Here, the trial court checked form boxes indicating that the juvenile's delinquency history level was "low," and that it considered a number of reports and assessments submitted by the parties. It then added the following findings of fact in a space labeled "Other Findings:"

> Juvenile was adjudicated on a B1 felony.
>
> Juvenile's level of regulation in the short term is low.

> Juvenile continued to engage in delinquent behavior despite this pending charge (see admission to attempted larceny, date of offense 4/7/17).
>
> Juvenile requires personal accountability for his actions.
>
> Juvenile requires more structure.
>
> Juveniles [sic] [Youth Detention Center] commitment and treatment will protect the public and provide juvenile the opportunity to mature regarding opportunistic and impulsive behavior.

Jeremy cites a number of cases to show that the brevity of the trial court's findings reflects a lack of appropriate consideration for each of the required factors. *See Matter of I.W.P.*, ___ N.C. App. ___, ___, 815 S.E.2d 696, 704 (2018) (remanding for further findings where the trial court considered only three of the five factors in Section 7B-2501); *In re V.M.*, 211 N.C. App. 389, 392, 712 S.E.2d 213, 216 (2011) (reversing and remanding where the trial court's order contained insufficient findings of fact). But these cases are distinguishable from the case before us. For instance, in *In re V.M.*, the trial court checked boxes indicating receipt of the parties' documents and stated that "[t]he juvenile has been adjudicated for a violent or serious offense and Level [3] is authorized by G.S. 7B-2508," but left the "Other Findings" space blank and made no additional findings of fact at all. *In re V.M.*, 211 N.C. App. at 392, 712 S.E.2d at 215. Similarly, in *Matter of I.W.P.*, the trial court made some findings of fact but failed to make findings as to the seriousness of the juvenile's offense and his or her culpability. *Matter of I.W.P.*, ___ N.C. App. at ___, 815 S.E.2d at 704.

Here, though, not only did the trial court make multiple, additional findings of fact, but each of the five factors in Section 7B-2501 are reflected in the findings. The seriousness of the juvenile's offense is listed as commission of a B1 felony. The findings show a high need to hold the juvenile accountable, as he continues to engage in delinquent behavior and requires accountability and structure. The findings show that Jeremy's disposition will protect the public while he matures, develops personal accountability, and is prevented from continual delinquent behaviors. Jeremy's culpability is described as adjudication of a violent offense for which he exhibits concerns with personal accountability. Lastly, the order shows that the trial court considered risks and needs assessments submitted by the parties and ultimately determined that commitment with the Youth Detention Center ("YDC") would provide Jeremy an opportunity for treatment and positive growth and provide protection for the public. I conclude that the trial court's findings were "appropriate" under Section 7B-2501.

2. Sufficiency of the Evidence to Support Those Findings

Jeremy contends that the evidence did not support the trial court's findings. I conclude that the evidence supported the trial court's findings.

Jeremy scored below the median score on an Adolescent Self-regulatory Inventory assessment, showing that "his levels of self-regulation are less developed in the short-term." Further, Jeremy elected to engage in further delinquent behavior following the sexual assault. Though reports suggested that Jeremy had adequate supervision at home, there was evidence that Jeremy's mother was unaware that the assault had occurred within her home until two weeks after the event, that Jeremy was allowed to spend time with others who engaged in criminal activity, and that his mother referred to the assault as simply "kids being kids." Psychological testing showed signs of immaturity, and Jeremy's assessments concluded that his "risk factors suggest that his referring offense behaviors were opportunistic and impulsive." The assessments also reflected that Jeremy only partially expressed remorse and/or guilt for his actions. The evidence shows that removing Jeremy from his current circumstances and committing him to the YDC would allow an opportunity to grow and mature away from a potentially negative environment.

3. Sufficiency of Conclusions to Support Level 3 Disposition

Jeremy contends that he "could have received a Level 2 disposition" and that a Level 2 disposition would have been "most appropriate in this case."

"The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason." *In re K.L.D.*, 210 N.C. App. 747, 749, 709 S.E.2d 409, 411 (2011); *see* N.C. Gen. Stat. § 7B-2506 (2017).

Here, the trial court adjudicated Jeremy delinquent for commission of a Class B1 felony, and the trial court found that his delinquency history level was "low." Class B1 felonies are considered "violent" offenses, and juveniles who commit violent offenses with a "low" delinquency history may receive either a Level 2 or 3 disposition. N.C. Gen. Stat. §§ 7B-2508(a), (f) (2017). Therefore, it was within the trial court's discretion to enter a Level 3 disposition in this case. "The existence of [evidence of Jeremy's good behavior], although it might have supported a decision by the trial court to impose a Level 2 disposition, does not support a conclusion that the trial court's decision to impose a Level 3

disposition was unreasonable." *Matter of D.E.P.*, ___ N.C. App. ___, ___, 796 S.E.2d 509, 516 (2017).

E. Confinement Pending Appeal

Upon entering his appeal, Jeremy also filed a motion requesting release from the YDC while his appeal was pending. The trial court entered an order denying this motion. Jeremy contends that the trial court failed to state compelling reasons for its denial, in violation of Section 7B-2605. I disagree.[5]

Section 7B-2605 of our General Statutes states that a juvenile must be released pending appeal, unless the trial court states written, compelling reasons otherwise:

> Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2017). While compelling reasons are required, the court need not be verbose. For instance, this Court has upheld denial of release pending appeal where the trial court simply listed that the defendant committed "first degree sex offenses with a child." *In re J.J.D.L.*, 189 N.C. App. 777, 781, 659 S.E.2d 757, 760-61 (2008). Most commonly, orders denying release are vacated where the trial court simply checks a box on a form in lieu of making any written findings at all. *See In re J.J., Jr.*, 216 N.C. App. at 376, 717 S.E.2d at 66.

Here, the trial court's order acknowledged in writing that Jeremy had a "lack of structure in the home" and "continued delinquent behavior

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5. The State contends that this issue is both not properly before us and also moot upon resolution of Jeremy's appeal. It is true that Jeremy has not appealed the order denying his release pending appeal, but our Court has oft reviewed this issue without a separate appeal. *See In re J.L.B.M.*, 176 N.C. App. 613, 628, 627 S.E.2d 239, 249 (2006); *In re Bass*, 77 N.C. App. 110, 117, 334 S.E.2d 779, 783 (1985). In the same respect, though his appeal will no longer be pending upon issuance of this opinion, our Court has repeatedly chosen to address this issue despite similar circumstances. *See In re J.J., Jr.*, 216 N.C. App. 366, 376, 717 S.E.2d 59, 66 (2011) (vacating an insufficient order despite "the likelihood that the passage of time may have rendered the issue of [the] juvenile's custody pending appeal moot"); *In re J.L.B.M.*, 176 N.C. App. at 628, 627 S.E.2d at 249; *In re Lineberry,* 154 N.C. App. 246, 256, 572 S.E.2d 229, 236 (2002)). In the interest of judicial economy, we reach the merits of this claim in the present appeal.

after being charged with a B1 felony." Jeremy entered an admission of guilt in regard to his subsequent delinquent behavior following his adjudication for sexual offenses. Further, the order decrees that Jeremy "shall remain in [YDC custody] pending appeal for . . . protection of the public." I conclude that the trial court's order sufficiently noted compelling reasons for Jeremy's continued confinement pending his appeal.

III. Conclusion

My vote is to affirm the order of the trial court. While I may have made different findings, there was evidence to support the findings that the trial court made. Accordingly, I dissent.

STEVE MANLEY, Personally and as Administrator of the Estate of Clarence Manley, deceased, Plaintiff

v.

MAPLE GROVE NURSING HOME, SNOWSHOE LTC GROUP, LLC, PRINCIPLE LONG TERM CARE, INC. and BRITTHAVEN, INC., Defendants

No. COA19-154

Filed 20 August 2019

Appeal and Error—notice of appeal—designation of both interlocutory order and final order—dismissal

The Court of Appeals dismissed an appeal in a civil case for lack of jurisdiction where plaintiff purported to appeal from an interlocutory order denying his motion to amend but failed to designate the final order in his notice of appeal. To properly appeal the interlocutory order, plaintiff should have designated in his notice of appeal both the interlocutory order and the final order rendering the interlocutory order reviewable. The jurisdictional deficiency required dismissal where it could not be fairly inferred from the notice of appeal that plaintiff also intended to appeal from the final order.

Appeal by Plaintiff from order entered 13 January 2017 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2019.

Schwaba Law Firm, PLLC, by Andrew J. Schwaba and Zachary D. Walton, for Plaintiff-Appellant.

Bovis Kyle Burch & Medlin, LLC, by Brian H. Alligood, for Defendants-Appellees.

COLLINS, Judge.

Plaintiff Steve Manley appeals from the trial court's 13 January 2017 order that, *inter alia*, denied his motion to amend his complaint on the grounds of futility. Because the 13 January 2017 order was interlocutory, and Plaintiff failed to appeal from the 23 October 2018 final order granting Defendants summary judgment in the case, we lack jurisdiction to hear Plaintiff's appeal. Accordingly, we dismiss Plaintiff's appeal.

I. Background

This matter arises out of an accident that took place at Defendant Maple Grove Nursing Home's facility, in which decedent Clarence Manley ("Decedent") fell and injured himself, an injury that allegedly led to his death on 30 December 2014.

Plaintiff, as Administrator of Decedent's estate, filed a so-called John Doe action on 11 April 2016 seeking subpoena power to investigate Decedent's fall and alleging negligence in connection therewith. On 19 May 2016, Plaintiff amended his complaint to bring causes of action for common law breach of fiduciary duty and professional negligence against Defendants Maple Grove Nursing Home; Snowshoe LTC Group, LLC; Principle Long Term Care, Inc.; and Britthaven, Inc. (collectively, "Defendants"). Defendants filed an answer to the amended complaint on 25 July 2016, and therein: (1) generally denied Plaintiff's allegations; (2) moved to dismiss the amended complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 9(j), 12(b)(1), and 12(b)(6); and (3) asserted defenses of contributory negligence and satisfaction of Plaintiff's requests for the production of Decedent's medical records.

Plaintiff filed a motion to amend the complaint on 19 December 2016, and a supplemental motion to amend the complaint on 22 December 2016 (collectively, the "Motion to Amend"). In the Motion to Amend, Plaintiff: (1) argued that Defendants have failed to provide document discovery sufficient for Plaintiff to prosecute his case, and moved to compel the production of the allegedly-withheld documents; and (2) asserted that he had retained an expert who had concluded that malpractice had occurred and that he sought to add a cause of action for "nursing home malpractice" to the second amended complaint. Plaintiff attached the proposed second amended complaint reflecting the proposed cause of action for malpractice to his Motion

to Amend, which included a certification of compliance with N.C. Gen. Stat. § 1A-1, Rule 9(j).[1]

On 13 January 2017, the trial court entered an order denying Plaintiff's Motion to Amend.[2] In its 13 January 2017 order, the trial court noted that neither the original nor the amended complaint contained or was accompanied by a certification of compliance with Rule 9(j). The trial court denied Plaintiff's Motion to Amend on the grounds of futility because: (1) the statute of limitations for bringing a cause of action for wrongful death had expired such that a pleading could not be amended to add a new cause of action for medical malpractice; and (2) to the extent the original or amended complaints stated a cause of action for medical malpractice, those pleadings were deficient for failure to include a Rule 9(j) certification.

On 14 August 2018, Defendants moved pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, for summary judgment on Plaintiff's amended complaint. Plaintiff responded on 22 October 2018.

On 23 October 2018, Superior Court Judge R. Stuart Albright entered an order granting Defendants' motion for summary judgment. On 20 November 2018, Plaintiff filed a Notice of Appeal that "gives notice of appeal to the North Carolina Court of Appeals from the Order denying the Plaintiff's Motion to Amend the Complaint, entered by the Honorable Lindsay R. Davis, Jr. on January 13, 2017[.]"

II. Discussion

Before we hear an appeal, we must first determine that we have jurisdiction to do so.

Rule 3 of the North Carolina Rules of Appellate Procedure governs the procedure for taking an appeal in a civil matter. The first step in taking an appeal is the filing and service of a proper notice of appeal within a specified time period following the entry of judgment against the appellant. *See* N.C. R. App. P. 3 (2018). Appellate Rule 3(d) sets forth the required contents of a notice of appeal, and specifically requires

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1. In relevant part, Rule 9(j) requires dismissal of a complaint alleging medical malpractice against a health care provider unless the complaint contains a specific assertion that a reasonably-anticipated expert witness has reviewed "the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" and "is willing to testify that the medical care did not comply with the applicable standard of care[.]" N.C. Gen. Stat. § 1A-1, Rule 9(j) (2016).

2. The trial court also denied Plaintiff's motion to compel further document production in its 13 January 2017 order.

an appellant to "designate the judgment or order from which appeal is taken[.]" *Id.*

"[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2018). The trial court's 23 October 2018 order granting Defendants' motion for summary judgment was a final judgment of a superior court. *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55 (2000) ("[A] cause of action determined by an order for summary judgment is a final judgment on the merits.").

As detailed above, in his Notice of Appeal, Plaintiff purported to appeal from the trial court's 13 January 2017 order denying Plaintiff's Motion to Amend. But other than in circumstances which this case does not present,[3] "[a]n order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable." *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 689, 582 S.E.2d 69, 71 (2003) (quotation marks and citation omitted). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). On the other hand, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381.

Plaintiff gained the right to appeal from prior interlocutory orders in the case (such as the 13 January 2017 order) once the 23 October 2018 order granting Defendants summary judgment was entered, as the 23 October 2018 order disposed of the case entirely and left nothing to be judicially determined by the trial court. *See Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982) ("An interlocutory decree . . . is reviewable only on appropriate exception upon an appeal from the final judgment in the cause."); N.C. Gen. Stat. § 1-278 (2018) ("Upon an appeal from a [final] judgment, the court may review any intermediate order

3. Our Supreme Court has said that "immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b)]. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a 'substantial right' " within the meaning of N.C. Gen. Stat. §§ 1-277 or 7A-27. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (citations omitted). No Rule 54 certification is reflected in the record, and Plaintiff nowhere argues that the trial court's denial of his Motion to Amend affected a substantial right within the meaning of N.C. Gen. Stat. §§ 1-277 or 7A-27.

involving the merits and necessarily affecting the judgment."). But in order to properly appeal an interlocutory order, an appellant must designate both the interlocutory order and the final judgment rendering the interlocutory order reviewable in its notice of appeal, since "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994).

Plaintiff did not designate the 23 October 2018 order in his Notice of Appeal, which is a jurisdictional deficiency requiring dismissal of his appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal."); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Without proper notice of appeal, this Court acquires no jurisdiction." (quotation marks and citation omitted)).

This Court has said that "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Von Ramm*, 99 N.C. App. at 156-57, 392 S.E.2d at 424 (emphasis in original) (quotation marks and citation omitted). But as in *Von Ramm*—where this Court held that a defendant's notice of appeal from an order denying his motion to set aside a final judgment did not allow the Court to fairly infer that defendant also intended to appeal the underlying judgment—we hold that an intent to appeal from the 23 October 2018 order cannot be fairly inferred from Plaintiff's Notice of Appeal. *Id.*

We accordingly conclude that we have not acquired jurisdiction to hear Plaintiff's appeal.

III. Conclusion

Because Plaintiff failed to comply with Appellate Rule 3 as required, we have no jurisdiction to hear Plaintiff's appeal. We thus dismiss Plaintiff's appeal.

DISMISSED.

Judges STROUD and ARROWOOD concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
WILLIAM THOMAS DANA, JR., INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF PAMELA MARGUERITE DANA, DEFENDANTS

No. COA18-1056

Filed 20 August 2019

Motor Vehicles—insurance—underinsured motorist coverage—multiple claimants—per-accident cap

Plaintiff-insurer was liable to pay defendants (a husband and his deceased wife, who was the named insured of a personal automobile policy issued by plaintiff) pursuant to the per-accident cap in their insurance agreement where the parties stipulated that underinsured motorist (UIM) coverage was available to defendants, there were two claimants (defendants) seeking coverage under the UIM policy, and the negligent driver's liability policy was exhausted pursuant to a per-accident cap.

Appeal by Plaintiff from Order entered 2 August 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 24 April 2019.

William F. Lipscomb for plaintiff-appellant.

Maynard & Harris Attorneys at Law, PLLC, by C. Douglas Maynard, Jr. and Sarah I. Young, for defendants-appellees.

MURPHY, Judge.

When a court is tasked with determining what amount, if any, of underinsured motorist ("UIM") coverage is available, it must determine whether UIM coverage is available at all, and, if so, how much the insured party or parties are entitled to receive in light of: (1) the number of claimants seeking coverage under the UIM policy and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap. Here, the parties stipulated that UIM coverage is available to the Defendants. Additionally, there are two claimants seeking coverage under the UIM policy, and the negligent driver's liability was exhausted pursuant to a per-accident cap. Accordingly, we must hold that Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, Inc., is obligated to pay the Defendants pursuant to the per-accident cap

in the parties' insurance agreement. The trial court's grant of summary judgment in favor of the Defendants is affirmed.

BACKGROUND

This is a declaratory judgment action regarding the extent of Plaintiff's liability to Defendants stemming from an automobile accident in which Defendant William Thomas Dana ("Mr. Dana") was injured and his wife ("Ms. Dana")—whose estate he represents in this suit—was killed. Ms. Dana was the named insured of a personal auto insurance policy issued by Plaintiff that covered the vehicle involved in the crash and provided UIM coverage in the amounts of $100,000.00 per-person and $300,000.00 per-accident. The other driver involved in the collision was represented by Integon Insurance and had liability coverage up to $50,000.00 per-person and $100,000.00 per-accident.

After the accident, Integon agreed to pay out the full $100,000.00 per-accident limit, divided equitably among the four parties involved in the accident, with Mr. Dana receiving $32,000.00 and Ms. Dana's estate receiving $43,750.00. In accordance with the per-person limits in Ms. Dana's insurance agreement, Plaintiff paid Mr. Dana $68,000.00 ($100,000.00 per-person UIM limit less the $32,000.00 paid by Integon) and Ms. Dana's estate $56,250.00 ($100,000.00 less the $43,750.00 paid by Integon).

At trial, Defendants successfully argued that, because the liability policy limits of Integon were exhausted on a per-accident basis, they are entitled to a total of $200,000.00 of UIM coverage from Plaintiff (the $300,000.00 per-accident limit less $100,000.00 paid by Integon). Plaintiff contends Defendants have already received the maximum amount of UIM coverage available under the policy in question. Both parties moved for summary judgment, which was granted for the Defendants rendering Plaintiff liable for an additional $75,750.00 of UIM coverage ($200,000.00 unpaid coverage less $68,000.00 to Mr. Dana and $56,250.00 paid to Ms. Dana). Plaintiff filed timely notice of appeal.

ANALYSIS

Our job on appeal is to determine whether the trial court was correct in determining, as a matter of law, that "[p]er the holding in [*N.C. Farm Bureau Mut. Ins. Co. v. Gurley, et. al.*, 139 N.C. App. 178, 532 S.E.2d 846 (2000)], the underlying policy in this matter was exhausted on a per-accident basis, requiring the applicability of the per-accident underinsured limits for the Defendants' claims." In reviewing a trial court's decision to grant or deny summary judgment, our standard is de novo. *In re Will of*

Jones, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate "only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (internal quotation marks omitted)). Because the parties stipulated to the relevant facts of this case, there are no genuine issues of material fact. After careful review, we conclude Defendant was entitled to a judgment as a matter of law and the trial court did not err in granting Defendant summary judgment.

In *Gurley*, we established a straightforward analysis to determine in what amount, if any, UIM coverage is available, given both the insurance policy in question and our UIM statute, N.C.G.S. § 20-279.21(b) (2017). *Gurley*, 139 N.C. App. at 180, 532 S.E.2d at 848. Initially we must determine whether UIM coverage is available. *Id.* If UIM coverage is available, we next ascertain "how much coverage the insureds are entitled to receive under the UIM policy." *Id.* To decide how much coverage the insured party or parties are entitled to, we must consider "(1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap." *Id.* at 181, 532 S.E.2d at 848.

> [W]hen more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

Id. at 181, 532 S.E.2d at 849.

Since the parties stipulated that UIM coverage is available to Mr. Dana and Ms. Dana's estate, we need only determine how much coverage the insured parties are entitled to receive. Applying the facts of this case to the *Gurley* framework is not difficult: there are multiple claimants (Mr. Dana and the Estate of Ms. Dana) seeking coverage under the UIM policy in question and the negligent driver's liability policy was exhausted pursuant to a per-accident cap. Accordingly, *Gurley* mandates the Defendants are collectively entitled to receive coverage pursuant to the per-accident cap of $300,000.00. We affirm the trial court's grant of summary judgment in favor of the Defendants.

CONCLUSION

The parties to this appeal have stipulated that UIM coverage is available to Defendants. There are two claimants seeking coverage under the UIM policy, and the negligent driver's liability was exhausted pursuant to a per-accident cap. Accordingly, *Gurley* controls and we must hold the Defendants are entitled to be paid pursuant to the per-accident cap in the parties' insurance agreement.

AFFIRMED.

Judges DILLON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
KENNETH RUSSELL ANTHONY

No. COA18-1118

Filed 20 August 2019

Satellite-Based Monitoring—lifetime—reasonableness—risk of recidivism—efficacy—evidence required

The trial court's order imposing lifetime satellite-based monitoring (SBM) was reversed where the State provided no evidence about defendant's risk of recidivism or the efficacy of SBM to accomplish reducing that risk that would support a reasonableness determination as applied to defendant. The State's contention that the trial court took judicial notice of the studies and statistics cited during argument was not supported by the record—the studies were not presented as evidence, the State did not request judicial notice, and the court did not indicate it was taking judicial notice.

Appeal by defendant from order entered on 26 April 2018 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Court of Appeals 8 May 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 David W. Andrews, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order imposing lifetime satellite-based monitoring ("SBM"). Although the State presented argument to the trial court regarding the risk of recidivism by sex offenders based upon various studies and statistics, the State did not provide the studies to Defendant or the trial court. The statistics noted by the State were not subject to judicial notice under Rule 201 since they are subject to reasonable dispute and they are not "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b) (2017). Since the State presented no evidence supporting the reasonableness of SBM as applied to Defendant, we must reverse the trial court's order for the reasons discussed in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*"), and *State v. Griffin*, ___ N.C. App. ___, 818 S.E.2d 336 (2018).

I. Background

Defendant entered an *Alford* plea to attempted first-degree sex offense, habitual felon, assault on a female, communicating threats, interfering with emergency communication, first-degree kidnapping, incest, and second-degree forcible rape. Defendant's charges were consolidated into a single judgment and the trial court imposed a sentence of 216 to 320 months. On the same day judgment was entered, Defendant submitted a motion to dismiss the State's petition for SBM. The trial court held a hearing regarding SBM. The trial court denied Defendant's motion and entered an order directing Defendant to submit to lifetime SBM upon his release from prison. Defendant timely appealed the order requiring him to submit to lifetime SBM.

II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 21 (quoting *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010)).

III. Evidence of Reasonableness of SBM

Defendant argues "[b]ecause the State in this case failed to satisfy its burden of demonstrating that SBM was a reasonable search, the order requiring Mr. Anthony to submit to lifetime SBM must be reversed without remand to superior court." Defendant also argues that "North Carolina's SBM program is an unreasonable search that violates the Fourth Amendment."

Once the trial court has determined that a defendant is subject to SBM under North Carolina General Statute § 14-208.40(a)(1)-(3), it must then determine the constitutionality of the search as applied to the particular defendant. *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 28 ("We reiterate the continued need for individualized determinations of reasonableness at *Grady* hearings."). This analysis includes two parts: the defendant's risk of recidivism and the efficacy of SBM to accomplish a reduction of recidivism. *See id.* at ___, 817 S.E.2d at 27. Even if we assume for purposes of argument that sex offenders have a higher risk of recidivism than those convicted of other crimes, the State still must address whether SBM is actually effective to prevent recidivism for that defendant.

At the hearing, the only evidence the State presented was "bills that the victim received for medical treatment, an order of evidence to destroy some evidence, two proposed form 615s for the registration and satellite-based monitoring, and two proposed permanent no-contact orders for the two victims."[1] As part of its argument, the State's counsel noted various studies and statistics:

> [T]here are some statistics I do want to recite for the Court so you can consider in your finding that this is reasonable search in this case. The United States Department of Justice, Office of Just Programs -- I'm referencing the office of sex offender sentencing, monitoring, apprehending, registering and tracking a research brief that was done by Louise DeBaca, D-e-B-a-c-a, he's a director, on July of 2015.

The State then discussed various studies and statistics but did not provide the trial court or defense counsel with these studies, nor are they in the record on appeal.

Much of the State's brief focuses on the portion of the hearing regarding Defendant's plea and its factual basis, but there is no issue regarding defendant's *Alford* plea or his convictions. After entry of the plea and sentencing, the trial court considered the State's petition for SBM and Defendant's motion to dismiss the petition. But the State presented no evidence as to the reasonableness of SBM. Instead, the State presented only argument opposing defendant's motion to dismiss and supporting its petition for SBM. In the argument, the State referred to various

1. The State presented this evidence during the portion of the hearing dealing with the plea and sentencing, but the trial court heard the SBM issues in the same hearing. The State did not present any additional evidence during the portion of the hearing regarding SBM.

studies and statistics on recidivism by sex offenders, but the State did not attempt to present any evidence or request judicial notice of any studies *regarding the actual efficacy of its SBM program in preventing recidivism*. Even if we assume sex offenders in general do have a higher rate of recidivism than those convicted of other crimes, and even if a defendant in particular has an increased likelihood of reoffending, if there is no evidence that SBM actually prevents recidivism, the State cannot show that imposing a continuous, life-time search is reasonable under the Fourth Amendment of the United States Constitution.

The State argues this case differs from *Griffin* because here the trial court took judicial notice of studies referenced by the State at trial. In *Griffin*, the State stresses that it did not present any evidence on the "efficacy of the SBM program." *Griffin*, ___ N.C. App. at ___, 818 S.E.2d at 340. In its brief, the State argues:

> Defendant also takes exception to the fact the State relied upon statistics from studies in its argument on the efficacy of SBM. However, at no point either during the hearing or in its memorandum did he object to the State's ability to raise those statistics. Instead, Defendant argued about the constitutionality of SBM on the basis of fees, the ability to travel, the burden of proof, and the ability to seek termination.
>
> However, on appeal, the basis for his argument about the statistics stems from this Court's decision in Griffin, namely that in relying upon a decision from the Fourth Circuit Court of Appeals, this Court reasoned, "Decisions from other jurisdictions relied upon by our dissenting colleague—and by the State—holding that SBM is generally regarded as effective in protecting the public from sex offenders are not persuasive;" and also the State did not attach the empirical or statistical reports to its memorandum. Understanding of course that this Court cannot overturn itself, it is therefore relevant that notwithstanding the lack of a bright-line test in Grady II, neither the State nor Defendant's trial court had the benefit of either Grady II or Griffin when addressing the reasonableness of SBM as it relates to Defendant.
>
> Even so, *the State did not simply argue about other cases, it argued about actual studies. While the State did not appear to have introduced the physical research, seeing as the information about the studies came from*

> *a well-known source*, *the United States Department of Justice*, the court was within its right to take judicial notice of the studies. See Khaja v. Husna, 243 N.C. App. 330, 353, 777 S.E.2d 781, 794 (2015) (quoting N.C.G.S. § 8C-1, Rule 201)(holding that a court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court may take judicial notice, whether requested or not.").

(Emphasis added) (citations omitted.) Therefore, the State's argument relies upon the contention that the trial court took judicial notice of the studies and statistics noted in its argument to the trial court, despite the fact that (1) the studies were not presented to defendant or the trial court; (2) the State did not request judicial notice; and (3) the trial court made no indication it was taking judicial notice of the studies. The State also contends that Defendant waived any argument regarding judicial notice of the studies by his failure to object, but since the State did not present the studies to the trial court or request that the trial court take judicial notice of them, defendant had no opportunity to object to judicial notice.

Judicial notice is governed by Rule 201 of the North Carolina Rules of Evidence:

> (b) **Kinds of facts.** — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) **When discretionary.** — A court may take judicial notice, whether requested or not.
>
> (d) **When mandatory.** — A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> (e) **Opportunity to be heard.** — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201.

Defendant argues that the trial court could not take judicial notice under Rule 201 of the State's "purported studies" for several reasons. First, the State presented no evidence of the studies to the trial court. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). In addition, Defendant notes that the risk of recidivism by sex offenders is subject to extensive reasonable debate and this debate has been noted by our Court.

> As the State itself acknowledges, a court can only take judicial notice of a fact whose accuracy "cannot reasonably be questioned." State's Brief, p. 20 (quoting Rule 201 of the North Carolina Rules of Evidence). Indeed, the State itself relies on *Khaja v. Husna*, 243 N.C. App. 330, 354, 777 S.E.2d 781, 794 (2015), which makes clear that "[a]ny subject . . . that is open to reasonable debate is not appropriate for judicial notice." Here, the results of the purported studies relied on by the State are subject to reasonable debate.
>
> As this Court has itself observed, there are multiple State and federal reports that counter the "widely held assumption that sex offenders recidivate at higher rates than other groups." *State v. Grady*, ___ N.C. App. ___, ___, 817 S.E.2d 18, 27-28 (2018). For example, a study of the Bureau of Justice Statistics found that "state prisoners in general had almost a one in two chance of a new conviction . . . ." Chrysanthi Leon et al, *Net-widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 Widener L. Rev. 127, 145 (2011). Of the released sex offenders, "the sex offense recidivism rate was only 5.3% over the three-year follow-up period." *Id.* Ultimately, because there is no consensus on recidivism rates among sex offenders, it is improper for the State to use judicial notice to establish such recidivism rates.

(Alterations in original).

This Court noted in *Grady II* that the defendant had "presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups." ___ N.C. App. at ___, 817 S.E.2d at 27-28. Our SBM statutes themselves also recognize that rates of recidivism vary for different classes of offenders and offenses, as the STATIC 99 evaluates the level

of the risk of reoffending based upon the type of offense and characteristics of the particular defendant. *See* N.C. Gen. Stat. § 14-208.40A (2017).

At trial, the State described statistics and studies to support its position that Defendant's risk of recidivism was higher because of his status as a sex offender.[2] But the studies were not presented to Defendant or the trial court, and there is no indication in our record or the transcript that the State requested or that the trial court actually took judicial notice. And as we have already noted, the studies the State relied upon were not included in the record on appeal.

Defendant also argues that if the trial court could have taken judicial notice of the studies and statistics argued by the State, the State still presented no evidence of the efficacy of SBM. The statistics noted by the State addressed only the risk of recidivism, but this is just one part of the determination of the reasonableness of SBM. Defendant argues, and we agree, that the State presented no evidence on the second part of the analysis of the reasonableness of SBM—whether SBM is actually effective to prevent recidivism:

> Further, the studies recited by the prosecutor did not indicate that SBM would prevent Mr. Anthony himself from committing sex crimes upon his release from prison. As explained in *Riley*, it is insufficient for the State to merely assert its interest in a search. Any warrantless search must actually further the interest claimed. Here, the State failed to produce any evidence that SBM was a valuable law enforcement tool or that it had ever prevented the commission of a crime. It likewise did not put on any evidence that Mr. Anthony, who will be 68-years old when he is released from prison, actually will present a risk to public safety at that time.

(Citation and emphasis omitted.)

The State's attempt to distinguish this case from prior SBM cases where the State presented no evidence to support the reasonableness of SBM fails. The trial court did not take judicial notice of the studies mentioned by the State in argument, nor could it have taken judicial notice under Rule 201. The studies were not offered into evidence or even presented to defendant or the trial court but only discussed in argument. Even assuming arguendo that making an argument based upon a study

2. During the hearing the State informed the trial court "I'll be reciting some of the statistics, but I don't have anything to present[,]" and the trial court responded, "Okay."

or statistics to a trial court could enable judicial notice, statistics or studies on the effectiveness of SBM are neither "generally known within the territorial jurisdiction of the trial court" nor "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* And again, the State presented no evidence regarding the *efficacy* of SBM.

IV. Conclusion

While defendant has facially challenged the constitutionality of North Carolina's SBM program, we decline to address this argument as the order requiring Defendant to submit to SBM was unreasonable as applied to him and must be reversed. Despite the State's attempt to distinguish this case from others where this Court has overturned SBM orders, we conclude that the statistics and studies mentioned by the State in its argument were not subject to judicial notice under Rule 201. In addition, the State presented no evidence on whether SBM is actually effective to prevent recidivism. Accordingly,

> [w]e also are bound by this Court's holding in *Grady II* that when the State has presented no evidence that could possibly support a finding necessary to impose SBM, the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing.

Griffin, ___ N.C. App. at ___, 818 S.E.2d at 342. The trial court's order imposing lifetime SBM is reversed.[3] As has been noted by other SBM cases, we emphasize that the State has preserved its arguments for review pending the outcome of the SBM cases with the Supreme Court of North Carolina.

REVERSED.

Judges HAMPSON and YOUNG concur.

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3. The parties disagree about the proper mandate given this Court's mandates in *State v. Greene*, ___ N.C. App. ___, 806 S.E.2d 343 (2017) (reversing the SBM order), and *State v. Gordon*, ___ N.C. App. ___, 820 S.E.2d 339 (2018) (vacating the SBM order), among other cases. Because "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant[,]" *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 28, and, in this case, where the trial court held a hearing on SBM, considered the constitutionality of enrolling Defendant in SBM when the State referenced statistics and studies in support of its position, and denied Defendant's motion to dismiss, it is appropriate to reverse the trial court's order requiring Defendant to enroll in lifetime SBM.

STATE OF NORTH CAROLINA
v.
NICHOLAS OMAR BAILEY, DEFENDANT

No. COA18-1187

Filed 20 August 2019

Search and Seizure—search warrant application—affidavit—probable cause—nexus between location and illegal activity

In a prosecution for drug trafficking, defendant was not entitled to the suppression of cocaine and drug paraphernalia found at an apartment where facts in the affidavit submitted with the search warrant application, along with inferences that could reasonably be drawn from those facts, indicated a fair probability that evidence of an illegal drug transaction would be found at that location. Although the drug transaction was observed elsewhere, law enforcement followed a vehicle occupied by known drug dealers directly back to the apartment from the place of the drug exchange, thereby providing a direct connection between the apartment and the illegal activity, and a substantial basis from which to make a probable cause determination.

Judge ZACHARY dissenting.

Appeal by defendant from judgment entered 10 July 2018 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Macari, for the State.

Richard Croutharmel for defendant-appellant.

BERGER, Judge.

Nicholas Omar Bailey ("Defendant") appeals from a judgment entered upon his guilty plea to trafficking in cocaine, following the trial court's denial of his motion to suppress. Because the magistrate had a substantial basis to find probable cause, we affirm the trial court's order denying Defendant's motion to suppress.

Factual and Procedural Background

On April 25, 2017, Detective Dallas Rose ("Detective Rose") with the Carteret County Sheriff's Department applied to a magistrate for a warrant to search the residence belonging to Brittany Tommasone ("Tommasone") and James White ("White") located at 146 E. Chatham Street, Apartment #1, Newport, North Carolina; any individual located at that location during the execution of the search warrant; and any vehicle at that location, including a blue Jeep Compass. Detective Rose, after being duly sworn, stated in his application that there was probable cause to believe "[h]eroin, scales, paraphernalia, packaging equipment, videos, photos, ledgers and documents" related to illegal narcotics would be found at the named location.

Detective Rose provided information concerning his training and experience as a law enforcement officer for twelve years. Specifically, Detective Rose swore that he

> has been a Deputy Sheriff for 9 years and has been a Police K-9 Handler for 6 years with the Carteret County Sheriff's Office. The affiant also was a Police Officer for the Morehead City Police Department for 3 years. The affiant is currently assigned as a Detective with the Carteret County Sheriff's Office Narcotics Unit. The Affiant has been employed with the Carteret County Sheriff's Office since January 2006. The Affiant has received training in the field of Narcotics Investigations and Criminal Interdiction Enforcement from Carteret and Craven Community College and other private and public training conferences and seminars. The Affiant has conducted and assisted in numerous criminal and narcotic investigations leading to arrests and convictions in [ ] trafficking different types of illegal narcotics, as well as crimes against persons, property crimes, both felony and misdemeanor.

Detective Rose then provided a statement of facts establishing probable cause as follows:[1]

> On 04/25/2017 at approximately 5:35 pm Detectives with the Carteret County Sheriff's Office, Jones County Sheriff's Office, and Havelock Police Department were conducting visual surveillance of a parking lot area located at 900 Old Fashioned Way in Newport, North Carolina.

1. Text has been modified to include paragraph breaks for ease of reading.

The name of the Apartment Complex is Compass Landing Apartments. During surveillance of the parking lot area Affiant of the Carteret County Sheriff's Office observed a blue in color Jeep Compass bearing a North Carolina Registration of "BRITCP" arrive in the parking lot area and park.

Affiant observed the occupants of the vehicle to be Brittany Elizabeth Tommasone as the driver and James Edward White Jr. as the front seat passenger of the vehicle. Affiant is familiar with Brittany Tommasone and James White Jr. from past dealings related to drug activity[,] including the sale of [i]llegal [n]arcotics. Affiant also had recent knowledge from 04/24/2017 that Britt[an]y Tommasone and James White Jr. were not residing at Compass Landing Apartments and have established a residence at 146. E. Chatham Street in Newport, North Carolina according to Brittany Tommaso[n]e and James White Jr.

Once the vehicle parked, Affiant observed a white female exit the passenger seat of a white in color Mercury Milan bearing a North Carolina Registration of "DCP-1384." Once the white female exited the vehicle the female walked and entered the blue in color Jeep. After approximately thirty seconds the same female that recently entered the blue in color [J]eep exited the blue in color [J]eep and walked back to the original vehicle the female subject exited from which was the white in color Mercury passenger vehicle. Once the female subject entered the white in color Mercury passenger vehicle the vehicle began exiting the parking lot area along with the blue Jeep Compass that was occupied by Brittany Tommasone and James White Jr. There were no other occupants in the Jeep that were observed by Affiant. In Affiant's training and experience the actions observed by the occupants of the two vehicles were consistent with that of a [d]rug [d]eal.

The facts that support the observation are the secluded location where the subjects met, previous knowledge of James White Jr. and Brittany Tommasone as participants in the active selling of illegal [n]arcotics, drug complaints the Carteret County Sheriff's Office had received about James White Jr. and Britt[an]y Tommaso[n]e, and the

duration of time spent inside of the Jeep once the female subject entered the Jeep from the time the female subject exited the Jeep. The two vehicles were traveling at a high rate of speed as the two vehicles were trailering one another out of the parking lot area.

Once exiting the parking lot area both vehicles made a left hand turn near the Dollar General and began traveling towards US-70. Once approaching US-70 both vehicles turned right onto US-70 and began traveling east bound on US-70 still trailering one another. As both vehicles approached the intersection of US-70 and 9 Foot Road both vehicles merged into the left hand turning lane which merges from US-70 to Howard Blvd. Once the directional signal turned green the Jeep continued onto Howard Blvd. as the white in color Mercury made a U-Turn and began traveling west bound on US-70 towards Havelock.

Affiant followed the white in color Mercury car on US-70 into Havelock where the vehicle made several lane changes without giving a turn signal. Detective Corey radioed to Affiant stating that the blue in color Jeep had driven back to 146 E. Chatham Street [A]partment 1[,] and that both occupants had exited the vehicle and entered the residence.

Detective Moots had caught up to Affiant by this time and also observed several traffic violations made by the white Mercury vehicle and activated his emergency equipment on US-70 near McDonald's pva. The Mercury put on brakes as Detective Moots had activated his emergency equipment and slowly began to stop but continued rolling forward. Once the vehicle came to a complete stop on Webb Blvd just west of McDonald[']s Restaurant[,] Detective Moots, Henderson[,] and Affiant approached the vehicle and Affiant came into contact with the passenger later identified as Autumn Lynn Taylor as the front seat passenger and Allen Dellacava as the driver of the vehicle.

Affiant requested Autumn Taylor to exit the vehicle in which she complied. Once Autumn Taylor exited the vehicle Affiant asked who she had just met with in which Autumn Taylor replied James White. Affiant then asked Autumn Taylor if she had just recently purchased Heroin from James White due to the recent observations

> observed in the Compass Landing parking lot area. Autumn Taylor responded that she purchased a twenty dollar bag of Heroin and snorted while traveling down the road and once finished she threw the Heroin baggie out the window. Detective Henderson was speaking with Dellacava during this time along with Detective Moots as Dellacava had already been requested to exit the vehicle and was explained the reasoning for the stop. Verbal consent was given by Dellacava to search Dellacava's person and Dellacava's vehicle in the presence of Detective Moots and Detective Henderson. During the duration of search of the vehicle[,] a Springfield XD 45 Caliber was located in the glove compartment area of the vehicle and was secured. After a short roadside inquiry[,] both occupants were released with strong reprimand and warning from Detective Henderson. Detective Henderson also informed Dellacava of the concealed weapon violation and the custody of the handgun was given back to Dellacava.

The search warrant was issued, and the search was conducted that same night. Tommasone, White, and Defendant were in the residence at that time. More than 41 grams of cocaine were seized from Defendant, along with drug paraphernalia, and approximately $900 in US Currency.

Defendant was indicted on October 9, 2017 for trafficking in cocaine. On July 3, 2018, Defendant filed a motion to suppress in which he argued the facts alleged in the affidavit were insufficient to support a finding of probable cause to obtain a search warrant for the Chatham Street Apartment. The trial court denied Defendant's motion to suppress, concluding the facts alleged in the affidavit were sufficient to support a finding of probable cause to issue a search warrant for the Chatham Street residence.

Defendant pleaded guilty to trafficking in cocaine while preserving his right to appeal the trial court's denial of his motion to suppress. The trial court sentenced Defendant to 35 to 51 months in prison and ordered him to pay a $50,000.00 fine. Defendant appeals, arguing that the trial court erred in denying his motion to suppress. Specifically, Defendant contends that the sworn affidavit provided by Detective Rose did not provide probable cause to issue the search warrant. We disagree.

Standard of Review

> A reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding

> that probable cause existed. Our Supreme Court has stated, "the applicable test is whether, given all the circumstances set forth in the affidavit before the magistrate, . . . there is a fair probability that contraband . . . will be found in a particular place."

State v. Frederick, ___ N.C. App. ___, ___, 814 S.E.2d 855, 858 (*purgandum*), *aff'd*, ___ N.C. ___, 819 S.E.2d 346 (2018).

Analysis

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Probable cause does not require absolute certainty. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972). Rather, "[p]robable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *Id.* at 128-29, 191 S.E.2d at 755 (citation omitted).

However, the allegations made in an affidavit supporting issuance of a search warrant requires only that the magistrate determine "there is a 'fair probability' that contraband will be found in the place being searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations omitted). "The quantum of proof required to establish probable cause is different than that required to establish guilt." *Frederick*, ___ N.C. App. at ___, 814 S.E.2d at 858 (citing *Draper v. United States*, 358 U.S. 307, 311-12 (1959)). "Probable cause requires . . . only *a probability or substantial chance* of criminal activity." *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (citation and quotation marks omitted). Probable cause is a flexible standard that is based upon the totality of the circumstances. *State v. Zuniga*, 312 N.C. 251, 260-62, 322 S.E.2d 140, 146 (1984).

Moreover, determination of probable cause permits a "magistrate to draw 'reasonable inferences' from the evidence . . . ." *McKinney*, 368 N.C. at 164, 775 S.E.2d at 824 (citation omitted). An inference of criminal activity is to be based upon "the factual and practical considerations of

everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)). The facts alleged in the affidavit need only "fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched . . . ." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016).

When reviewing an affidavit for a search warrant, a reviewing court should accord "great deference . . . [to] a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Gates*, 462 U.S. at 236). The role of this court "is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (alteration in original) (quoting *Gates*, 462 U.S. at 238). Reviewing "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 434-35 (alterations in original) (quoting *Gates*, 462 U.S. at 236). Moreover, "[t]he resolution of *doubtful or marginal cases* in this area should be largely determined by the preference to be accorded to warrants." *Id.*, 400 S.E.2d at 435 (emphasis added).

Here, the statements alleged in the affidavit yield more than a fair probability that officers executing a search warrant would find evidence of an illegal drug transaction or illegal drug activity at the Chatham Street address. Detective Rose's affidavit stated that the officers observed the drug transaction in which Taylor purchased heroin from White. Taylor was then stopped by Detective Rose shortly after leaving the scene of the drug transaction. When asked, Taylor confirmed to Detective Rose that she had purchased "a twenty dollar bag of heroin" from White. At this point, officers had witnessed what they believed was a crime involving the sale of illegal drugs, and confirmed that a sale of heroin had occurred through Taylor's statement.

At the same time, Detective Corey followed the blue Jeep Compass to the residence at 146 E. Chatham Street. Based on the chronology set forth in the affidavit, before the traffic stop was initiated against Taylor, Detective Corey radioed Detective Rose and informed him that he observed Tommasone and White go into the apartment at that address.

From this information in the affidavit, the magistrate could reasonably infer that Tommasone and White traveled directly from the scene

of the drug transaction to the Chatham Street residence.[2] In addition, it is reasonable to infer that Tommasone and White went to the residence with the twenty dollars Taylor admitted she used to obtain the heroin. This money was evidence of the drug transaction, and the magistrate could reasonably infer that this evidence would be present at the Chatham Street address. Thus, contrary to our dissenting colleague's assertion, there was a direct connection between the crime observed and the location to be searched.

Even if we were to assume that money obtained from an illegal drug transaction was not evidence of a crime, there still existed sufficient inferences to establish a nexus. *See Allman*, 369 N.C. at 297, 794 S.E.2d at 305 (nexus may be inferred to support a finding of probable cause even absent evidence "directly link[ing] defendant's home with evidence of drug dealing.").

Here, it would also be reasonable to infer that the two drug dealers whom investigators had just observed sell heroin, and who were known by detectives to be involved in drug activity, would have other additional drugs or paraphernalia stored in their residence or vehicle. The practical considerations involved in selling quantities of heroin require that the product be cut, weighed, and packaged at some location. Common sense suggests that the blue Jeep Compass is not the ideal location for such activity, and that a residence is where this type of preparation would take place. Moreover, it is highly unlikely that individuals who are involved in the sale of illegal drugs would trust others in the business to hold their product. Even though not stated in the affidavit, it is also common sense "that drug dealers typically keep evidence of drug dealing at their homes." *Allman*, 369 N.C. at 295-96, 794 S.E.2d at 304. The dissent's assertion that there is no nexus here ignores the totality of the evidence and the inferences which could be reasonably drawn from the facts set forth in the affidavit.

Thus, there was a fair probability that evidence of the illegal drug transaction with Taylor, or other contraband, would be found at the Chatham Street address. There is no question that the affidavit here could have been more specific and provided more facts. But, the dissent would ignore the "great deference" that should be afforded to the magistrate's determination in favor of "after-the-fact scrutiny" in the form of

2. The trial court found in its order denying the motion to suppress that Detective Corey followed the blue Jeep Compass "directly to the residence at 146 E. Chatham Street, Newport."

de novo review. This is not permitted. *See Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (citing *Gates*, 462 U.S. at 236).

Here, the facts alleged in Detective Rose's affidavit, when taken together with the reasonable inferences that could be drawn therefrom, yield a fair probability that the officers would find contraband or evidence at the drug dealers' residence. Claiming there is no "link" between the drug deal and the Chatman Street Apartment runs counter to a " 'practical, common-sense decision,' based on the totality of circumstances . . . ." *McKinney*, 268 N.C. at 164, 775 S.E.2d at 824 (quoting *Gates*, 462 U.S. at 238).

The magistrate had a substantial basis for determining that probable cause existed. The trial court's order denying Defendant's motion to suppress should be affirmed.

AFFIRMED.

Judge DIETZ concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

In that the search warrant application in the instant case sought to search Defendant's home based solely upon an allegation that his two roommates had recently sold narcotics from a different location, I agree with Defendant that this case is indistinguishable from *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). Because that crime had been completed—and the evidence for its prosecution already obtained—and because the search warrant application did not allege that narcotics had otherwise been possessed or sold in or about the premises, I believe *Campbell* compels this Court to hold that the magistrate did not have a substantial basis for concluding that probable cause existed to search the home. Accordingly, I respectfully dissent, and would reverse the trial court's order denying Defendant's motion to suppress.

On 25 April 2017, officers with the Carteret County Sheriff's Office applied for a warrant to search Defendant's three-bedroom apartment located on E. Chatham Street in Newport ("Defendant's Apartment" or "the Chatham Street Apartment"). Defendant was not named as the target of the search warrant application, although he was the only individual listed on the lease for the Chatham Street Apartment. The

search warrant application instead sought to search the Chatham Street Apartment for "violations of possession of illegal narcotics" by Brittany Tommasone and James White, Defendant's roommates at the time.

As the majority notes, the facts alleged in the search warrant application to support a finding of probable cause to search the Chatham Street Apartment were (1) that Defendant's roommates were seen selling narcotics to an individual at a different apartment complex, and (2) that they thereafter returned to the Chatham Street Apartment.

In his motion to suppress, Defendant argued that these allegations were insufficient to support a finding of probable cause that evidence of narcotics would also be found inside the *Chatham Street Apartment*. Specifically, Defendant noted that the affidavit "included no information indicating that drugs had been possessed in or sold from [the Chatham Street Apartment], and failed to establish a nexus between his residence and the narcotics being sought." I agree that these circumstances warrant reversal of the trial court's denial of Defendant's motion to suppress.

"Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found in a particular place." *United States v. Doyle*, 650 F.3d 460, 471 (4th Cir. 2011) (quotation marks omitted); *accord State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016). Thus, in seeking authorization to search a particular location for contraband, the affidavit must include allegations of some facts or circumstances establishing a nexus between the identified premises and the presence of contraband; an affidavit that "implicates [the] premises *solely as a conclusion of the affiant*" is insufficient. *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 56 L. Ed. 2d 525, 535 (1978). Neither our Supreme Court nor the United States Supreme Court has "approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757.

In *State v. Campbell*, officers applied for a warrant to search a home upon obtaining arrest warrants for its residents after they had each sold narcotics to an undercover officer. *Id.* at 130, 191 S.E.2d at 756. The affidavit, however, provided no information from which it could be gleaned that those sales were, in fact, conducted from within the home, nor did the affidavit otherwise indicate "that narcotic drugs were ever possessed

or sold in or about the dwelling." *Id.* at 131, 191 S.E.2d at 757. The affidavit therefore "implicate[d] those premises *solely as a conclusion of the affiant*," having "detail[ed] no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*." *Id.* Quite simply, an inference that narcotics would be found in the premises did "not reasonably arise" from the mere fact that it was the known residence of narcotics dealers. *Id.* Accordingly, our Supreme Court reversed the trial court's denial of the defendant's motion to suppress, in that the search warrant application did not detail "any underlying circumstances . . . from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Id.*

I am unable to discern any factor which practically distinguishes the case at bar from *Campbell*,[1] which the majority altogether neglects to discuss.

Just as in *Campbell*, the affidavit in the instant case "details no underlying facts and circumstances from which the issuing officer could find that probable cause existed *to search the premises described*." *Id.* The affidavit here did not contain "any statement that narcotic drugs were ever possessed or sold in or about" the residence. *Id.* Moreover, it is important to note that the officers had already obtained the evidence of the crime for which the search warrant was sought; no facts or circumstances were alleged that suggested the presence of additional narcotics within the Chatham Street Apartment, such as evidence that Defendant's roommates were observed carrying contraband or other related items from their vehicle into the residence following their alleged street-sale. *See id.* at 132, 191 S.E.2d at 757 ("[T]he United States Supreme Court [has] said that there must be 'reasonable grounds at the time of issuance of the warrant for the belief that the law was being violated *on the premises to be searched*.' " (alterations and citation omitted)). Also absent from the affidavit was any insight from the affiant's "training and experience" which might have helped to link the single occurrence of a narcotics transaction with the presence of additional narcotics inside the suspected dealer's home, in light of other suspicious factors. *See Allman*, 369 N.C. at 295-97, 794 S.E.2d at 304-05 (distinguishing the facts from *Campbell* because the search warrant application in *Allman* included both insight from the affiant's training and experience "that

1. It is of no meaningful distinction that the suspects in *Campbell* were *known* to live in the house identified in the search warrant application, whereas the detectives here observed the suspects "*go* into the apartment at that address." *Majority* at 10. (Emphasis added).

drug dealers typically keep evidence of drug dealing at their homes," *as well as the fact* that the suspect had initially "lied to [the officer] about his true address").

The affidavit instead purported to connect Defendant's Apartment to suspected criminal activity on the basis of Defendant's roommates having returned there after allegedly selling narcotics to an individual from their vehicle at a different apartment complex. *See Campbell*, 282 N.C. at 132, 191 S.E.2d at 757 (explaining the "uniformly held" understanding that observing an individual selling narcotics does "not in any way link such activities to [his] apartment," and is therefore insufficient "to establish probable cause for a search of his apartment"). Having only identified Defendant's Apartment as the current residence of two suspected narcotics dealers, the affidavit thus sought to implicate the residence in the harboring of narcotics "*solely as a conclusion of the affiant*." *Id.* at 131, 191 S.E.2d at 757. As our Supreme Court has explained:

> Probable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. The issuing officer must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion.

Id. at 130-31, 191 S.E.2d at 756 (quotation marks and citations omitted).

Accordingly, I would necessarily hold that the search warrant application in the instant case failed to provide the issuing magistrate with a substantial basis from which to conclude that the proposed search of Defendant's Apartment would reveal the presence of illegal narcotics. I would therefore reverse the trial court's order denying Defendant's motion to suppress the evidence recovered from that search and the judgment entered upon his guilty plea.[2]

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2. Defendant also notes that the written judgment entered in the instant case indicates that he pleaded guilty to a Class F offense, whereas the transcript of plea and Defendant's sentence reveal that the trafficking in cocaine offense to which he pleaded guilty was, in fact, a Class G offense. However, because I would reverse the judgment entered against Defendant upon reversing the order denying his motion to suppress, I do not believe it necessary to further remand the case to the trial court for correction of this clerical error.

STATE v. ELLIS

[267 N.C. App. 65 (2019)]

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS, DEFENDANT

No. COA18-817

Filed 20 August 2019

1. Search and Seizure—traffic stop—reasonable suspicion—profane hand gesture made from a vehicle

Where a trooper conducted a traffic stop after seeing defendant make a profane hand gesture from the passenger seat of a moving car, the trial court properly denied defendant's motion to suppress the trooper's testimony because a reasonable suspicion of criminal activity justified the stop. Although a profane gesture directed toward the trooper would have amounted to constitutionally protected speech, it was unclear to the trooper whether defendant was gesturing to him or to another motorist (in which case, defendant's conduct could have amounted to the crime of "disorderly conduct").

2. Sentencing—prior record level—calculation—stipulation—based on error—not binding

In a prosecution for resisting, delaying, and/or obstructing a public officer during a traffic stop, the trial court erred in sentencing defendant as a Level III offender where the parties mistakenly stipulated that one of defendant's prior convictions—which the trial court factored into its prior record level calculation—was a misdemeanor when in fact it was an infraction, which could not be counted as one of the five prior convictions required for a prior record level of III. The parties' stipulation was not binding on the court because it was based on a mistake of law.

Judge ARROWOOD dissenting.

Appeal by Defendant from judgment entered 13 March 2018 by Judge Karen Eady-Williams in Stanly County Superior Court. Heard in the Court of Appeals 27 March 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for the Defendant.

DILLON, Judge.

Defendant Shawn Patrick Ellis appeals the trial court's judgment entered upon his guilty plea to resisting, delaying, and/or obstructing a public officer during a stop. Defendant contends that the trial court erred in denying his motion to suppress evidence. After careful review, we affirm.[1]

I. Background

This case arises from Defendant's failure to identify himself to a trooper during a stop. It is a crime in North Carolina for one to refuse to identify himself to a police officer during a *valid* stop. *See State v. Friend*, 237 N.C. App. 490, 768 S.E.2d 146 (2014) (refusing to provide identification during a valid stop may constitute violation of N.C. Gen. Stat. § 14-223 (2017)).

The key issue in this case is whether the trooper conducted a *valid* stop of Defendant. As reiterated by our Supreme Court just last year, "the Fourth Amendment permits a police officer to conduct a brief investigatory stop of an individual based on *reasonable suspicion* that the individual is engaged in criminal activity." *See State v. Nicholson*, 371 N.C. 284, 288-89, 813 S.E.2d 840, 843 (2018) (emphasis added). As explained by our Supreme Court, the "reasonable suspicion" standard required to justify the initiation of a brief, investigatory stop is a low standard, much lower than the "probable cause" standard necessary to initiate an actual arrest, and does not require that the officer witness actual criminal behavior:

> 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 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.

Id. at 289, 813 S.E.2d at 843 (quoting *Navarette v. California*, 572 U.S. 393, 396-97 (2014)).

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1. This opinion replaces the opinion that was filed 6 August 2019 and withdrawn by order of this Court entered 13 August 2019.

Here, the only evidence offered at the suppression hearing was the testimony of the trooper. Defendant did not testify or offer any evidence to refute the trooper's testimony. The trooper essentially testified that, while standing on the side of the road assisting another driver in icy conditions, he witnessed Defendant wave his entire arm out the window in a distracting manner. At this time, Defendant was riding as a passenger in a vehicle traveling on a public highway in the middle of a group of vehicles all going the same direction. The trooper testified that after Defendant traveled another one hundred (100) yards past his position on the side of the road, Defendant changed his arm gesture to a pumping motion with his middle finger extended. He testified that it was unclear whether Defendant was gesturing to him all this time or was gesturing to someone in one of the other vehicles. The trooper testified that he stopped Defendant to investigate the situation but that Defendant refused to identify himself. Defendant was charged and convicted for his failure to identify himself, not for the gestures.

Defendant moved to suppress the officer's testimony concerning his refusal to identify himself, based on his contention that the facts did not give rise to establish "reasonable suspicion" to justify the stop. Based on the trooper's testimony, however, the trial court orally denied Defendant's motion to suppress. Defendant then pleaded guilty to resisting, delaying, and/or obstructing a public officer during a stop.

II. Motion to Suppress

On appeal, Defendant argues that the trial court erred in denying his motion to suppress.

A. Standard of Review

Typically, we review the denial of a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015).

In this case, though, the trial court did not make any findings or enter any written order. Rather, following the trooper's testimony and counsels' arguments, the trial court *orally* denied Defendant's motion, stating:

> Based on a review of the evidence, the Court does find reasonable suspicion for the stop. In addition, based on the totality of the evidence the Court does find probable cause for the arrest [for Defendant's failure to identify himself during the stop].

Our Supreme Court has held, however, that the lack of specific findings in an order is not fatal to our ability to conduct an appellate review *if* the underlying facts are not in dispute. *Nicholson*, 371 N.C. at 288, 813 S.E.2d at 843 (stating that "when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court"). Here, Defendant offered no evidence to refute any of the trooper's testimony. Therefore, we *infer* the factual findings based on the trooper's testimony. *See Nicholson*, ___ N.C. at ___, 813 S.E.2d at 843 ("[W]e consider whether the inferred factual findings arising from the uncontested evidence presented by [the trooper] at the suppression hearing support the trial court's conclusion that reasonable suspicion existed to justify defendant's seizure.").

Further, the lack of *written* conclusions of law is not fatal to meaningful appellate review, as we review a trial court's conclusions of law *de novo* anyway. *See State v. McNeill*, 371 N.C. 198, 220, 813 S.E.2d 797, 813 (2018) ("We review conclusions of law de novo."). That is, the lack of written conclusions does not inhibit our ability to determine whether or not the findings inferred from the trooper's undisputed testimony support a conclusion that the stop was valid.

B. Uncontested Facts

The trial court's inferred findings based on the trooper's testimony tend to show the following:

Around lunchtime on 9 January 2017, the trooper was assisting a motorist in a disabled vehicle on the side of U.S. Highway 52 in Albemarle. There had been a heavy snowstorm in the area a few days prior, snow was still on the ground, and the temperature was still below freezing. The trooper had been assisting other motorists, as there had been a number of reported accidents in the area.

While assisting the motorist, the trooper noticed a group of three or four passing vehicles, including an SUV in the middle of the pack. As the vehicles passed, the trooper saw Defendant stick his arm all the way out of the passenger window of the SUV and make a hand-waving gesture, "a back-and-forth motion [] from [the trooper] towards [Defendant]." At this point, the trooper "believed that [Defendant,] was signaling for [his] attention and was requesting for [him] to respond." The trooper, therefore, turned his entire body away from the motorist he was assisting and toward the passing vehicles to get a better look.

When the SUV was one hundred (100) yards past the trooper's position, the trooper observed Defendant still gesturing with his arm, but that his gesture changed at this point to an up-and-down pumping motion with his middle finger extended:

> [TROOPER:] I know there was a group of three or four cars around that passed, and then as this caught my attention, I did turn my body and completely look. The vehicle was approximately a hundred yards or so past me at this point, at which point my body turned and began to look towards the traffic. The -- hand of the passenger changed from the motioning to a middle finger and was now pumping up and down in the air like this (demonstrating).

The trooper was unsure whether Defendant was gesturing all this time at him or at someone in one of the vehicles around him:

> [COUNSEL:] Okay. So based on this -- this action that you saw, what did you believe was occurring?
>
> [TROOPER:] Actually, two things, sir. I believe, number one, this person signaled to me. For what, I don't know. And number two, they committed a crime of disorderly conduct either towards me or towards someone on the road or with other vehicles -- again, something I was unsure of and had to conduct a traffic stop to find out both of those answers.

The trooper returned to his patrol car and pursued the SUV. During the pursuit, the trooper did not observe the SUV engage in any traffic violations. The trooper, though, did pull the SUV over to investigate the matter.

The trooper approached the SUV and observed Defendant and his wife, who was in the driver's seat, take out their cell phones to record the traffic stop. The trooper knocked on Defendant's window, whereupon Defendant partially rolled it down. The trooper asked Defendant and his wife for their identification. Defendant's wife eventually gave the trooper her license, but Defendant refused to comply.

Defendant's failure to identify himself at that point was a violation of the law. The trooper then requested that Defendant step out of the vehicle. The trooper handcuffed Defendant and placed him in his patrol car. While in the patrol car, Defendant finally gave the trooper his name and told the trooper that he was gesturing toward him. After running warrants checks which yielded no results, the trooper issued Defendant

a citation for resisting, delaying, and obstructing an officer and allowed Defendant and his wife to leave.

C. Analysis

[1] Defendant argues that the trooper's stop was not valid, contending that it is not a crime for one to merely raise his middle finger *at an officer*, as such conduct is simply an exercise of free speech protected by the First Amendment of the United States Constitution.[2] U.S. Const. amend. I ("[The legislature] shall make no law . . . abridging the freedom of speech[.]"). Because Defendant fundamentally mischaracterizes the basis for the stop, we disagree.

We note that there are a number of court decisions from across the country holding that one cannot be held criminally liable for simply raising his middle finger at an officer.[3] This gesture obviously directed at a police officer is simply an exercise of free speech and, therefore, by itself typically would not give rise to reasonable suspicion sufficient to justify a stop. Indeed, the United States Supreme Court has recognized that "fighting words" or gestures obviously directed at an officer are less likely to constitute the crime of disorderly conduct than if those same words or gestures had been directed toward an ordinary citizen since "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen." *Houston v. Hill*, 482 U.S. 451, 462 (1987) (internal quotations omitted). That Court explained that "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder [toward police officers] not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Id.* at 472.

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2. As applied to the states via the Fourteenth Amendment of the United States Constitution.

3. *See, e.g.*, *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019) ("Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment."); *Freeman v. State*, 302 Ga. 181, 186, 805 S.E.2d 845, 850 (2017) ("[A] raised middle finger, *by itself*, does not, without more, amount to fighting words[.]" (emphasis added)); *Duran v. Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (holding vehicle passenger's obscene gesture at an officer through an open window, though "inarticulate and crude," was an expression of disapproval that "fell squarely within the protective umbrella of the First Amendment"); *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (finding no reasonable suspicion for a stop where "[t]he only act [the officer] had observed prior to the stop that prompted him to initiate the stop was [the defendant's] giving-the-finger gesture."); *Cook v. Board of County Commissioners*, 966 F. Supp. 1049 (D. Kan. 1997) (holding that a private citizen has stated a claim for wrongful prosecution for disorderly conduct where the only evidence against him was that he engaged in a single gesture of displaying his middle finger toward a police officer).

But the circumstances observed by the trooper in this case regarding Defendant's behavior differs from the circumstances in the cases cited in the preceding footnote. Unlike the circumstances in those other cases, where all that was involved was an individual expressing contempt to a law enforcement officer, here, it was not clear to the trooper to whom Defendant was continuously gesturing. Indeed, Defendant was well past the trooper when he changed his gesture to a pumping motion with his middle finger extended. While it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating. Such continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of "disorderly conduct." N.C. Gen. Stat. § 14-288.4(a)(2) (2017) (defining disorderly conduct as committed where a person "makes or uses any . . . gesture . . . intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace").

Perhaps the trooper did not see enough to give him "probable cause" to arrest Defendant for engaging in disorderly conduct. But we conclude that the evidence was sufficient to establish "reasonable suspicion," a much lower standard, to initiate an investigatory stop to determine if Defendant was trying to provoke a motorist. To meet "reasonable suspicion," the trooper was not required to rule out that Defendant was gesturing at him before initiating the stop; indeed, that was the purpose of the stop. *See State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (recognizing that "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct").[4]

It could be argued that Defendant initiated the stop, not because of concerns for traffic safety, but simply out of anger. But there is no direct evidence that the trooper initiated the stop in bad faith, as Defendant presented no evidence to that effect and the trial court made no such finding. Furthermore, and more significantly, our Supreme Court and the Supreme Court of the United States *compel* us not to consider an officer's *subjective* reason for initiating a stop in determining whether

4. We note our holding in *In re V.C.R.*, involving an individual loudly speaking obscenities toward an officer while standing on a public street. *See In re V.C.R.*, 227 N.C. App. 80, 86, 742 S.E.2d 566, 570 (2013). This Court held that a defendant's yelling of obscenities in public, though it "may be protected speech," does not preclude a determination that the officer had reasonable suspicion to seize the defendant, as such conduct could lead to a breach of the peace in violation of Section 14-288.4(a)(2) of our General Statutes. *Id.*

reasonable suspicion existed. *Nicholson*, 371 N.C. 284, 293, 813 S.E.2d 840, 846 (2018) (stating that the "officer's subjective opinion is not material" in determining whether reasonable suspicion exists); *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that our jurisprudence "foreclose[s] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"). Therefore, we affirm the trial court's order denying Defendant's motion to suppress based on the presence of "reasonable suspicion" for the initial stop.[5]

IV. Sentencing

[2] Defendant argues that the trial court erred in calculating his Prior Record Level ("PRL") as III. Specifically, he contends that the trial court improperly counted a past conviction based on an error in the State's PRL worksheet.[6] The State concedes this point and agrees that Defendant should have been sentenced at PRL II.

We agree that Defendant, indeed, should have been sentenced at PRL II. The State bears the burden of proving the existence of a defendant's prior convictions, but that burden may be satisfied by stipulation of the parties. N.C. Gen. Stat. § 15A-1340.21(c) (2017). "Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the

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5. The State argues, as an alternate legal basis justifying the stop, that the trooper's traffic stop was justified under the judicially-recognized "community caretaking" exception, which allows an officer to initiate a stop even without the presence of reasonable suspicion of criminal conduct, so long as he has a reasonable belief that an individual is in need of aid. *State v. Sawyers*, ___ N.C. App. ___, ___,786 S.E.2d 753, 758 (2016). But it is hard for us to fathom why the trooper would have believed that Defendant and his wife were in need of care. There is no basis to believe that the middle-finger gesture is a sign of distress in Stanly County. And even if there was some basis to make the initial stop based on a concern that Defendant or his wife were in distress, any such concern rapidly dissipated when the officer observed their filming and protesting the stop as he approached the SUV, well before he asked Defendant for his identification.

In any event, we affirm the trial court's order based on the trial court's legal reasoning that the trooper had "reasonable suspicion," notwithstanding that the State did not rely on this legal basis in its appellate argument. Indeed, the State, as appellee, was not required to make any legal argument. *See, e.g.*, *Williams v. Williams*, 339 N.C. 608, 453 S.E.2d 165 (1995) (affirming lower court though appellee did not file a brief); *Bunting v. Bunting*, 2019 N.C. App. LEXIS 607 (2019) (same).

6. Defendant did not object to his sentencing at trial, but his arguments are still preserved. Failure to appeal sentencing does not waive appellate review where a defendant argues that "[t]he 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." *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2017)).

points assigned to that prior offense." *State v. Arrington*, ___ N.C.___, ___, 819 S.E.2d 329, 333 (2018). A PRL is a question of law which we review *de novo*. *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013).

When determining a PRL in misdemeanor sentencing, level II is achieved when a defendant has between one and four prior convictions, while level III requires at least five prior convictions. N.C. Gen. Stat. § 15A-1340.21(b) (2017). Here, the parties stipulated that a prior conviction for "Expired Operators' License" was a level 2 misdemeanor, making it the fifth prior conviction in Defendant's history. In reality, at the time of Defendant's current offense, possession of an expired operator's license was an infraction. *See* N.C. Gen. Stat. § 20-35(a2) (2017); N.C. Gen. Stat. § 15A-1340.21(b) (2017) ("In determining the prior conviction level, a prior offense may be included if it is either a felony or a misdemeanor[, but not an infraction,] at the time the offense for which the offender is being sentenced is committed."). Without this infraction, Defendant's history only shows four prior eligible convictions.

We note that, in light of our Supreme Court's recent decision in *State v. Arrington*, it would appear that the parties' stipulation to the classification of Defendant's conviction as a misdemeanor is binding on this Court. Our Supreme Court in *Arrington* held that the defendant's stipulation to the existence of a prior conviction in tandem with its classification was "properly understood to be a stipulation to the facts of his prior offense and that those facts supported its [] classification," and was therefore binding on the courts as a factual determination. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 335.

However, *Arrington* is distinguishable from the present circumstance. In *Arrington*, the defendant stipulated to the appropriate classification of his prior conviction where two possible classifications existed depending on the offender's factual conduct in carrying out the offense. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 333. Here, there is no such ambiguity. As a matter of law, no misdemeanor category crime for possession of an expired operators' license existed at the time Defendant was sentenced for his current offense. Therefore, there is no factual basis which would support a misdemeanor classification for this conviction and, as a matter of law, the parties may not stipulate to the same. Our *de novo* review shows that this conviction should not have been included in determining Defendant's PRL.

After removing Defendant's conviction for Expired Operators' License from consideration, we conclude that the trial court properly

considered Defendant's remaining four prior convictions, giving him a PRL of II.[7] N.C. Gen. Stat. § 15A-1340.21(b) ("The prior conviction levels for misdemeanor sentencing are: . . . Level II - - At least 1, but not more than 4 prior convictions[.]").

V. Conclusion

It was not obvious to the trooper that Defendant was simply engaging in free speech toward him when he was gesturing out of his vehicle window. Rather, based on the totality of the circumstances as inferred from the trooper's unchallenged testimony, the trooper had reasonable suspicion that Defendant was engaging in escalating disorderly conduct toward another vehicle to justify the stop. And we hold that the trooper was justified in further detaining Defendant when he failed to provide his identity during the stop. As such, we conclude that the trial court did not err in denying Defendant's motion to suppress.

However, we conclude that Defendant should have been sentenced at PRL II, rather than III. We, therefore, remand to the trial court for the limited purpose of resentencing accordingly.

AFFIRMED IN PART; REMANDED IN PART.

Judge BRYANT concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissents.

Because I do believe there was insufficient evidence to support a traffic stop of the car in which defendant was riding as a passenger, I dissent.

I. Facts

Defendant was arrested on 9 January 2017, after he refused to provide a highway patrol officer his identification when the trooper stopped a car driven, by his wife, in which he was the passenger. The trooper

7. The worksheet stipulated to by the parties shows five additional convictions, apart from the Expired Operators' License infraction. But Defendant was convicted of two of these offenses on the same day, and the trial court rightfully considered only one in calculating his PRL. N.C. Gen. Stat. § 15A-1340.21(d) (2017) ("[I]f an offender is convicted of more than one offense in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.").

initiated the traffic stop after defendant extended his middle finger in the trooper's direction, forming the gesture colloquially known as "shooting him the bird," and started pumping his fist up and down in the air. At the time of the incident, the trooper was helping someone else on the side of the road as the defendant and his wife passed him in their vehicle. The trooper admitted that he did not witness any traffic violation but testified that his reason for the stop was two-fold: (1) he believed they may have been motioning to him for assistance; and (2) he believed they may have been engaging in disorderly conduct by provoking other vehicles on the road to violence.

When the trooper approached the car and attempted to open the passenger door, he saw that both the driver and defendant were videotaping the incident on their phones. The driver and defendant said repeatedly, "You're being recorded. What did we do wrong?" and "This is not a stop-and-ID state." The trooper insisted on taking identification from both of them so he could run warrants checks, and he cited defendant for resisting a public officer when he refused to identify himself.

II. Standard of Review

Defendant filed a motion to suppress, claiming the traffic stop was unlawful and therefore his resistance was lawful. The trial court orally denied the motion without entering any written findings or conclusions.

> In evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court.

State v. Nicholson, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018) (footnote omitted).

III. Discussion

The State argued in its brief that the trooper's traffic stop was justified under the "community caretaking" exception. The majority properly rejects that argument. This Court has found that hearing "mother f****r" yelled from a moving vehicle was not an objectively reasonable basis for a traffic stop under the "community caretaking" exception. *State v. Brown*, 265 N.C. App. 50, 827 S.E.2d 534 (2019). As in *Brown*, where the deputy heard the obscenity and unreasonably stopped the passing car, here, the trooper stopped the car after defendant shot him the bird.

I therefore agree with the majority that there is no reasonable basis for the "community caretaking" argument put forth by the State. However, I disagree with the majority's conclusion that a "reasonable suspicion" argument could justify the lower court's ruling.

"The Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures." *State v. Smathers*, 232 N.C. App. 120, 123, 753 S.E.2d 380, 382 (2014) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). "Traffic stops are recognized as seizures under both constitutions." *Id.* "[T]raffic stops are analyzed under the 'reasonable suspicion' standard created by the United States Supreme Court[.]" *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

"[A] brief, investigatory [traffic] stop" is permitted if the officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000). "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop." *Id.* "A court sitting to determine the existence of reasonable suspicion must require the [trooper] to articulate the factors leading to that conclusion . . . ." *United States v. Sokolow*, 490 U.S. 1, 10, 104 L. Ed. 2d 1, 12 (1989).

"[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one–whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 19-20, 20 L. Ed. 2d at 905. To determine whether an officer acted reasonably, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* at 27, 20 L. Ed. 2d at 909. A court must consider the totality of the circumstances to determine whether a reasonable suspicion exists. *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff'd*, 350 N.C. 630, 517 S.E.2d 128 (1999).

Here, the majority concludes that the trooper had a reasonable, articulable suspicion that defendant was committing the crime of disorderly conduct. The inquiry is two-fold: whether the trooper had a minimal objective justification to make the stop and whether the stop was reasonably related in scope to the perceived disorderly conduct.

While the majority cites a number of cases which found that one cannot be held criminally liable for raising one's middle finger at an officer, the majority attempts to differentiate the case *sub judice* by finding it was objectively reasonable for the officer to suspect the gesture was meant for someone in another vehicle. The majority believes that "such continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.' "

The majority presents no evidence to support that defendant's gesture was "continuous and escalating." From the officer's testimony, defendant's gesture simply turned from a hand-waving gesture to flipping the bird. There was no mention that the car was speeding, that the horn was being honked, or any other kind of intensified activities. In fact, the officer testified that he had no issues when pulling the car over. He further testified that when he approached the passenger side of the car where the defendant was sitting the window was rolled up, so at some point defendant had stopped his gesturing out of the window. Simply changing from a waving to an obscene gesture is not enough to support an objective conclusion that a public disturbance was imminent.

Our General Statutes define disorderly conduct in a number of ways, but the one the majority chooses to cite is as "a public disturbance intentionally caused by any person who . . . [m]akes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace." N.C. Gen. Stat. § 14-288.4(a)(2) (2017). There are no facts presented here that support the contention that defendant's gesture was an attempt to intentionally provoke a violent retaliation, nor that it would cause one. There is no testimony or indication that anyone other than the trooper saw it. There was also no indication that the vehicle was creating any danger to other motorists on the road.

I do not believe that this action was sufficient to justify the trooper in becoming alert "to a potential, future breach of the peace," because he did not see any evidence of aggressive driving or other interactions between the vehicles on the road that would suggest road rage. If that was truly his concern he could have followed the vehicle further to see if there was evidence of some road rage toward other vehicles. He did not do so, nor did he testify that he saw any improper driving. He chose not to take any actions to determine if road rage was occurring. Instead, he initiated an improper search and seizure to engage in an improper fishing expedition to find a crime with which to charge the defendant who had directed an obscene gesture to him moments earlier.

Even viewing the evidence in a light most favorable to the State, what we have here is a passenger in a vehicle making an uncalled-for obscene gesture. While defendant's actions were distasteful, they were, in my opinion, within the realm of protected speech under the First Amendment of the United States Constitution. Given that this was protected speech, I believe that the stop was not supported under the reasonable suspicion test of the Fourth Amendment.

In conclusion, extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is, in my opinion, protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct. "[T]he First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Houston v. Hill*, 482 U.S. 451, 472, 96 L. Ed. 2d 398, 418 (1987).

Therefore, I dissent and vote to reverse the trial court's order denying the motion to suppress and would vacate the conviction.

STATE OF NORTH CAROLINA
v.
WILLIAM ALLAN MILES

No. COA18-1274

Filed 20 August 2019

1. Appeal and Error—preservation of issues—insufficient evidence—not raised in trial court

Defendant failed to preserve for appellate review an argument that the State lacked evidence of "identifying information" in a prosecution for identity theft because he did not raise the issue in the trial court.

2. Conspiracy—to commit robbery with a dangerous weapon—agreement—attempted taking—threat—sufficiency of evidence

The State presented sufficient evidence that defendant and at least four other people had a mutual agreement and intent to rob the victim at gunpoint outside of his house. After two carloads of participants met at a nearby parking lot, one car driven by a female drove into the victim's driveway and honked the car horn to

get the victim to come outside, at which point defendant approached the victim from behind as the victim was retrieving his phone from his car, raised a loaded gun, and threatened the victim not to move.

3. Evidence—witness opinion testimony—law enforcement officer—modus operandi of the crime—conspiracy to commit robbery with a dangerous weapon

In a prosecution for conspiracy to commit robbery with a dangerous weapon, no plain error occurred from the admission of a law enforcement officer's testimony regarding the modus operandi behind the series of events at issue—which included a female driver pulling into the victim's driveway, honking to lure the victim outside, and then defendant approaching the victim from behind and threatening him at gunpoint—and their similarity to other incidents in the same geographic area, since the officer never stated it was his opinion that the suspects were guilty of conspiracy, and the State presented substantial evidence of each element of the crime.

4. Identity Theft—jury instructions—"identifying information"—section 14-113.20—nonexclusive list

In an identity theft case, the trial court properly instructed the jury regarding "identifying information" where it accurately based its instruction on N.C.G.S. § 14-113.20 (defining identity theft) and used nearly verbatim language from the N.C. Pattern Jury Instructions. The Court of Appeals rejected defendant's argument that the statutory list of identifying information was exclusive—therefore, although the statute did not include another person's name, date of birth, and address, where defendant used those pieces of information to present himself as someone else in order to avoid legal consequences, his actions were covered under the statute.

Appeal by defendant from judgment entered 18 September 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was substantial to show defendant committed the charged offenses, the trial court did not err in denying defendant's motion to dismiss for identity theft and conspiracy to commit robbery with a dangerous weapon. Where the testimony of a law enforcement officer was proper, the trial court did not err in admitting the testimony. Where the trial court properly informed the jury on the identity theft charge, the trial court did not err in giving the jury instruction.

On 6 September 2016, defendant William Allan Miles was indicted for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, and identity theft. The matter was tried on 11 September 2017 before the Honorable James K. Roberson, Judge presiding.

The State's evidence tended to show that at approximately 4:00 a.m. on 29 July 2016, Jacob Badders was asleep in his home on Cole Mill Road when he noticed lights shining into his window and heard a car horn "honking" in his driveway. Badders went outside and encountered a woman who asked to use his phone saying that she had gotten into a fight with her father. Badders told her to leave, and he went inside to call the police. As he started looking for his cellphone, Badders's girlfriend told him they had left their phones in his car. Badders went outside to retrieve their phones, taking his gun with him. When he reached his car, a male approached him with a gun and said, "Don't f**kin' move." The two men exchanged gunfire, and the assailant ran away. Badders called the police who arrived at the scene minutes later.

Officer Lauren McFaul-Brow and Officer J.E. Harris, of the Durham County Police Department, arrived at Badders's house and interviewed Badders and his neighbor John Lobaldo. Badders informed Officer McFaul-Brow that he used "snake shot" as ammunition, which would leave a distinctive wound on his assailant. Later during her investigation, Officer McFaul-Brow received information that someone had come into Duke Regional Hospital—approximately 10 minutes from Badders's house—with a distinctive wound matching the description of the snake shot described by Badders.

Officer Harris interviewed Lobaldo, who had surveillance cameras around his house, and reviewed the surveillance footage. Lobaldo stated that he noticed two cars enter a church parking lot near the intersection of Cole Mill Road. He saw three men get out of one of the cars and run across Cole Mill Road to the back of Badders's house. One of the cars, driven by a white female, left the church parking lot and drove to

Badders's house. The car parked in Badders's driveway and "honked" the horn three times until Badders came outside. Lobaldo heard the shooting and saw the assailant, along with two other men, get into one of the cars as they fled from Badders's house. The assailant seen leaving Badders's house was wearing a white t-shirt, jeans, tennis shoes, and a white toboggan or bandana on his head. Lobaldo stated he could tell the assailant was hurt by the way he was running.

The assailant—later identified as defendant—arrived at the hospital for treatment of his gunshot wounds. When defendant was asked for his name, he responded with a name, date of birth, and address other than his own. He gave the name "Jerel Antonio Thompson" and, as a result, he was provided a hospital tag with that name and corresponding date of birth. Defendant's clothing—a white t-shirt and jeans—was taken into evidence. Defendant later revealed his correct name and other identifying information and told an investigating officer that he started using the identity of Jerel Thompson because "it kind of matched him."

At trial, defendant moved to dismiss charges of attempted robbery with a dangerous weapon, felony conspiracy (to commit robbery with a dangerous weapon), assault with a deadly weapon with intent to kill, and identity theft. The trial court denied defendant's motions to dismiss.

Defendant was found guilty by jury of conspiracy to commit robbery with a dangerous weapon and identity theft. After the trial court declared a mistrial on the remaining charges, the State dismissed those charges. Defendant was sentenced to 29 to 47 months of imprisonment for conspiracy to commit robbery with a dangerous weapon and a consecutive sentence of 12 to 24 months for identity theft. Defendant appealed.

On appeal, defendant argues the trial court erred by: I) failing to dismiss the charges of conspiracy to commit robbery with a dangerous weapon and identity theft, II) permitting improper opinion testimony from a lay witness, and III) instructing the jury on identity theft.

I

Defendant argues that the trial court erred by denying his motion to dismiss because the State did not present substantial evidence to support the charges against him—identity theft and conspiracy to commit robbery with a dangerous weapon. Specifically, defendant argues the State neither proved that he agreed to commit robbery or that he used identifying information of another person. We disagree.

The standard of review for this Court to review the trial court's denial of a motion to dismiss is *de novo*. *State v. Woodard*, 210 N.C. App. 725, 730, 709 S.E.2d 430, 434 (2011). "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, 669 S.E.2d 290, 294 (2008) (quotation marks 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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "[T]he trial court should only be concerned that the evidence is sufficient to get the case to the jury," as opposed to examining the weight of the evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). "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).

In the instant case, defendant challenges his convictions for identity theft and conspiracy to commit robbery with a dangerous weapon. We address each claim in order.

Identity Theft

[1] Defendant argues the State did not present evidence of "identifying information" because he only provided another person's name, date of birth, and address. Defendant concedes that he did not preserve this issue for appellate review due to his failure to raise the issue before the trial court.[1] *See* N.C.R. App. P. 10(a)(1) (2019) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling. . . [i]t is also necessary for the complaining party to obtain a ruling [from the trial court] upon the party's request, objection, or motion.").

1. At trial, defendant argued that he did not *knowingly* use the name, date of birth, and address of Jerel Thompson because he was given pain medicine at the hospital. However, that argument was not presented on appeal.

Acknowledging his failure to preserve this issue, defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the merits of his argument. *See* N.C.R. App. P. 2 (2019) (Rule 2 provides, in pertinent part, that "[t]o prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]"). However, this Court will invoke Rule 2 only in exceptional circumstances or to prevent manifest injustice, and defendant has not demonstrated such an exceptional circumstance exists to warrant invocation of the rule. Thus, we decline to exercise our discretion to invoke Rule 2 to address defendant's argument regarding the identity theft charge.[2]

Conspiracy to Commit Robbery with a Dangerous Weapon

[2] Defendant contends the State did not present substantial evidence to withstand a motion to dismiss for conspiracy to commit robbery with a dangerous weapon. We disagree.

> The State's successful assertion of a charge of criminal conspiracy requires proof of an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence tending to establish a mutual, implied understanding will suffice to withstand a defendant's motion to dismiss.

State v. Boyd, 209 N.C. App. 418, 427, 705 S.E.2d 774, 781 (2011) (citation and quotation marks omitted).

"The proof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (citation and quotation marks omitted). Moreover, "[i]n order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove there was an agreement to perform every element

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2. As an alternative argument, defendant contends his trial counsel provided ineffective assistance by failing to make a general motion to dismiss and preserve the identity theft claim. While defendant's issue does not rise to the level that would require us to suspend the rules, as a practical matter, we analyze the identity theft statute in our review of his properly preserved argument in Issue III, regarding jury instructions. Thus, as noted *infra*, we see no prejudice from trial counsel's actions and dismiss defendant's IAC argument.

of the underlying offense." *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

Here, the evidence presented showed defendant was one of at least four people who occupied two cars that were present at the scene of the crime. Two cars drove into a parking lot of a church located in the victim's neighborhood in the early morning. One car with three male occupants parked at the church parking lot. The other car had a female occupant who then drove into Badders's driveway and initiated contact with Badders by honking her car horn. Badders instructed the female to leave his property, and soon thereafter, Badders was approached by a man––later identified as defendant––with a loaded weapon. After the two men exchanged gunfire, three men including defendant were seen running away from Badders's house. Badders's assailant was seen getting back into the car at the parking lot. When viewing all the evidence in the light most favorable to the State, a logical inference to be drawn is there was a meeting of minds to form an agreement to commit robbery. *See State v. Brewton*, 173 N.C. App. 323, 329–30, 618 S.E.2d 850, 855–56 (2005) (holding that an agreement may be established by circumstantial evidence).

Additionally, the State presented evidence satisfying the essential elements of the underlying offense: robbery with a dangerous weapon. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003) (stating that a defendant is guilty of robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 where the defendant commits: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, [and] (3) whereby the life of a person is endangered or threatened" (citation omitted)).

The evidence shows that defendant approached Badders from behind while Badders was retrieving his phone from his car in the driveway of his house. Defendant raised a loaded weapon towards Badders, threatening him by saying, "don't f**kin' move." Badders reacted by drawing his weapon, and they exchanged gunfire. Defendant's actions accompanied by his words were substantial evidence that defendant manifested the intent to rob Badders, and his arrival at Badders' house with the weapon was an overt act to carry out his intentions. *See State v. Davis*, 340 N.C. 1, 13, 455 S.E.2d 627, 632 (1995) (holding that the defendant's actions were substantial evidence of attempted armed robbery where he drew his pistol and stated to the victim, "Buddy, don't even try it," even without the demand for money or property).

Accordingly, as the State presented substantial evidence that defendant conspired with several others to commit robbery with a dangerous weapon, we overrule defendant's argument.

II

[3] Next, defendant argues the trial court allowed improper witness testimony from Officer Harris into evidence. Specifically, defendant argues that the testimony of Officer Harris, as to the modus operandi of the crime and similar incidents within the area, was inadmissible opinion testimony. Having not objected to the testimony at trial, defendant now urges that Harris's testimony constituted plain error. We disagree.

> 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). "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." *Id.* (citation and quotation marks omitted).

Rule 404(b) of the North Carolina Rules of Evidence governs the admissibility of relevant evidence of other crimes, wrongs, or acts.

> This rule is subject to but one exception requiring exclusion [of the evidence] 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. Thus, although the evidence of the defendant's other crimes may tend to show his inclination to commit them, the evidence is admissible under Rule 404(b), as long as it is also relevant for some other proper purpose. *Such other purposes include establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.*

State v. Allred, 131 N.C. App. 11, 17–18, 505 S.E.2d 153, 157 (1998) (alterations in original) (emphasis added) (internal citations and quotation marks omitted).

Here, Office Harris testified, without objection, during direct examination, to the following when asked specifically about the motive behind the sequence of events:

> [THE STATE]: Tell me about [the motive of the crime or the MO]. What does an "MO" mean?
>
> [OFFICER HARRIS]: Modus operandi, how a criminal operates.
>
> [THE STATE]: And can you describe for the jury what that is?
>
> [OFFICER HARRIS]: It's the way a person particularly commits a crime. With this particular one, it seemed that the suspects would use a female in a car by herself to lure out the victim and easy access into the home. Once the female would get access to the home, the other two suspects or however many suspects would use that opportunity to get entry to the home, take command of it and to commit an armed robbery.
>
> [THE STATE]: Have you seen this particular MO before in that area?
>
> [OFFICER HARRIS]: We have had a number of similar incidents within the area in the city in those -- in that particular time during the summer.

Officer Harris further testified that he became aware of similar incidents occurring in the area after reviewing the reports filed by other officers before his shift.

Defendant's contention that the aforementioned testimony is somehow improper opinion testimony because Officer Harris gave "his opinion [that] the suspects were guilty of conspiracy" is a mischaracterization of Officer Harris's testimony. Contrary to defendant's assertions in his brief, Officer Harris never testified it was his opinion that the suspects were guilty of conspiracy. Officer Harris testified to his understanding of what occurred on the night in question, after interviewing a witness on the scene and reviewing the surveillance video, and merely testified, without objection, to the *modus operandi* defendant used. Our rules of evidence allow a lay witness to testify about details "helpful to the fact-finder in presenting a clear understanding of [the] investigative process" as long as such details are rational to the lay witness's perception and experience. *State v. O'Hanlan*, 153 N.C. App. 546, 562–63, 570 S.E.2d 751, 761–62 (2002).

Moreover, as defendant has not demonstrated it is probable that the jury would have reached a different result—given that the State presented substantial evidence supporting the charge of criminal conspiracy—we conclude the trial court did not commit plain error by admitting the testimony.

III

[4] Finally, defendant argues the trial court erred by instructing the jury on the identity theft charge—specifically as to the element of "identifying information"—in which he contends the instruction was "contrary to existing laws." After careful consideration, we disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Section 14-113.20 of our General Statutes, provides, in pertinent part, that identity theft exists when: "A person . . . knowingly obtains, possesses, or *uses* identifying information of another person . . . with the intent to fraudulently represent that the person is the other person . . . *for the purpose of avoiding legal consequences*[.]" N.C. Gen. Stat. § 14-113.20(a) (2017) (emphasis added).

The General Assembly enumerated fourteen examples of "identifying information":

> The term "identifying information" as used in this Article includes the following:
>
> (1) Social security or employer taxpayer identification numbers.
>
> (2) Driver's license, State identification card, or passport numbers.
>
> (3) Checking account numbers.
>
> (4) Savings account numbers.
>
> (5) Credit card numbers.
>
> (6) Debit card numbers.

> (7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
>
> (8) Electronic identification numbers, electronic mail names or addresses, Internet account numbers, or Internet identification names.
>
> (9) Digital signatures.
>
> (10) Any other numbers or information that can be used to access a person's financial resources.
>
> (11) Biometric data.
>
> (12) Fingerprints.
>
> (13) Passwords.
>
> (14) Parent's legal surname prior to marriage.

Id. § 14-113.20(b).

On its face, unlike other statutes criminalizing fraudulent crimes involving identities, the statute in question specifically includes the word "use" in reference to making use of another's information to derive a benefit or escape legal consequences. *Compare id.*, *with* N.C. Gen. Stat. § 14-100.1 (stating that it is unlawful for any person to knowingly *possess*, *manufacture*, *or obtain* a false or fraudulent form of identification (emphasis added)), *and* N.C. Gen. Stat. § 14-113.20A (stating it is unlawful for any person to knowingly *sell*, *transfer*, *or purchase* identifying information of another person (emphasis added)). Additionally, the General Assembly amended section 14-113.20 to its current version to expand the conduct prohibited by statute and impose a greater punishment for violating this statute.[3]

Defendant contends that the General Assembly intended for this list to be "distinctive and exclusive" to the aforementioned examples. However, the statute itself disproves defendant's contention of exclusivity by usage of the term "includes" before listing the fourteen examples. *See id.* § 14-113.20(b) ("The term 'identifying information' as used in this Article *includes* the following [examples] . . . ." (emphasis added)). We consider the purpose behind enacting the identity theft statute was to

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3. Section 14-113.20 was also amended to remove "financial" from the original enactment of the identity theft statute. *See* N.C. Sess. Law 2005-414, § 6 (Sept. 21, 2005); *see also* N.C. Gov. Mess., (Sept. 21, 2005) (referring to Sen. Daniel Clodfelter's remarks as a sponsor of the Bill intended to create "comprehensive" legislation equipped with "tools to fight this crime" as "identity theft is one of the fastest-growing crimes in our state right now").

protect against *using* misrepresentation to achieve a benefit. Where a person presents himself to be another person and then *uses* that identification to obtain a favorable result, such actions were intended to be covered under N.C. Gen. Stat. § 14-113.20 to support identity theft convictions. Thus, we reject the notion that a conviction for identity theft is restricted to just the fourteen examples and the General Assembly intended for the list of these examples to be exclusive.

Moreover, *assuming arguendo*, that we were to view the list as exclusive, defendant's conduct would fall under subsection (10)—"[a]ny other numbers or information that can be used to access a person's financial resources[.]" Another person's name, date of birth, and address are possible forms of identifying information where a defendant, like defendant in the instant case, uses the information for the purposes of escaping arrest or other legal consequences and possibly to receive hospital services for his injuries.[4]

A warrant for defendant's arrest was issued under the name Jerel Thompson. Defendant's actual name and identifying information were not discovered and obtained until well after defendant was in custody. Defendant was indicted under the identity theft statute for using the name, date of birth, and address of Jerel Thompson while an investigation was underway regarding the events, including the shooting, that had taken place at Badders's residence. Therefore, such actions embody what the General Assembly intended for the identity theft statute to protect against.

At trial, the trial court used the North Carolina Pattern Jury Instructions for identity theft and instructed the jury as follows:

> The defendant has been charged with identity theft.
>
> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant used personal identifying information of another person. A person's name, date of birth, and address would be personal identifying information.

---

4. We also consider the federal identity theft statute as persuasive authority, which allows federal prosecution of a person who "knowingly transfers, possesses, or uses, without lawful authority, a *means of identification* of another person with the intent to commit . . . any unlawful activity[.]" *See* 18 U.S.C. § 1028(a)(7) (2017) ("Fraud and related activity in connection with identification documents, authentication features, and information"). By definition, "means of identification" includes a name and date of birth "alone or in conjunction with any other information, to identify a specific individual." *Id.* § 1028(d)(7)(A).

> And, second, that the defendant acted knowingly and with the intent to fraudulently – fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant used personal identifying information of another person and that the defendant did so knowingly with the intent to fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The Pattern Jury Instruction provides:

> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant [obtained] [possessed] [used] personal identifying information of another person. (Name type of identifying information, e.g., social security number) would be personal identifying information.
>
> And Second, that the defendant acted knowingly and with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in the other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences].
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant [obtained] [possessed] [used] personal identifying information of another person and that the defendant did so knowingly, with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in that other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I.—Crim. 219B.80 (2018).

Here, the trial court gave accurate jury instructions in accordance with the statute and nearly verbatim to the approved pattern jury instructions for identity theft. "Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law," and this Court has recognized "that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation and quotation marks omitted). Having already considered and determined that a person's name, date of birth, and address constitutes identifying information under the statute, we reject defendant's contention that the trial court gave a jury instruction as to identifying information that was "contrary to existing law." Accordingly, we find no error in the trial court's jury instruction on identity theft.

NO ERROR.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JAMES ALLEN RUTLEDGE

No. COA19-32

Filed 20 August 2019

1. Criminal Law—right to jury trial—waiver—statutory notice—notice of intent and request for arraignment on the day of trial

The trial court did not err by allowing defendant to waive his right to a jury trial where defendant gave notice of his intent to waive a jury trial on the day of the trial, the trial court and the State both consented to the waiver, and defendant invited noncompliance with the timeline requirements of N.C.G.S. § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of the trial.

2. Criminal Law—right to jury trial—waiver—trial court's colloquy with defendant—statutory requirements

The trial court did not err by allowing defendant to waive his right to a jury trial where the trial court complied with N.C.G.S. § 15A-1201(d)(1) by addressing defendant personally—explaining the consequences of waiving a jury trial and asking whether

defendant had discussed his rights and the consequences of waiving them with his attorney. Contrary to defendant's argument on appeal, the trial court was not required to ask defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial.

3. Criminal Law—right to jury trial—waiver—right to revoke waiver within 10 business days—waiver on day of trial

The Court of Appeals rejected defendant's argument that the trial court was required to provide him with a 10-day "cooling-off" revocation period before starting trial where defendant waived his right to a jury trial on the first day of trial. A plain reading of N.C.G.S. § 15A-1201(e) did not compel such a rule, which would effectively allow criminal defendants to force a mandatory 10-day continuance.

4. Criminal Law—right to jury trial—waiver—prejudice

Even assuming the trial court erred by allowing defendant to waive his right to a jury trial, defendant could not show prejudice where he chose to wait until the day of trial to give his intent to waive his right and there was no indication that a jury would have been privy to exculpatory evidence that the trial court did not consider.

Appeal by defendant from judgment entered 14 August 2018 by Judge R. Gregory Horne in Transylvania County Superior Court. Heard in the Court of Appeals 8 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Jeffrey William Gillette for defendant-appellant.

TYSON, Judge.

James Allen Rutledge ("Defendant") appeals from judgment entered after the trial court found him guilty of one count of possession of methamphetamine, a Schedule II controlled substance. We affirm.

I. Background

In late 2017, the Brevard Police Department received complaints about suspected drug trafficking occurring at a Transylvania County home. On 29 November 2017, officers executed a search warrant for the home at 54 Camp Harley Farm Drive in Transylvania County. Officers

observed Defendant and another male standing outside the home. As part of the process of executing the search warrant, the officers secured the men. The officers conducted a pat-down search of Defendant and found a small purple case containing a crystal-like substance. Testing revealed the substance to be one-tenth of a gram of methamphetamine. Defendant was indicted on 12 February 2018 for one count of possession of methamphetamine, a Schedule II controlled substance.

Defendant's case was called for trial on 14 August 2018. At the start of trial, Defendant requested to waive his right to a trial by jury and have the judge hear the evidence and adjudicate the charge. Defendant's attorney stated: "Good Afternoon. May it please the Court, at this point in time we do have and do request a waiver of jury trial in this matter." Defendant's attorney also confirmed engaging in prior discussions with the prosecutor about the waiver, and asserted the State had no objections.

The following colloquy then occurred:

> THE COURT: All right. . . . Mr. Rutledge, if you would just stand up where you are, sir. Mr. Rutledge, good afternoon, sir. Sir, you are charged with possession of methamphetamine. Mr. Barton represents you in this matter. Is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Possession of methamphetamine is a felony. It's a Class I felony. The maximum possible punishment for any Class I felony under North Carolina law is up to 24 months. That would be the maximum. If your prior record level if it is not a VI, the maximum you would face would be correspondingly lower. Have you had an opportunity to talk with Mr. Barton and review the maximum that you actually would face given your prior record, sir?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. And I will ask you a couple of questions about that. I'm advised that, by Mr. Barton, that it is your desire to waive a jury trial in this matter and have a bench trial; is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you do understand, sir, that you have the right to have 12 jurors, jurors of your peers, selected,

that you have the right to participate in their selection pursuant to the rules set forth in our law and that any verdict by the jury would have to be a unanimous verdict, unanimous of the 12? Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: You have the right to waive that and instead have a bench trial, which would mean that the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present were you to waive your right to a jury trial. Do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Have you talked with Mr. Barton about your rights in this regard and the ramifications of waiving a jury trial?

DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the jury trial or your rights therein?

DEFENDANT: No, sir.

THE COURT: All right. And, sir, is it your decision then that you wish, and your request, that the jury trial be waived and that you be afforded a bench trial?

DEFENDANT: Yes, sir.

THE COURT: All right. Thank you, sir.

The court granted Defendant's motion to waive his right to a jury trial. The court and Defendant signed form AOC-CR-405 ("Waiver of Jury Trial form"). The document was not signed by the State. After the waiver was entered, Defendant's attorney requested that Defendant be arraigned. After arraignment, Defendant's trial began.

The State offered testimony from the two police officers who found the drugs on Defendant's person on 29 November 2017. Defendant stipulated that the substance found in the purple case was methamphetamine without further testimony from employees of the State Crime Lab. Defendant testified and asserted he had never before seen the small purple case. Following trial, the court entered a verdict of guilty, and imposed a split sentence of four months' imprisonment followed

by thirty months' supervised probation. Defendant timely filed written notice of appeal.

II. Jurisdiction

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

III. Issue

The sole issue on appeal is whether the trial court erred in granting Defendant's request to waive a jury trial and to proceed to a bench trial in violation of N.C. Gen. Stat. § 15A-1201 (2017).

IV. Standard of Review

The Court conducts a *de novo* review of a question of law to determine whether a trial court has violated a statutory mandate. *State v. Mumma*, ___ N.C. App. ___, ___, 811 S.E.2d 215, 220 (2018).

V. Analysis

The North Carolina Constitution affirmatively confirms a defendant's right to request a bench trial, subject to the trial court's approval. N.C. Const. art. I, § 24. In 2014, the North Carolina General Assembly amended N.C. Gen. Stat. § 15A-1201 to allow criminal defendants in non-capital cases to waive their right to a trial by jury. In 2015, the statute was again amended to include provisions regarding advance notice, revocation period, and judicial consent. *Id.*

A. Statutory Violation

Defendant argues the trial court committed reversible error in violation of N.C. Gen. Stat. § 15A-1201 in three ways: (1) by failing to require the statutory notice provision set out in N.C. Gen. Stat. § 15A-1201(c); (2) by failing to comply with N.C. Gen Stat. § 15A-1201(d)(1), which requires the trial court to "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury"; and, (3) by failing to provide Defendant the statutory 10-day revocation period before starting the trial as required by N.C. Gen. Stat. § 15A-1201(e).

1. Advance Notice

[1] Defendant argues the trial court erred when it failed to require Defendant's compliance with the notice provision outlined by N.C. Gen. Stat. § 15A-1201(c). The statute allows a defendant charged with a

non-capital offense to give notice of his intent to waive his right to a trial by jury in any of the three following ways:

> (1) Stipulation, which may be conditioned on each party's consent to the trial judge, [and] signed by both the State and the defendant . . .
>
> (2) Filing a written notice of intent to waive a jury trial with the court . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
>
> (3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

N.C. Gen. Stat. § 15A-1201(c).

The critical times under the statute for filing a waiver of a jury trial are the date of arraignment, the date of service of a calendar setting, and the date of calendar call. Nothing in the record before us indicates when either the calendar setting under N.C. Gen. Stat. § 7A-49.4(b) (2017) or the setting of the definite trial date under N.C. Gen. Stat. § 7A-49.4(c) (2017) occurred in this case.

Defendant was not formally arraigned until the day of trial. Apparently, a formal arraignment was not requested by Defendant at any time prior to the scheduled trial date. Formal arraignment may be waived. Pursuant to N.C. Gen. Stat. § 15A-941(d) (2017), "[a] defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment."

This Court addressed similar issues to those at bar in both *State v. Swink*, 252 N.C. App. 218, 797 S.E.2d 330 (2017) and *State v. Jones*, 248 N.C. App. 418, 789 S.E.2d 651 (2016). In *Jones*, the defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. *Id.* at 423, 789 S.E.2d at 655. This Court held the defendant never requested a formal arraignment, and his right to be formally arraigned was deemed waived twenty-one days after he was indicted. *Id.*

In *Swink*, the defendant never entered a "not guilty" plea to trigger informal arraignment. Defendant's request for a bench trial functioned

as an implicit plea of not guilty. *Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333. This Court held in *Swink* no violation of the statutory notice provision of N.C. Gen. Stat § 15A-1201(c) occurred when no stipulation was provided and the defendant was arraigned on the day of his trial. *Id*. The defendant's actions barred the court from enforcing technical compliance with the provision. This Court found no error in *Swink*. *Id*. We find none here.

The filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial. *See* N.C. Gen. Stat § 15A-1201. It is not necessary to postpone the subsequent trial by ten working days, due to a defendant's decision to not request prior arraignment until the trial date itself. *See Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333.

2. Judicial Consent

[2] Defendant argues the trial court ignored procedural safeguards when it failed to "solicit much of the information normally required in order to determine if a waiver is [made] knowing[ly] and voluntar[ily]." The trial court did not specifically ask Defendant whether he was literate, whether he was satisfied with his lawyer's work, or whether anyone had made promises or threats to induce him to waive a jury trial. Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial.

In *Swink*, where the defendant sought to waive his right to trial by jury, the trial court never specifically asked the defendant whether or not he was satisfied with his lawyer's work or whether anyone had made promises or threats to induce him to waive a jury trial. *Swink*, 252 N.C. App. at 219-20, 797 S.E.2d at 331-32.

N.C. Gen. Stat. § 15A-1201(d)(1) requires the trial court to: "[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C. Gen. Stat. § 15A-1201(d)(1). No other specific inquiries are required in the statute to make the determination of Defendant's understanding and

appreciation of the consequences "to waive his trial by jury." *Id.* This Court will not read such further specifications into law.

Here, Defendant appeared in court with his attorney on the day of trial, who initiated and informed the trial judge of Defendant's specific desire to waive a jury trial and proceed with a bench trial. The trial court clearly explained to Defendant that waiving his right to a trial by jury meant "the judge alone would decide guilt or innocence and the judge alone would determine any aggravating factors that may be present." The judge also inquired whether Defendant had the opportunity to discuss his rights and the ramifications of the waiver with his attorney. As noted above, in response to each question, Defendant answered "yes."

The trial court also confirmed that Defendant knew the offense was non-capital and knew the maximum sentence that could be imposed. Defendant responded he had no other questions about the waiver, trial, or his rights. Defendant swore that by signing the form, he was freely, voluntarily, and knowingly waiving his right to a jury trial.

The trial court's colloquy mirrored the acknowledgements made on the Waiver of Jury Trial form. The colloquy between the trial court and Defendant established that Defendant "fully underst[ood] and appreciate[d] the consequences of the defendant's decision to waive the right to trial by jury." *Id.*

3. Revocation Period

[3] N.C. Gen. Stat § 15A-1201(e) provides that: "[o]nce waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice[.]" Defendant argues N.C. Gen. Stat. § 15A-1201(e) mandates a ten-day "cooling-off" period, wherein defendants are permitted ten working days to reflect upon their choice to waive. This revocation period is granted following the required notice outlined in N.C. Gen. Stat § 15A-1201(c).

A plain reading of the statute does not compel a mandatory ten-day cooling-off period for a waiver made on the eve of trial. Rather, the statute provides a period when the waiver was provided in advance of trial during which a defendant has an absolute right to revoke a waiver. If a defendant moves to revoke such a waiver after the ten-day period has lapsed, N.C. Gen. Stat. § 15A-1201(e) provides that "the defendant may only revoke the waiver of a trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State." To interpret and enforce this power to revoke within ten days

as a "mandatory cooling-off period" is inconsistent with the text of the statute and the prior actions of Defendant.

Allowing a ten-day revocation period when defendant has declared intent to waive a jury trial at an informal arraignment, contemporaneous with the start of trial, would allow a defendant to *force* a mandatory ten-day continuance. The General Assembly, in drafting N.C. Gen. Stat. § 15A-1201(e), anticipated a defendant may improperly attempt to waive his right to a trial by jury on the scheduled day of trial. Nothing shows the General Assembly intended for the revocation period provision to create or to allow such a loophole and cause unnecessarily delays.

Were defendants unilaterally permitted to force such a continuance, the provisions of N.C. Gen. Stat. § 15A-1201 would lead to absurd results. Under the absurdity doctrine, "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." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

In 2015, a proposed amendment to N.C. Gen. Stat § 15A-1201(e) was introduced in the North Carolina Senate to expressly allow a defendant to "revoke [his waiver of jury trial] until such time as the first witness is sworn." That proposed amendment failed. *See* An Act to Establish Procedure for Waiver of The Right to a Jury Trial in Criminal Cases in Superior Court: Hearing on H.B. 215 Before the Subcomm. on the Judiciary B of the H. Comm. On the Judiciary, 2015 Leg.

The intent of our General Assembly was to prevent a defendant from forcing undue delays by invoking the revocation period provision as late as the day of his trial. If Defendant wanted to take advantage of the ten-day revocation rule, he should have given advance notice and requested arraignment prior to trial. *See* N.C. Gen. Stat § 15A-1201(e).

B. Prejudice

[4] Even were we to presume Defendant could show the trial court erred by granting his requested waiver of a jury trial, Defendant must also show the actions of the trial court prejudiced him to receive a new trial. *See Swink*, 252 N.C. App. at 221, 797 S.E.2d at 332; *see also State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) ("when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the] defendant's failure to object at trial."). In *State v. Love*,

this Court stated: "However, a new trial does not necessarily follow a violation of statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (2006) (citations omitted).

N.C. Gen. Stat. § 15A-1443 places the burden on Defendant to show a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C. Gen. Stat. § 15A-1443(a) (2017). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). *See also State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review").

If Defendant wanted to waive his jury trial in accordance with N.C. Gen. Stat. § 15A-1201, he needed to request a formal arraignment prior to trial and deliver notice of intent to waive at either that arraignment time, or the time of the calling of the calendar. Defendant failed to do either.

Defendant waited until the day of trial to announce his intention to waive his right to trial by jury. Presuming, without finding, the trial court's grant of Defendant's requested waiver was error under N.C. Gen. Stat. § 1201, Defendant has failed to and cannot show prejudice under N.C. Gen. Stat. § 15A-1443.

The record is devoid of any indication tending to show a jury would have been privy to exculpatory evidence that this trial court did not consider. Defendant initiated and requested the waiver of a jury trial on the day of trial. Defendant made the strategic choice to request a bench trial and was informed of the potential consequences of his request and proceeded to trial. The trial court's grant of such request, even if it was shown to be in technical violation of N.C. Gen. Stat. § 15A-1201, was not prejudicial. Defendant's arguments are overruled.

VI. Conclusion

Defendant clearly initiated his choice for a bench trial and proceeded to trial and testified after being fully advised and counseled on the potential consequences. He has not shown that his own strategic choice to waive his right to a jury trial on the day of trial prejudiced him in any way.

We hold the trial court did not commit any error to warrant a new trial by allowing Defendant to waive his right to a jury trial and proceed

to trial on the scheduled trial date. Defendant's conviction and the judgment entered thereon are affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JERRY GIOVANI THOMPSON

No. COA17-477-2

Filed 20 August 2019

Search and Seizure—suspicionless seizure—incident to execution of a search warrant—"occupant" of searched premises

In a prosecution for various drug possession charges, where a team of officers detained defendant while executing a warrant to search his girlfriend's apartment, the trial court erred by denying defendant's motion to suppress evidence recovered from his nearby vehicle because—assuming a Fourth Amendment seizure did occur when the officers retained defendant's driver's license—a suspicionless seizure incident to the warrant's execution was unjustified because defendant was not an "occupant" of the searched premises. Although defendant and his vehicle were physically close to the apartment, defendant cooperated with police questioning, never attempted to approach the apartment, and otherwise did nothing to interfere with the officers' search.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 3 January 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 5 October 2017, with opinion issued 2 January 2018. On 1 February 2019, the Supreme Court vacated and remanded to this Court for reconsideration in light of *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman, for defendant-appellant.

ZACHARY, Judge.

Defendant Jerry Giovani Thompson appealed from the trial court's judgment sentencing him for convictions of felony possession of marijuana, possession with intent to sell or deliver marijuana, possession of marijuana paraphernalia, and possession of a firearm by a felon. Defendant argued on appeal that the trial court erred in denying his motion to suppress.[1] By published opinion issued on 2 January 2018, a majority of this Court concluded over a dissent "that the factual findings in the order denying defendant's suppression motion did not resolve a pivotal disputed issue of fact, requiring us to vacate the judgment and remand for further findings." *State v. Thompson*, ___ N.C. App. ___, ___, 809 S.E.2d 340, 343 (2018) ("*Thompson I*"). The Supreme Court subsequently vacated *Thompson I* and remanded the matter to this Court for reconsideration in light of the Supreme Court's decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018). Upon reconsideration, we conclude that the trial court's order denying Defendant's motion to suppress cannot be upheld on the grounds enumerated in *State v. Wilson*. Accordingly, we vacate the judgment and remand for entry of additional findings consistent with our decision in *Thompson I*.

I. Background

On 10 April 2015, a team of roughly eight to twelve law enforcement officers with the Charlotte-Mecklenburg Police Department traveled to an apartment on Basin Street in Charlotte in order to execute a search warrant. The target of the search warrant was a female.

Defendant was cleaning his vehicle in the street adjacent to the apartment when the officers arrived to execute the search warrant. Sergeant Michael Sullivan approached Defendant in order to confirm that he was not the female named in the search warrant and to ensure that he would not interfere with the search. Defendant told Sergeant Sullivan that he did not live in the apartment, but his girlfriend did.

Sergeant Sullivan asked Defendant for his identification, "handed him" and his driver's license off to Officer Justin Price, and then proceeded inside the apartment in order to supervise the search. Officer

1. Defendant also argued that the judgment sentencing him for felony possession of marijuana should be vacated on the grounds that he did not plead guilty to that offense.

Price testified that Defendant was already in custody at that point. Officer Price and Officer Michael Blackwell remained outside with Defendant while the other officers executed the search warrant. Roughly ten minutes later, Officer Mark Hefner exited the apartment and asked Defendant for permission to search his vehicle. Defendant consented to the search, and officers found marijuana, paraphernalia, and a firearm in the trunk.

Defendant was indicted for possession of marijuana paraphernalia, possession with intent to sell or deliver marijuana, felony possession of marijuana, maintaining a vehicle for the purpose of keeping a controlled substance, and possession of a firearm by a felon.

On 4 October 2016, Defendant filed a motion to suppress the evidence seized from the search of his vehicle. Defendant argued that "[t]he initial police encounter . . . was not a voluntary contact, but rather an illegal seizure and detention of [Defendant] which was unsupported by reasonable suspicion," and that the trial court was therefore required to "suppress all evidence gathered as a result of the illegal seizure of his person and the illegal search of his vehicle." Following a hearing, however, the trial court found that Defendant "was neither seized nor in custody" at the time he consented to the search of his vehicle.

Because Defendant was never "seized" within the meaning of the Fourth Amendment, the trial court concluded that no Fourth Amendment violation had occurred and, accordingly, denied Defendant's motion to suppress. Defendant subsequently pleaded guilty to possession of drug paraphernalia, possession with intent to sell or deliver marijuana, and possession of a firearm by a felon, preserving his right to appeal the trial court's denial of his motion to suppress. The trial court imposed a suspended sentence and placed Defendant on 24 months' supervised probation. A written order denying Defendant's motion to suppress was entered on 5 January 2017. Defendant timely appealed.

This Court heard Defendant's appeal on 5 October 2017. Defendant argued on appeal that the officers "seized" him for purposes of the Fourth Amendment "when they took and retained his driver's license," and that such seizure, in the absence of "any reasonable suspicion that he was involved in criminal activity," violated Defendant's Fourth Amendment rights. Citing *State v. Cottrell*, 234 N.C. App. 736, 760 S.E.2d 274 (2014), Defendant maintained that the trial court was required to suppress the evidence recovered from the search of his vehicle because it was the product of "this unconstitutional seizure."

Over a dissent, this Court concluded that the trial court's findings of fact were insufficient to determine whether Defendant had been "seized" for purposes of the Fourth Amendment:

> It is long-established that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). As a result, "an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210, 215, 80 L. Ed. 2d 247, 255 (1984).
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> . . . .
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> In determining whether a defendant was seized, "relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification, or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).
>
> . . . .
>
> In arguing that he was seized, defendant places great emphasis upon his contention that the law enforcement officers retained his driver's license during the encounter. Defendant cites several cases, including *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009), in which this Court stated, in analyzing whether the defendant had been seized, that "a reasonable person under the circumstances would certainly not believe he was free to leave without his driver's license and registration." We find this argument persuasive. Indeed, we have not found any cases holding that a defendant whose identification or driver's license was held by the police without reasonable suspicion of criminal activity was nonetheless "free to leave."
>
> . . . .

> In its appellate brief, the State does not dispute the crucial significance of whether the officers kept defendant's license. . . . The State instead argues that the trial court's findings of fact fail to establish whether the officers retained defendant's license or returned it to him after examination. We agree with this contention.
>
> Witnesses at the hearing on defendant's suppression motion gave conflicting testimony with regard to the circumstances under which law enforcement officers took possession of defendant's driver's license and the time frame in which the relevant events occurred. . . .
>
> [D]efendant testified that the officers retained his license, but the officers did not testify about this issue. Assuming that the law enforcement officers kept defendant's identification, the testimony is conflicting as to whether defendant's car was searched before, immediately after, ten minutes after, or a half-hour after defendant gave his license to [Sergeant] Sullivan.
>
> . . . .
>
> In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred. Given that the officers conceded that their interaction with defendant was not based upon suspicion of criminal activity, a finding that officers kept defendant's identification would likely support the legal conclusion that he had been seized.

Thompson I, ___ N.C. App. at ___, 809 S.E.2d at 345-49 (internal citations, quotation marks, and brackets omitted). Accordingly, "[b]ecause the court's findings of fact fail[ed] to resolve material issues, we vacate[d] the judgment entered against defendant, and remand[ed] for the trial court to enter findings of fact that resolve all material factual disputes."[2]

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2. We likewise agreed with Defendant "that the judgment entered against [him] and the written transcript of plea, both of which were signed by the trial judge, are inconsistent," and therefore remanded "for resolution of this discrepancy." *Id.* at ___, 809 S.E.2d at 343. The dissent, and thus the resulting appeal, was not predicated upon this ground, nor does the Supreme Court's decision in *Wilson* affect that conclusion. Accordingly, we reiterate that portion of our holding from *Thompson I*, but decline to address it further in this opinion.

Id. at ___, 809 S.E.2d at 349. Judge Berger dissented on the grounds that "Defendant was never seized by Charlotte-Mecklenburg Police Department . . . officers within the meaning of the Fourth Amendment." *Id.* at ___, 809 S.E.2d at 350 (Berger, J., dissenting).

The State appealed of right to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-30(2). On 1 February 2019, the Supreme Court vacated *Thompson I* and remanded the case to this Court for review in light of its decision in *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018).

Wilson requires this Court to determine, assuming, *arguendo*, that Defendant was in fact "seized" for purposes of the Fourth Amendment, whether such seizure was nevertheless justified under the rule set forth by the United States Supreme Court in *Michigan v. Summers*, 452 U.S. 692, 69 L. Ed. 2d 340 (1981). We conclude that it was not.

II. *Michigan v. Summers* and *State v. Wilson*

In *Michigan v. Summers*, the United States Supreme Court held that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 69 L. Ed. 2d at 351 (footnote omitted). Our Supreme Court in *Wilson* identified three prongs to the rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815 (citations and quotation marks omitted). "These three parts roughly correspond to the 'who,' 'where,' and 'when' of a lawful suspicionless seizure incident to the execution of a search warrant." *Id.*

Our Supreme Court in *Wilson* applied the *Summers* rule and rejected the defendant's challenge to the trial court's denial of his motion to suppress. In that case, the defendant had arrived on the scene while the Winston-Salem Police Department was in the process of actively securing a home in order to execute a search warrant. *Id.* at 922, 821 S.E.2d at 813. The defendant penetrated the perimeter securing the scene, walked past an officer, and announced that he was going to retrieve his moped. *Id.* After disobeying the officer's command to stop, the defendant proceeded down the driveway toward the home, at which point officers detained and frisked him. *Id.* Officers recovered a firearm, and the defendant was charged with possession of a firearm by a felon. *Id.* at 922, 821 S.E.2d at 814.

In determining whether the defendant had been lawfully seized under the *Summers* rule, our Supreme Court noted that the application of the second and third prongs was "straightforward," and thus focused its inquiry on the first prong, i.e., whether the defendant's brief detention was justified on the ground that he was an "occupant" of the premises during the execution of a search warrant. *Id.* at 924-25, 821 S.E.2d at 815.

The United States Supreme Court adopted the *Summers* rule based in part upon the rationale that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer that an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that citizen to remain while officers of the law execute a valid warrant to search [her] home." *Summers*, 452 U.S. at 704-05, 69 L. Ed. 2d at 351. Our Supreme Court noted, however, that beyond enumerating the governmental interests that combine to justify a *Summers* detention, the United States Supreme Court had yet to "directly resolve[ ] the issue of who qualifies as an 'occupant' for the purposes of the . . . rule." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815.

In attempting to answer this question, the *Wilson* Court examined the various rationales underlying the *Summers* rule. The Court ultimately concluded that a person is an "occupant" for purposes of the rule "if he poses a real threat to the safe and efficient execution of a search warrant." *Id.* (quotation marks omitted); *see also Bailey v. United States*, 568 U.S. 186, 195, 185 L. Ed. 2d 19, 29-30 (2013) ("When law enforcement officers execute a search warrant, safety considerations require that they secure the premises, which may include detaining current occupants. By taking unquestioned command of the situation, the officers can search without fear that occupants, who are on the premises and able to observe the course of the search, will become disruptive, dangerous, or otherwise frustrate the search." (citation and quotation marks omitted)). Thus, under this formulation of the rule, our Supreme Court noted that although a defendant may not be "an *occupant* of the premises being searched in the ordinary sense of the word," *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815, the defendant's "own actions" may nevertheless "cause[ ] him to satisfy the first part, the 'who,' " of a lawful *Summers* detention. *Id.* at 926, 821 S.E.2d at 816.

Applying this definition, although the defendant was not inside the premises when the officers arrived to execute the search warrant, our Supreme Court concluded that the defendant's own actions had nevertheless rendered him an "occupant," thereby subjecting him to a suspicionless seizure incident to the lawful execution of the search warrant. The Supreme Court reasoned:

> We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. . . . [I]t was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained.

Id. at 925, 821 S.E.2d at 815. Because the defendant's initial detention, lawful under the *Summers* rule, did not taint the subsequent search, no Fourth Amendment violation occurred, and the Supreme Court therefore affirmed the trial court's denial of his motion to suppress.

III. Application

In the instant case, there is no question but that the third prong of the *Summers* rule—the "when"—is satisfied, in that the officers detained Defendant during their lawful execution of a warrant to search his girlfriend's apartment. Moreover, given the apartment's proximity to the street on which Defendant's vehicle was parked, it is also arguable that the circumstances here satisfied the second prong—the "where"—of the *Summers* rule. *See id.* at 924, 821 S.E.2d at 815 ("It is also evident that defendant was seized within the immediate vicinity of the premises being searched."). We conclude, however, that Defendant was not an "occupant" of the searched premises, as that term is defined in *Wilson*, so as to satisfy the first prong—the "who"—of a lawful *Summers* detention.

Defendant was cleaning his vehicle in the street when officers arrived to execute the search warrant. The officers approached Defendant to question him. Defendant remained inside his vehicle and told the officers that he did not live in the apartment, but that his girlfriend did. At no point did Defendant attempt to approach the apartment. Nor did he exhibit nervousness or agitation, disobey or protest the officers' directives, appear to be armed, or undertake to interfere with the search.[3] *Cf. id.* at 925-26, 821 S.E.2d at 816 ("Indeed, if such precautionary measures [such as erecting barricades or posting someone at the door] did

3. The dissent appears to argue that Defendant's detention was justified, in part, upon his girlfriend "identif[ying] him as the supplier of the drugs that were the target of the search." *Dissent* at 7. This is obviously irrelevant, as Defendant had already purportedly been "seized" by the time the officers learned this information.

not carry with them some categorical authority for police to detain individuals *who attempt to circumvent them*, it is not clear how officers could practically search without fear that occupants, who are on the premises and able to observe the course of the search, would become disruptive, dangerous, or otherwise frustrate the search." (emphasis added) (quotation marks omitted)). Quite simply, there were no circumstances to indicate that Defendant would pose "a real threat to the safe and efficient execution" of the officers' search.[4] *Id.* at 925, 821 S.E.2d at 815.

To hold that Defendant's presence in his vehicle under these circumstances was sufficient to render him an "occupant" of the apartment for purposes of the *Summers* rule would afford the State the wide discretion to detain any unlucky bystander, simply because he or she happens to be familiar with a resident of the premises being searched.[5] Nevertheless, the dissent maintains that "[t]he Court in *Wilson* addressed [this] main concern when it limited law enforcement's ability to detain only those who are within 'the immediate vicinity of the premises to be searched.' " *Dissent* at 5. This contention is misplaced. Nor is the same eliminated by virtue of Defendant's "connection to the apartment." *Id.* at 6.

The dissent's suggestion that a defendant's presence in the immediate vicinity of a searched premises should operate categorically to satisfy the first prong of the *Summers* rule would render entirely superfluous our Supreme Court's scrupulous effort in *Wilson* to define "occupant" as someone who "poses a real threat to the safe and efficient execution of a search warrant." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. To be sure, in arriving at its definition of "occupant" for purposes of the first prong of *Summers*, the *Wilson* Court used as a "guidepost" that same reasoning which underlies the lawful spatial dimension of a *Summers* detention under the second prong. *Id.* ("The reasoning in *Bailey* comports with the justification in *Summers* because someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises."). Such *guidance*, however, does not amount to a holding that an individual's presence within the immediate vicinity of a search, by its very nature, poses a threat to the search's safe and efficient execution.

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4. The dissent would also conclude that Defendant posed a threat "to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant[.]" *Dissent* at 6. This circular argument is a logical fallacy.

5. Such a precedent would be particularly concerning given the prevalence of neighborhoods in which family members live within close proximity to one another.

Had the Supreme Court intended such a rule, it would have had no reason to examine the particular circumstances in order to analyze whether the defendant in that case had, in fact, posed "a *real* threat to the safe and efficient execution of [the] search warrant." *Id.* (emphasis added) ("We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. . . . Defendant argues that he was not an *occupant* of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to [the officer] that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained."). Moreover, although both factors were present, our Supreme Court's holding in *Wilson* was not based, even in part, upon either the defendant's "connection" to the premises or his proximity thereto. *Id.*

Thus, under the dissent's logic—where the second prong of *Summers* is the only meaningful requirement—*Summers* would still boundlessly subject to detention any grass-mowing uncle, tree-trimming cousin, or next-door godson checking his mail, merely based upon his "connection" to the premises and hapless presence in the immediate vicinity. We do not interpret *Summers* or *Wilson* as creating such a sweeping exception to the Fourth Amendment's proscription against unreasonable seizures. Nor are we able to perceive any line which might practically be drawn to curtail this tremendous discretion, beyond that which our Supreme Court has already set forth. *See id.* ("[A] person is an occupant for the purposes of the *Summers* rule if he poses a *real threat to the safe and efficient execution* of [the] search warrant." (emphasis added) (quotation marks omitted)).

Accordingly, assuming that there was one, we conclude that Defendant's suspicionless seizure in the instant case cannot be justified on the ground that he was an "occupant" of the premises during the lawful execution of a search warrant. Therefore, we vacate the judgment entered upon the denial of Defendant's motion to suppress, and remand the matter to the trial court for entry of an order containing findings of fact necessary to resolve all material factual disputes, pursuant to our holding in *Thompson I*. *See Thompson I*, ___ N.C. App. at ___, 809 S.E.2d at 349 ("In this case, the trial court's findings of fact do not resolve the question of whether the law enforcement officers returned defendant's license after examining it, or instead retained it, or the issue of the sequence of events and the time frame in which they occurred.").

In addition, we reiterate our decision in *Thompson I* to remand for correction of the discrepancy between the transcript of Defendant's plea and the judgment entered against him. *Id.* at ___, 809 S.E.2d at 350.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting.

This case is before us again on remand from the Supreme Court of North Carolina with instructions to reconsider this matter in light of *State v. Wilson*, 371 N.C. 920, 821 S.E.2d 811 (2018). *State v. Thompson*, ___ N.C. ___, 822 S.E.2d 616 (2019). I continue to believe that no seizure occurred. *See State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) (Berger, J., dissenting). Following the Supreme Court's instructions and assuming, *arguendo*, that a seizure did occur, I respectfully dissent.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "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).

"The question for review is whether the ruling of the trial court was correct and not whether the reason given therefore is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted). "[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) (citation omitted).

> The burden on appeal rests upon Defendant to show the trial court's ruling is incorrect. . . . the State's failure to raise the . . . issue at the hearing does not compel nor permit

> this Court to summarily exclude the possibility that the trial court's ruling was correct under this or some other doctrine or rationale. . . . Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct and "ultimate ruling" to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from.

State v. Hester, ___ N.C. App. ___, ___, 803 S.E.2d 8, 16 (2017) (*purgandum*).

On remand, we have been instructed to review this case in light of *Wilson* which states:

> a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant . . . . These three parts roughly correspond to the "who," "where," and "when" of a lawful suspicionless seizure incident to the execution of a search warrant.

State v. Wilson, 371 N.C. 920, 923, 821 S.E.2d 811, 815 (2018) (*purgandum*). I disagree with the majority's conclusion that, assuming Defendant was in fact seized, such seizure cannot be justified upon the ground that he was an "occupant of the premises" during the execution of a search warrant.

Our Supreme Court has defined the term occupant to be one who "poses a real threat to the safe and efficient execution of a search warrant." *Id.* at 925, 821 S.E.2d at 815 (citation omitted). The threat does not have to be immediately present during the execution of the search warrant. As the Court in *Wilson* noted, "someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises." *Id.* Sufficient proximity to the premises being searched allows for the mere possibility of interference with the search, which *could* result in potential harm to officers and a less efficient execution of the search warrant.

This potential for interference and harm has led to "the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search 'by taking routine precautions, for instance by erecting barricades or posting someone on the

perimeter or at the door.' " *Id.* (quoting *Bailey v. United States*, 568 U.S. 186, 195 (2013)).

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence . . . [and] the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

Michigan v. Summers, 452 U.S. 692, 702-03 (1980).

Officers must have the authority to mitigate risks during the execution of a search warrant. Without such authority, "it is not clear how officers could practically 'search without fear that occupants, who are on the premises and able to observe the course of the search, [would] become disruptive, dangerous, or otherwise frustrate the search.' " *Wilson*, 371 N.C. at 926, 821 S.E.2d at 816 (alteration in original) (quoting *Bailey*, 568 U.S. at 195).

The majority seems to be concerned that if mere presence in the "immediate vicinity" of a search is sufficient for someone to be an "occupant," and subject to lowered Fourth Amendment protections, this would justify detaining "any unlucky bystander." Perhaps confident that Defendant did not pose a threat to law enforcement, the majority declines to acknowledge that an individual within "immediate vicinity" of the area to be searched is a real threat to safe and efficient execution of a search warrant. In addition, the majority ignores the fact that the target of the search identified Defendant as her drug supplier.

The majority opinion jeopardizes the safety of law enforcement officers across this State. While the majority is content to focus on the coolness and calmness of Defendant, law enforcement officers should not be required to gamble with their lives because an individual within the immediate vicinity simply *looked* calm. The majority elevates hyper-technical Monday-morning quarterbacking over common sense. We should be reminded that "courts should credit the practical experience of officers who observe on a daily basis what transpires on the street, so as to avoid indulging in unrealistic second-guessing of law enforcement judgment calls." *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 118 (2016) (*purgandum*).

The Court in *Wilson* addressed the majority's main concern when it limited law enforcement's ability to detain only those who are within

"the immediate vicinity of the premises to be searched." *Wilson*, 371 N.C. at 924, 821 S.E.2d at 815. The *Wilson* Court adopted the limitations from *Bailey* to circumscribe law enforcement's authority to detain occupants, and the Court listed factors to be considered "to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limit of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id.* (quoting *Bailey*, 568 U.S. at 201).

Officer safety has justified the broad discretion for law enforcement to use detention as a measure of mitigation and protection during the execution of a search warrant. The United States Supreme Court found that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Summers*, 452 U.S. at 705, n. 19). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her [possessions]." *Id.* at 101 (first alteration in original) (citation omitted).

Here, in their lawful search for drugs, a situation which can often give rise to "sudden violence," CMPD officers "exercise[d] unquestioned command of the situation." *Summers*, 452 U.S. at 703. Defendant was engaged by officers to determine who he was, to prevent any potential interference by Defendant, and to keep officers safe. After discovering Defendant's connection to the apartment—that he was visiting his girlfriend who lived there and who was the subject of the search warrant—CMPD officers were not willing to risk any potential interference or harm by Defendant.

His proximity and connection to the apartment being searched "pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. The nature of the search and Defendant's proximity to the apartment gave rise for officers to believe Defendant *could* pose a threat to the safety of the search. Upon learning that Defendant was the subject's boyfriend and supplier, Defendant required officer attention because he was a threat, not only to the efficacy of the search, as CMPD resources were diverted away from the execution of the search to prevent any potential interference by Defendant, but to officer safety. Therefore, Defendant was an occupant of the premises to be

searched pursuant to *Wilson*, and CMPD officers detention of Defendant was appropriate in their effort to mitigate risk.

Applying the *Bailey* factors to determine whether Defendant was within the immediate vicinity or not, there is no question that he was both "within the line of sight" of the dwelling to be searched and could have easily gained entry from his location. *Bailey*, 568 U.S. at 201.

As noted before, Defendant stated his purpose for being there was to visit his girlfriend, the target of the search. Officers could infer that he had been there before and was familiar with the surrounding areas and layout of the apartment. Defendant told police during his interrogation after arrest that he had slept at the residence the previous night. He was well within the line of sight of the apartment being searched, located "directly in front of the walkway that would lead to the residence." Additionally, while law enforcement was searching the apartment, his girlfriend *saw* him outside and identified him as the supplier of the drugs that were the target of the search. Defendant's location at the end of the walkway leading to the apartment, and the girlfriend's ability to identify him from inside the residence show Defendant's being "within the line of site" and therefore within the immediate vicinity.

Defendant "*could* [have] pose[d] just as real a threat to officer safety and to the efficacy of the search as someone who [was] within the premises." *Wilson*, 371 N.C. at 925, 821 S.E.2d at 815. Pursuant to *Wilson*, Defendant was an occupant of the premises. Defendant was within the line of sight of the apartment being searched, and was a threat to enter or attempt to enter the premises. Thus, Defendant was located within the "immediate vicinity of the premises to be searched," *Bailey*, 568 U.S. at 199, and subject to detention.

The trial court did not err in denying Defendant's motion to suppress. Even assuming a seizure occurred, it was justified under *Wilson* because CMPD officers had authority to detain Defendant as an occupant of the premises who was in the immediate vicinity. I would affirm the trial court.

VOLIVA v. DUDLEY

[267 N.C. App. 116 (2019)]

DOROTHY P. VOLIVA, PLAINTIFF
v.
CHARLES DUDLEY AND WENDY CHLOE GREWE, DEFENDANTS

No. COA19-58

Filed 20 August 2019

Contracts—validity—promissory note—executed by beneficiaries of estate—in favor of executrix—fiduciary duty

There was a genuine issue of material fact as to the validity of a promissory note that made defendants (beneficiaries of an estate) liable to plaintiff (executrix of the estate) for $15,000 "for value received" where the parties filed contradictory affidavits regarding defendants' allegations that plaintiff said she would not allow an in-kind conveyance of real property in place of the will's contemplated sale of the property unless defendants executed the promissory note in her favor. If the factfinder were convinced that plaintiff demanded the promissory note in exchange for an agreement to perform her duties as executrix, the note could be set aside for plaintiff's breach of her fiduciary duty to the beneficiaries of the estate.

Appeal by Defendants from order entered 6 September 2018 by Judge Robert P. Trivette in Currituck County District Court. Heard in the Court of Appeals 9 May 2019.

Trimpi & Nash, LLP, by John G. Trimpi, for Plaintiff-Appellee.

Sharp, Graham, Baker & Varnell, LLP, by Casey C. Varnell, for Defendants-Appellants.

COLLINS, Judge.

Defendants Charles Dudley and Wendy Chloe Grewe appeal from an order denying their motion to dismiss and motion for judgment on the pleadings made pursuant to North Carolina Rules of Civil Procedure 12 and 56, and granting Plaintiff's motion for summary judgment made pursuant to Rule 56 on Plaintiff's cause of action alleging breach of contract. Defendants contend that the trial court erred by granting Plaintiff's motion for summary judgment because genuine issues of material fact exist that preclude summary judgment in Plaintiff's favor, and that the trial court erred by denying Defendants' motion for judgment on the pleadings because the purported contract was illegally procured and

unenforceable as a matter of law. We reverse and remand in part and affirm in part.

I. Background

Amy Cassandra Dudley Payne died testate in April 2013, naming Plaintiff as the desired executrix of her estate. On 7 May 2013, Plaintiff filed an application for probate and letters testamentary with the Clerk of Superior Court. The Clerk probated the Payne will and issued Plaintiff letters testamentary the same day.

The Payne will provided, in relevant part, that Plaintiff was to sell certain real property owned by the decedent and to distribute the net proceeds of the sale equally amongst the three beneficiaries: Tony Voliva, Defendant Dudley, and Defendant Grewe (collectively, the "Beneficiaries"). On 11 March 2014, pursuant to the desires of the Beneficiaries, Plaintiff and the Beneficiaries filed a verified petition in the Superior Court seeking the court's permission to allow Plaintiff to deviate from the terms of the will by foregoing the contemplated sale and conveying the real property to the Beneficiaries instead. The Superior Court entered an order on 12 March 2014 allowing the deviation and the conveyance. Plaintiff had the real property surveyed and divided into three parcels, and conveyed one parcel to each of the Beneficiaries.

On 2 December 2014, Plaintiff filed an application in the Superior Court seeking an executor's commission of $4,504.38, which amounted to five percent of the total receipts and disbursements of the Payne estate. The Clerk entered an order the same day granting Plaintiff the commission she sought. On 7 February 2018, Plaintiff filed a final account in the Superior Court, and the Clerk approved the final account on 12 February 2018.

On 7 March 2018, Plaintiff filed a complaint in the District Court (the "trial court") seeking to enforce the terms of a promissory note executed by the Beneficiaries on 24 January 2014 (the "Note"), which Plaintiff attached as an exhibit to her complaint. Per the terms of the Note, the Beneficiaries became jointly and severally liable to Plaintiff in the amount of $15,000 "FOR VALUE RECEIVED." The Note does not reference the Payne will or otherwise describe what value was provided in exchange for the Beneficiaries' promise to pay. In the complaint, Plaintiff alleges that Tony Voliva, who is her son, is the only beneficiary who has paid her anything under the Note. Plaintiff seeks to enforce the Note against Defendants only, and seeks the balance of the principal due on the Note plus interest, attorney's fees, and costs.

On 15 May 2018, Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and answered the complaint, raising the defenses of lack of consideration; fraud, duress, and undue influence; and unclean hands. Defendants' motion to dismiss and answer included a number of factual allegations, including that "[t]he entire claim of the Plaintiff and alleged consideration for the subject promissory note stems directly from" the probate of the Payne will, and that after Defendants "suggested" to Plaintiff that they preferred the partition and conveyance of the real property to the sale, "Plaintiff informed the Defendants that [Plaintiff] would not agree to or allow an in-kind partition of the Property unless and until the Defendants executed" the Note. On 13 July 2018, Defendants filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56, arguing that there exist no genuine issues of material fact and that Defendants were entitled to judgment as a matter of law.

On 31 July 2010, Plaintiff filed a motion for summary judgment under Rule 56, arguing that there exist no genuine issues of material fact and that Plaintiff was entitled to judgment as a matter of law. Plaintiff attached to her motion for summary judgment two affidavits: one of her own, and one executed by William Brumsey, III, the attorney who both helped Plaintiff administer the Payne estate and drafted the Note on behalf of the Beneficiaries. In her own affidavit, Plaintiff states that she "never spoke to or had any conversation with either of the defendants pertaining to the transaction in question or the [Note]," and that the Note was "the result of a negotiated settlement arrangement between [Tony Voliva] and the two defendants in this action."

On 13 August 2018, Defendants filed verifications in which they stated that the 15 May 2018 motion to dismiss and answer "is true of [their] own knowledge, except as to those matters and things stated on information and belief," which Defendants stated they believed to be true.

On 6 September 2018, the trial court entered an order (1) granting Plaintiff's motion for summary judgment, (2) denying Defendants' motions, and (3) ordering Defendants to pay Plaintiff damages, attorney's fees, and costs. Defendants timely appealed.

II. Discussion

Defendants contend that the trial court erred by (1) granting Plaintiff's motion for summary judgment because genuine issues of material fact exist that preclude summary judgment in Plaintiff's favor and (2) denying

Defendants' motion for summary judgment[1] because the purported contract was illegally procured and unenforceable as a matter of law.

a. 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 (2018). "The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). We review a trial court's order granting or denying summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012).

b. Analysis

This is an action alleging breach of contract.[2] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (citation omitted). The questions for this Court are therefore (1) whether the trial court properly concluded that Plaintiff succeeded in meeting her burden of establishing that the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there exist no genuine issues of material fact regarding whether (a) the Note is a valid contract and (b) Defendants breached the Note, and that Plaintiff was accordingly entitled to judgment as a matter of law, and (2) whether the trial court properly concluded that Defendants failed in meeting their burden of establishing that the same documents show there exist no genuine issues of material fact regarding the same issues and that Defendants are entitled to judgment as a matter of law.

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1. As the parties each recognize in their briefs, the fact that the trial court was presented with evidence outside of the pleadings (e.g., Defendants' verified factual allegations in their 15 May 2018 motion to dismiss and answer) and did not exclude said evidence converted Defendants' motion for judgment on the pleadings into a motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rules 12(c) and 56.

2. Defendants do not contest Plaintiff's standing to bring suit under the Note. While not herself a party to the Note, since she was the intended beneficiary of the Note, Plaintiff may bring suit under the Note pursuant to the third-party beneficiary doctrine. *See Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (discussing third-party beneficiary doctrine).

Defendants admit that they signed the Note obligating them to pay Plaintiff, and do not allege that they have paid Plaintiff anything pursuant thereto. Defendants' breach of the Note is therefore not in dispute.

Defendants argue, however, that the Note is unenforceable for lack of consideration and because of fraud/duress/undue influence attributable to Plaintiff,[3] and that the Note is therefore not a valid contract. The gravamen of Defendants' argument is that Plaintiff, as executrix of the Payne estate, had a fiduciary duty to Defendants, as beneficiaries of the Payne will, and that Plaintiff breached her duty by demanding that Defendants execute the Note in her favor in exchange for her agreement to support the in-kind conveyance of the real property.

An executrix is a fiduciary to the beneficiaries of the estate she administers. *See Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 149, 371 S.E.2d 483, 485 (1988); N.C. Gen. Stat. § 32-2(a) (2018). "Fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act." *Miller v. McLean*, 252 N.C. 171, 174, 113 S.E.2d 359, 362 (1960). "Both by law and the words of h[er] oath [an executrix] must faithfully execute the trust imposed in [her]. [Sh]e must be impartial. [Sh]e cannot use [her] office for [her] personal benefit." *In re Will of Covington*, 252 N.C. 551, 553, 114 S.E.2d 261, 263 (1960).

If able to convince the factfinder that Plaintiff demanded the Note in exchange for an agreement to perform her duties as executrix in violation of a fiduciary duty owed to them, Defendants could have the Note set aside, e.g., under the doctrine of constructive fraud. *See Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) ("To establish constructive fraud, a plaintiff must show that defendant (1) owes plaintiff a fiduciary duty; (2) breached this fiduciary duty; and (3) sought to benefit h[er]self in the transaction."); *Mehovic v. Mehovic*, 133 N.C. App. 131, 135, 514 S.E.2d 730, 733 (1999) ("a party alleging fraud must elect either the remedy of rescission or that of damages").

Defendants filed verifications of their motion to dismiss and answer, in which they swore on personal knowledge that Plaintiff told Defendants she would not allow the in-kind conveyance of the real

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3. Defendants make no arguments regarding unclean hands in their brief, and we accordingly consider that issue abandoned for purposes of this appeal. N.C. R. App. P. 28(b)(6) (2018) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

property unless Defendants executed the Note in her favor. Defendants' verifications satisfy the requisite criteria to be treated as an affidavit for purposes of summary judgment. *See Daniel v. Daniel*, 132 N.C. App. 217, 219, 510 S.E.2d 689, 690 (1999) ("A verified pleading may be treated as an affidavit for summary judgment purposes if it: (1) is made on personal knowledge; (2) sets forth such facts as would be admissible into evidence[4]; and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." (citing Rule 56(e)).

Plaintiff subsequently filed affidavits of her own, however, denying Defendants' allegations and asserting that she never spoke with Defendants regarding the Note. The parties' contradictory affidavits create genuine issues of fact which, if material, preclude summary judgment. *Hyde v. Taylor*, 70 N.C. App. 523, 528, 320 S.E.2d 904, 907 (1984).

The question of whether Plaintiff demanded the Note in exchange for supporting the in-kind conveyance of the real property is material to the question of the Note's validity and enforceability. By virtue of the material uncertainty concerning the way the Note came into being[5] created by the parties' contradictory affidavits, there thus exist genuine

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4. While the parol evidence rule "prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is used to contradict, vary, or explain the written instrument[,]" *Carolina First Bank v. Stark, Inc.*, 190 N.C. App. 561, 568, 660 S.E.2d 641, 646 (2008) (citation omitted), parol evidence is admissible to establish contract defenses like those raised by Defendants. *See Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 437 n.3, 617 S.E.2d 664, 670 n.3 (2005) ("[T]he parol evidence rule does not bar the admission of parol evidence to prove that a written contract was procured by fraud because the allegations of fraud challenge the validity of the contract itself, not the accuracy of its terms." (internal quotation marks, brackets, and citation omitted)); Restatement (Second) of Contracts § 214(d) (1981) (parol evidence admissible to prove "illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause.").

5. Plaintiff asserts in her affidavit that it is her understanding that the Note was one aspect of an agreement between the Beneficiaries to petition the trial court for the in-kind conveyance. Plaintiff's understanding of what the Beneficiaries agreed to is not based upon Plaintiff's personal knowledge, however, and therefore is not properly considered in adjudging the propriety of summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(e). But if Plaintiff is able to prove at trial that Tony Voliva demanded that Defendants execute the Note in exchange for his agreement to join the petition for the in-kind conveyance, the Note could be enforced as a valid third-party beneficiary contract. *See Wachovia Bank & Trust Co. v. Allen*, 232 N.C. 274, 279, 60 S.E.2d 117, 120-21 (1950) ("Where land is directed to be converted into money . . . all the parties entitled beneficially thereto have the right to take the property in its unconverted form, and thus prevent the actual conversion thereof, and this right to take the realty instead of the proceeds is not limited to beneficiaries who also hold the legal title. *In the case of land, the election of one of the beneficiaries alone will not change the character of the estate; all the persons so beneficially interested must join, and all must be bound.*") (emphasis added) (quotation marks and citation omitted).

issues of material fact regarding the validity of the Note Plaintiff seeks to enforce, and we accordingly conclude that the trial court (1) erred by granting Plaintiff's motion for summary judgment and (2) did not err by denying Defendants' motion for summary judgment.

III. Conclusion

Because genuine issues of material fact exist regarding whether the Note is a valid and enforceable contract, we reverse the trial court's grant of Plaintiff's motion for summary judgment, affirm the trial court's denial of Defendants' motion for summary judgment, and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Judges DIETZ and MURPHY concur.

HENRY C. WATKINS, Plaintiff
v.
JENNIFER L. BENJAMIN (f/k/a Watkins), Defendant

No. COA18-894

Filed 20 August 2019

Child Custody and Support—modification—existing order—requiring a different parent to pay support

The trial court did not err by exercising jurisdiction over a child support dispute where the trial court's order was a modification of an existing child support order, rather than an establishment of a new one. A child support order is not confined to the obligations of one specific parent, so the new order requiring plaintiff to make child support payments modified the existing order that required defendant to make child support payments.

Appeal by Defendant from orders entered 28 December 2017 and 25 January 2018 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 23 May 2019.

Jackson Family Law, by Jill Schnabel Jackson, for Plaintiff-Appellee.

Jonathan McGirt for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from the trial court's (1) 28 December 2017 order establishing child support obligations and settling arrearage issues between the parties and (2) 25 January 2018 order denying Defendant's motions pursuant to North Carolina Rules of Civil Procedure 59 and 60 seeking to modify the 28 December 2017 order. Defendant contends that the trial court erred by exercising subject matter jurisdiction over the child support dispute in the 28 December 2017 order, and that both the 28 December 2017 and 25 January 2018 orders should be vacated (the latter as moot) as a result. We affirm.

I. Background

The parties married in October 1996, separated in August 2012, and divorced in April 2014. Two children were born of the marriage, and the family lived together in Buncombe County.

In April 2013, following the parties' separation, Defendant and the children relocated to Virginia. On 19 August 2013, Plaintiff filed a complaint in Buncombe County District Court seeking equitable distribution of the marital estate and joint custody of the children. Defendant answered on 14 February 2014, and asserted a number of counterclaims including, *inter alia*, a claim for child support. Plaintiff replied, asserted affirmative defenses, and moved to dismiss on 3 April 2014, conceding that he "owe[d] a duty of support to the minor children."

The trial court entered a temporary consent order on 17 July 2014 awarding the parties joint custody of the children and awarding primary placement of the children to Plaintiff in Buncombe County. On 6 February 2015, the trial court entered an order that, *inter alia*, denied both parties' claims for temporary child support, and reserved the issues of retroactive and prospective child support for subsequent determination. The trial court entered an order on 25 August 2015 that, *inter alia*, dismissed both parties' pending claims for retroactive child support, held that no child support arrears existed as of 1 August 2015, and reserved the issues of child custody and prospective child support for subsequent determination.

On 9 October 2015, the trial court entered an order that, *inter alia*, found that Defendant had relocated to Maryland, awarded custody of the children to Plaintiff; and ordered Defendant to pay Plaintiff child support (including arrears) and temporary prospective child support. The trial court entered an order on 22 March 2016 that, *inter alia*,

calculated the arrears owed to Plaintiff by Defendant, set Defendant's permanent prospective child support obligation to Plaintiff, and set forth certain prospective expenses to be shared by the parties. Plaintiff applied for child support services from the Buncombe County Child Support Enforcement Agency, which moved to intervene on 27 May 2016. On 28 June 2016, the trial court entered an order that, *inter alia*, allowed the intervention and recalculated the child support arrears owed to Plaintiff by Defendant.

Defendant filed a motion to modify the child custody arrangement and to hold Plaintiff in civil contempt on 4 October 2016. The trial court entered a contempt citation and order to show cause on 6 October 2016. On 3 January 2017, the trial court entered a consent order that reflected the parties' agreement to, *inter alia*: (1) modify the custody arrangement such that the parties would share joint custody of the children, and award primary placement of the children to Defendant; (2) settle Defendant's pending claims in the action; (3) reserve Plaintiff's rights to recover retroactive child support from Defendant; and (4) have the trial court and the State of North Carolina "retain jurisdiction over the parties and the minor children in regards to child custody and child support issues" and "future modification of" the orders enforcing the trial court's rulings on those issues.

Sometime in early 2017, Defendant filed a complaint seeking child support from Plaintiff in the Circuit Court of Baltimore County, Maryland (the "Maryland action"). Plaintiff moved to dismiss, and the Maryland court dismissed Defendant's Maryland action on 9 June 2017, concluding that it lacked personal jurisdiction over Plaintiff. On 13 November 2017, Defendant filed a petition with the Maryland court to have the dismissal of the Maryland action reviewed, and Defendant's petition was apparently granted and remained pending as of the time the orders at issue in this appeal were entered.

On 19 May 2017—after she filed the Maryland action, and before the Maryland court dismissed the same—Defendant moved the trial court (i.e., the Buncombe County District Court) to modify the child support obligations between the parties to reflect the modified custody arrangement, specifically arguing that "substantial changes in circumstances [] ha[d] occurred[.]"

On 10 August 2017, Plaintiff moved the trial court to "review [] the current order of child support" and to "determine an appropriate award of support and an appropriate manner of crediting the arrears due from Defendant to Plaintiff." Plaintiff stated that the children were with

Defendant in Maryland, but did not allege that a substantial change in circumstances had taken place.

The trial court entered a consent order on 7 November 2017 granting Defendant's request to voluntarily dismiss the 19 May 2017 motion without prejudice. Defendant paid the arrears she owed to Plaintiff in full on 9 November 2017.

The trial court held a hearing on 14-15 November 2017 on Plaintiff's 10 August 2017 motion to clarify the child support obligations owed by the parties. At the hearing, Defendant moved to dismiss due to the pendency of the Maryland court's review of the dismissal of the Maryland action. The trial court denied Defendant's motion.

The trial court entered the child support order here at issue on 28 December 2017. In its 28 December 2017 order, the trial court, *inter alia*: (1) found that "North Carolina retains ongoing, exclusive jurisdiction of the matters of custody and support of the minor children[,]" even though the children resided with Defendant in Maryland; (2) ordered Plaintiff to make child support payments going forward; and (3) decreed that the order "resolve[d] all pending matters of child support[and] arrears[] by and between the parties."

On 8 January 2018, Defendant moved the trial court under N.C. Gen. Stat. § 1A-1, Rules 59 and 60, to amend the 28 December 2017 order after consideration of Defendant's draft proposed order, which the trial court agreed to consider. On 25 January 2018, the trial court entered an order denying Defendant's Rule 59 and 60 motions and dismissing them with prejudice. Defendant timely appealed both the 28 December 2017 and 25 January 2018 orders.

II. Discussion

Defendant contends that the trial court erred by exercising subject matter jurisdiction over the child support issue in the 28 December 2017 order, and that the 25 January 2018 order is moot as a result.

a. Standard of Review

We review a trial court's exercise of subject matter jurisdiction *de novo*. *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009).

b. Analysis

The Uniform Interstate Family Support Act ("UIFSA"), codified at N.C. Gen. Stat. § 52C (2017), contains a provision that sets forth whether a state has jurisdiction over a support dispute when there exist multiple

support proceedings pending simultaneously in multiple states: N.C. Gen. Stat. § 52C-2-204 ("Simultaneous Proceedings"). N.C. Gen. Stat. § 52C-2-204(a) specifically concerns when a "tribunal of this State may exercise jurisdiction to *establish* a support order"—as opposed to the state's jurisdiction to *modify* an existing support order—and sets forth certain deadlines for filing a support petition which a litigant must meet if it seeks to have a state exercise jurisdiction over the petition. *Id.* (emphasis added).

Defendant argues that, pursuant to N.C. Gen. Stat. § 52C-2-204(a), the trial court lacked subject matter jurisdiction over the child support issue in the 28 December 2017 order. Specifically, Defendant argues that since Plaintiff did not owe Defendant child support on 28 December 2017, the 28 December 2017 order setting Plaintiff's obligation to Defendant was the *establishment* of a new child support order, rather than the *modification* of the existing child support order (as last modified on 28 June 2016) which previously obligated Defendant to pay Plaintiff. Since no child support obligation flowing from Plaintiff to Defendant had been established as of 28 December 2017, Defendant's argument continues, the facts that (1) Defendant filed the Maryland action in early 2017 to establish Plaintiff's child support obligation to Defendant and (2) Plaintiff did not move the trial court until 10 August 2017 to clarify Plaintiff's obligation to Defendant—which was beyond the time Maryland law allowed Plaintiff to file a responsive pleading contesting Maryland's exercise of jurisdiction—mean that North Carolina was not authorized to exercise jurisdiction over the child support issue on 28 December 2017 under N.C. Gen. Stat. § 52C-2-204(a).

Defendant does not argue that the trial court lacked jurisdiction to modify its existing orders, such that we need not analyze whether Plaintiff met N.C. Gen. Stat. § 52C-2-204(a)'s filing deadlines unless we decide that the 28 December 2017 order was the *establishment* of a new support order rather than a *modification* of an existing support order. A threshold question is therefore whether the trial court's 28 December 2017 order was, in fact, the establishment of a new child support order under UIFSA as Defendant suggests.

Neither "establishment" nor "modification" are expressly defined in UIFSA's "Definitions" section, N.C. Gen. Stat. § 52C-1-101. Defendant argues that UIFSA makes a "distinction between 'establishment' proceedings versus 'modification' proceedings" that is "tied to the definition of 'obligor.' " Defendant points out that UIFSA defines "[o]bligor" as one who is actually or allegedly obligated to owe child support, N.C. Gen. Stat. § 52C-1-101(13), and argues that since Plaintiff was not

actually or allegedly obligated to Defendant for child support prior to the initiation of the Maryland action, the result is that Plaintiff was not an "[o]bligor" prior to that time whose obligation could be modified in a modification proceeding.

But Defendant does not cite to any authority for her contention that UIFSA employs an "obligor-focused approach[.]" As mentioned above, N.C. Gen. Stat. § 52C-2-204(a) describes when a "tribunal of this State may exercise jurisdiction to establish *a support order*[,]" not an obligation. N.C. Gen. Stat. § 52C-2-204(a) (emphasis added). And "[s]upport order" is expressly defined by UIFSA as "a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or a foreign country for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support." N.C. Gen. Stat. § 52C-1-101(21). That definition does not specify that a support order is confined to the obligations of one specific obligor, discrete from any obligations the obligee might owe to the obligor. On the contrary, that definition contemplates that a "[s]upport order" is an "order, . . . for the benefit of a child, . . . which [*inter alia*] provides for monetary support, . . . [and] arrearages," and specifically contemplates that such a support order can be "subject to modification." *Id.* Since the trial court entered an order first on 9 October 2015—which was most recently superseded on 28 June 2016—requiring Defendant to pay Plaintiff prospective child support and arrearages for the benefit of the parties' children, a support order had already been established prior to the trial court's 28 December 2017 order. We thus conclude that the 28 December 2017 order was a modification thereof rather than the establishment of a new child support order.

Our conclusion resonates with the purposes for which our legislature (and the legislatures of many of our sister states, including Maryland) enacted UIFSA:

> UIFSA was enacted to replace its predecessor, the Uniform Reciprocal Enforcement of Support Act ("URESA"). Under URESA, a state could assert jurisdiction to establish, vacate, or modify a child or spousal support obligation even when a similar obligation had been created in another jurisdiction. The result was often multiple, inconsistent obligations existing for the same obligor and injustice in that obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations

> modified or even vacated. UIFSA creates a structure designed to correct this problem and provide for only one support order at a time.

Butler v. Butler, 152 N.C. App. 74, 78, 566 S.E.2d 707, 709-10 (2002) (internal quotation marks and citations omitted). And most on-point on the facts of this case, the official commentary to the UIFSA "Definitions" section (notably regarding the definition of "[o]bligor") states as follows, in part:

> The one-order system of UIFSA can succeed only if the respective obligations of support are adjusted as the physical possession of a child changes between parents or involves a third-party caretaker. *This must be accomplished in the context of modification, and not by the creation of multiple orders attempting to reflect each changing custody scenario.*

N.C. Gen. Stat. Ann. § 52C-1-101 official commentary (2015) (emphasis added). We accordingly conclude that the trial court did not err in exercising jurisdiction over the child support issue, and affirm the trial court's modification of its existing child support order.

Nonetheless, Plaintiff asks us to remand the 28 December 2017 order to the trial court for the addition of a conclusion that there has been a substantial change in circumstances. We do not believe that remand is necessary. While a child support order may only be modified "upon . . . a showing of changed circumstances," N.C. Gen. Stat. § 50-13.7(a) (2017), the lack of an express conclusion that such a showing has been made does not render such a modification deficient such that remand is required where the findings in the order reflect the showing of the changed circumstances. *See Davis v. Davis*, 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013) ("even if the 'magic words' are not used, the factual findings must still make the substantial change of circumstances and its effect upon the children clear").

In its 28 December 2017 order, the trial court found that the children had moved to Maryland to live with Defendant. The undisputed finding regarding the children's move reflects a substantial change of circumstances sufficient to support the modification of the support order under N.C. Gen. Stat. § 50-13.7(a). *See Shipman v. Shipman*, 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003) (reviewing the trial court's modification of a child custody order and noting that "the effects of the substantial changes in circumstances on the minor child . . . [were] self-evident, given the nature and cumulative effect of those changes as characterized

by the trial court in its findings of fact"). We accordingly decline to remand the 28 December 2017 order to the trial court.

Finally, Defendant's arguments concerning the 25 January 2018 order rest upon a conclusion that the 28 December 2017 order is void. As we decline to so conclude, and instead affirm the 28 December 2017 order, Defendant's arguments are unavailing, and we also affirm the 25 January 2018 order.

III. Conclusion

Because we conclude that the trial court's 28 December 2017 order was a modification of the trial court's existing child support order, we conclude that the trial court had subject matter jurisdiction over the child support issue and affirm both the 28 December 2017 and 25 January 2018 orders.

AFFIRMED.

Judges BRYANT and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 AUGUST 2019)

BACHE v. TIC-GULF COAST No. 18-788	N.C. Industrial Commission (X70584)	Affirmed
BENDER v. HORNBACK No. 18-1006	Rutherford (13CVD1247)	Dismissed in part; Affirmed in part.
GOSS v. SOLSTICE E., LLC No. 18-1158	Buncombe (18CVS218)	Affirmed
IN RE FORECLOSURE OF STEPHENS No. 18-1058	Wake (16SP2231)	Affirmed
IN RE K.W. No. 19-108	Mecklenburg (16JB410)	Vacated and Remanded
MARTIN v. THOTAKURA No. 18-1247	Forsyth (16CVS2701)	Affirmed
STATE v. BARNETT No. 18-831	Johnston (16CRS51059)	No Plain Error.
STATE v. HALL No. 18-1172	Rowan (16CRS54879)	Reversed
STATE v. HERNANDEZ No. 18-973	Pitt (15CRS58365) (15CRS712403)	Affirmed in Part and Reversed and Remanded in Part.
STATE v. McANINCH No. 18-852	Buncombe (17CRS84185)	No Error
SYSCO CHARLOTTE, LLC v. NAIK No. 18-1037	Cabarrus (18CVD463)	Affirmed in Part; Reversed in Part; Vacated and Remanded in Part
WEEKS v. WEEKS No. 18-1076	Nash (15CVD930)	Vacated and Remanded.

BRAWLEY v. SHERRILL

[267 N.C. App. 131 (2019)]

BILLIE CRESS SHERRILL BRAWLEY, AS EXECUTRIX OF THE ESTATE OF ZOIE S. DEATON A/K/A ZOE LEE SPEARS DEATON, PLAINTIFF
v.
BOBBY VANCE SHERRILL, BRADLEY BRAWLEY, AND REBECCA BRAWLEY THOMPSON, DEFENDANTS

No. COA18-1043

Filed 3 September 2019

Wills—per stirpes—predeceased beneficiary's share—plain language of will

The Court of Appeals construed the use of the term *per stirpes* in a will to mean that a predeceased beneficiary's share must be distributed among all of the testatrix's grandchildren, with the percentages varying based on the child from which each grandchild descended. Although the distributive scheme of this will differed from what is commonly used, leading to one grandchild inheriting one-fourth of the estate and two other grandchildren inheriting one-eighth of the estate each (from the predeceased beneficiary's share), the language of the will was plain and unambiguous, so the testamentary intent was given effect.

Judge INMAN dissenting.

Appeal by defendant Rebecca Brawley Thompson from order entered 20 June 2018 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 13 March 2019.

Homesley, Gaines, Dudley & Clodfelter, LLP, by T.C. Homesley, Jr., and Christina E. Clodfelter, for defendant appellee Bobby Vance Sherrill.

Jones, Childers, Donaldson & Webb, PLLC, by Mark L. Childers, for defendant appellant Rebecca Brawley Thompson.

No brief filed for plaintiff-appellee Billie Cress Sherrill Brawley as Executrix of the Estate of Zoie S. Deaton a/k/a Zoe Lee Spears Deaton.

No brief filed for defendant-appellee Bradley Brawley.

ZACHARY, Judge.

This appeal concerns application of the Latin term "*per stirpes*," which has been employed as a term of art in wills and estates for more than a century in America and adopted from English common law. A will may provide for the distribution of the interest of a beneficiary who does not survive the testator. The use of the term *per stirpes* directs a specific manner of distribution to the survivors of the predeceased beneficiary.

On 20 June 2018, the trial court issued a declaratory judgment order interpreting provisions of the testatrix's will, pursuant to which the testatrix conveyed her entire estate to her two children provided that, if either of them predeceased her, that deceased child's interest would be devised to "my grandchildren, *per stirpes*." Defendant Appellant Rebecca Brawley Thompson ("Rebecca") argues on appeal that, because the will is clear and unambiguous, the trial court erred in construing the testatrix's intent as to this provision. After careful review of the will and applicable law, we reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 30 April 1968, Zoie S. Deaton ("Testatrix") executed her last written will and testament, which provides, in relevant part:

> ITEM I: I give devise and bequeath all of my estate and property . . . to my children, Billie Cress Sherrill Brawley and Bobby Ray Sherrill, if they are living at the time of my demise, to be theirs absolutely and in fee simple, share and share alike.
>
> ITEM II: If either of my children shall predecease me, I direct that either his or her share shall go to my grandchildren, *per stirpes*.

At the time of Testatrix's death, her son Bobby Ray Sherrill ("Bobby Ray") was no longer living, but was survived by one child, Defendant Appellee Bobby Vance Sherrill ("Bobby Vance"). Testatrix's daughter Billie Cress Sherrill Brawley ("Billie Cress") survived her, and her two children, Rebecca and Bradley Brawley ("Bradley"), also survived Testatrix. In sum, at the time of her death, Testatrix had one living child and three living grandchildren.

Billie Cress was named executrix of the estate. She filed an action for declaratory judgment, requesting that the trial court construe the terms of the will. Specifically, Billie Cress asked the trial court to determine whether Bobby Ray's share under Item II of the will vested solely in his son, Bobby Vance, or in all three of Testatrix's grandchildren. The parties did not dispute Billie Cress's share in the estate.

The trial court entered judgment determining[1] that Testatrix's intent under Item II was to "create two branches for distribution purposes," one branch going to Billie Cress and the other to Bobby Ray. Consistent with this intent, the trial court concluded that Bobby Ray's one half share in the estate vested solely in his son Bobby Vance, to the exclusion of the other two grandchildren, Rebecca and Bradley.

Rebecca appeals.

II. ANALYSIS

Rebecca argues that the trial court erroneously interpreted the will by prematurely considering Testatrix's intent, rather than first determining whether the will itself was unequivocal on its face. Rebecca contends that the will unambiguously directs that Bobby Ray's one-half share be divided equally among all of the grandchildren.

A. Standard of Review

"The interpretation of a will's language is a matter of law. When the parties place nothing before the court to prove the intention of the testator, other than the will itself, they are simply disputing the interpretation of the language which is a question of law." *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (citations omitted). We review questions of law *de novo*. *Simmons v. Waddell*, 241 N.C. App. 512, 526, 775 S.E.2d 661, 676 (2015).

Here, the will was the only relevant evidence introduced at trial and the only evidence included in the record on appeal, and the parties cite only the will's language in their respective arguments. As a result, we apply the *de novo* standard to the entirety of this appeal.

B. Intent and Interpretation

> It is an elementary rule in this jurisdiction that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In attempting to determine the testator's intention, the language used, and the sense in which it is used by the testator, is the primary source of

1. Although the trial court characterized this determination as a finding of fact, it is a conclusion of law. *See Halstead v. Plymale*, 231 N.C. App. 253, 256, 750 S.E.2d 894, 897 (2013) (holding that the trial court's interpretation of a will based solely on its language is a conclusion of law).

> information, as it is the expressed intention of the testator which is sought.

Pittman v. Thomas, 307 N.C. 485, 492, 299 S.E.2d 207, 211 (1983) (quotation marks and citations omitted).

The interpretation of any will is as simple, or complicated, as its language. "Where the language employed by the testator is plain and its import is obvious, the judicial chore is light work; for in such event, the words of the testator must be taken to mean exactly what they say." *McCain v. Womble*, 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965). Resort to canons of construction is warranted only when the provisions of a will are set forth in unclear, equivocal, or ambiguous language. *Buchanan v. Buchanan*, 207 N.C. App. 112, 116, 698 S.E.2d 485, 488 (2010).

As recounted *supra*, Item I of the will bequeaths Testatrix's estate to Billie Cress and Bobby Ray, "if they are living at the time of [Testatrix's] demise, to be theirs absolutely and in fee simple, share and share alike." Neither party disputes that this devise, by its plain language, and consistent with North Carolina law, provides for an equal *per capita* distribution to Testatrix's children as individuals. *See, e.g.*, *Wooten v. Outland*, 226 N.C. 245, 248, 37 S.E.2d 682, 684 (1946) ("[W]hen [beneficiaries] take directly under a bequest or devise as individuals and not in a representative capacity, and the testator provides that the division or distribution shall be in equal proportions, they take per capita.").

What the parties *do* dispute is the meaning of Item II's language: "If either of my children shall predecease me, I direct that either his or her share shall go to my grandchildren, *per stirpes*." Contrary to a *per capita* devise, a *per stirpes* distribution "denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living." *Wachovia Bank & Tr. Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963). We conclude that our Supreme Court's decision in *Bryant* controls, and compels a reversal of the trial court's interpretation of the will.

The devise at issue in *Bryant* was as follows: "to my nephews and nieces, the child or children of any deceased nephew and niece to receive the share the parent would have taken, the said distribution to be per stirpes and not per capita." *Id.* at 484, 128 S.E.2d at 761. The appellant contended that the last clause, which included the *per stirpes* language, operated to modify the class of "nephews and nieces," rather than "the child or children of any deceased nephew and niece," such that the nephews and nieces, and not their issue, would take *per stirpes* according to the respective representations of their

fathers, that is, the testator's unnamed siblings. *Id.* The Supreme Court disagreed, holding that the testator had clearly "recognized the *nephews and nieces as the stirpes and not their fathers*." *Id.* at 485, 128 S.E.2d at 761 (emphasis added).

The Court explained:

> *Stirp* or *stirps* means the root or trunk, a person from whom a branch of a family is descended. The term "per stirpes" denotes the division of an estate by representation, a class taking the share to which the deceased whom they represent would have been entitled had he been living.
>
> We think the last clause in the provision under consideration modifies the one immediately preceding it . . . . The testator's gift was to a class, nephews and nieces. He made them the primary legatees after the life estate of his wife—not because they represented a particular brother of his but because they were his nephews and nieces. Not once did he refer to them as children of his deceased brothers . . . . No suggestion that they were to take according to stock or root immediately followed the designation of the nephews and nieces as beneficiaries. That direction followed the designation of those who would take if a nephew or niece died before the date for distribution.

Id. (citation omitted).

In the instant case, the will provides that Testatrix's children, Bobby Ray and Billie Cress, would share equally in her estate. Item II then provides that "if either of [her] children" should predecease Testatrix, "either his or her share shall go to my grandchildren, *per stirpes*." The class identified in Item II is quite explicitly "*my grandchildren*," and not "the issue of the predeceased beneficiary." The addition of the term "*per stirpes*" indicates that the share or shares of any predeceased beneficiary shall then be distributed amongst the grandchildren by representation "according to stock or root."[2] *Id.* In other words, the predeceased beneficiary's share must be distributed amongst all of Testatrix's grandchildren, with the percentages varying based not upon the total headcount of surviving grandchildren (*per capita*), but upon the root from which the particular grandchild descends (*per stirpes*).

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2. This is as compared to a *per capita* distribution, under which the grandchildren "would share equally." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4, *reh'g denied*, 350 N.C. 385, 536 S.E.2d 70 (1999).

Thus, the plain language of the will directs that Bobby Ray's one-half share of the estate must be distributed to the class of Testatrix's grandchildren as follows:

> Bobby Vance: One-half of his father's one-half share, or one-fourth of the estate.
>
> Rebecca and Bradley: The remaining one-half of their uncle's one-half share, divided equally between the two of them, or a one-eighth share of the estate to each.

That Testatrix intended such a distribution is evidenced by none other than the clear and unambiguous language of Item II. *See id.* ("We think the intent of the testator is clear from the will itself . . . ."). It is not the role of the courts to intervene and change the plain language of a testamentary instrument simply because the distribution provided for therein differs from that which is more commonly employed.

III. CONCLUSION

We hold that the trial court erred when it construed Testatrix's intent as anything other than that which is explicitly stated within the four corners of her will. Accordingly, we reverse its judgment and remand for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

Judge STROUD concurs.

Judge INMAN dissents by separate opinion.

INMAN, Judge, dissenting.

Because I disagree with the majority's interpretation of the *per stirpital* distribution scheme contained in Testatrix's will, I respectfully dissent.

When a will contains legal or technical words or phrases, we "presume[] that [the testatrix] used them in their well known legal or technical sense unless, in some appropriate way in the instrument, [she] indicates otherwise." *Wachovia Bank & Tr. Co. v. Livengood*, 306 N.C. 550, 552, 294 S.E.2d 319, 320 (1982).

The term *per stirpes*, fundamentally, describes how a gift to a class is to be distributed among the class members, with each surviving member

of the class taking the share that would have passed to any ancestral predecessor that also fell within the class. *Wachovia Bank & Tr. Co. v. Bryant*, 258 N.C. 482, 485, 128 S.E.2d 758, 761 (1963); *see also Walsh v. Friedman*, 219 N.C. 151, 161-62, 13 S.E.2d 250, 256 (1941) (defining "*per stirpes*" as "that method of dividing an intestate estate where a class or group of distributees take the share which *their deceased would have been entitled to*, taking thus by their right of representing such ancestor, and not as so many individuals" (emphasis added) (citation and quotation marks omitted)); Black's Law Dictionary (11th ed. 2019) (defining "*per stirpes*" as "[p]roportionately divided between beneficiaries according *to their deceased ancestor's share*" (emphasis added)). Quoting with approval an opinion by the South Carolina Supreme Court, our Supreme Court in *Walsh* explained that the term "*per stirpes*" " 'as employed in our law relates to the mode of distribution—not who shall take, but the manner in which those shall take who come within the class entitled to take.' " 219 N.C. at 161, 13 S.E.2d at 255-56 (emphasis added) (quoting *Irvin v. Brown*, 160 S.C. 374, 378, 158 S.E. 733, 734 (1931)).

Testatrix's will instructs that, if either of her children predecease her, her grandchildren shall take *per stirpes*, *i.e.*, only by representation through their respective deceased parent. This interpretation is consistent with the *Restatement Third of Property*, which provides:

> If, for example, a gift is made to the "grandchildren" or to the "nieces and nephews" of a designated person "per stirpes," the described class members might stem from different children or different siblings of the designated person. In such case, the words "per stirpes" suggest an initial division of the property into shares at the generation above the generation of the class members, with one share going to the children of each child or of each sibling. In this situation, . . . the words "per stirpes" also cause the share of a deceased class member to be divided by representation among his or her descendants.

Restatement (Third) of Prop. (Wills & Donative Transfers) § 14.2 cmt. h (2011).

The majority asserts that by devising the share of any of her deceased children "to my grandchildren"—rather than "to the child of any deceased child" or other more precise description—the Testatrix indicated her intent for all of her grandchildren to take from the deceased child, with each grandchild's percentage interest calculated according to each grandchild's root or parent. The majority's analysis

means that Rebecca and Bradley—whose mother, Billie Cress, is still living—take from Bobby Ray, their deceased uncle. The analysis modifies a *per stirpes* devise in a manner that has never before been contemplated.

While Testatrix's lack of precise language created a chore for counsel, the trial court, and this Court, that imprecision cannot negate the plain meaning of the term "*per stirpes*" used to describe the method of distribution among the class members. No one disputes that Rebecca and Bradley are part of the class of grandchildren described in the will and can potentially benefit from the will's devise. But, because Billie Cress, unlike Bobby Ray, was still alive at the time of Testatrix's death, the *condition* for the manner in which Rebecca and Bradley take from the will did not occur. To put it differently, had Billie Cress predeceased Testatrix instead of Bobby Ray, Bobby Vance would not be able to take from Billie Cress' share because Billie Cress is not the "stock or root" of Bobby Vance.

Accordingly, consistent with the historical administration of the term "*per stirpes*," Rebecca and Bradley, whose root is Billie Cress and not Bobby Ray, should not be entitled to take of the will's devise to the deceased Bobby Ray, while Bobby Ray's son, Bobby Vance, should be entitled to all of his father's share. The majority's holding—allowing Rebecca and Bradley to be co representatives along with Bobby Vance—conflicts with our jurisprudence's implementation of a *per stirpes* devise. By allowing Rebecca and Bradley to take from their uncle, the majority has extended and modified an otherwise basic *per stirpes* distribution to allow certain members of a class, whose root did not predecease the testatrix, to take as representatives through an *indirect ancestor* absent clear intent from the will.

I therefore respectfully dissent.

BURROUGHS v. GREEN APPLE, LLC

[267 N.C. App. 139 (2019)]

DEVON J.A. BURROUGHS, PETITIONER
v.
GREEN APPLE, LLC, APPLE GOLD GROUP (DBA) APPLEBEE'S, AND R. GLEN PETERSON, CHIEF COUNSEL, NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF EMPLOYMENT SECURITY, RESPONDENTS

No. COA18-248

Filed 3 September 2019

Unemployment Compensation—disqualification from benefits—misconduct connected with work—employer-employee disagreement

A former restaurant employee was improperly disqualified from receiving unemployment benefits because his employer failed to show that it fired him for "misconduct connected with the work" (N.C.G.S. § 96-14.6(a)) when, instead, it fired him for refusing to sign a document responding to an internal complaint the employee had filed against his manager. The employee's refusal to sign part of the document—stating that the employer conducted a complete investigation into his complaint and had taken appropriate corrective actions—did not show a wanton or willful disregard for the employer's interests, a deliberate violation of the employer's rules, or a wrongful intent. Rather, the employee reasonably responded to an honest disagreement with how the employer handled his complaint.

Appeal by respondent Division of Employment Security from order entered 9 August 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 22 May 2019.

Mary McCullers Reece for petitioner-appellee.

Respondent-appellant North Carolina Department of Commerce, Division of Employment Security Chief Counsel R. Glen Peterson, by Camilla F. McClain.

No brief filed for respondent-appellee Green Apple, LLC.

ZACHARY, Judge.

Respondent North Carolina Department of Commerce, Division of Employment Security ("the Division"), appeals from the superior court's order reversing the Board of Review's decision that Petitioner Devon

J.A. Burroughs was disqualified from receiving unemployment compensation benefits. We affirm.

Background

Burroughs began working as a server for Applebee's in September 2015. Burroughs reported a wage-and-hour concern to Human Resources in May 2016, complaining of nonpayment for hours worked. Following an investigation, Applebee's issued a check to Burroughs in the amount of $1,299.45.

On 22 June 2016, Burroughs filed another complaint with Human Resources alleging that the assistant manager had engaged in a pattern of retaliatory behavior against him that included physical contact—specifically, "pushing [him] in [his] back" on one occasion. Human Resources employee Vanessa Roman opened an investigation into the complaint, and spoke with the assistant manager as well as other employees. Ms. Roman testified that, based on her investigation, she was unable to substantiate Burroughs's allegations.

On 18 July 2016, Ms. Roman held a meeting with Burroughs, the assistant manager, and the general manager. At the meeting, all parties were asked to sign a document stating that they "would all agree to move forward and align with the organization's guiding principles." The document also contained an acknowledgment that Applebee's had "completed [its] investigation into the concerns raised by" Burroughs's complaint, and had taken "corrective actions as needed."

Burroughs agreed to sign that portion of the document in which he pledged to abide by his employer's expectations moving forward, but he refused to sign the portion acknowledging that Applebee's had made a complete investigation into his complaint and that appropriate corrective action had been taken. According to Ms. Roman, Burroughs

> said he would only provide me with additional details to support his allegations if I provided him a copy of my investigation report. Since I was the one that conducted the investigation I was the lead on that case, I expressed to him that I had completed a thorough investigation into his concerns and that the document that we were asking him to sign was only a tool to memorialize our previous conversation about alignment and moving forward and again continuing to provide our guests with excellent service. He still refused and stated that he did not agree and

> he said I guess I can't work for you guys then. And at that moment we agreed to separate.

Burroughs last worked for Applebee's on 17 July 2016.

Burroughs filed a claim for unemployment insurance benefits on 7 August 2016. Ms. Roman reported that the reason for Burroughs's discharge was that he had "[f]ailed to follow instructions, policy, [and] contract." Thereafter, a claims adjudicator determined that Burroughs was disqualified from receiving unemployment insurance benefits pursuant to N.C. Gen. Stat. § 96-14.6(a)(b), in that he "was discharged for misconduct connected with the work." Burroughs appealed that decision to the Appeals Referee, who issued a decision on 9 November 2016 concluding that Burroughs had been "discharged for insubordination," which amounted to "misconduct connected with his work," thereby disqualifying him from receiving benefits. Burroughs appealed to the Board of Review, which affirmed the Appeals Referee's decision.

Burroughs petitioned for judicial review in Wake County Superior Court. By order entered 9 August 2017, the superior court reversed the Board's decision and ordered that "the agency shall [ensure] that [Burroughs] receives the unemployment benefits to which he is entitled as a matter of law." The Division filed timely notice of appeal from the superior court's order.

On appeal, the Division argues that the superior court erred by disregarding the applicable standard of review and reversing the Board's determination that Burroughs was discharged for misconduct connected with his work, disqualifying him from receiving unemployment benefits. We disagree, and affirm the superior court's order reversing the Board's decision and requiring that the Division issue to Burroughs the unemployment benefits to which he is entitled.

Standard of Review

The instant appeal arises under N.C. Gen. Stat. § 96-15(i).

> The statute provides in relevant part that in any judicial proceeding under this section, the findings of fact by the [Division], if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Thus, findings of fact in an appeal from a decision of the Employment Security Commission are conclusive on both the superior court and this Court if supported by any competent evidence.

James v. Lemmons, 177 N.C. App. 509, 513, 629 S.E.2d 324, 328 (2006) (quotation marks and citation omitted). The Division's conclusions of law are reviewed *de novo*. *Carolina Power & Light Co. v. Emp't Sec. Comm'n of N.C.*, 363 N.C. 562, 564, 681 S.E.2d 776, 778 (2009). A determination that an employee's unemployment is due to misconduct connected with the work is a conclusion of law, and is therefore reviewed *de novo*. *Bailey v. Div. of Empl. Sec.*, 232 N.C. App. 10, 11, 753 S.E.2d 219, 221 (2014).

Discussion

Pursuant to N.C. Gen. Stat. § 96-14.6, an individual will be disqualified from receiving unemployment benefits if the individual is discharged due to "misconduct connected with the work." N.C. Gen. Stat. § 96-14.6(a) (2017). The burden is on the employer to show that a claimant is unemployed due to misconduct, thereby disqualifying the individual from receiving unemployment benefits. *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 376, 289 S.E.2d 357, 359 (1982).

While an employer may be within its right in terminating an employee, this fact alone is not necessarily determinative of the employee's right to receive unemployment benefits. However, an employee who is fired for "misconduct connected with the work" will be disqualified from receiving unemployment benefits. *Williams v. Davie Cty.*, 120 N.C. App. 160, 165, 461 S.E.2d 25, 29 (1995). In the context of the statute, "misconduct" means "conduct which shows a wanton or wilful disregard for the employer's interests, a deliberate violation of the employer's rules, or a wrongful intent." *Intercraft Indus. Corp.*, 305 N.C. at 375, 289 S.E.2d at 359; *see also* N.C. Gen. Stat. § 96-14.6(b) (defining "misconduct connected with the work").

Nevertheless, "[v]iolating a work rule is not willful misconduct if evidence shows the employee's actions were reasonable and were taken with good cause." *Williams*, 120 N.C. App. at 164, 461 S.E.2d at 28. "Good cause is a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Id.* Indeed, "[t]he purpose of denying a discharged employee unemployment benefits because of misconduct connected with work is to prevent these benefits from going to employees who lose their jobs because of callous, wanton and deliberate misbehavior." *Id.* at 165, 461 S.E.2d at 29 (quotation marks omitted). In that respect, one of the key considerations in determining, as a matter of law, whether an employee was discharged for "misconduct connected with the work" is whether the circumstances "display[ed] wrongful intent" in the employee's actions. *Id.* at 164, 461 S.E.2d at 28.

In the instant case, the Division found that Burroughs was discharged from employment for "insubordination" based solely upon Burroughs's refusal to sign a portion of the document that was presented to him in response to his complaint against the assistant manager. Burroughs communicated his support for, and willingness to sign, those portions of the agreement concerning his employer's future expectations; however, he declined to sign that portion acknowledging that his employer had fully investigated the allegations of his grievance and had taken appropriate corrective action.

The Division's findings of fact that Burroughs was terminated on the grounds of insubordination are supported by competent evidence, and are thus binding on appeal. *James*, 177 N.C. App. at 513, 629 S.E.2d at 328. Accordingly, the only issue remaining on appeal is whether, as a matter of law, Burroughs's refusal to attest that his employer had conducted a complete investigation into his internal complaint and taken appropriate "corrective actions" in response constituted "misconduct connected with the work." The superior court concluded that such "insubordination" did "not rise to the level of misconduct" sufficient to disqualify Burroughs from receiving unemployment insurance benefits. *Williams*, 120 N.C. App. at 165, 461 S.E.2d at 28. We agree.

Burroughs's refusal to attest to the completion of the investigation or the appropriateness of the corrective action that had been taken did not show a "wanton . . . disregard for [his] employer's interests, a deliberate violation of [its] rules, or a wrongful intent," *Intercraft Indus. Corp.*, 305 N.C. at 375, 289 S.E.2d at 359, but was instead "a reasonable response" to the disagreement at hand, *Williams*, 120 N.C. App. at 165, 461 S.E.2d at 28. Moreover, Burroughs's reluctance to acknowledge that his employer had conducted a complete investigation in no way prevented his employer from closing that investigation. *See Umstead v. Emp't Sec. Comm'n*, 75 N.C. App. 538, 541, 331 S.E.2d 218, 220 ("In this case, there were no logistical problems sufficient to constitute misconduct under the statute, caused by [the employee]."), *disc. review denied*, 314 N.C. 675, 336 S.E.2d 405 (1985). The record reveals "no refusal to report to work or to perform an assigned task," in that Burroughs readily agreed to sign that portion of the document indicating his willingness to move forward and to abide by his employer's expectations. *Id.*

In these respects, the Division's findings and the evidence before it do not support a conclusion that Burroughs's insubordination constituted "callous, wanton and deliberate misbehavior." *Williams*, 120 N.C. App. at 165, 461 S.E.2d at 29 (quotation marks omitted). The superior court therefore correctly concluded that Burroughs's employer failed to

meet its burden of showing that his conduct "rose to the level of culpability required for a finding of 'misconduct' within the meaning of the statute." *Umstead*, 75 N.C. App. at 542, 331 S.E.2d at 221.

Accordingly, we affirm the superior court's order reversing the Division's decision that Burroughs is disqualified from receiving unemployment insurance benefits.

AFFIRMED.

Judges STROUD and MURPHY concur.

GAIL CANUP HINSON, Executrix of the ESTATE OF WALTER DUNBAR HINSON, Deceased-Employee, Plaintiff-Appellant

v.

CONTINENTAL TIRE THE AMERICAS, SELF-INSURED, Employer-Defendant-Appellee

PART OF THE CONTINENTAL TIRE THE AMERICAS CONSOLIDATED ASBESTOS MATTERS

No. COA18-770

Filed 3 September 2019

1. Workers' Compensation—occupational diseases—asbestosis—burden of proof—causation—section 97-53 factors

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission (IC) did not place an impermissible burden on plaintiffs by requiring them to establish their level of exposure to asbestos at work pursuant to the standard and factors stated in N.C.G.S. § 97-53 (even though that section was applicable to "chemicals herein mentioned," not asbestos). Plaintiffs were required to prove that their work at the factory was a significant causal factor in the development of their alleged asbestosis, which could be accomplished by showing they were exposed to asbestos in a certain form, quantity, and frequency over time. Further, the IC's unchallenged ultimate finding—that plaintiffs' failure to prove causation relieved the employer of liability—did not include the language to which plaintiffs objected.

2. Workers' Compensation—evidence—asbestosis—level of exposure—different theories

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, there was no merit to plaintiffs' argument that the Industrial Commission (IC) erred in relying on air sampling and fiber year theory in its determination that plaintiffs were not exposed to a sufficient level of asbestos to cause illness. It was plaintiffs' burden to prove a level of exposure that caused or significantly contributed to their illnesses, the IC was not required to state which evidence or witnesses it found credible, and the IC's findings of fact were supported by competent evidence.

3. Workers' Compensation—evidence—asbestosis—non-medical expert testimony

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission was free to consider and rely on non-medical expert testimony in addition to medical expert testimony on the issue of whether plaintiffs established a causal connection between their work and development of alleged asbestosis or related illnesses, and to determine what weight to give each piece of evidence.

4. Workers' Compensation—evidence—asbestosis—lung tissue analyses

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission did not err by considering lung tissue pathology of a few deceased plaintiffs—which indicated no asbestosis or other asbestos-related diseases—in its determination that all of the plaintiffs failed to prove a causal connection between their work at a tire factory and asbestosis, since the evidence was relevant to the issues in the case.

5. Workers' Compensation—evidence—asbestosis—consideration of entire record

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission (IC) did not err by stating that its conclusions were based on the "entire record." The IC was entitled to consider all of the evidence and was not required to state which evidence it found less credible. Further, since its findings were supported by competent evidence, they were conclusive on appeal, even if other incompetent evidence had been improperly admitted.

6. Workers' Compensation—asbestosis—causation—findings of fact—sufficiency of evidence

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, findings by the Industrial Commission (IC) which plaintiffs purported to challenge on appeal were deemed binding because plaintiffs' arguments failed to state that the findings were not supported by competent evidence and amounted to a disagreement about the weight and credibility determinations of the IC. Other findings properly challenged by plaintiffs were supported by sufficient competent evidence.

7. Workers' Compensation—occupational diseases—colon cancer—tonsil cancer—ultimate findings

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission's ultimate findings of fact (resolving mixed questions of law and fact)—including those stating that plaintiffs failed to prove that either colon cancer or tonsil cancer were occupational diseases compensable under Chapter 97—were supported by competent evidence.

8. Workers' Compensation—asbestosis—claims by one plaintiff of group—sufficiency of findings

In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, findings and conclusions by the Industrial Commission specific to one plaintiff—that plaintiff failed to show a causal connection between work at the factory and development of illness from exposure to asbestos, or that he had developed asbestosis—were binding. Plaintiff failed to argue that the conclusions were not supported by the findings, and the findings were supported by competent evidence.

Appeal by Plaintiff from opinion and award entered 25 January 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 2019.

Wallace and Graham, PA, by Edward L. Pauley, for Plaintiff-Appellant.

Fox Rothschild LLP, by Jeri L. Whitfield and Lisa K. Shortt, for Defendant-Appellee.

McGEE, Chief Judge.

This appeal is companion to four additional appeals, COA18-766, COA18-767, COA18-768, and COA18-769 (all five together, the "bellwether cases"), consolidated for hearing by order of this Court entered 8 June 2018. The four companion appeals will be decided by opinions filed concurrently with this opinion.

I. Procedural History

Decedent Walter Dunbar Hinson ("Plaintiff Hinson") worked for Continental Tire the Americas ("Defendant") at Defendant's tire factory (the "factory") in Charlotte from 1967 until 1999.[1] This case and the other bellwether cases involve workers' compensation claims based on allegations that Plaintiff Hinson, along with the additional four plaintiffs[2] in the bellwether cases ("Bellwether Plaintiffs"), were exposed to levels of harmful airborne asbestos sufficient to cause asbestos-related diseases, including asbestosis.[3] The bellwether cases constitute a small percentage of a much larger number of related claims that were consolidated by the Industrial Commission (the "consolidated cases").[4] Determination of the bellwether cases will impact not only the Bellwether Plaintiffs, but also the remaining plaintiffs from the consolidated cases (together with the Bellwether Plaintiffs, "Plaintiffs" or "Consolidated Plaintiffs"). The Full Commission (the "Commission") explained the unique procedure that was adopted to handle the large volume of consolidated cases in five opinions and awards, entered on 25 January 2018, that decided the bellwether cases:

> This case is part of a large group of cases (currently numbering 144) alleging occupational exposure to asbestos at [the] factory. The large group of [P]laintiffs contends that they developed asbestos-related disease, primarily asbestosis, caused by exposure to asbestos at the . . . factory[.] Defendant denied that the diagnoses of asbestosis were

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1. The factory was initially operated under the General Tire name.

2. Douglas M. Epps, Bobby James Newell, Frank Lee Welch, and Charles Edward Wilson.

3. Plaintiff Hinson filed a Form 18B with the Industrial Commission, completed 23 May 2002, alleging he had developed asbestosis as a result of exposure to asbestos while an employee at the factory.

4. The Commission's 25 January 2018 opinion and award states that there were "currently" 144 consolidated cases. However, the number of consolidated cases has fluctuated. Both Plaintiffs and Defendant moved to consolidate these cases.

valid, and also denied that any employee could develop an asbestos-related disease as a result of employment with [D]efendant because there was insufficient exposure to asbestos in [the] factory.

[The consolidated cases] were postured so that there would be an "initial six" cases to be tried as bellwether cases. Although the 144 cases had many issues and facts in common, it was an impossibly large number to try individually, and too difficult to manage in one joint hearing. Therefore, [P]laintiffs' counsel selected a group of six representative bellwether cases to be tried together in a consolidated manner. The evidence presented in this consolidated hearing regarding the factory, [asbestos] exposures to employees, the criteria for the diagnosis of asbestosis, the scientific evidence regarding asbestos exposure, and the potential for disease causation would be common to, and thus universally applicable to, all 144 claims. The parties agreed that evidence on the general issues was to be part of the record for all [consolidated cases], to the extent the evidence was applicable to each [P]laintiff's issues. The [B]ellwether [P]laintiffs' individual medical and employment histories would be addressed, as would scientific evidence applicable to all 144 claims regarding asbestos-related-disease-causing capabilities, including the exposure and medical causation testimony. In addressing the bellwether cases first and presenting evidence applicable to all extant claims, the assumption was that after the six cases proceeded through trial, decision and appeal, the parties would be in a better position to evaluate the remaining claims. The remaining [consolidated cases] could then be potentially resolved, or they could proceed to abbreviated hearings for the introduction of evidence regarding their individual medical and employment information.

One of these "initial six" [Bellwether P]laintiffs, Kirkland . . ., filed a Notice of Voluntary Dismissal with Prejudice on 13 November 2012. This left five Bellwether Plaintiffs to proceed through trial, decision, and appeal.[5] While

5. These five Bellwether Plaintiffs are the five Plaintiffs currently before us in the associated appeals.

> under the jurisdiction of former Deputy Commissioner George Glenn, these matters were set on a course unlike that of most workers' compensation cases, in that each side was given the opportunity to have a "full trial on the science"—with freedom to prosecute the cases according to the civil procedure used in superior court. The parties were permitted to take as many pre-hearing depositions as they wished and could call as many hearing witnesses as they determined to be necessary. The [B]ellwether [P]laintiffs' cases were heard together in a consolidated posture by former Deputy Commissioner Gheen on a special-set basis in various locations over the course of thirty-eight hearing days beginning 14 February 2011 and concluding 18 February 2013. Former Deputy Commissioner Gheen's hearing of these claims also involved substantial pre-trial proceedings.[6] Much of the evidence presented was "common" evidence applicable to all 144 extant claims.
>
> . . . . The Full Commission has reviewed and considered all hearing and deposition transcripts, along with all evidentiary exhibits, arguments, and briefs in reaching a decision in this claim.

After hearings had already commenced, the deputy commissioner entered a 27 July 2012 order requiring that "Plaintiffs who die during the pendency of these claims shall have at least 30 blocks of lung tissue preserved for autopsy and examination by an expert of Defendant's choice." The deputy commissioner based this order on the following findings and reasoning:

> [Defendant] denies that any of its employees, including claimants, would have had sufficient exposure to asbestos from working at its facility to either cause or contribute to an asbestos related disease. It has presented the testimony of multiple credible expert witnesses in support of this defense.
>
> [] Plaintiffs' claims against [Defendant] are based, in part, on a "B-read" of an x-ray provided by Plaintiffs' expert.[7]

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6. Three different deputy commissioners had been involved in the consolidated cases through entry of the initial opinions and awards for the bellwether cases by the deputy commissioner.

7. See findings of fact 25 to 28, below, for an explanation of the "B-read" process.

> As testified by the medical experts, radiological studies are only effective at identifying abnormal features on the x-ray that may be consistent with the disease of asbestosis, but also may be consistent with multiple other lung diseases. In order to make a diagnosis of asbestosis, a physician is called upon to rule out other possible conditions.
>
> [] The medical experts representing both parties have repeatedly testified that the only way to positively identify whether or not a lung condition or other cancer is caused by asbestos exposure is to take a sample of and examine the actual lung tissue. However, due to the risks involved, this procedure is not done while the patient is alive; it is commonly performed at autopsy.

Therefore, the deputy commissioner ordered that Plaintiffs save lung tissue of any Plaintiffs who died so that their lung tissue could be examined. Plaintiffs did not fully comply with this order.

The deputy commissioner reasoned in a 30 April 2013 order: "The diagnoses [of asbestosis], or lack thereof, by the experts is based on the reading of the same radiology. Both sides argue the veracity of their own experts." "Given the opposing medical findings, . . . the undersigned Deputy Commissioner suggested to the parties" that they "jointly agree to independent medical experts or to experts chosen by the Industrial Commission to review the radiology and any other relevant medical evidence, which experts' opinion both parties would accept as final." "Alternatively the parties debated whether the Plaintiffs should be compelled to submit to a high resolution computed tomography (hereinafter 'HRCT') scan to be interpreted by a physician selected by the Commission in order to determine the presence or absence of asbestosis." Defendant agreed to the suggestion, and agreed to pay for the HRCT scans and associated costs, but Plaintiffs did not agree.

During the hearings, "[m]uch of the evidence presented was 'common' evidence applicable to all 144 extant claims." Due to the resignation of the deputy commissioner who had presided over the hearings, the consolidated cases were assigned to a different deputy commissioner on 15 April 2015. Plaintiffs and Defendant completed submission of evidence to the deputy commissioner, and made their closing oral arguments on 26 and 27 January 2016. The deputy commissioner filed his opinions and awards in the bellwether cases on 19 December 2016, denying the claims of all five Bellwether Plaintiffs. Plaintiffs appealed to the Full Commission on 21 December 2016. The Commission heard

the matters on 29 June 2017, and also denied Plaintiffs' claims by five opinions and awards entered 25 January 2018. The five 25 January 2018 opinions and awards filed in the consolidated cases each contain findings of fact common to all claims, which also include the ultimate findings and conclusions of law common to all claims. Following the common findings and conclusions, each of the five opinions and awards before us contain findings of fact and conclusions of law sections that are specific to each individual Bellwether Plaintiff, as well as the Commission's rulings denying each of the Bellwether Plaintiffs' claims.

Bellwether Plaintiffs appealed, and Plaintiffs and Defendant filed a motion with this Court on 30 May 2018 requesting consolidation of the bellwether cases for appeal.[8] This Court ordered that a single record be submitted for all five bellwether cases, and that: "The parties shall each submit one general brief addressing common issues and five specific briefs addressing individual [P]laintiff issues." Plaintiffs and Defendant each filed a single "general brief"—ostensibly the "general brief addressing common issues" ordered by this Court. Plaintiffs' general brief is in reality the statement of facts for Plaintiffs' individual briefs. In addition, each of the five Bellwether Plaintiffs filed "specific" individual appellant briefs that are nearly identical, and almost exclusively argue common issues. Defendant responded to the Bellwether Plaintiffs' individual briefs by filing five separate appellee briefs addressing the issues specific to each of the five Bellwether Plaintiffs. Although Plaintiffs' individual briefs do not address the "common issues" separately from the "individual issues," we address all Plaintiffs' arguments concerning the "common issues" that were decided in the Commission's 25 January 2018 opinions and awards in this opinion—COA18-770. Our holdings for the "common issues" will be incorporated by reference in our opinions for the remaining four bellwether cases—COA18-766, COA18-767, COA18-768, and COA18-769. The "individual issues" will be addressed separately in each opinion.

II. General Factual History

Plaintiffs all allege they were exposed to asbestos while working at the factory, and further allege they developed compensable asbestos-related diseases as a result. As explained in a *Fact Sheet* published by the National Cancer Institute ("NCI")—which was entered into evidence:[9]

8. Because the "common issues" sections of the 25 January 2018 opinions and awards apply to all Consolidated Plaintiffs, we treat them as appellants as well.

9. We include this NCI publication as a general introduction to asbestos, asbestos-exposure, and related disease. This is just one piece of evidence considered by the Commission—it was not specifically adopted by the Commission in its opinions and awards.

> Asbestos is the name given to a group of minerals that occur naturally in the environment as bundles of fibers that can be separated into thin, durable threads. These fibers are resistant to heat, fire, and chemicals and do not conduct electricity. For these reasons, asbestos has been used widely in many industries.
>
> . . . .
>
> Asbestos minerals are divided into two major groups: Serpentine asbestos and amphibole asbestos. Serpentine asbestos includes the mineral chrysotile, which has long, curly fibers that can be woven. Chrysotile asbestos is the form that has been used most widely in commercial applications. Amphibole asbestos has straight, needle-like fibers that are more brittle than those of serpentine asbestos and are more limited in their ability to be fabricated.

National Cancer Institute, U.S. Department of Health and Human Services, *Fact Sheet: Asbestos Exposure and Cancer Risk* 1 (1 May 2009) ("NCI *Fact Sheet*") (citations omitted). According to the NCI *Fact Sheet*:

> People may be exposed to asbestos in their workplace, their communities, or their homes. If products containing asbestos are disturbed, tiny asbestos fibers are released into the air. When asbestos fibers are breathed in, they may get trapped in the lungs and remain there for a long time. Over time, these fibers can accumulate and cause scarring and inflammation, which can affect breathing and lead to serious health problems.
>
> . . . . According to [the International Agency for Research on Cancer], there is sufficient evidence that asbestos causes mesothelioma (a relatively rare cancer of the thin membranes that line the chest and abdomen), and cancers of the lung, larynx, and ovary. Although rare, mesothelioma is the most common form of cancer associated with asbestos exposure. There is limited evidence that asbestos exposure is linked to increased risks of cancers of the stomach, pharynx, and colorectum.
>
> Asbestos exposure may also increase the risk of asbestosis (an inflammatory condition affecting the lungs that can cause shortness of breath, coughing, and permanent lung damage) and other nonmalignant lung and pleural

disorders, including pleural plaques (changes in the membranes surrounding the lung), pleural thickening, and benign pleural effusions (abnormal collections of fluid between the thin layers of tissue lining the lungs and the wall of the chest cavity).

. . . .

Everyone is exposed to asbestos at some time during their life. Low levels of asbestos are present in the air, water, and soil. However, most people do not become ill from their exposure. People who become ill from asbestos are usually those who are exposed to it on a regular basis, most often in a job where they work directly with the material or through substantial environmental contact.

. . . .

Although it is clear that the health risks from asbestos exposure increase with heavier exposure and longer exposure time, investigators have found asbestos-related diseases in individuals with only brief exposures. Generally, those who develop asbestos-related diseases show no signs of illness for a long time after exposure. It can take from 10 to 40 years or more for symptoms of an asbestos-related condition to appear.

. . . .

Several factors can help to determine how asbestos exposure affects an individual, including:

- Dose (how much asbestos an individual was exposed to).
- Duration (how long an individual was exposed).
- Size, shape, and chemical makeup of the asbestos fibers.
- Source of the exposure.
- Individual risk factors, such as smoking and pre-existing lung disease.

Although all forms of asbestos are considered hazardous, different types of asbestos fibers may be associated with different health risks. For example, the results of several studies suggest that amphibole forms of asbestos may be

> more harmful than chrysotile, particularly for mesothelioma risk, because they tend to stay in the lungs for a longer period of time.

Id. at 2-3 (citations omitted). The NCI *Fact Sheet* also states that initial examination for someone who suspects they may have an asbestos-related disease would generally include "[a] thorough physical examination, including a chest x-ray and lung function tests[.] . . . . Although chest x-rays cannot detect asbestos fibers in the lungs, they can help identify any early signs of lung disease resulting from asbestos exposure." *Id.* at 4 (citations omitted). However, the NCI further stated: "A lung biopsy, which detects microscopic asbestos fibers in pieces of lung tissue removed by surgery, is the most reliable test to confirm exposure to asbestos." *Id.*

Plaintiffs worked in different sections of the factory, but all allege they were exposed to airborne asbestos in quantities and of a type sufficient to cause asbestos-related diseases—primarily asbestosis. The Commission made the following relevant findings of fact related to the "common issues" raised by Plaintiffs' claims:

> 1. Asbestos is a generic term for a group of six naturally-occurring, fibrous silicate minerals that are ubiquitous in ambient air. The general public is exposed to asbestos from natural and artificial sources through food, water, and in other ways. The background level of asbestos to which the general public is exposed varies based on several factors including geography and proximity to urban centers. Low levels of asbestos can be found in the lungs of virtually 100% of the general population. [N.C.G.S.] § 97-62 defines asbestosis as "a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust."
>
> 2. Plaintiffs allege that they contracted asbestosis caused by exposure to airborne asbestos during employment with [D]efendant at the . . . factory[.] Additionally, some Plaintiffs allege that they also contracted diseases other than asbestosis caused by exposure to airborne asbestos during employment at [the] factory. Asbestos is not a tire component. The [P]laintiffs allege workplace exposure in the factory from one or more of four main sources: 1) airborne asbestos originating from damaged or deteriorated asbestos-containing pipe insulation; 2) powdered

talc allegedly contaminated with asbestos used as a non-stick agent in certain areas of the factory; 3) asbestos-containing dust released into the air by sawing and/or otherwise working with asbestos-containing gaskets; and 4) airborne asbestos-containing brake dust that allegedly emanated from forklifts and other factory vehicles during maintenance and use. Plaintiffs allege that they were exposed to asbestos through one or more of these methods in such form and quantity and with such frequency that it caused asbestosis.

3. The . . . factory was constructed in the late 1960s and began manufacturing tires by 1969. . . . . The factory ceased tire production on 4 July 2006. . . . .

4. The tire-making process began in the Banbury/mixing department, a three-story area open to the rest of the factory. On the top floor of the Banbury/mixing area, chemicals and rubber were received, weighed, and mixed. On the second floor of this area, these raw materials were put into heated mixing machines. From these mixers the material was dropped down chutes to the mills on the main floor. The mills pressed the chunks of rubber material into sheets. The sheets of rubber were then hung on a line and dried using fans. Once dry, the sheets were put on pallets and sent to the "calendaring and extruding" area.

5. In the calendaring and extruding area, the rubber material was compressed into different thicknesses, shapes, and sizes for eventual use as the different components of a tire. . . . . The compressed rubber was then transferred to the "stock prep" area, where it was cut to the correct dimensions for tire building.

6. In the "tire building" area, all of the tire pieces were layered together and pressed in a tire-building machine. . . . . The "green tires" were then transported to the curing department.

7. There were 147 clam-shell-shaped curing presses/ovens in the curing department. . . . . The curing process, during which the "green tires" were placed in a mold and vulcanized under heat and pressure, was very hot and was operated by steam. For this reason, the curing area

had more condensate and steam piping than any other area in the factory. Much of this piping was located in trenches that ran to the curing presses/ovens.

8. After curing, the tires went to the "final finish" area where they were trimmed, cleaned, and inspected. The tires that passed inspection were put on pallets and transported to the warehouse[.]

9. Steam and condensate pipes ran throughout the factory. . . . . There were at least 26,180 linear feet of insulated steam and condensate piping in the factory. The insulation was comprised of one to two inches of an asbestos-containing cement, Thermobestos, encapsulating the steam and condensate pipes. The pipes had protective canvas and glue surrounding the Thermobestos. Asbestos insulation was removed from the market in the early 1970s and, as such, expansions at the . . . factory after a certain date would not have included the installation of asbestos-encapsulated piping. Most of the insulated steam and condensate piping was at ceiling level, 20-30 feet above the factory floor, or below floor level in the trenches that ran between and into the curing presses. The floor-level and trench-level pipe insulation was susceptible to damage by foot traffic. Forklifts could damage floor-level pipe insulation and also could damage pipe insulation at higher levels. For example, while stacking tires high in the warehouse, it was possible for the forklift payloads to strike the insulated piping.

10. Plaintiffs allege exposure to airborne asbestos originating from deteriorated pipe insulation. Plaintiffs allege that it was damaged through external molestation by workers walking on pipes, climbing on pipes, and striking the pipes with forklifts and forklift payloads. Plaintiffs also argue that internal pipe damage from ruptures forced steam to leak out of the pipes with sufficient force to cause insulation damage and cause asbestos to become airborne. Plaintiffs further allege that workers used compressed air near the damaged insulation, causing asbestos to become airborne. There is conflicting evidence regarding the amount of pipe insulation damage present at [the] factory.

11. The highest concentration of insulated piping in the factory existed in the curing department, with much of the piping at or below floor level. Plaintiffs allege that workers used a band saw to cut large asbestos-containing gaskets in the curing department. If [P]laintiffs' allegations are correct, it would be logical to expect high levels of airborne particulates in the curing department originating from damaged pipe insulation and gasket-sawing. However, the greater weight of the evidence does not support this conclusion.

12. In 1979, the . . . factory took part in an air contaminant assessment study in conjunction with The National Institute for Occupational Safety and Health (hereinafter "NIOSH"). At the time, NIOSH was studying the best methods and technologies to control air quality in the tire industry. The report reflects that [the] factory was selected for the study because it had "among the better controls for air contaminants in the industry." NIOSH performed area and personal air monitoring in each area of the plant that it expected to find measurable dust or emissions. Specifically, NIOSH measured for dust—both airborne and respirable, as well as petroleum distillates, rubber solvent, Benzene, and Toulene. The dust measurements would have measured any particulates in the air—whether the particulates were asbestos, talc, or something else. The 1979 NIOSH dust measurements found that the measured dust levels in the curing department were 1/100th of the permissible level. This was possibly due to the curing department's powerful exhaust system, which drew air up and out of the area. Except for an outlier measurement created by an employee jumping up and down in a dusty trash bin, the 1979 dust measurements at [the] factory were five to ten times less than the permissible exposure level (hereinafter "PEL") in place in 2013. NIOSH concluded that the particulate and vapor concentrations at [the factory] were well below the PEL established by the Occupational Safety and Health Administration (hereinafter OSHA), NIOSH, and the American Conference of Governmental Industrial Hygienists. NIOSH also concluded that the environmental controls (exhaust and ventilation systems) were effective.

13. There was also environmental air sampling for asbestos at [the] factory in 1985 when asbestos-containing

insulation was removed from a furnace on the third floor of the mixing area. This sampling was done with background air monitoring as well as with personal air monitors on the personnel conducting the removal. In 1985, there were no regulations regarding wetting down insulation as it was removed. Therefore, the air measurements taken during this removal process record a scenario very favorable for the creation of airborne dust. However, the 1985 background air monitoring that took place showed results well below the then-current OSHA PEL. The highest recorded personal air monitoring result during the removal was also below the then-existing OSHA PEL.

14. As a result of the 1986 federal asbestos regulations, large-scale asbestos abatement procedures were undertaken at [the] factory. This process required pre-abatement area air quality monitoring to measure pre-removal levels. For this reason, there were background air samples collected for abatement projects in 1989 (curing), 1995 (calendar and extruding), and 2003 (powerhouse). In all of these areas, these measurements show that at no time was the potential exposure above the OSHA PEL. Background monitoring reflected levels to which the public at large is exposed.

15. In areas with ceiling-level piping, such as the warehouse, the evidence demonstrates that any small amount of asbestos potentially disturbed and released at ceiling level due to pipe insulation damage would have dissipated before reaching workers and would not have created any meaningful exposure.

. . . .

17. Plaintiffs also allege exposure to asbestos through the inhalation of powdered talc which they allege contained asbestos. Talc is used ubiquitously by the general population in things such as makeup and baby powder. It is the most common non-asbestos mineral found in general population lung tissue. Talc was used in [the] factory as a non-stick agent. However, the amount of talc used in the . . . factory is a contested factual issue. Defendant avers that routinely, workers mistook other powdery materials used in great quantities at the factory for talc. Specifically,

[D]efendant contends that clay [kaolin], calcium carbonate, and zinc oxide were commonly used in vastly larger quantities and were routinely incorrectly referred to by the workers as "talc." . . . .

18. While talc from certain mines is known to be contaminated by asbestos, there was disagreement among the experts regarding the likelihood of asbestos being a contaminant in the talc used at [the] plant. Furthermore, in 1995, air monitoring was done in the calendaring area while calendaring work continued. Plaintiffs allege significant talc usage in this area. If [P]laintiffs' allegations are correct, it would be logical to expect high levels of airborne particulates in calendaring. However, the 1995 measurements, performed as calendaring work continued, found airborne particulate levels well below the then-existing OSHA PEL, and EPA clearance levels.

. . . .

20. . . . . There was contradicting testimony on the issue of cutting gaskets—with some witnesses testifying that gaskets came from the manufacturer already made to fit and did not require any sawing and other testimony that any such sawing, if it took place, would have been done in the maintenance shop, not in curing.

. . . .

24. In 1986, federal government regulations mandated new procedures to identify, encapsulate, and abate workplace asbestos. As part of these new regulations, in 1987, certain employees at [the] factory were trained for the possibility that small asbestos removals would have to be performed by [Defendant's] employees. . . . . All removal and abatement procedures were performed by outside contractors. Subsequent to the 1986 regulations, the new asbestos management policies were made known to all employees, masks were provided, and safety protocols, such as the prohibition of using compressed air on damaged insulation, were enacted. Furthermore, known asbestos-containing materials were labeled, encapsulated, and removed.

25. An asbestosis B-read is a test in which NIOSH-certified physicians view a patient's chest x-ray and score it from 0/0

(for normal lungs) through 3/3 (for lungs with severe disease). B-readers become certified (and re-certified every 4 years) based on their tested proficiency in scoring a set of standard x-rays. The first number in a B-read score reflects that reader's first impression of the film, with the second number reflecting a different number if the reader has a "second thought" or if the reader thinks another B-reader could arrive at a different conclusion. For example, a 1/0 score reflects a B-reader's conclusion that the film is mildly abnormal, but that another B-reader could read the film as normal.

26. The 1986 American Thoracic Society criteria required a B-read to be 1/1 or greater before the result was considered consistent with asbestosis. The 1986 criteria also stated: "the benefit of the doubt should be given whenever the clinical features and occupational exposure data are compatible with the diagnosis." The 2004 American Thoracic Society criteria liberalized the standard to define a 1/0 read or greater as consistent with asbestosis, but removed the "benefit of the doubt" language. Many common non-asbestos-related conditions are consistent with a 1/0 B-read. For example, cigarette smoking can cause opacities consistent with a 1/0 B-read.

27. The [P]laintiffs in these cases took part in a mass screening of chest x-rays of [Defendant's] former . . . factory workers. This mass screening was organized by [P]laintiffs' attorneys. These x-rays were reviewed by B-readers selected by [P]laintiffs' attorneys. Over 80% of [P]laintiffs in these cases were evaluated by [P]laintiffs B-readers to have "1/0" B-reads. Plaintiffs were subsequently referred by [P]laintiffs' attorneys for mass diagnostic examinations at a hotel in Charlotte performed by pulmonologists selected by [P]laintiffs' attorneys.

28. Defendant's B-readers evaluated the [P]laintiffs' x-rays as 0/0. This consistent disparity of B-reads, which, by definition, are meant to be read to a consistent standard, raises the issue of possible B-reading bias by one or both sides.

29. Asbestos-related diseases follow a dose-response relationship—the higher the cumulative [asbestos] exposure

dose, the greater the risk of disease, with asbestosis generally requiring the highest dose. Pleural plaques, pleural thickening, and mesothelioma are asbestos-related conditions that generally form at a lower dose.

30. In the general population, approximately 80% of people diagnosed with asbestosis will also have bilateral pleural plaques. However, experts in these cases only identified about 10% of the [P]laintiffs diagnosed with asbestosis as also having bilateral pleural plaques. This outcome is statistically improbable. Because pleural plaques require less exposure, it is not logical that such a large group diagnosed with asbestosis would have so few with pleural plaques.

31. Pursuant to an order issued by former Deputy Commissioner Gheen, [D]efendant has been entitled to autopsies and lung tissue examinations of deceased [P]laintiffs to allow pathological examinations. Although 18 [P]laintiffs have died to date, [D]efendant has only been able to obtain autopsy results and tissue examinations of five deceased [P]laintiffs—Walter Hinson, Johnnie Jones, Charles Gibson, Homer Hunt, and Lloyd Cox. Walter Hinson is the only [Bellwether P]laintiff who had post-mortem pathology[.]

32. Pathological examination of lung tissue is a definitive method of determining whether an individual has an asbestos-related disease. x-rays are inherently limited in that they can only identify markings that are consistent with a pneumoconiosis such as asbestosis. These markings, as seen on radiological scans, can also be consistent with a number of unrelated conditions and diseases.

33. The accepted scientific method to diagnose asbestosis pathologically requires diffuse interstitial fibrosis AND either two or more asbestos bodies per centimeter squared OR a count of uncoated asbestos fibers that falls within that lab's range for asbestosis (accounting for the background levels found in that lab's reference population/control group). Labs also may have different methodologies to digest and identify fibers, making cross-lab comparisons problematic. Asbestos bodies are fibers that have been coated by the body as a defense mechanism. Diffuse interstitial fibrosis or scarring can be caused by numerous

things other than asbestosis. Many non-asbestos-related diseases and conditions can result in a 1/0 B-read.

34. Of the five deceased [P]laintiffs who had post-mortem pathological study of their lung tissue, (Walter Hinson, Johnnie Jones, Charles Gibson, Homer Hunt, and Lloyd Cox), none had pathological evidence of asbestosis. Pathology is the most reliable method to diagnose asbestosis.

35. Pursuant to the Helsinki, OSHA, and NIOSH standards, fibers shorter than 5 micrometers [or microns] are not counted pathologically for purposes of asbestosis diagnosis or risk assessment. Fibers shorter than 5 micrometers, due to their length, are cleared quickly by the lungs and are not believed to contribute to the disease. Only fibers longer than 5 micrometers become lodged into the lung tissue, as they are too big to navigate through the lymphatic channels to be cleared by a human lung's defense mechanisms.

36. Samples of the pipe insulation at the . . . factory show the presence of two types of asbestos—amosite and chrysotile. Amosite is an amphibole. Chrysotile is a type of [serpentine] asbestos, often shorter than five micrometers, that is particularly susceptible to being broken down quickly in acidic environments, such as a human lung. Due to its length and fragility in the human lung, the clearance half-life of chrysotile asbestos in humans has been estimated to be a few weeks to a few months. Plaintiffs argue that the tissue fiber analyses in these cases under-assessed the number of fibers by not counting the chrysotile fibers because they are quickly cleared from the human lung. Many experts believe that chrysotile asbestos does not cause or contribute to asbestosis or asbestos-related disease due to its short clearance half-life and that fact that persistence of a fiber within the lung is a crucial determinant of its pathogenicity. By contrast, amphibole asbestos fibers are not susceptible to being dissolved by lung tissue and have a clearance half-life in the human body measured in decades. Because the pipe insulation at the . . . factory had both chrysotile and amphibole asbestos, the [P]laintiffs' lung pathology would show occupational exposure, if it existed, in the form of amphibole fibers.

37. [Plaintiff] Hinson . . . worked for 32 years, mainly in the curing department. The curing department had the highest concentration of insulated piping in the factory, with much of it at floor level or in exposed trenches. According to [Plaintiff] Hinson, he was also exposed to significant asbestos dust from using a band saw to cut large asbestos gaskets. If [P]laintiffs' arguments are correct, [Plaintiff] Hinson would have been exposed to a significant amount of airborne asbestos. [Plaintiff] Hinson was given a 1/0 B-read by Dr. James Johnson[.] Dr. Craig Hart at York pathology performed [P]laintiff Hinson's lung autopsy. Dr. Hart found no evidence of asbestos bodies or fibrosis, but did see evidence of smoking. The tissue was sent to Dr. Oury, who examined the sample and confirmed Dr. Hart's conclusions. Although it was not required for diagnostic purposes due to the lack of fibrosis, a fiber count analysis was done by Dr. Oury upon [D]efendant's request. The fiber count analysis found 5 asbestos bodies per gram, which is a level well below that seen in individuals with asbestosis and in the range of control individuals with no history of [occupational] asbestos exposure.

38. Decedent Johnnie Jones . . . worked for 25 years in the calendar area. If [P]laintiffs' arguments are correct, he would have been subjected to significant airborne asbestos-contaminated talc exposure in his workplace environment. Decedent Johnnie Jones had a 1/0 B-read from Dr. Crim. However, when Dr. Roggli performed a pathological examination of Jones' lung tissue, he found no histologic evidence of asbestosis or elevated asbestos content. Based on decedent Jones' employment history at [the factory] and his pathology results, Dr. Roggli testified that there was not sufficient exposure to asbestos at the factory . . . to contribute to or to cause an asbestos-related disease for Mr. Jones or anyone in his position.

39. Decedent Charles Gibson . . . worked at the . . . factory . . . for 31 years—holding jobs in the tire-building and warehouse departments. If [P]laintiffs' arguments are correct, Gibson would have been subjected to significant airborne asbestos exposure in his workplace environment. Decedent Gibson was found to have a 1/0 B-read according to Dr. Crim. Decedent Gibson's lung tissue was collected

by York Pathology Associates after his death. Dr. Jenkins with York Pathology performed a gross tissue examination. Dr. Jenkins found no pleural plaques. Dr. Oury also examined the tissue and found no evidence of pulmonary fibrosis, no asbestos bodies, and no fibers. Talc and vermiculite were found, but the source of these materials was impossible to discern.

40. Decedent Homer Hunt . . . was employed at the . . . factory for 17 years as a mechanic—working in all areas of the factory. Among many other tasks, decedent Hunt replaced forklift brakes. If [P]laintiffs' arguments are correct, decedent Hunt would have been subjected to significant amounts of airborne asbestos-containing brake dust in his workplace environment. Decedent Hunt was a 45-year smoker who died of lung cancer in 2012. His lung tissue was collected by York pathology pursuant to the Autopsy Order. Dr. Richard Johnson and Dr. Oury examined decedent Hunt's lung tissue. No fibrosis was found in areas of the lung not impacted by the unrelated carcinoma tumor. Furthermore, there were no asbestos bodies or fibers found.

41. Decedent Lloyd Cox . . . worked at [the] factory for 31 years in the stock and bead prep area. Decedent Cox died in 2014 of viral pneumonitis complicated by other factors. Although decedent Cox had "end stage asbestosis" written on his death certificate by the Lancaster County coroner, this diagnosis is of dubious reliability in that it apparently has little or no scientific basis. The coroner does not have a college degree and did not consult with the county pathologist before writing that conclusion on the death certificate. Decedent Cox's lung tissue was collected and examined by York Pathology Associates. Surgical pathologist Dr. Sporn performed a "transbronchial biopsy." Dr. Sporn did not find any asbestos bodies and no condition was found on the biopsy that would have been caused by or contributed to by asbestos exposure. Dr. Sporn articulated that viral pneumonia was the likely cause of death. Dr. Hart performed the pathology exam, microscopically and grossly, and found that there was no interstitial fibrosis, no asbestos bodies, no pleural plaques, no asbestos fibers, and no evidence of exposure to asbestos above the general population.

> 42. Despite [P]laintiffs' theories of exposure, pathology results from the lung tissue of five long-term employees from a variety of departments and factory locations uniformly show a lack of fibrosis, a lack of asbestos bodies, and a lack of fibers.
>
> . . . .
>
> 44. Drs. Ghio, Barrett, Goodman, and Alexander concluded that [P]laintiffs did not have findings consistent with diagnoses of asbestosis. Given the preponderance of the evidence in view of the entire record, their opinions are given greater weight than those of Drs. Crim, Ohar, Schwartz, and Frank [Plaintiffs' experts].

Plaintiffs argue that some of these findings are erroneous, incomplete, or misstate the facts. We will address Plaintiffs' arguments concerning the findings of fact below. Based upon these common findings of fact, the Commission determined that Plaintiffs had not meet their burden of proving they were exposed to levels of hazardous airborne asbestos capable of causing—or significantly contributing to—their alleged asbestos-related diseases. Additional facts will be discussed below.

III. Relevant Workers' Compensation Law

A. *Standard of Review*

The issues before us are controlled by Article 1, Chapter 97 of the General Statutes—the "Workers' Compensation Act" (the "Act"). "The employee seeking workers' compensation benefits bears the burden of proving every element of compensability. The degree of proof required of a claimant under the Act is the 'greater weight' or 'preponderance' of the evidence." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (2000) (citations omitted). This Court's standard of review is well established:

> "Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." Unchallenged findings of fact are presumed to be supported by competent evidence[.] The Commission's conclusions of law are reviewed *de novo*.

Penegar v. United Parcel Serv., __ N.C. App. __, __, 815 S.E.2d 391, 394 (2018) (citations omitted). "Whether an injury arose out of and in

the course of employment is a mixed question of law and fact, and the Industrial Commission's findings in this regard are conclusive on appeal if supported by competent evidence." *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780 (1989) (citation omitted).[10] The Commission's findings, including its ultimate findings, are binding "when they are supported by direct evidence or by reasonable inferences drawn from the record." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 30, 398 S.E.2d 677, 680 (1990) (citations omitted). "[T]he Commission is required to evaluate the credibility of the evidence and reject any evidence it finds as not convincing." *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995) (citation omitted).

> [T]he Commission has sole authority to make findings of fact. This Court does not weigh the evidence. We determine only whether there is *any* evidence of substance in the record to support the Commission's findings; if there is, we are bound by the findings, even though the record may contain evidence supporting findings contra. There must be a complete lack of competent supporting evidence to justify disregarding the Commission's findings of fact. Where medical testimony is conflicting, the Commission decides which testimony to give the greater weight.

Carroll v. Burlington Industries, 81 N.C. App. 384, 387-88, 344 S.E.2d 287, 289–90 (1986) (citations omitted).

B. *Workers' Compensation; Occupational Diseases*

Most, if not all, Consolidated Plaintiffs allege they developed asbestosis as a result of their work at the factory.[11] *See* N.C.G.S. § 97-53(24) (2017). Two Bellwether Plaintiffs, Wilson and Epps, alleged they have occupational diseases as defined by N.C.G.S. § 97-53(13); colon cancer and tonsil cancer, respectively—caused by asbestos exposure at the factory. Normally, the Commission would first determine whether a plaintiff had proven an occupational disease, and only after determining that the plaintiff had met that burden would the Commission consider evidence related to compensability, or whether the occupational disease had any causal connection to the plaintiff's employment. However, for these cases we are asked to review the Commission's determinations that

10. We refer to the Commission's resolution of these mixed questions of law and fact as "ultimate findings."

11. Or, for deceased Plaintiffs, their estates allege that the deceased Plaintiffs had developed asbestosis.

conditions at the factory could not have exposed Consolidated Plaintiffs to airborne asbestos of a type and in sufficient amounts to cause asbestosis, or other asbestos-related diseases—*before* the Commission determines whether any Consolidated Plaintiffs actually have asbestos-related diseases.[12] In light of the unusual procedure employed, a review of workers' compensation law and procedure applicable to cases of alleged compensable asbestos-related diseases is appropriate.

"The underlying purpose of [the 1929 adoption of the] Act . . . [wa]s to provide compensation for workmen who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). Initially, the Act only allowed compensation for "injury by accident." *See id.* at 127, 66 S.E.2d at 694. However, the Act was amended in 1935 to include benefits for employees who developed compensable occupational diseases. *Id.* at 128, 66 S.E.2d at 694–95; N.C.G.S. § 97-52 (2017). The amendment enumerated specific diseases—like asbestosis—that were designated as " 'occupational diseases within the meaning of [Article 1].' " *Henry*, 234 N.C. at 128, 66 S.E.2d at 694 (citation omitted); N.C.G.S. § 97-53. Later, the Act was amended to allow employees to prove that a disease *not* specifically enumerated in N.C.G.S. § 97-53 was a "compensable occupational disease" based upon the specific facts of the plaintiff's claim. N.C.G.S. § 97-53(13). N.C.G.S. § 97-53(13) states in relevant part: "Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment" "shall be deemed to be [an] occupational disease[] within the meaning of" the Act. N.C.G.S. § 97-53(13).

"[T]he addition of G.S. 97-53 to the Act 'in nowise relaxed the fundamental principle which requires proof of causal relation between injury and employment.' " *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979) (citations omitted). "It is overwhelmingly apparent that . . . disablement resulting from an occupational disease . . . must arise out of and in the course of the employment, *i.e.*, there must be some causal relation between the injury and the employment[.]" *Morrison v. Burlington Industries*, 304 N.C. 1, 12, 282 S.E.2d 458, 466 (1981).

Now, all provisions of the Act that had formerly applied only to injuries by accident also apply to compensable occupational diseases—so

12. Excluding the Bellwether Plaintiffs, for whom the Commission has concluded no asbestos-related diseases have been proven to exist.

long as they do not conflict with more specific provisions in the Act specifically pertaining to occupational diseases. N.C.G.S. § 97-52. "[A]n employee becoming disabled by asbestosis [or other occupational disease] . . . within the terms of the specific definition embodied in G.S. [§] 97-54 should be entitled to ordinary compensation measured by the general provisions of the . . . Act. G.S. [§] 97-64." *Young v. Whitehall Co.*, 229 N.C. 360, 366, 49 S.E.2d 797, 801 (1948).

Therefore, the Act now provides that the terms "injury," "personal injury," or "injury by accident" also encompass "[d]isablement or death of an employee resulting from an occupational disease described in G.S. 97-53[.]" N.C.G.S. § 97-52; N.C.G.S. § 97-2(6) (2017) (emphasis added) ("Injury.—'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment[.]"); *see also Henry*, 234 N.C. at 128, 66 S.E.2d at 694 (citation omitted) (The amendment also "broadened or extended the meaning of the word 'accident' as used in the original Act so as to include a disablement or death resulting from an occupational disease described in G.S. § 97-53[.]"). "Nothing is said in [N.C.G.S. § 97-52] or cases construing it which could be interpreted as allowing compensation for injury from occupational disease which falls short of 'disablement.' " *Harrell v. Harriet and Henderson Yarns*, 56 N.C. App. 697, 699, 289 S.E.2d 846, 847 (1982); N.C.G.S. § 97-64 (2017).

Generally, "disablement" means a diminished ability to earn wages resulting from an injury sustained due to employment. N.C.G.S. § 97-2(9); N.C.G.S. § 97-54 (2017). "The term 'disability' as used in [the Act] means the state of being incapacitated as the term is used in defining 'disablement' in G.S. 97-54[,]" N.C.G.S. § 97-55 (2017), and is therefore, in all ways relevant to this opinion, synonymous with "disablement." "The term 'death' as a basis for a right to compensation means only death resulting from an injury." N.C.G.S. § 97-2(10).

In order to be compensable, a plaintiff-employee must prove, *inter alia*, that the plaintiff's alleged occupational disease, including one—like asbestosis—that is specifically enumerated in N.C.G.S. § 97-53, " 'was incident to or the result of the *particular* employment in which the workman was engaged.' " *Booker*, 297 N.C. at 475, 256 S.E.2d at 200 (citation omitted). Stated differently, "to demonstrate a causal link between the condition for which plaintiff seeks compensation and plaintiff's employment[,]" the plaintiff must prove that the plaintiff's "employment 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003) (citations omitted). As noted in finding of fact 2, Consolidated Plaintiffs do not argue that employment at the

factory "significantly contributed to" the development of their alleged asbestosis diagnoses. Instead, "Plaintiffs allege that they were [each] exposed to asbestos [while working at the factory] in such form and quantity and with such frequency that it *caused* asbestosis." (Emphasis added). Therefore, with respect to asbestosis, our review will be limited to whether Plaintiffs proved work at the factory "was a significant causal factor in" development of Plaintiffs' alleged asbestosis. *Id.*

Pursuant to N.C.G.S. § 97-53(13), colon cancer or tonsil cancer

> may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to [asbestos] significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Rutledge v. Tultex Corp., 308 N.C. 85, 101, 301 S.E.2d 359, 369–70 (1983) (citation omitted). When determining whether an occupational disease is compensable, "[t]he factual inquiry . . . should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Id.* at 102, 301 S.E.2d at 370. "[I]f a disease is produced by some extrinsic or independent agency, it may not be imputed to the occupation or the employment." *Id.* at 103, 301 S.E.2d at 370 (citations omitted).

Therefore, generally, in order for a claim of occupational disease to be compensable under the Act, the plaintiff must prove (1) that the plaintiff has an injury—specifically an occupational disease; (2) that the occupational disease "arose out of" and "in the course of" some employment, *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402–03, 233 S.E.2d 529, 531–32 (1977),—*i.e.* that the "employment 'significantly contributed to, or was a significant causal factor in, the disease's development[,]' " *James*, 160 N.C. App. at 562, 586 S.E.2d at 560 (citations omitted); and (3) that the occupational disease resulted in "disability," N.C.G.S. § 97-54.[13] "In general, the term 'in the course of' refers to the

13. Generally, Plaintiff Hinson's estate would not need to prove that his employment with Defendant was the "origin or cause" of his disablement, *Penegar*, __ N.C. App. at __, 815 S.E.2d at 398—it could prove a causal connection between his alleged asbestosis and any employment prior to or including his work at the factory. Defendant would then be

time, place and circumstances under which an accident occurs, while the term 'arising out of' refers to the origin or causal connection of the accidental injury to the employment." *Gallimore*, 292 N.C. at 402–03, 233 S.E.2d at 531–32 (citations omitted). "In determining whether a claimant's [alleged occupational] exposure to [asbestos] has significantly contributed to, or been a significant causative factor in, [an asbestos-related] disease, the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony." *Rutledge*, 308 N.C. at 105, 301 S.E.2d at 372 (citation omitted). Our Supreme Court has stated:

> In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation *must of necessity be based on circumstantial evidence*. Among the [non-exclusive] circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history.

Booker, 297 N.C. at 476, 256 S.E.2d at 200 (citations omitted) (emphasis added).

Only after a plaintiff has proven that the plaintiff's occupational disease is compensable, must the plaintiff prove a defendant-employer's liability—by proving the plaintiff was "last injuriously exposed" to the hazards of the disease while working for that defendant-employer. N.C.G.S. § 97-57. N.C.G.S. § 97-57 states in part:

> In any case where compensation is payable for an occupational disease,[14] the employer in whose employment the

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liable for any disability due to Plaintiff Hinson's asbestosis if his estate could also prove that he "was last injuriously exposed to the hazards of" asbestosis, as defined in N.C.G.S. § 97-57, while working for Defendant. N.C.G.S. § 97-57 (2017). However, the Commission found as fact that Plaintiffs all "allege that they contracted asbestosis caused by exposure to airborne asbestos . . . during employment with [D]efendant[,]" and that Plaintiff "Hinson apparently had no exposure to asbestos through his prior employment." Plaintiff Hinson's Estate does not contest these findings, so it must prove that Plaintiff Hinson developed asbestosis due to exposure to asbestos while working at the factory—and that his asbestosis led to disablement as defined by the Act at some point prior to his death. N.C.G.S. § 97-52; N.C.G.S. § 97-2(6); N.C.G.S. § 97-54.

14. *I.e.*, once the plaintiff has proven a compensable occupational disease.

> employee was last injuriously exposed to the hazards of such disease . . . shall be liable.
>
> *For the purpose of this section* when an employee has been exposed to the hazards of asbestosis . . . for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious[.]

N.C.G.S. § 97-57 (emphasis added). If a plaintiff fails to prove that the plaintiff has a compensable occupational disease, compensation will be denied and "last injurious exposure" analysis pursuant to N.C.G.S. § 97-57 will not be necessary. N.C.G.S. § 97-57 is not meant to establish the burden for proving a causal relationship between a particular employment and *development of* an occupational disease. Instead:

> [T]he purpose of the "last injurious exposure" doctrine is "to eliminate the need for complex and expensive litigation of the issue of relative contribution by each of several employments to a plaintiff's occupational disease." The doctrine provides a plaintiff with a reduced burden by requiring only a showing that the occupational exposure augmented a disease, "however slight[,]" as opposed to demonstrating how much each exposure resulted in the disease.

Penegar, __ N.C. App. at __, 815 S.E.2d at 398 (citations omitted). In the present cases, Plaintiffs alleged their sole occupational exposure to asbestos occurred working in the factory.

C. *The "Bellwether Cases" Approach*

As noted above, in the ordinary case—because it is the plaintiffs' burden to prove they "suffer[ed] from [] compensable occupational disease[s,]" *Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371 (citations omitted)—the Commission would *first* determine whether the plaintiffs had met their burden of proving they suffered from an occupational disease. If the plaintiffs failed to meet that burden, the Commission could deny their claims without making any further determinations such as compensability and liability. *See*, *e.g.*, *Payne v. Charlotte Heating & Air Conditioning*, 172 N.C. App. 496, 616 S.E.2d 356 (2005); *Clark v. ITT Grinnell Ind. Piping, Inc.*, 141 N.C. App. 417, 539 S.E.2d 369 (2000).

However, because of the bellwether cases approach, the Commission addressed the issues common to all Consolidated Plaintiffs first—and only then made individual determinations specific to the individual

Bellwether Plaintiffs. The Commission's determinations concerning whether any individual Consolidated Plaintiff had asbestosis will necessarily require review of the medical evidence specifically relevant to that particular Plaintiff—*i.e.*, thorough review of all relevant documentary and testimonial evidence for every one of the 144 Consolidated Plaintiffs. Pursuant to the bellwether cases approach, review of the medical evidence for the alleged asbestos-related diseases for all Consolidated Plaintiffs will only be necessary *if* Plaintiffs first prove that working in the factory exposed them to asbestos, in a form and in quantities, that could have caused the alleged asbestosis; or caused—or significantly contributed to—the development of *other* alleged asbestos-related diseases.

The Commission determined employment in the factory did not expose Plaintiffs to airborne asbestos of a kind and in amounts sufficient to cause or contribute to asbestosis.[15] If this determination is affirmed, most, if not all, of the Consolidated Plaintiffs' asbestosis claims can be decided without the time and cost involved in conducting full hearings for all 144 cases. *Booker*, 297 N.C. at 472, 256 S.E.2d at 198. In light of the inverted approach applied in the bellwether cases, the Commission essentially assumed, *arguendo*, that the Consolidated Plaintiffs actually had asbestosis that resulted in disablement or death—and focused solely on whether Plaintiffs proved work at the factory was a significant causal factor in development of the alleged asbestosis. The Commission has not, of course, made this determination[16]—but will do so if required by this Court's resolution of the bellwether cases and factual circumstances particular to the remaining Consolidated Plaintiffs. The Commission also determined that, with respect to employment at the factory, neither colon cancer nor tonsil cancer were occupational diseases pursuant to N.C.G.S. § 97-53(13).

D. *The Bellwether Plaintiffs' Claims*

Plaintiffs and Defendant presented weeks of expert testimony concerning the common issue of whether Plaintiffs could have been subjected to sufficient airborne asbestos—chrysotile or amphibole—while working at the factory to cause compensable asbestosis. *James*, 160 N.C. App. at 562, 586 S.E.2d at 560. Evidence was also presented for Bellwether

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15. *I.e.*, that any alleged asbestos-related disease could not have "arisen out of" employment with Defendant. *Gallimore*, 292 N.C. at 402–03, 233 S.E.2d at 531–32; N.C.G.S. § 97-54.

16. Except for the five Bellwether Plaintiffs currently before us. Because these five cases were actually tried, the Commission considered the evidence relevant to the "common issues," as well as the evidence uniquely relevant to each individual Bellwether Plaintiff.

Plaintiffs' individual claims, including evidence related to whether Bellwether Plaintiffs had the diseases alleged. Based upon this testimony, deposition testimony, and the exhibits tendered, the Commission determined that Plaintiffs failed to meet their burdens on all accounts.

IV. Plaintiffs' Common Issues Arguments

Plaintiffs did not brief the common issues separately from the individual issues, so we look to Bellwether Plaintiffs' individual briefs for the common issues arguments. Because our analysis pertaining to the common issues will apply to the claims of all Consolidated Plaintiffs—not just Plaintiff Hinson or the other Bellwether Plaintiffs—where Plaintiff Hinson's brief refers to "Plaintiff," we will substitute "Plaintiffs" or "Consolidated Plaintiffs," which will refer to *all* Consolidated Plaintiffs.

Generally, Plaintiffs argue: (A) The Commission did not apply the appropriate burden of proof in reaching its determinations concerning Plaintiffs' exposure to asbestos as employees in the factory; (B) the Commission relied on incompetent evidence in reaching its conclusions; (C) certain of the findings of fact were not supported by sufficient competent evidence; and (D) the ultimate findings/conclusions of law are incorrect.

A. *Burden of Proof*

[1] Plaintiffs first argue that the Commission "placed an impermissible burden of establishing the amount of exposure to asbestos" on Plaintiffs. We disagree.

As a general matter: "The employee seeking workers' compensation benefits bears the burden of proving every element of compensability. The degree of proof required of a claimant under the Act is the 'greater weight' or 'preponderance' of the evidence." *Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371 (citations omitted). Plaintiffs specifically argue:

> One of the critical issues in the [consolidated cases] was whether Plaintiff[s] [were] exposed to asbestos and whether such exposure was medically capable of causing a disease. . . . .
>
> [The] Commission made findings and conclusions regarding the amount of exposure [] Plaintiff[s] had to asbestos and whether that level was sufficient to cause a disease.
>
> The Commission specifically, and repeatedly, [determined] that [Plaintiffs] "[were] not exposed to asbestos in such form and quantity, and used with such frequency, as to

> cause asbestosis or any asbestos-related condition." What the . . . Commission . . . did was place the burden on [] [Plaintiffs] to establish the level of exposure to [asbestos]. Under North Carolina law, that is impermissible.

We first note that Plaintiffs' counsel acknowledged during the hearings that Plaintiffs' burden was to prove "what [Plaintiffs'] actual exposures were" to asbestos "[a]t the plant." In addition, Plaintiffs have not challenged finding of fact 2, which states in part: "Plaintiffs allege that they were exposed to asbestos [while working in the factory] in such form and quantity and with such frequency that it caused asbestosis." As we must take this unchallenged finding as correct, Plaintiffs now challenge the application of a standard they approved while arguing before the Commission. Nonetheless, Plaintiffs contend that the Commission erroneously applied the following burden of proof contained in N.C.G.S. § 97-53—and that by so doing, the Commission imposed upon Plaintiffs the impermissible burden of "establish[ing] the[ir] level[s] of exposure" to asbestos. N.C.G.S. § 97-53 contains different requirements depending on the type of injury alleged, including the following:

> Occupational diseases caused by chemicals shall be deemed to be due to exposure of an employee to the chemicals herein mentioned only when as a part of the employment such employee is exposed to such chemicals in such form and quantity, and used with such frequency as to cause the occupational disease mentioned in connection with such chemicals.

N.C.G.S. § 97-53. Defendant's counsel referred to this section of N.C.G.S. § 97-53 in the opening statement to the deputy commissioner, and Plaintiffs did not object. On appeal, Plaintiffs do not specifically challenge the applicability of this part of N.C.G.S. § 97-53 to cases involving exposure to asbestos—but do state that "this language speaks of 'chemicals' and not necessarily asbestos. There was no testimony or evidence that asbestos would be considered a 'chemical' under the statute." Plaintiffs further contend: "Regardless, this statute, as applied by the Commission, would be in direct conflict with . . . case law whereby [employees were] not required to establish the amount of exposure."[17]

17. While this Court is generally bound by its prior decisions interpreting a statute, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), no such interpretation of this part of N.C.G.S. § 97-53 has occurred. Since there are no appellate opinions interpreting N.C.G.S. § 97-53 in the manner suggested by Plaintiffs, this Court is bound by the language of the statute itself, not the principles of law discussed in the two cases cited by Plaintiffs—one of which is unpublished—that do not address this provision.

We note that this part of N.C.G.S. § 97-53, by its plain language, only applies to "[o]ccupational diseases caused by chemicals" "herein mentioned[,]" and only to "occupational disease[s] mentioned in connection with such chemicals." N.C.G.S. § 97-53. Even assuming that asbestos would be considered a "chemical" for the purposes of this section, *asbestos* is not "mentioned" in N.C.G.S. § 97-53, and asbestosis is not "mentioned in connection with" asbestos, or any other "chemical." *Id.*; *cf.*, *e.g.* N.C.G.S. § 97-53(24) and (12) (compare "[a]sbestosis" to "[p]oisoning by benzol, or by nitro and amido derivatives of benzol").

However, the Commission did include language that tracks the language of this part of N.C.G.S. § 97-53 in five of its ultimate findings. For example, finding 45 states in part: "The greater weight of the evidence in view of the entire record does not show that [P]laintiffs, through their employment at [the] factory, were exposed to asbestos *in such form and quantity and [] with such frequency as to cause* or significantly contribute to the development of asbestosis[.]" (Emphasis added). The italicized portion of this ultimate finding tracks the language of N.C.G.S. § 97-53. However, though the underlined portion is not found in N.C.G.S. § 97-53, it does correspond with the correct burden for proving a causal connection between a particular employment and alleged asbestosis. "Asbestosis may be [a compensable] occupational disease provided that the worker's exposure to . . . [asbestos] '*significantly contributed to*, or was a significant causal factor in,' the development of the disease." *Patton v. Sears Roebuck & Co.*, 239 N.C. App. 370, 375, 768 S.E.2d 351, 355 (2015) (citations omitted) (emphasis added).

As discussed below, we find that the burden applied by the Commission was a correct application of the law to the facts of the consolidated cases. The testimony of both Plaintiffs' and Defendant's experts included opinions that support the Commission's focus on "exposure to airborne asbestos," "in such form," in sufficient "quantity," and "with such frequency"—*i.e.* recurring exposures over time, or duration of exposure—in making its determination of whether Plaintiffs had met their burden of proving a causal connection between their alleged asbestosis and their work at the factory. These categories conform with factors enumerated by the NCI concerning elevated risk for asbestos-related diseases: "Dose (how much asbestos an individual was exposed to)[; d]uration (how long an individual was exposed)[; and s]ize, shape, and chemical makeup of the asbestos fibers." NCI *Fact Sheet* at 2-3 (citations omitted). They also conform to one of the non-exclusive circumstantial factors appropriate for consideration in determining

whether a plaintiff has met the burden of proving a causal relationship: "[T]he extent of exposure to the disease or disease-causing agents during employment[.]" *Booker*, 297 N.C. at 476, 256 S.E.2d at 200 (citations omitted). Therefore, consideration of these factors was appropriate in determining whether asbestos exposure at the factory " 'was a significant causal factor in,' the development of" Plaintiffs' alleged asbestosis. *Id.* (citations omitted).

1. "Form" of Asbestos

As recognized by the NCI, the "size, shape, and chemical makeup of the asbestos fibers" are relevant in determining the likelihood exposure will result in disease. NCI *Fact Sheet* at 2-3 (citations omitted). Plaintiffs' "expert in electron microscopy and lung tissue analysis," Mark Wilson Rigler, PhD ("Rigler"),[18] agreed with the NCI *Fact Sheet* that "asbestiform minerals come in a couple of different broad classes"—"serpentine," which "is mainly comprised of chrysotile" asbestos and is "like a tube[,]" and "amphibole," which is "mainly composed of blocky structural forms." Rigler clarified that only when these minerals are in fiber form are they capable of causing disease. Rigler testified that "probably ninety-five percent of the products [] manufactured, at least in America, had chrysotile asbestos[,]" "and the other five percent would've probably had amosite [an amphibole form], and that might've been pipe coverings, that kind of thing."

Rigler further testified that the human body handles chrysotile asbestos differently than amphibole asbestos:

> Chrysotile asbestos, which is the tubular type that we talked [about] earlier, . . . is not retained as long as the amphibole fibers are, so if you get chrysotile in the lung, it tends to move that out a bit quicker. Some of the [chrysotile] fibers are smaller. They are taken up a little bit easier into macrophages. . . . . So . . . then they try to move out, if they can, through your lymphatic circulation. Some are removed out through the blood stream, but they do . . . migrate in the body. Now, the amphibole types of asbestos, they tend not to migrate like that. They tend to stay in the body for 45 [years], so you can, you know, after ten, twenty, thirty years, you can see amphibole asbestos in the body.

18. Because Plaintiffs argue on appeal that only medical experts are qualified to give certain causation opinion testimony, in order to avoid confusion concerning which experts were medical doctors and which were PhDs, we will only use the honorific "Dr." when referring to medical doctors.

Defendant's expert, Dr. Victor Roggli ("Dr. Roggli"), testified that chrysotile asbestos fibers cleared from the body much more rapidly than amphibole fibers. Plaintiffs' expert industrial hygienist, William M. Ewing ("Ewing"), agreed that amosite asbestos is "recognized as being more potent when it comes to cancer and exposure" than chrysotile asbestos, but testified that he did not know if "there is a general understanding among [other] industrial hygienists . . . that chrysotile is less potent with respect to asbestosis as well[.]" Dr. Roggli testified that exposure to commercial amphibole fibers can cause disease at a lower dosage than other asbestos fibers, such as chrysotile. He stated the difference was very significant for lung cancer, and that "it's believed" by many experts that someone would require a greater exposure to "chrysotile to get to asbestosis than for commercial amphiboles." Dr. Roggli testified that chrysotile asbestos fibers do not "form asbestos bodies as well" as amphibole asbestos fibers, and that "it really takes huge amounts of exposure to chrysotile to get asbestosis." Dr. Thomas Sporn ("Dr. Sporn") testified: "In general my opinions have been that exposure [to] chrysotile containing end products [commercial products such as insulation, gaskets, or brakes] do not particularly cause . . . asbestosis[.]"[19]

According to Dr. Roggli, asbestos fibers less than five microns in length "would not be disease-producing[,]" and that approximately ninety percent of the scientific community was of the same opinion. In prior testimony, Rigler also defined "larger structures" indicative of occupational exposure as "greater than five microns." Dr. Roggli testified that chrysotile fibers of over five microns are rarely found in lungs—estimating that only about ten percent of chrysotile lung exposures include fibers longer than five microns. Rigler testified that "asbestos bodies" are created when tissue forms around an asbestos fiber, and they can be indicators of asbestosis. Defendant's expert, Dr. Timothy David Oury ("Dr. Oury"), testified: "without asbestos bodies, [you cannot] make the pathological diagnosis for asbestosis[.]" Because of its generally smaller size, and the rapidity with which the human body evacuates it, Dr. Roggli testified that "of the asbestos types," chrysotile is "the least effective at forming asbestos bodies."

Dr. Roggli's expert medical opinion was that "short fibers of chrysotile[20 are] more consistent with a background environmental exposure than a long fiber would be[.]" Dr. Roggli testified that short chrysotile

19. Assuming the product contained only chrysotile asbestos.

20. Less than five microns.

fibers are commonly found in water supplies and products such as beer, wine, soft-drinks, and ketchup. Rigler testified that multiple governmental and science agencies required that a suspected asbestos fiber had to be at least five microns in length "in order to be counted as a fiber" for purposes of determining asbestos exposure—but stated that he disagreed with this requirement.[21] Rigler testified that a relatively small amount of short chrysotile fibers found in lung tissue would suggest a very significant prior exposure to chrysotile. Rigler saw no contradiction between his testimony in the present cases and testimony he had given in prior cases that " '[t]ypically [a]n occupational exposure will be indicated by longer fibril structures.' " " 'As far as the length of structures, you will not normally see [fibers longer than five microns] in non-occupational exposure. You may see some much, much smaller structures. That's typically what you see in environmental type exposure.' "

Dr. Roggli testified in response to the idea that finding short chrysotile asbestos fibers in lung tissue was indicative of a substantial prior occupational exposure to chrysotile asbestos with the following: "Well, if that's the case, it means everybody in the general population has had a huge exposure to chrysotile in the past because that's exactly what you find in lung tissue from the people from the general population—is a number of short chrysotile fibers."

The Commission found as fact: "Chrysotile is a type of asbestos, often shorter than five micro[ns], that is particularly susceptible to being broken down quickly in acidic environments, such as a human lung." "Fibers shorter than 5 micro[ns], due to their length, are cleared quickly by the lungs and are not believed to contribute to [asbestosis]." "Many experts believe that chrysotile asbestos does not cause or contribute to asbestosis or asbestos-related disease due to its short clearance half-life and the fact that persistence of a fiber within the lung is a crucial determinant of its pathogenicity." There was plenary evidence from which the Commission could determine that the "form" of the asbestos that Plaintiffs alleged they were exposed to at the factory was a relevant factor in determining whether Plaintiffs' alleged asbestos exposure at the factory could have caused asbestosis.

2. Quantity

The quantity, or amount of asbestos exposure, was central to the Commission's determination. The NCI refers to this as the "dose," "how

21. There are also minimum width requirements, and the structure must also "have an aspect ratio of three . . . to one."

much asbestos an individual was exposed to[,]" and considers it an important factor to consider. NCI *Fact Sheet* at 3 (citations omitted). There are two general ways in which the amount of exposure impacts the Commission's causation analysis: (1) Was the exposure sufficient to be a "significant causal factor" in the development of Plaintiffs' alleged asbestosis; and (2) was the exposure "significantly greater" than the background environmental exposure.[22] "[T]he 'causative danger must be *peculiar to the work and not common to the neighborhood*.' " *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781 (citation omitted). If the answer to either of these questions was "no," then any alleged asbestos-related diseases could not be causally linked to work at the factory.

Rigler testified that at his laboratory, in order to estimate the amount of exposure, they conduct a fiber analysis using "grid counting"; "we'll count the number of asbestos [fibers]." According to Rigler, grid counting is "standard protocol." Rigler testified that he would first use an electron microscope to count "what we call large fiber structures, ones that are larger than five microns or so." Then Rigler increases magnification to the extent that he can count asbestos fibers "a half micron in size and up." An estimated number of fibers per gram of lung tissue is extrapolated from the number of fibers actually detected in a smaller amount of tissue.

Although Rigler testified that he believed "background" exposure levels should be zero, he testified in 2000 that, based on his own research and the relevant literature, the environmental background range he had seen had " 'been upwards of two hundred and fifty thousand [asbestos fibers] [per gram of lung tissue]. Sometimes, again, it depends on the literature that you look at—half a million structures.' " Rigler admitted that he used to compare the number of structures per gram against a cohort, or control group, developed from examining lung tissue of people with no reported occupational asbestos exposure. The range of structures per gram determined from the cohort constituted the range of non-occupational background environmental asbestos exposure of the general population. Rigler stopped comparing tissue samples examined in

22. "*Significant* means 'having or likely to have influence or effect: deserving to be considered: important, weighty, notable.' *Significant* is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or *of little moment*." *Rutledge*, 308 N.C. at 101–02, 301 S.E.2d at 370 (citation omitted). Proving what constituted exposure "significantly greater" than environmental exposure for these cases was Plaintiffs' burden, and a determination that could only be made by the Commission—absent consensus between the parties.

his lab against a cohort before his examination of Plaintiff Jones'[23] lung tissue sample, which Rigler opined showed asbestosis. Dr. Roggli testified that the number of structures counted is meaningless without a proper cohort to compare that number to.

The deputy commissioner questioned the basis of Rigler's opinion that any amount of asbestos fibers found in lung tissue would be indicative of occupational exposure, and Rigler's opinion that the amount of asbestos found in Plaintiff Jones' tissue indicated asbestosis:

> THE COURT: The [Plaintiffs] I'm looking at are from Charlotte, . . . which is a major metropolitan area[.] So I would assume that you would expect that some people within the Charlotte area, who've never had an occupational history, would have some asbestos in their lungs.
>
> [RIGLER]: I don't know.
>
> THE COURT: Don't know. Wow.

Rigler then testified: "I think that you're going to see a lot of variation [in background level] depending upon where these people lived. It's always going to be dependent upon what they did and where they lived." Plaintiffs' expert, Dr. David A. Schwartz, testified "I don't think people in the general public are at risk of developing asbestosis based on their exposures to environmental concentrations of asbestos."

Dr. Roggli testified: "The analysis that we did did not demonstrate that [Plaintiff Jones] was exposed to asbestos greater than that of [the] general population." Dr. Roggli explained that the types of employment that could expose a worker to the levels of chrysotile asbestos required to cause asbestosis were those jobs where employees were working directly with the asbestos, such as "insulators," "shipyard workers," and specialized work within other industries, but he could not remember ever diagnosing a tire factory employee with asbestosis.

Therefore, there was evidence presented that most of the asbestos used in the factory was chrysotile, and that Plaintiffs would have had to have been exposed to "huge amounts" of it to develop asbestosis. Based on the evidence, the Commission needed to determine whether working at the factory exposed Plaintiffs to "quantities" of asbestos fibers sufficient to cause asbestosis, and whether working at the factory exposed Plaintiffs to quantities of asbestos "significantly" greater than the background levels to which the general public were exposed.

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23. One of the deceased Consolidated Plaintiffs whose lung tissue was examined.

3. Frequency

Plaintiffs' experts and Defendant's experts disagreed concerning the likelihood that episodic exposures to elevated levels of asbestos were likely to cause asbestosis. The Commission found: "Asbestos-related diseases follow a dose-response relationship—the higher the cumulative exposure dose, the greater the risk of disease, with asbestosis generally requiring the highest dose." The NCI *Fact Sheet* included "duration"—"how long an individual was exposed" to airborne asbestos fibers—as one of the factors to consider when evaluating the risks of developing asbestos-related diseases. NCI *Fact Sheet* at 3 (citations omitted). It is the position of the NCI that though "it is clear that the health risks from asbestos exposure increase with heavier exposure and longer exposure times, investigators have found asbestos-related diseases in individuals with only brief exposures." *Id.* It was the province of the Commission to determine from the record evidence if Plaintiffs had met their burden of proving sufficient frequency of exposure—whether by proving large, intermittent exposures, or lesser but more continuous exposures.

Plaintiffs' expert, Ewing, testified concerning the relationship between "quantity," "frequency," and duration of asbestos exposure: "You would like to have exposure information [quantity], duration information, how long is that exposure going on, and then frequency information, so you'd like to have those three pieces of data. If you have that, then you can do some calculations that can give you a person's dose." Ewing agreed that for the Bellwether Plaintiffs, "at most, their exposures were episodic[.]" Defendant's expert, Dr. Andrew J. Ghio ("Dr. Ghio"), testified that, in his expert medical opinion, he did not believe "an individual working at [the factory] [wa]s at increased risk for asbestosis." The Commission noted: "Dr. Roggli testified that there was not sufficient exposure to asbestos at the factory in question to contribute to or to cause an asbestos-related disease for Mr. Jones or anyone in his position." Drs. Ghio and Roggli were both of the opinion that Plaintiffs would have only endured minor, infrequent episodic exposures to airborne asbestos fibers, and these minor episodic exposures would not have been significant enough to increase Plaintiffs' risks of developing asbestos-related diseases. The Commission did not err in considering the "frequency" of Plaintiffs' exposure to airborne asbestos fibers.

4. Last Injurious Exposure

Plaintiffs make no arguments on appeal concerning the liability determinations made by the Commission pursuant to N.C.G.S. § 97-57. Therefore, any such arguments are deemed abandoned. Although, as

discussed above, the Commission was not required to make any determination pursuant to N.C.G.S. § 97-57—once it determined that Plaintiffs had failed to prove their alleged asbestosis arose out of their employment, and was therefore not compensable—the Commission did make this determination in its ultimate findings 16, 19, 21, 23, 43 and 45.

For example, in ultimate finding 43 the Commission determined that Plaintiffs had not been "exposed to the hazards of asbestosis through [their] employment with [D]efendant for 30 days or parts thereof within a seven-month consecutive period which proximately augmented the disease process of asbestosis to the slightest degree." That unchallenged determination relieved Defendant of any liability for Plaintiffs' alleged asbestosis—even assuming, *arguendo*, that all Plaintiffs had asbestosis, and that their asbestosis was compensable. This is because the "last injurious exposure" analysis is only concerned with which employer—or insurance company—will be held liable for a proven compensable occupational disease. *See Penegar*, __ N.C. App. at __, 815 S.E.2d at 398.

5. Conclusion

It was the province of the Commission to decide, based on competent evidence, what factors Plaintiffs needed to prove in order to meet the burden of proving asbestos exposure at the factory was a significant causal factor in the development of their alleged asbestosis. Based on the evidence presented, the "form" of the asbestos, and the "quantity" and "frequency" of exposure, were legitimate considerations in making this determination. Therefore, the Commission's ultimate findings that state "[t]he greater weight of the evidence in view of the entire record shows that [P]laintiffs were [not] exposed to airborne asbestos . . . in such form and quantity and with such frequency as to cause . . . asbestosis" do not show that the Commission "placed an impermissible burden" on Plaintiffs.

In addition, the Commission also made the following ultimate finding in finding 43:

> Given the evidence of air contaminant measurements taken at [the] factory, the pathology evidence collected from workers' lungs, and the scientific and epidemiological literature presented on the subject, the greater weight of the evidence in view of the entire record does not demonstrate a causal connection between asbestosis and employment at the . . . factory.

This ultimate finding—which determined Plaintiffs failed to prove the required causal connection, *Patton*, 239 N.C. App. at 375, 768 S.E.2d at 355, and other authority cited—does not contain the language to which Plaintiffs object. Finally, the Commission's unchallenged determinations pursuant to N.C.G.S. § 97-57 serve to relieve Defendant from any liability for Consolidated Plaintiffs' alleged compensable asbestosis. This argument is without merit.

B. *Competent Evidence*

We have held that Defendant cannot be held liable for Plaintiffs' alleged asbestosis, even were it compensable, due to the Commission's unchallenged N.C.G.S. § 97-57 determinations. However, in light of the number of Consolidated Plaintiffs impacted by this opinion, we address Plaintiffs' remaining arguments. Plaintiffs primarily argue that certain evidence relied upon by the Commission was not competent. However, as this Court has stated:

> Although [Plaintiffs] point[] to . . . evidence which [they] feel[] was incompetent to support [some of] the . . . Commission's findings of fact, we find it unnecessary to decide those points of contention in light of the rule that findings of fact which are supported by competent evidence are conclusive on appeal, *even though other incompetent evidence may have been improperly admitted*.

Kennedy, 101 N.C. App. at 33, 398 S.E.2d at 682 (citation omitted) (emphasis added). Therefore, even assuming, *arguendo*, the Commission relied upon some incompetent evidence, our review is limited to whether the competent evidence was sufficient to support the Commission's findings of fact—including its ultimate findings—and whether the findings support its conclusions and rulings.[24] *Id.*

Plaintiffs' arguments fall into the following general categories: (1) The "air sampling" evidence and the "fiber year theory"; (2) reliance on "non-medical" expert testimony; (3) reliance on the lung pathology from the five deceased Plaintiffs; and (4) the Commission's reliance on the above allegedly incompetent evidence in support of its ultimate findings and conclusions.

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24. Plaintiffs did not seek to suppress the evidence they now challenge on appeal—either prior to or during the hearings. Although hearings before the Commission are *quasi*-judicial, this Court has applied N.C.G.S. § 8C–1, Rule 702 in its review of workers' compensation claims. *Wise v. Alcoa, Inc.*, 231 N.C. App. 159, 752 S.E.2d 172 (2013).

1. Air Sampling and Fiber Year Theory

[2] Plaintiffs argue that "the Commission erred in relying on the 'fiber year theory' " and air sampling to determine that Plaintiffs were not exposed to sufficient amounts of airborne asbestos at the factory to cause asbestosis. We disagree.

Specifically, Plaintiffs argue that the "Commission never stated what level of exposure was necessary to cause a disease except to subscribe to [D]efendant's usage of the 'fiber year theory.' " Plaintiffs further argue that Defendant "could not prove the amount of [Plaintiffs'] exposure to asbestos and could only provide a very broad guess at the level necessary to cause a disease." Plaintiffs also argue that the Commission ignored the fact that incidents of airborne asbestos being released in the factory were "occasional," not constant, and, therefore, "no one knows how much asbestos was being damaged on any particular day. No one knows how much asbestos was inhaled by [Plaintiffs]. The only evidence of the levels of the asbestos in the air was from air sampling done in the facility."

Plaintiffs may be correct that "[n]o one knows how much asbestos was inhaled by" Plaintiffs, but it was *Plaintiffs'* burden to prove that their alleged exposure to asbestos fibers at the factory caused or significantly contributed to their alleged asbestos-related diseases. The fact the Commission did not include findings of fact related to all the evidence that Plaintiffs believe supported their claims does not mean the Commission ignored this evidence. "[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citation omitted). "Requiring the Commission to explain its credibility determinations . . . would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another." *Id.* at 116-17, 530 S.E.2d at 553. Further, the Commission stated that it had "reviewed and considered all hearing and deposition transcripts, along with all evidentiary exhibits, arguments, and briefs in reaching a decision[.]" The opinion and award contains over 25 pages devoted to listing the transcripts, depositions, and exhibits considered by the Commission. The Commission also stated multiple times throughout the opinion and award that its determinations were based upon the "greater weight of the evidence in view of the entire record[.]"

Plaintiffs continue: "Yet the Commission found that [Plaintiffs were] not exposed to . . . levels" of asbestos sufficient to cause

asbestosis. Plaintiffs again suggest that it was Defendant's burden to disprove Plaintiffs' claims when it was Plaintiffs' burden to prove all the elements necessary to show compensable asbestos-related diseases. Further, Plaintiffs did not direct this Court to any part of the Commission's opinion and award in which the Commission "found that [Plaintiffs were] not exposed to" sufficient "fiber years" of asbestos to cause asbestosis. This is because "fiber years" are not discussed in the opinion and award. There is no evidence that the Commission subscribed to the fiber year theory, or relied on it when making its relevant findings and conclusions.

Plaintiffs argue: "There was no evidence introduced by [D]efendant to establish whether [P]laintiffs' exposure was consistent with the background level of the [factory]. There was no evidence introduced showing the levels of exposure when [P]laintiff[s] w[ere] damaging insulation, using compressed air on damaged insulation or cutting asbestos gaskets." It was Plaintiffs' burden to introduce this evidence, and Defendant had no burden to convince the Commission that Plaintiffs' alleged injuries did not arise in the course of employment at the factory.

Although Plaintiffs presented evidence to the contrary, there was plenary evidence—including evidence unrelated to air sampling or the fiber year theory—to support the Commission's ultimate finding that Plaintiffs were not—due to their work at the factory—exposed to asbestos sufficient to cause asbestosis. For example, Dr. Ghio testified as follows:

> [DR. GHIO]: Again, the only [air sampling] levels that I'm aware of are those taken during the health hazard evaluation done by NIOSH in their review of the plants across the Midwest[.] . . . . And the ones that [Defendant's attorneys] forwarded to me regarding [the factory]. This is outside of my expertise though. I'm not an industrial hygienist. I'm a pulmonologist.
>
> . . . .
>
> Q. Sir, do you think it's proper for you to make an attribution of cause and effect when you acknowledge that you're unaware of any of the exposure levels for disease in the tire industries?
>
> A. I'm aware of the levels at [the factory]. They were forwarded to me. Regarding a more global approach to that question, you know, can a physician be called upon

> to make a diagnosis of asbestosis without being aware of the actual dust levels in the environment, and it's very rare that, as pulmonologists . . . we're made [aware of] those values. We make diagnoses all the time of asbestosis. 99 percent of all diagnoses of asbestos[is] are made without any awareness of such levels. Dr. Ohar and Dr. Schwartz [Plaintiffs' medical experts] were unaware of levels when they diagnosed these patients to have asbestosis.

Dr. Ghio's testimony shows he was not, to any significant degree, "relying on the 'fiber year theory' " or the air sampling in order to reach his conclusions. Further, as noted in finding of fact 38: "Dr. Roggli testified that there was not sufficient exposure to asbestos at the factory in question to contribute to or to cause an asbestos-related disease for Mr. Jones or anyone in his position." This opinion was not based air sampling from the factory.

Dr. Ghio also testified: "[Asbestos] was simply there [in the factory], and by being there, [Plaintiffs] misinterpret that to [mean] that they're at increased risk. They're aware that piping in [the factory] had asbestos, and they have—they have the misconception that that increases their risk for asbestosis, and it does not." Plaintiff's expert, Ewing, agreed with Dr. Ghio in this regard, stating: "I'm not of the opinion that because pipe insulation is present there must be exposure. There has to be work going on on the pipe insulation or some disturbance of that material for the exposure to arise." In forming his opinions, Dr. Ghio relied heavily on Plaintiffs' patient histories, and review of their x-rays:

> [PLAINTIFFS' COUNSEL:] Dr., with respect to exposure history, you've testified in the past, have you not, that you put more emphasis on what the patient says than you do actually specific [airborne] fiber levels, sir. Do you remember that testimony?
>
> A. I do. I follow the ATS [("American Thoracic Society")] criteria which is—I base my diagnosis whenever possible on an accurate occupation history.
>
> Q. All right. So in the case of [Plaintiffs], you really never looked at what the industrial hygiene reported as to what the individual exposures were or the sampling was. Is that not true, sir?
>
> A. I have been provided actual values of fiber measurements, and actual fiber values of fiber measurements were

in agreement with the histories, and that is that the exposure was minimal.

Q. Well, let me ask you, sir. [W]hen you gave your report and had your opinions about [Plaintiffs], you did not at any time mention the fiber levels. Did you, sir, or the industrial hygiene results?

A. I don't believe I did.

Q. All right. And you've testified repeatedly . . . that patient histories are the best indicator of exposures, even over specific fiber levels. Has that been your testimony, sir?

A. Well, it's very rare for me to get . . . specific fiber levels. So, yes, that has been my testimony in the past. And as a physician, we take occupational histories. That's what we do.

. . . .

Q. Sir, . . . you do require an occupational environmental history, but you go along to also require that the industry and occupation place the patient at an increased risk. And also, you require a marker of exposure, usually pleural plaque, sir. Do you see that?

A. I don't require all three. I require an occupational, and environmental history that increases the patient's risk for asbestosis or I need a marker of exposure. If I see pleural plaques that are bilateral, I assume that that individual is at an increased risk.

THE COURT: And that's the marker.

[DR. GHIO]: That's the marker. You know, if that person has had enough fiber, you know, even though [their occupation is] lower in the pyramid, it's way down at the bottom, I assume, you know, they had bilateral plaques, I'm going to give them the benefit of the doubt they had the exposure.

THE COURT: And you, in looking at all the x-rays from [Plaintiffs], you didn't see anything that was a marker in any of them.

[DR. GHIO]: Not a single one.

Dr. Ghio stated that his opinions were based on the following:

> [DR. GHIO]: [T]he tire industry has never been reported in the medical literature to be associated with asbestosis. I've looked at the industrial hygiene behind the exposures of [the factory], and forty years would not make the criteria of twenty-five fiber years. I've been looking at a lot of these chest x-rays. I've not seen any evidence of asbestosis. I'm not seeing any evidence for even those diseases that require very, very minute exposures to fibers, and those would be pleural plaques. *I don't see any evidence of a significant exposure. So I think because of . . . all the above, I don't think an individual working at [the factory] is at increased risk for asbestosis*. [Emphasis added].

To the extent that the Commission relied on the air sampling results as consistent with the testimony of Defendant's experts that asbestos exposure at Defendant's plant would not be sufficient to cause Plaintiffs' alleged asbestosis, because the air sampling reports never indicated significantly elevated levels of dust or asbestos fibers, the Commission did not err in considering that evidence. Had the air sampling results shown elevated levels of asbestos during the testing periods, that would have been relevant evidence favorable to Plaintiffs that the Commission would have properly considered. The fact that none of the air sampling indicated elevated asbestos levels does not alter the relevance of the evidence, nor render it incompetent—it simply tends to support Defendant's position more than Plaintiffs'. It was for the Commission to determine the weight to give to that evidence, and Plaintiffs fail to demonstrate that the Commission abused its discretion in that regard. *See Wise*, 231 N.C. App. at 164, 752 S.E.2d at 175–76. This argument is without merit.

2. Medical Expert Evidence

[3] Plaintiffs argue that "the Commission erred by relying only on non-medical expert testimony" because "the amount of exposure necessary to cause disease is a medical question [that] only a physician can answer." We disagree.

Plaintiffs contend that there was "insufficient medical expert testimony for the Commission to determine that [Plaintiffs were] not exposed to sufficient levels of asbestosis to cause a disease." Again, it was Plaintiffs' burden to present evidence, medical or otherwise, to prove sufficient exposure to asbestos—not Defendant's burden to prove insufficient exposure. Plaintiffs bore the burden of producing "competent evidence to support the inference that the [exposure] in question

resulted in the injury complained of[.]" *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Plaintiffs rely in part on *Click* in support of their argument. *Click* states:

> The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be "many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.

Id. (citations omitted). *Click* was not an asbestosis case, and the injury involved in *Click* required very different causation evidence. Each case is fact specific, and Plaintiffs cite to no authority that would *per se* exclude reliance on non-medical expert testimony when deciding whether a particular employment could have caused or contributed to development of an asbestos-related disease.[25]

In asbestosis cases, diagnosis of the disease itself requires expert medical testimony. However, once asbestosis is established, expert medical testimony is not necessarily required to establish a causal connection between the disease and the worker's employment. For example, if a plaintiff has been diagnosed with asbestosis, non-medical evidence that the only place the plaintiff was exposed to asbestos was while working for the defendant-employer should be sufficient to prove a causal connection. This Court has reasoned: "If a plaintiff has not been exposed in prior employment, and has asbestosis, then that could give rise to an inference that he was exposed (and last injuriously exposed) while working for defendant-employer." *Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 474, 598 S.E.2d 629, 632 (2004). Conversely, if an industrial hygienist testified that the plaintiff's workplace contained no asbestos, the Commission could properly determine that the plaintiff had failed to prove a causal connection. In *Vaughn*, the "plaintiff argued the Commission improperly required him to produce scientific or medical evidence of exposure to asbestos for the relevant time period while in defendant's employ." *Id.* at 473, 598 S.E.2d at 631 (citation omitted).

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25. Further, as noted above, Plaintiffs did not object to the testimony of Defendant's industrial hygienists.

This Court held that "[p]laintiff [wa]s correct that there [wa]s no need for such expert testimony." *Id.* "This does not mean, however, that the Commission cannot consider expert testimony, or the lack thereof, along with lay testimony, in weighing the evidence and determining whether claimant has met his burden of proof." *Id.* at 473, 598 S.E.2d at 632. The Commission was free to consider all the evidence, lay and expert, to inform its conclusion that Plaintiffs failed to meet their burden on the issues of exposure and causation.

In addition, Plaintiffs acknowledge that their contention is not accurate, admitting: "The Commission did rely on [Defendant's expert] Dr. Ghio who is a medical expert." Plaintiffs then incorrectly argue: "The only other medical expert offered by [] Defendant was Dr. [Selwyn] Spangenthal" ("Dr. Spangenthal").[26] For example, Defendant also presented live testimony from Dr. Kenneth Samuel Karb, Dr. David Allen Hayes ("Dr. Hayes"), and Dr. Roggli. Deposition testimony was presented from, *inter alia*, Dr. Oury, Dr. Gregory S. Parsons, Dr. Robert Reuter, and Dr. Sporn. Medical records and reports were entered into evidence from multiple additional physicians.

Dr. Roggli offered, *inter alia*, his opinions that he would not "typically expect to see asbestos-related disease" associated with work within the tire industry, and the medical literature supports his opinion that tire plant workers are not exposed to a greater risk of asbestosis than the general public; that in his medical practice he has "not seen any asbestos-related lung cancers or asbestosis, to my recollection, from anybody . . . working with the tire industry"; that, contrary to Plaintiffs' evidence, the appearance of "a few short chrysotile fibers in the lung" of an individual is "exactly what you find in lung tissue from the people from the general population"; that it would be very unusual to examine lung tissue from the general population and fail to find any measurable asbestos fibers; that, contrary to Plaintiffs' evidence, asbestos fibers less than five microns in length "would not be disease-producing"; that approximately

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26. Further, Plaintiffs are also incorrect in claiming Dr. Spangenthal "testified that [Plaintiffs] had sufficient exposure to asbestos to cause a disease." Dr. Spangenthal was asked by Plaintiffs' counsel, for each Bellwether Plaintiff: "And if [the individual Plaintiff's] testimony is true [concerning his exposure to asbestos in the factory], assuming that for the sake of my question, . . . would that exposure have been significant . . . enough to cause disease?" Dr. Spangenthal responded "yes," but added "I just assume that, you know, [Plaintiff] knows where he works, and that's his impression of what . . . his exposure was, and that's what I've noted down. Whether it's true or not, I have no idea." The Commission was not required to give weight to Bellwether Plaintiffs' own accounts of alleged asbestos exposure—whether given as testimony during the hearings, or given to physicians taking their histories.

ninety percent of the scientific community was of the same opinion; and that, based upon his pathological analysis of Plaintiff Jones' lung sample, he was "completely ruling out asbestosis[.]" Further, based on his fiber count analysis of Plaintiff Jones' lung tissue, Dr. Roggli testified to his opinion "within a reasonable degree of scientific certainty," that neither Plaintiff Jones, nor "a person in [Plaintiff] Jones' position" would have received "sufficient exposure to asbestos at [the factory] . . . to contribute to an asbestos-related disease[.]"

Dr. Ghio testified concerning why he did not trust the Plaintiffs' experts methodology when only ten percent of Plaintiffs diagnosed as having asbestosis also showed signs of pleural plaques:

> [DR. GHIO:] . . . . *Eighty percent of the time [patients] have pleural plaques if they have significant exposure to asbestos*. . . . .
>
> THE COURT: Well, let me ask it more specifically. On a . . . one zero,[27] are they going to have pleural plaques?
>
> [DR. GHIO]: Yes, eighty percent of them will.
>
> THE COURT: Okay.
>
> [DR. GHIO]: *If it's truly the result of significant exposure to fibers*, eighty percent of the chest x-rays[—S]omewhere between fifty and eighty percent—and I like the eighty actually. More of the studies have come out with *eighty percent will show pleural plaques if it is attributable—if it's truly the result of fiber exposure*. [Emphasis added].

Dr. William Franklin Alleyene, II ("Dr. Alleyene"), Plaintiffs' expert, agreed that pleural plaques will be present in approximately eighty percent of people who have asbestosis. Dr. Ghio further testified:

> [DR. GHIO:] [T]here have been many diagnoses of asbestosis that I've made on individuals who have come in, and they're part of that twenty percent or the fifty percent that don't have pleural plaques. But that's an individual. *When you have a group of 157, you have the benefit of numbers here. And if in 157 individuals you're looking at zero plaques, then you have to come to some conclusion about the exposure*.

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27. The deputy commissioner is referring to a B-readers assessment of 1/0 as explained in finding of fact 25.

> THE COURT: Well, you're saying—basically from your testimony, if I'm—and I want to make sure I understand what you've testified correctly. I'm just trying to clarify. Out of the 158, you would expect something like 120 to have pleural plaques on their x-rays.
>
> THE WITNESS: That is correct.
>
> THE COURT: Therefore, and because there are no pleural plaques, if other people are diagnosing one zeros on 157 x-rays, [and] somewhere about . . . 75 or so to 120 don't have pleural plaques, you're saying that those x-rays generally are being misread.
>
> [DR. GHIO]: That's correct.
>
> . . . .
>
> [DR. GHIO]: And there's nothing in the medical literature to support this possibility.

Dr. Ghio then expresses his medical expert opinion that Plaintiffs were not exposed to sufficient asbestos working at the factory to cause disease:

> I don't think that any contribution . . . from the work environment [in the factory] would significantly increase one's risk [of contracting an asbestos-related disease]. But[, hypothetically,] these individuals may have [been exposed to significant amounts of asbestos fibers in prior employment]. . . . I believe that they could be diagnosed to have asbestosis if they're a Continental Tire worker, but it had nothing to do with the environment at [the factory].
>
> THE COURT: To any degree?
>
> [DR. GHIO]: To any degree.

In addition, Plaintiffs' expert Dr. Alleyene, testified concerning the superiority of CT scans over x-rays in diagnosing asbestosis:

> X-rays are based on technology that's over a hundred years old, and it's like looking at something with a naked eye when you've got a microscope right next to you. And I can see things on a CT scan that is—are much more detailed [and] three-dimensional, and, also, it takes a lot of the guess work out of it. The—somebody looks at an x-ray, a B-reader, and they say, "Well, gee, I see these shadows, and they look like 1/0" versus on a CT scan I can see fibrosis,

> I can see pleural plaquing, I can see all types of things and so when physicians talk about making that diagnosis whether it's in a board review course or anything, no one even mentions a B-read chest x-ray. That is something that exists only in the courtroom. Physicians, when we talk about asbestosis, when we talk[] about diagnosing asbestosis and how to manage patients with asbestosis, we speak specifically about high resolution CT scans. We don't even talk about an x-ray other [than] to say, "Gee, if your x-ray is unclear or suspicious, you get a CT scan to confirm."

The deputy commissioner, based on Dr. Alleyene's testimony, proposed that Plaintiffs and Defendant agree to allow independent doctors who were experts in asbestos-related diseases to administer and analyze high resolution CT scans of every living Plaintiff. Defendant wanted the deputy commissioner to order Plaintiffs to obtain high resolution CT scans, and Defendant agreed to pay for the procedures and the analysis. Plaintiffs' counsel informed the trial court that they would not agree to having Plaintiffs undergo high resolution CT scans. The deputy commissioner responded that Plaintiffs' refusal "cuts both ways. And based on—based on the evidence I have heard thus far, I again say that decision . . . cuts both ways—okay—cuts both ways because [P]laintiffs have the burden of proof here[.]"

Both Plaintiffs and Defendant presented medical expert testimony that the only certain method of diagnosing asbestosis is to examine a sufficient sample of the patient's lung tissue. Plaintiffs' attorney, in response to the deposition testimony of Dr. Spangenthal that CT scans were "the gold standard" for diagnosing asbestosis, stated: "Actually, the gold standard would probably be a biopsy, isn't it?" Dr. Spangenthal agreed, noting that he was referring to procedures that he would generally perform on living patients. When Plaintiffs' expert, Dr. Alleyene, was asked if there were any symptoms that are "pathopneumonic" for asbestosis—*i.e.* "a sign or a symptom or a finding that would be so closely correlated with a specific disease entity as to be virtually diagnostic"—he responded:

> There are what we call asbestos bodies[.] And if one found a certain concentration of asbestos bodies per gram of lung tissue, that would be pathopneumonic of asbestosis. Having said that, the way that you would get that tissue would require a procedure that is fairly invasive called an open-lung biopsy where they literally spread your ribs,

> take a piece of lung tissue that would be significantly larger than one could obtain from other methods[.] This—you would get a nice wedge of lung tissue, literally. And if they then prepped that tissue . . . and looked at it under an electron microscope, you could see these linear—they're not fibers but they're actually coated asbestos fibers, and they call them asbestos bodies[.] And if one has an open-lung biopsy and if one has the finding of these asbestos bodies or sufficient numbers of these asbestos bodies either in the tissue itself or in the lung fluid . . ., then that would be pathopneumonic.
>
> Q. Short of taking a wedge of somebody's lung, there's nothing pathopneumonic about asbestosis?
>
> A. That is correct.

Dr. Oury agreed with Dr. Alleyene that "pathology [is] still the only way to definitively diagnose asbestosis[.]" Dr. Hayes also testified for Defendant, and agreed that pathology is the most accurate way to diagnose asbestosis, followed by high resolution CT scan. When Dr. Roggli was asked: "Would it be safe to say that, if you don't have it pathologically, you don't have it?" He responded: "Correct. That is assuming that you have a reasonable, decent sample of tissue, that would be correct." Dr. Roggli also testified that the best tool for diagnosing asbestosis is "pathologic examination," followed by "high-resolution CT—regular CT would be less sensitive, and least sensitive would be the routine chest x-ray." Plaintiffs provided Defendant lung tissue from five of the eighteendeceased Plaintiffs; Defendant submitted lung tissue from all five for pathological examination, and none of the lung tissue from these deceased Plaintiffs, including Plaintiff Hinson, showed asbestos bodies or other signs of disease related to asbestos exposure.

In Plaintiffs' brief, they argue that the "Commission ignored the testing done by Plaintiffs' pathologists. This testing irrefutably showed excess levels of asbestos in the lungs of the workers." However, Plaintiffs did not offer testimony from any pathologists.[28] The Commission can "consider expert testimony, *or the lack thereof*, along with lay testimony, in weighing the evidence and determining whether claimant has met his burden of proof." *Vaughn*, 165 N.C. App. at 473, 598 S.E.2d at 632.

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28. The only record evidence of Plaintiffs having obtained analysis of a deceased Plaintiff's lung tissue was the fiber count done on Plaintiff Jones' lung tissue by Rigler—who is not a medical doctor.

The common issues findings of fact demonstrate that evidence from medical experts factored heavily in the determinations of the Commission—see findings 1, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, and 44—the Commission simply gave the testimony of certain of Defendant's medical experts greater weight. It was the province of the Commission to determine the credibility of, and the weight to be given to, the various expert witnesses, including the medical experts. *Wise*, 231 N.C. App. at 164, 752 S.E.2d at 175–76.

Because Plaintiffs had "the burden of proving [their claims] by . . . a 'preponderance of the evidence[,]' " they were required to "present credible evidence of [sufficient asbestos] exposure[.]" *Id.* We hold that the Commission properly relied on both medical and non-medical evidence—expert and lay—when considering the issue of causation in this matter. Plaintiffs' refusal to agree to certain more accurate medical procedures was also proper to consider. *Id.* Plaintiffs' argument is without merit.

3. Extrapolating the Evidence

[4] As part of the section challenging certain findings of fact, Plaintiffs include the following two sentence argument: "[T]he Commission is attempting to use lung tissue samples from some workers to determine the amount of asbestos in the lungs of all [Plaintiffs]. That is speculation and there was no evidence of the relevance of the lung pathology to other workers." We hold the results of the lung tissue analyses of the deceased Plaintiffs were a proper factor for the Commission to consider, and were relevant to the Commission's decision. Plaintiffs' brief includes testimony from multiple witnesses contending that exposure to asbestos in the curing department was worse than anywhere else in the plant. Plaintiffs argue on appeal that "[t]he condition of the insulation was especially bad in the curing department." In finding 32, the Commission determined: "Pathological examination of lung tissue is a definitive method of determining whether an individual has an asbestos-related disease." In finding 37, the Commission found that Plaintiff Hinson worked in the factory

> for 32 years, mainly in the curing department. The curing department had the highest concentration of insulated piping in the factory, with much of it at floor level or in exposed trenches. According to decedent Hinson, he was also exposed to significant asbestos dust from using a band saw to cut large asbestos gaskets. If [P]laintiffs' arguments are correct, decedent Hinson would have been exposed to

> a significant amount of airborne asbestos. . . . . Dr. Craig Hart at York pathology performed [P]laintiff Hinson's lung autopsy. Dr. Hart found no evidence of asbestos bodies or fibrosis, but did see evidence of smoking. The tissue was sent to Dr. Oury, who examined the sample and confirmed Dr. Hart's conclusions. Although it was not required for diagnostic purposes due to the lack of fibrosis, a fiber count analysis was done by Dr. Oury upon [D]efendant's request. The fiber count analysis found 5 asbestos bodies per gram, which is a level well below that seen in individuals with asbestosis and in the range of control individuals with no history of asbestos exposure.

Despite Plaintiffs' arguments and evidence suggesting Plaintiff Hinson should have been exposed to more airborne asbestos than Plaintiffs who worked in other areas of the factory, Plaintiff Hinson's lung pathology demonstrated that not only did he not have asbestosis, his exposure to asbestos was at "a level well below that seen in individuals with asbestosis and in the range of control individuals with no history of asbestos exposure." This evidence was relevant to the Commission's decision regarding the overall levels of airborne asbestos in the factory, and properly considered for that purpose.

Plaintiffs also argue that they were exposed to significant levels of asbestos in other areas of the factory. Plaintiffs claim that the asbestos insulation in the plant that "was in a damaged, deteriorated and [] dangerous condition" was "located in the work areas of the employees including the [P]laintiffs herein." One of Plaintiffs' witnesses testified that "the insulation was torn off, beaten off, and looked ragged[,]" and "that this condition was consistent throughout the plant." Plaintiffs agree in their brief that "[t]he poor condition of the asbestos insulation was not restricted to a single area but was consistent throughout the plant." In addition, Plaintiffs argue they were exposed to airborne asbestos fibers throughout the plant due to the use of talc contaminated with chrysotile asbestos; and the removal, replacement, and repair of gaskets and brakes that contained chrysotile asbestos. Plaintiffs argued to the Commission that the factory was "a very dusty plant" and that any plaintiff who worked throughout the factory "would have been in each of these departments and subject to the same type of exposures [as] everyone else."

In finding 34, the Commission stated: "Of the five deceased [P]laintiffs who had post-mortem pathological study of their lung tissue, (Walter Hinson, Johnnie Jones, Charles Gibson, Homer Hunt, and Lloyd

Cox), none had pathological evidence of asbestosis. Pathology is the most reliable method to diagnose asbestosis." In findings 38, 39, 40, and 41, the Commission determined that deceased Plaintiff Jones worked for twenty-five years in the calendar area—where he would have been exposed to talc, along with pipe insulation; deceased Plaintiff Gibson worked for thirty-one years in the tire-building and warehouse departments; deceased Plaintiff Hunt worked for seventeen years throughout the factory as a mechanic—which would have exposed him to the alleged brake-related asbestos dangers as well as all other alleged causes of airborne asbestos in the factory; and deceased Plaintiff Cox worked for thirty-one years in the stock and bead preparation areas. The Commission determined in finding 42: "Despite Plaintiffs' theories of exposure, pathology results from the lung tissue of five long-term employees from a variety of departments and factory locations uniformly show a lack of fibrosis, a lack of asbestos bodies, and a lack of fibers."

The above findings of fact illustrate the relevance of the pathological examinations to the general issue of whether employment at the plant served to expose Plaintiffs to asbestos of the type and quantity that could cause or significantly contribute to the development of an asbestos-related disease. The lung tissue pathology was direct evidence that none of the deceased Plaintiffs had asbestosis or other asbestos-related diseases, and was also circumstantial evidence supporting the Commission's determination that Plaintiffs had failed to prove "a causal connection between asbestosis and employment at the . . . factory."

4. The Entire Record

[5] Plaintiffs challenge the Commission's findings 16, 19, 21, 23, 43, 44, and 45, because the Commission stated that it was basing its determinations on "the greater weight of the evidence in view of the entire record." Plaintiffs argue that the "entire record" language demonstrates that the Commission based these findings, *in part*, on incompetent evidence and, therefore, these findings and conclusions are invalid. Plaintiffs argue: "The 'entire record' consisted of the air sampling and testimony of experts regarding the amount of exposure for each [P]laintiff and the amount necessary to cause disease. As stated herein, [Plaintiffs] find[] that such evidence is not competent. Regardless, the Commission based its opinions on that evidence." Plaintiffs also contend that "all of the testimony relied upon by the Commission to establish the levels of exposure were based upon air sampling." As the Commission's findings of fact, and the small sampling of the expert testimony included herein demonstrates, the Commission relied primarily on expert

medical testimony, not air sampling, and Plaintiffs' argument fails for this reason.

In addition, "[b]efore the Commission makes findings of fact, it 'must consider and evaluate all of the evidence. Although the Commission may choose not to believe the evidence after considering it, it may not wholly disregard or ignore competent evidence.' " *File v. Norandal USA, Inc.*, 232 N.C. App. 397, 400, 754 S.E.2d 202, 205 (2014) (citation omitted). It would have been improper for the Commission not to have considered "the entire record" before making its determinations. Further, the Commission is not required to make specific findings indicating the evidence it is *not* relying on. *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998). Finally, "findings of fact which are supported by competent evidence are conclusive on appeal, even though other incompetent evidence may have been improperly admitted." *Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682 (citation omitted). This argument is without merit.

C. *Findings of Fact*

[6] Plaintiffs contest certain findings of fact, in whole or in part.[29] Our review is limited to "whether the findings of fact are supported by competent evidence[.]" *Penegar*, __ N.C. App. at __, 815 S.E.2d at 394 (citation omitted). Uncontested findings are binding on appeal. *Id.* We include as "unchallenged" many findings of fact that Plaintiffs purport to challenge on appeal—because Plaintiffs' "challenges" to these findings are not based on any alleged insufficiency of supporting evidence. *Id.*

Plaintiffs challenge certain findings based on the following sentence: "In Findings of Fact 43, 44, 45, 47 the Commission relies on evidence that is not competent for the reasons set forth herein." That is the totality of the challenge, and it is not sufficient for appellate review. Plaintiffs challenge findings 12, 13, 14, 15, 16, 18, 19, 21, and 23 by arguing that the Commission should not have relied on the air sampling reported in these findings. However, Plaintiffs do not contend that the findings themselves are not supported by competent evidence. These findings simply state uncontested facts concerning the air sampling done at the factory, and do not include any indication of how, or if, the Commission relied on these findings to make its decisions.[30]

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29. Plaintiffs challenge some of the "common issue" findings in certain individual briefs, but not others. For the sake of clarity, we address the challenges from all of the bellwether briefs related to common issues in this opinion.

30. Findings 16, 19, 21, and 23 are ultimate findings, but they are not properly challenged in this section.

Plaintiffs challenge findings 15, 35, 36, 37, 38, 39, 40, 41, 42, 44, and 47, on the basis that the Commission "gave more credibility to [the opinions and testimony of] Defendant's experts" and "failed to consider, and plainly ignored, the evidence that contradicted" the opinions of Defendant's experts. Again, this is not an argument concerning whether there was sufficient evidence to support these findings—Plaintiffs simply argue that they disagree with the weight and credibility determinations of the Commission.[31] That is not a valid challenge to findings of fact, and this Court is without authority to make the determinations Plaintiffs ask of it:

> In passing upon issues of fact, the Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not. The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683–84 (1982) (citations omitted). Therefore, these "unchallenged" findings of fact are binding on appeal.[32] *Penegar*, __ N.C. App. at __, 815 S.E.2d at 394.

Plaintiffs challenge finding 11, arguing that the Commission's determination that the greater weight of the evidence did not support a finding that there were high levels of airborne particulates in the curing department "ignores evidence and misstates the evidence. Plaintiff[s] never suggested that workers were damaging the asbestos on the pipes every minute of every day. It was occasional exposures." We agree that "high levels of airborne particulates in the curing department originating from damaged pipe insulation and gasket-sawing" would have been intermittent. However, there was sufficient evidence to support this finding as written. As the Commission stated in its ultimate finding 43:

> In occupational disease cases, a causal connection between the employment and the alleged disease must be proven. This analysis includes the extent of exposure. Of necessity, evidence on the subject of causation in these cases is often circumstantial. Given the evidence of air

31. Finding 47 is an ultimate finding or conclusion, but Plaintiffs' argument is insufficient to challenge this conclusion as well.

32. We further hold that all these findings of fact are supported by competent record evidence.

> contaminant measurements taken at [D]efendant's factory, the pathology evidence collected from workers' lungs, and the scientific and epidemiological literature presented on the subject, the greater weight of the evidence in view of the entire record does not demonstrate a causal connection between asbestosis and employment at the . . . factory.

The Commission is correct in its statement of law: "In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence." *Booker*, 297 N.C. at 476, 256 S.E.2d at 200. The pathology evidence, the testimony of Defendant's medical experts and industrial hygienists, the scientific and epidemiological literature, and other evidence presented, constituted sufficient evidence to support the finding that "the greater weight of the evidence [did] not support" that there were "high levels of airborne particulates in the curing department originating from damaged pipe insulation and gasket-sawing"—even though Plaintiffs presented evidence in support of a contrary finding.

Plaintiffs also argue that in finding 12 the Commission "completely ignored the fact that the 1979 study was not measuring for asbestos." However, finding 12 correctly states that the study "measured for dust—both airborne and respirable, as well as petroleum distillates, rubber solvent, Benzene, and Toulene. The dust measurements would have measured any particulates in the air—whether the particulates were asbestos, talc, or something else." We hold that all of the "common issues" findings of fact included in this opinion are binding on appeal.

D. *Ultimate Findings and Conclusions of Law*

[7] Plaintiffs do not challenge the following ultimate findings/conclusions and they are therefore binding on appeal:

> 46. Plaintiff Charles Wilson[], one of the "initial five" plaintiffs, alleges that he also contracted colon cancer as a result of exposure to asbestos at the . . . factory. However, the greater weight of the evidence in view of the entire record shows that colon cancer is an ordinary disease of life to which the public is equally exposed. The greater weight of the evidence in view of the entire record does not show that colon cancer is characteristic of persons engaged in the tire manufacturing industry or that working at the . . . factory placed those who worked there at an increased risk of developing colon cancer.

> 47. Plaintiff Epps[], one of the "initial five" plaintiffs, alleges that he also contracted tonsil cancer as a result of exposure to asbestos at the . . . factory. However, the greater weight of the evidence in view of the entire record shows that tonsil cancer is an ordinary disease of life to which the public is equally exposed. The greater weight of the evidence in view of the entire record does not show that tonsil cancer is characteristic of persons engaged in the tire manufacturing industry or that working at the . . . factory placed those who worked there at an increased risk of developing tonsil cancer.

Plaintiffs challenge ultimate finding 16, which states:

> 16. The greater weight of the evidence in view of the entire record shows that plaintiffs were neither exposed to airborne asbestos as a result of damaged pipe insulation in such form and quantity and with such frequency as to cause or significantly contribute to the development of asbestosis, nor were plaintiffs exposed to the hazards of asbestosis through this method in this employment for 30 days or parts thereof within a seven month consecutive period which proximately augmented the disease process of asbestosis to the slightest degree.

Plaintiffs argue: "In short, the Commission found that [P]laintiffs were not exposed to asbestos in a sufficient amount from damaged pipe insulation to cause asbestosis. This finding was based upon 'the entire record.' " Plaintiffs then state:

> The Commission also found the exposures from asbestos-containing talc, gaskets and brakes were insufficient to cause disease based upon the entire record. (Findings of Fact 19, 21, 23). The "entire record" consisted of the air sampling and testimony of experts regarding the amount of exposure for each [P]laintiff and the amount necessary to cause disease. As stated herein, Plaintiff[s] find[] that such evidence is not competent. Regardless, the Commission based its opinions on that evidence.

Plaintiffs contest ultimate findings 43 and 45 on the same grounds.[33] We have already addressed Plaintiffs' argument above—in section IV. B. 4.

33. All of these ultimate findings are determinations that Plaintiffs' alleged injuries did not "arise out of" their employment at the factory. *See Culpepper*, 93 N.C. App. at 247, 377 S.E.2d at 780.

of this opinion—as well as noting that Plaintiffs failed to challenge the Commission's "last injurious exposure" determinations made pursuant to N.C.G.S. § 97-57. In addition, we hold that there is sufficient competent record evidence to support the Commission's ultimate findings.[34] *Culpepper*, 93 N.C. App. at 247, 377 S.E.2d at 780.

Findings 43 and 45 state in relevant part:

> 43. . . . . Given the evidence of air contaminant measurements taken at [the] factory, the pathology evidence collected from [deceased Plaintiffs'] lungs, and the scientific and epidemiological literature presented on the subject, the greater weight of the evidence in view of the entire record does not demonstrate a causal connection between asbestosis and employment at the . . . factory.
>
> . . . .
>
> 45. The greater weight of the evidence in view of the entire record does not show that [P]laintiffs, through their employment at [the] factory, were exposed to asbestos in such form and quantity and used with such frequency as to cause or significantly contribute to the development of asbestosis[.]

Because both ultimate findings 43 and 45 include determinations that Plaintiffs failed to meet their burden of proving a sufficient causal relationship between employment at the factory and their alleged asbestosis, these ultimate findings defeat Consolidated Plaintiffs' asbestosis claims. Because the Commission determined in "findings" 46 and 47 that Plaintiffs have failed to prove that either colon cancer or tonsil cancer are "occupational diseases" as defined by N.C.G.S. § 97-53(13), these determinations also apply to the outstanding consolidated cases.

E. *Conclusion—Common Issues Arguments*

We affirm the Commission's common issues determinations. It did not err in: (1) Determining Plaintiffs failed to prove a causal connection between employment at the factory and asbestosis; (2) its determination, based upon the facts presented, that Plaintiffs failed to prove that either colon cancer or tonsil cancer were occupational diseases

34. To the extent, if any, that the ultimate findings are, or contain, conclusions of law, Plaintiffs abandoned any challenge to them because they have failed to argue that they are not supported by the findings of fact. In addition, we hold that any conclusions in the common issues section of the bellwether opinions and awards are supported by the findings of fact.

pursuant to N.C.G.S. § 97-53(13); or (3) its unchallenged determination that Plaintiffs were not last injuriously exposed to the hazards of asbestosis at the factory. Further, we hold that the Commission's findings and ultimate findings are supported by competent evidence, and its conclusions and rulings are supported by the findings.

V. Plaintiff Hinson's Appeal

[8] Although we affirm the Commission's opinion and award based on our holdings set forth above, we will also address the findings and conclusions specific to Plaintiff Hinson. Initially, Plaintiff Hinson does not make any argument that the findings of fact fail to support the conclusions of law; therefore, the conclusions of law stand. *Penegar*, __ N.C. App. at __, 815 S.E.2d at 394. For example, Plaintiff argues that, in support of conclusion of law 3, "the Commission . . . relied, in large part, on a determination of the amount of asbestos that [P]laintiff inhaled and how much was necessary to cause disease." Conclusion 3 states in part: "[I]n this case, it was not established, by the preponderance of the evidence in view of the entire record, that [Plaintiff] contracted asbestosis or any asbestos-related condition." Plaintiff argues this conclusion is not supported by competent evidence, but does not make an argument that the *findings of fact* fail to support this conclusion—therefore, this conclusion of law stands. *Id.*

Assuming, *arguendo*, Plaintiff Hinson has preserved challenge to the findings and conclusions specific to him, we hold that competent evidence supports the relevant findings of fact and ultimate findings, which support the Commission's relevant conclusions of law. *Id.* Plaintiff Hinson does not challenge finding 34 which states in part that the "post-mortem pathological study of" Plaintiff Hinson's "lung tissue" revealed no "pathological evidence of asbestosis. Pathology is the most reliable method to diagnose asbestosis." Findings 55, 57, 58, 60, 61, 62, and 63 are also unchallenged. These findings include determinations by multiple doctors that Plaintiff Hinson's x-rays did not show evidence of pleural abnormalities or asbestosis; that after Plaintiff Hinson told his treating physician of his asbestosis diagnosis, his physician told Plaintiff Hinson "to inform his attorney that the abnormal x-ray was due to pneumonia"; and that though Plaintiff Hinson "testified vehemently that he never smoked," medical records and his pathology results indicated he had "a remote smoking history."

The Commission found in findings 37 and 64 that during pathological examination of Plaintiff Hinson's lung tissue, "Dr. Hart found no evidence of asbestos bodies or fibrosis, but did see evidence of smoking[,]"

a conclusion "confirmed" by Dr. Oury, who also conducted a fiber count analysis and found results "well below that seen in individuals with asbestosis and in the range of control individuals with no history of asbestos exposure." Plaintiff Hinson's only argument concerning these findings is that the Commission "ignore[d] the pathology findings of [P]laintiff's experts." As noted above, Plaintiffs did not present any evidence from pathologists. To the extent Plaintiffs—including Plaintiff Hinson—mean to include non-pathologist medical doctors, or non-physician scientists who work with lung tissue, under the definition of "pathologists," it was the province of the Commission to weigh the evidence and the credibility of the witnesses. Because there is some competent evidence to support these findings, they are conclusive on appeal. Plaintiff challenges finding 65, in which the Commission states that Defendant's medical experts were "given greater weight than" Plaintiffs'. Plaintiff Hinson's challenge to this finding is based on Plaintiffs' rejected "entire record," "air sampling," and "fiber year theory" arguments.

Our review of the record demonstrates that the evidence supports the ultimate finding—included in finding of fact 66 and conclusions of law 2 and 4—that Plaintiff Hinson failed to prove a causal connection between his employment at the factory and his alleged asbestosis. We further hold that the Commission's findings, which are based on substantial competent evidence, support conclusion 3, in which the Commission determined that Plaintiff Hinson failed to prove he had asbestosis. Finally, Plaintiff Hinson does not challenge the determination made pursuant to N.C.G.S. § 97-57 that he was not "last injuriously exposed" to the hazards of asbestosis at the factory. For all the above reasons, we affirm the denial of Plaintiff Hinson's claim.

AFFIRMED.

Judges DIETZ and COLLINS concur.

IN RE K.J.

[267 N.C. App. 205 (2019)]

IN THE MATTER OF K.J.

No. COA18-639

Filed 3 September 2019

Appeal and Error—preservation of issues—waiver—challenge to sufficiency—petition for involuntary commitment

An appeal from an involuntary commitment order was dismissed where defendant waived his only argument—that the underlying affidavit and petition for involuntary commitment alleged insufficient facts to support the trial court's order—by failing to raise it before the trial court.

Appeal by Respondent from Order entered 2 November 2017 by Judge Adam S. Keith in Granville County District Court. Heard in the Court of Appeals 12 February 2019.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for respondent-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

MURPHY, Judge.

Respondent's (K.J.) sole argument on appeal is that the *Affidavit and Petition for Involuntary Commitment* ("Petition") supporting the trial court's involuntary commitment order was insufficient. Respondent failed to challenge the sufficiency of the affidavit during the hearing before the District Court, and our binding precedent mandates that the argument is waived. We dismiss Respondent's appeal.

BACKGROUND

This action commenced when Richard Benson II, M.D. ("Dr. Benson"), signed a petition requesting that Respondent be involuntarily committed. Dr. Benson's Petition alleged Respondent was mentally ill and a danger to herself and others. Dr. Benson stated his conclusion was based upon the following facts: "Aggressive behavior/HI/psychosis[.]" An involuntary commitment hearing was held in Granville County District Court, and Respondent was subsequently committed for a period not to exceed 45 days, followed by outpatient commitment for

a period not to exceed 45 days. At that hearing, Respondent did not object to the Petition or argue it did not present a valid factual basis to support an involuntary commitment. Respondent timely appeals.

ANALYSIS

Respondent's only argument on appeal is that Dr. Benson's Petition lacked sufficient facts to show reasonable grounds for involuntary commitment. Indeed, before a trial court may enter a commitment order, there must be an underlying petition that alleges facts sufficient to show reasonable grounds that the person is mentally ill and a danger to himself or others. N.C.G.S. § 122C-261(a) (2017); *In re Reed*, 39 N.C. App. 227, 227-29, 249 S.E.2d 864, 865-66 (1978). However, our caselaw requires respondents to "raise issues with the affidavit, petition, or custody order in the first involuntary commitment hearing . . . ." *In re Moore*, 234 N.C. App. 37, 42, 758 S.E.2d 33, 37 (2014). Otherwise, we must hold that "respondent has waived any challenge to the sufficiency of the affidavit to support the magistrate's original custody order." *Id.* Here, it is undisputed that Respondent did not challenge the sufficiency of the Petition during the initial involuntary commitment hearing. This issue, which is Respondent's only argument on appeal, is deemed waived, and this appeal is dismissed.

CONCLUSION

Respondent's only argument on appeal is waived because it was not raised during Respondent's initial involuntary commitment hearing.

DISMISSED.

Judges BRYANT and DIETZ concur.

K2HN CONSTRUCTION NC, LLC, PLAINTIFF
v.
FIVE D CONTRACTORS, INC. A NORTH CAROLINA CORPORATION AND BRIAN DALTON
AN INDIVIDUAL, DEFENDANTS

No. COA19-104

Filed 3 September 2019

Appeal and Error—appellate rule violations—Rule 28(b)(6)—abandonment of issues—dismissal warranted

In a contractual dispute between two general contractors, plaintiff's appeal from an order granting summary judgment to defendants was dismissed for multiple violations of the Rules of Appellate Procedure. Even assuming the numerous nonjurisdictional rule violations did not constitute a substantial failure or gross violation warranting dismissal, plaintiff's failure to present meaningful legal arguments supported by citations to authority as required by Rule 28(b)(6) constituted abandonment and precluded substantive review.

Appeal by Plaintiff from summary judgment entered 18 April 2018 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2019.

Wesley S. White for Plaintiff-Appellant.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum and Kimberly J. Kirk, for Defendants-Appellees.

INMAN, Judge.

Plaintiff K2HN Construction NC, LLC, ("Plaintiff") appeals from an order granting summary judgment in favor of Defendants Five D Contractors, Inc. and Brian Dalton ("Defendants"). Defendants seek dismissal of this appeal for violation of various nonjurisdictional appellate rules. After careful review, we dismiss the appeal because Plaintiff, in addition to committing numerous nonjurisdictional defaults alleged in Defendants' motion and independently identified by this Court on review, abandoned its appeal by failing to cite any legal authority in support of its arguments as mandated by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff and Defendants are general contractors. In 2014, the parties orally agreed to enter into a joint venture to build four commercial properties in Georgia where, at the time of the agreement, only Plaintiff was licensed. The agreement contemplated an even split of all profits realized on the projects.

Defendants commenced construction on the projects and Plaintiff provided its Georgia contractor's license and agents' signatures on various contracts, permits, and registration forms connected to the projects. At no point did Plaintiff provide labor or materials. Its contributions to the projects consisted only of providing a license number and signatures and unspecified administrative work that Plaintiff was unable to describe at deposition.

The four projects were eventually completed, but Plaintiff never received any compensation as contemplated by the joint venture agreement. Plaintiff filed suit against Defendants on 12 April 2017, alleging claims for breach of contract, *quantum meruit*, conversion, fraudulent misrepresentation, unfair and deceptive trade practices, piercing the corporate veil, and punitive damages. Defendants filed their combined motion to dismiss, answer, and affirmative defenses on 5 September 2017, denying each of Plaintiff's claims and asserting ten affirmative defenses. Following discovery, Defendants filed a motion for summary judgment. That motion was granted by the trial court by order entered 18 April 2018 after a hearing on 29 March 2018. Plaintiff filed its notice of appeal on 17 May 2018.

Following service of its notice of appeal on 17 May 2018, Plaintiff procured a transcript of the proceedings and prepared a proposed record on appeal. The reporter certified delivery of the transcript on 30 September 2018, giving Plaintiff until 5 November 2018 to serve a proposed record on Defendants pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 11(b) (2018). Plaintiff served a proposed record on Defendants a day late, on 6 November 2018.

The parties agreed to contents of the record on appeal via email on 16 January 2019,[1] and it was filed with this Court on 18 January 2019. Plaintiff, however, failed to post the appeal bond and pay the docketing fee at the time of filing as required by our appellate rules. N. C. R.

1. Plaintiff contends the record was settled by agreement on 15 January 2019. Defendants' counsel filed an affidavit and exhibits with this Court alongside their

App. P. 6(c) and 12(b).[2] This Court sent a letter reminding Plaintiff of the required appeal bond and docketing fee and extended the deadline for those payments by ten days, until 8 February 2019. Plaintiff did not post the bond or pay the required fee until 28 February 2019, 20 days beyond the extended deadline.

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motion to dismiss the appeal demonstrating that the record was not agreed to until 16 January 2019.

In any event, we conclude that the record on appeal was settled well before 16 January 2019 by operation of Rule 11 of the North Carolina Rules of Appellate Procedure. Plaintiff served the proposed record via hand delivery on 6 November 2018 and Defendants timely served their objections and amendments to the proposed record on 5 December 2018, one day before the 30-day deadline provided by Rule 11. N.C. R. App. P. 11(c) (2019). To avoid settlement of the record by operation of rule, if Plaintiff disagreed with Defendants' objections and amendments, Plaintiff must have sought judicial settlement prior to 18 December 2018. *See id.* ("If any appellee timely serves amendments [or] objections . . . and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c)."). No request for judicial settlement or agreement to the record's contents appears in the record, so we therefore assume the record was settled by operation of Rule 11(c) on 18 December 2018. *See* N.C. R. App. P. 9(a)(1)i. (requiring an agreement, notice of approval, or judicial settlement order to be included in the record on appeal). Although Rule 11(c) provides that "nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order[,]" that time expired on 8 January 2019. *See id.* (requiring entry of an order settling the record on appeal within twenty days of service of a request on a judge, which must have been made within ten days of the of the latest possible served objection or amendment by an appellee). After the record was settled by operation of Rule 11, the parties could not settle it by agreement. This discrepancy raises an additional rule violation not identified by Defendants—if the record on appeal was settled by rule on 18 December 2018, Plaintiff was required to file the final record on appeal on 2 January 2019. *See* N.C. R. App. P. 12(a) (requiring the record on appeal to be filed within fifteen days of settlement under Rule 11). The record on appeal, however, was not filed until 18 January 2019.

2. It is also unclear whether Plaintiff properly served the final record on appeal. *See* N.C. R. App. P. 26(b)-(c) (requiring service of documents filed with this Court and enumerating valid methods of service). The certificate of service in the record states that it was served via "email/electronic" on Defendants on 15 January 2019; although Plaintiff's counsel provided Defendants' counsel access to a Dropbox folder containing the proposed record via email on 15 January 2019, later emails show Plaintiff's counsel continued to modify the contents of the record on 16 January, with Defendants' final agreement to the record transmitted via email later that day. And there is no other material before this Court conclusively demonstrating that the final record Plaintiff eventually filed was ever provided to Defendants via email or hand delivery. Plaintiff's failure to timely pay the docketing fee also made it difficult for Defendants to confirm that the record in the Dropbox folder matched the final record actually filed with this Court, as they could not access the electronic copy Plaintiff had filed on 18 January 2019 until that fee was paid more than a month later on 28 February 2019. Defendants requested that Plaintiff's counsel provide a copy of the record via letter dated 30 January 2019, but Plaintiff's counsel never responded.

Plaintiff's filing of the record on appeal on 18 January 2019 also meant that its principal brief was due to be filed on or before 18 February 2019, *i.e.*, within 30 days as required by our rules. N.C. R. App. P. 13(a)(1). By 22 February 2019, Plaintiff still had not filed its brief, and Defendants moved to dismiss the appeal. Plaintiff responded by arguing that the time to file its brief had not begun to run because this Court's clerk had not yet mailed the printed record to the parties, apparently relying on a superseded version of the appellate rules. *Compare* N.C. R. App. P. 13(a)(1) (2018) (requiring the appellant to file its brief "[w]ithin thirty days after the clerk of the appellate court has mailed the printed record to the parties") *with* N.C. R. App. P. 13(a)(1) (2019) (requiring the same "[w]ithin thirty days after the record on appeal has been filed with the appellate court").

This Court dismissed—without prejudice—Defendants' first motion to dismiss on 4 March 2019 and informed Plaintiff of the applicable version of Rule 13; Plaintiff thereafter filed a motion for an extension of time to file its principal brief on 8 March 2019. We allowed that motion in our discretion and ordered Plaintiff to file its brief "on or before 25 March 2019."

Plaintiff did not file its principal brief on or before 25 March 2019. Instead, Plaintiff filed its brief electronically the following day.[3] And, despite representing in the certificate of service that its principal brief was served on Defendants via U.S. Mail on 25 March 2018, Defendants' counsel's affidavit and attached documentation filed with this Court disclose that Defendants never received Plaintiff's brief via mail. Defendants' counsel notified Plaintiff's counsel via email on 2 April 2019 that they had not yet received the brief in the mail and inquired whether it had ever actually been sent; Plaintiff's counsel replied the next day that he "thought" he had mailed the brief but would send it again. Defendants' counsel then followed up by asking when the brief was mailed. A day later, Plaintiff's counsel had not answered that question, nor had he provided Plaintiff's brief to Defendants per his representation. Defendants' counsel sent another email on 4 April 2019 asking Plaintiff's counsel when or if the brief was mailed. Plaintiff's counsel responded the following morning by emailing a copy of the

3. The certificate of service attached to Plaintiff's brief states that it was electronically filed with this Court on "25 March 2018." However, this Court's internal records system and the public e-filing portal both disclose the filing date as 26 March 2019. *See 19-104: K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, N.C. Sup. Ct. and Ct. App. Elec. Filing Site and Document Library, https://www.ncappellatecourts.org/search-results.php?sDocketSearch=19-104&exact=1 (last visited Aug. 22, 2019).

brief and promising hand-delivery later that day without answering Defendants' question.

It appears, then, that Plaintiff finally effectuated valid service of its brief on 5 April 2019, ten days after the time prescribed by rule. *See* N.C. R. App. P. 13(a)(1) (requiring service of appellant's brief); N.C. R. App. P. 26(c) (allowing service consistent with Rule 4 of the North Carolina Rules of Civil Procedure via hand delivery, mail, or, if the document is filed electronically, via email); N.C. R. App. P. 26(b) ("Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, *at or before the time of filing*, be served on all other parties to the appeal." (emphasis added)).

On 24 April 2019, Defendants filed a second motion to dismiss with this Court, alleging violations of Rules 6(c), 11, 12(b), and 13(a)(1) based on the above conduct. Defendants included in their filing the affidavit from Defendant's counsel and supporting documentation referenced above. Plaintiff did not file a response to Defendants' motion.

II. ANALYSIS

A. Appellate Rules Violations Generally

Our Supreme Court has recently reiterated that "the Rules of Appellate Procedure are mandatory and not directory[,]" *State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 304 (2019) (internal quotation marks and citation omitted), as a " 'failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice.' " *Id.* at 198-99, 827 S.E.2d at 304 (quoting *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008)). Thus, "[a]s a natural corollary, parties who default under the rules ordinarily forfeit their right to review on the merits." *Dogwood*, 362 N.C. at 194, 657 S.E.2d at 363 (citations omitted).

Tempering such a harsh result is the urging from the Supreme Court "that noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* This is particularly true where a nonjurisdictional default has occurred, as "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.* at 198, 657 S.E.2d at 365 (citations omitted). A determination of whether such violations warrant sanctions up to and including dismissal is subject to Rules 25 and 34, meaning:

> the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional

> requirements of the rules does not rise to the level of a "substantial failure" [under Rule 25(b)] or "gross violation" [under Rule 34(a)(3)]. In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent possible.

Id. at 199, 657 S.E.2d at 366. The existence of a substantial failure or gross violation depends upon the factors present in the case, which may include "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67 (citations omitted). It is also appropriate for this Court to weigh the number of rules violated. *Id.* at 200, 657 S.E.2d at 367. Additionally, and of critical import to this appeal, "in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review." *Id.* (citing a prior version of N.C. R. App. P. 28(b)(6)).

B. Plaintiff's Various Nonjurisdictional Defaults

Here, Plaintiff has committed at least the following nonjurisdictional violations: (1) failing to timely serve the proposed record on appeal as required by Rule 11(b); (2) failing to timely file the record on appeal pursuant to Rule 12(a) given that the record appears to have been settled by rule on 4 January 2019; (3) failing to timely post an appeal bond as required by Rule 6(c); (4) failing to timely pay the docketing fee as required by Rule 12(b); (5) failing to timely file its principal brief as required by Rule 13(a)(1); (6) failing to timely serve its principal brief as required by Rules 13(a)(1) and 26(b); and (7) failing to take timely action pursuant to an order of this Court as set forth in Rule 25(a).

In addition to these violations, Plaintiff's filings with this Court appear to include discrepancies that contradict and do not align with either the sworn statements and documentation provided by Defendants' counsel or this Court's own internal records concerning Plaintiff's pursuit of this appeal. Those discrepancies include: (1) a statement in the certificate of service in the record on appeal that it was served on 15 January 2019 when emails between the parties show Plaintiff's counsel continued to modify the record's contents until at least the following day; (2) a statement in the certificate of service included in Plaintiff's principal brief that it was filed electronically on 25 March 2018 when this Court's internal documentation shows it was not filed until 26 March 2019; and (3) a statement in that same certificate of service that service was made on Defendants via U.S. Mail when no such mailing appears to have occurred and, when pressed for confirmation of mailing by Defendants' counsel, was not confirmed by Plaintiff.

Presuming, *arguendo*, that the above violations do not give rise to a substantial failure or gross violation warranting dismissal, this Court's own independent review of Plaintiff's brief reveals a "noncompliance with a discrete requirement of the rules [that] constitute[s] a default precluding substantive review." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. Plaintiff's brief violates Rule 28(b)(6) to such an extent that we deem each argument presented to be abandoned.

C. Plaintiff's Rule 28(b)(6) Violations

Rule 28(b)(6) requires the appellant's brief to include "[a]n argument, to contain the contentions of the appellant with respect to each issue presented." N.C. R. App. 28(b)(6). The rule expressly warns appellants that "[i]ssues . . . in support of which no reason or argument is stated, will be taken as abandoned." *Id.* An appellant avoids abandonment when it complies with the rule's mandate that "[t]he body of the argument . . . shall contain citations of the authorities upon which the appellant relies." *Id.* This Court has routinely held an argument to be abandoned where an appellant presents argument without such authority and in contravention of the rule. *See*, *e.g.*, *Fairfield v. WakeMed*, ___ N.C. App. ___, ___, 821 S.E.2d 277, 281 (2018) ("Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. Therefore, we deem this issue to be abandoned." (citation omitted)); *GRE Props. Thomasville LLC v. Libertywood Nursing Ctr., Inc.*, 235 N.C. App. 266, 276, 761 S.E.2d 676, 682 (2014) ("Yet, defendant cites only *State v. Kirby* for the proposition that issues of relevance are reviewed *de novo* and fails to cite any further legal authority in support of its argument. As a result, we find defendant has abandoned this argument." (citation omitted)).

Each argument in Plaintiff's brief violates Rule 28(b)(6). For example, Plaintiff's arguments that genuine issues of material fact exist concerning its breach of contract, unjust enrichment, fraud, and unfair and deceptive trade practices claims cite no authority establishing: (1) what the elements of those claims are; or (2) how the evidence demonstrates the existence of any genuine issue of material fact pertinent to those elements or any of Defendants' defenses pled and argued below.[4]

4. It is clear from the summary judgment hearing transcript that Defendants' motion was based in no small part on the defense of contract illegality; citing both North Carolina and Georgia law, Defendants asserted that an agreement allowing an unlicensed contractor to perform all the construction work on a project under the cover of a licensed general contractor's license number is illegal and unenforceable as against public policy in both states. Plaintiff's brief on appeal completely ignores that defense.

Plaintiff has, as a result, abandoned these arguments. *See*, *e.g.*, *Lopp v. Anderson*, ___ N.C. App. ___, ___, 795 S.E.2d 770, 775 (2016) (holding arguments raised on a plaintiff's appeal from a grant of summary judgment in favor of the defendants were abandoned by violation of Rule 28(b)(6) when they "consist[ed] of declaratory statements unsupported by any citation to authority" and failed to address defendant's sovereign immunity defense raised below). Although Plaintiff's arguments regarding its claims for conversion and piercing the corporate veil do contain citations to authority setting forth the elements of conversion and defining piercing the corporate veil, the remainder of those arguments consist of no more than one or two conclusory sentences that fail to apply any legal authority to the evidence presented below or to explain how the trial court's order was inconsistent with the law. These arguments, too, are abandoned. *See*, *e.g.*, *Thompson v. Bass*, ___ N.C. App. ___, ___, 819 S.E.2d 621, 627 (2018) (deeming an argument seeking reversal of summary judgment on an unfair and deceptive trade practices claim abandoned when it consisted of four sentences that, though they included a recitation of the elements of that claim, lacked "any meaningful argument as to how the trial court erred in granting summary judgment on [that] claim").[5]

Plaintiff's final argument—that summary judgment was improper because there may be issues of witness credibility pertinent to two potentially forged documents—does not salvage its appeal. Even presuming, *arguendo*, that this argument in Plaintiff's brief contains sufficient citation to authority under Rule 28(b)(6),[6] Plaintiff's argument fails to identify how these alleged forgeries establish or relate to either an issue of material fact or a claim that has not otherwise been abandoned.[7]

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5. Although Plaintiff's statement of the facts does contain some record citations, several of them appear inaccurate and do not support the propositions for which they are cited. The arguments discussed above, however, are entirely without any citations to the record despite Rule 28(b)(6)'s guidance that "[e]vidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, *with appropriate reference to the record on appeal*, *the transcript of proceedings*, *or exhibits*.") N.C. R. App. P. 28(b)(6) (emphasis added).

6. The body of the argument does not contain any citations to authority but begins with the introduction "[a]s stated above under the Standard of Review." Plaintiff's standard of review section does contain citations to authority pertinent to this argument, though those cases merely state a general rule and are not analogized or otherwise analyzed in support of Plaintiff's position.

7. By way of illustration, it is possible that the documents, if forged, are circumstantial evidence of an intent to deceive consistent with the elements of a fraudulent misrepresentation claim. *See Taylor v. Gore*, 161 N.C. App. 300, 303, 588 S.E.2d 51, 54 (2003) (setting forth the five elements of a claim for fraudulent misrepresentation). Plaintiff, however,

Although this Court can, after reviewing the record and caselaw, discern some potential lines of argument that *could* have been made in this portion of the brief, those arguments have not been set forth by Plaintiff, "and it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein." *Thompson*, ___ N.C. App. at ___, 819 S.E.2d at 627. We deem this argument abandoned, as it fails "to submit any meaningful argument as to how the trial court erred in granting summary judgment." *Id.*

III. CONCLUSION

Plaintiff has committed numerous nonjurisdictional rules violations in pursuing this appeal. Presuming, *arguendo*, that these violations may not, standing alone, have warranted dismissal, Plaintiff's failure to present appropriate argument supported with citations to authority and the record consistent with Rule 28(b)(6) "constitute[s] a default precluding substantive review." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. That failure both "impairs the court's task of review and . . . frustrate[s] the adversarial process[,]" *id.* at 200, 657 S.E.2d at 366-67 (citation omitted), as any review on the merits would require this Court to construct and decide arguments that Plaintiff has not adequately presented and to which Defendants have not had an opportunity to respond. As a result, we allow Defendant's motion to dismiss for the violations identified therein and the other violations identified by this Court.

DISMISSED.

Judges TYSON and HAMPSON concur.

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does not make this argument with specificity and citations to authority, nor does it argue how any of the other four elements would be satisfied, either through uncontroverted evidence precluding summary judgment for Defendants or evidence that creates a genuine issue of material fact. Plaintiff's brief does not identify the elements of fraudulent misrepresentation at all and does not cite a single case discussing or applying the law of that cause of action, whether at summary judgment or otherwise.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v.
MARINA MARTIN, BY AND THROUGH HER NATURAL PARENT AND GUARDIAN JEAN O. MARTIN, JEAN O. MARTIN, INDIVIDUALLY, AND DAVID M. MARTIN, DEFENDANTS

No. COA18-328

Filed 3 September 2019

Insurance—policy terms—interpretation—"resident" of "household"—fact-specific inquiry

In an insurance dispute arising from a car accident, the trial court properly determined that plaintiff mother's and daughter's injuries were not covered under the grandmother's automobile insurance policy, which limited coverage to "any family member" who was a "resident" of the grandmother's "household." Based on the plain and ordinary meaning of the policy terms, plaintiffs were not "residents" of the grandmother's "household" where, although they lived on the grandmother's farm, they occupied separate houses on the property with different addresses, and neither plaintiff had ever lived in the grandmother's house.

Judge INMAN dissenting.

Appeal by defendants from order entered 28 September 2017 by Judge J. Carlton Cole in Currituck County Superior Court. Heard in the Court of Appeals 20 September 2018.

Young Moore & Henderson, P.A., by Glenn C. Raynor, for plaintiff-appellee.

Breit Drescher Imprevento, P.C., by Jeffrey A. Breit, for defendants-appellants.

BERGER, Judge.

Marina Martin ("Marina") by and through her parents, Jean ("Jean") and David Martin ("David"), (collectively, "the Martins"), and Jean, individually appeal the trial court's grant of summary judgment for North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Farm Bureau"). We affirm the trial court's judgment.

Factual and Procedural Background

On January 6, 2014, Jean operated a 1994 Ford vehicle in Virginia Beach, Virginia. Marina was a passenger in the vehicle. This vehicle was owned by David and Jean with a separate and independent policy of insurance issued in their names. Jean attempted to cross a four-way intersection when another vehicle driven by Santiago T. Livara, Jr., ("Livara") struck the 1994 Ford driven by Jean. Jean and Marina were both injured in the accident. Jean and Marina subsequently sued Livara in Virginia, alleging negligence.

Both Jean and Marina asserted that they were covered under the uninsured/underinsured motorist ("UM/UIM") provisions of a separate automobile insurance policy issued by Farm Bureau solely to Mary Martin ("Mary"). Mary is Jean's mother-in-law and Marina's paternal grandmother. Mary's policy was in effect on the date of the accident and provided medical coverage and UM/UIM coverage. The policy issued to Mary named only Mary as an owner-insured, and did not identify the 1994 Ford as a covered vehicle.

The Farm Bureau policy issued to Mary provides, in relevant part:

> PART B—MEDICAL PAYMENTS COVERAGE
>
> INSURING AGREEMENT
>
> We will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury:
>
> 1. Caused by accident; and
> 2. Sustained by an Insured
>
> . . . .
>
> "Insured" as used in this Part means:
>
> 1. You or any family member;
>
> a. while occupying; or
>
> b. as a pedestrian when struck by;
>
> a motor vehicle designed for use mainly on public roads or a trailer of any type.

Under Mary's policy, an "Insured", and consequently coverage, is limited to "You [Mary] or *any family member*, which is defined as "a person related to you by blood, marriage or adoption who is a resident of your household." The policy does not define either of the terms "resident" or "household."

On the date of the accident, Mary was the sole owner of a farm located on Knotts Island, North Carolina ("Martin Farm"). Mary lived alone on Martin Farm Lane, and her mailing address was registered to a Post Office Box in Knotts Island, North Carolina. The Martins lived in a separate and detached house located on the Martin Farm with an address on Bay Orchard Lane. Their mailing address was registered to a different Post Office Box in Knotts Island, North Carolina. The houses share a single driveway, but are both stand-alone houses and located approximately a three to five minute walk from one another. No evidence in the record tends to show either Marina or Jean ever lived with Mary in her residence on Martin Farm Lane.

Mary and the Martins saw each other almost every day and considered themselves to be a cohesive family unit. The Martins had keys to Mary's house with unlimited access, and Mary had the same access to the Martin's home. Barring unforeseen circumstances or occasional overnight stays, the Martins and Mary lived separately in their respective houses.

Farm Bureau brought a declaratory judgment action alleging that Jean and Marina did not qualify as "insured[s]" as defined in the policy because they were not "residents" of Mary's "household" at the time of the accident. Farm Bureau and the Martins filed cross-motions for summary judgment and the trial court heard their motions on August 21, 2017. The Martins contended that Marina and Jean are entitled to coverage under Mary's policy because they are her "family member[s]," as defined therein. On September 28, 2017, the trial court granted summary judgment in favor of Farm Bureau and denied the Martins' motion for summary judgment.

The Martins timely appealed, arguing that the trial court erred by entering summary judgment in favor of Farm Bureau and concluding that Marina and Jean were not covered under Mary's policy. We affirm.

Standard of Review

"Although this is an action for declaratory judgment, because it was decided by summary judgment, we apply the standard of review applicable to summary judgment." *Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 563, 752 S.E.2d 775, 779 (2014).

> Summary judgment is appropriate where there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. In ruling on a motion for summary judgment, the court may consider the pleadings,

> depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials. All such evidence must be considered in a light most favorable to the non-moving party. On appeal, an order allowing summary judgment is reviewed *de novo*.

Id. (citation and quotation marks omitted).

"A party seeking benefits under an insurance contract has the burden of showing coverage." *Integon Nat'l Ins. Co. v. Villafranco*, 228 N.C. App. 390, 393, 745 S.E.2d 922, 925 (2013) (citation omitted). The judgment appealed from is presumed to be correct. *London v. London*, 271 N.C. 568, 571, 157 S.E.2d 90, 92 (1967). As appellants, Defendants carry the burden to show, not only that error occurred, but prejudicial and reversible error exists to overturn the trial court's judgment. "[T]he burden is upon appellant to show prejudicial error." *Id.* at 570, 157 S.E.2d at 92.

"The meaning of language used in an insurance policy is a question of law for this Court, as is the construction and application of the policy's provisions to the undisputed facts. As with any other question of law, our review is de novo." *Bruton v. N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. 496, 498, 490 S.E.2d 600, 601 (1997) (citations omitted).

Analysis

On appeal, Marina and Jean argue that they are "insureds" under the policy and thus entitled to coverage because they are related to Mary by blood or marriage and are residents of Mary's Household. The material facts of this case are not disputed and both parties agree that Marina and Jean are related to Mary. Thus, the sole issue on appeal is whether Marina and Jean were "residents" of Mary's "household" under the policy on the date the accident occurred.

> As with all contracts, the object of construing an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued. If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. We supply undefined, nontechnical words . . . a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise. We construe all clauses of an insurance policy together, if possible, so as to bring them into harmony. We deem all words to have been put into the policy for a

> purpose, and we will give effect to each word if we can do so by any reasonable construction.
>
> . . . .
>
> However, we only apply the preceding rules of construction when a provision in an insurance agreement is ambiguous. To be ambiguous, the language of an insurance policy provision must, in the opinion of the court, be fairly and reasonably susceptible to either of the constructions for which the parties contend. *If the language is not fairly and reasonably susceptible to multiple constructions, then we must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.*

Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, LLC., 364 N.C. 1, 9-10, 692 S.E.2d 605, 612 (2010) (emphasis added) (*purgandum*). The Supreme Court of North Carolina has also warned against result-orientated outcomes, instructing that "if a policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 492, 467 S.E.2d 34, 40 (1996) (citations omitted).

"The interpretation of the terms 'resident of your household' or 'resident of the same household' or similar terms in insurance policies has been the subject of numerous appellate court decisions." *Great Am. Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 655-56, 333 S.E.2d 145, 147 (1986) (citations omitted). We will address each term herein.

I. "Resident"

We first address whether the term "resident," as used in Mary's Farm Bureau policy before us, has a plain and ordinary meaning or whether it is ambiguous. Past decisions of this Court have failed to answer this question consistently.

> As observed by our courts, the words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. . . . It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous.

Id. at 656, 333 S.E.2d at 147 (citations omitted). Further, "a person may be a resident of more than one household for insurance purposes." *Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985) (citation omitted). This Court has previously determined the word "resident" to be ambiguous and then construed it in a manner to conclude that the would-be insured was a member of the policy holder's household. *See*, *e.g.*, *Paschal*, 231 N.C. App. at 568, 752 S.E.2d at 781-82; *Davis*, 76 N.C. App. at 104-06, 331 S.E.2d at 745-47; *Fonvielle v. S.C. Ins. Co.*, 36 N.C. App. 495, 497, 244 S.E.2d 736, 738 (1978).

However, this Court has clarified that "the term 'resident,' when used in an insurance policy and not defined by that policy, although subject to several different meanings, does not automatically result in coverage but instead is subject to its most inclusive definition." *Monin v. Peerless Inc.*, 159 N.C. App. 334, 341, 583 S.E.2d 393, 398 (2003) (citations omitted). In addition, the "[d]eterminations of whether a particular person is a resident of the household of a named insured are individualized and fact-specific . . . ." *Paschal*, 231 N.C. App. at 565, 752 S.E.2d at 780. Further, "the intent of that person is material to the question" of residency as well. *Great Am.*, 78 N.C. App. at 656, 338 S.E.2d at 147 (citation omitted); *see also Fonvielle*, 36 N.C. App. at 498, 244 S.E.2d at 738 ("Intent to remain at a place seems determinative, although not intent to remain permanently.").

Notwithstanding these gerrymandered and stretched interpretations, there are defined and rational limits, like a snapped rubber band, to the asserted notions of "flexible, elastic, [and] slippery" meanings of the term "resident." *Great Am.*, 78 N.C. App. at 656, 338 S.E.2d at 147. Its meaning can fall anywhere within the spectrum of "a place of abode for more than a temporary period of time" to "a permanent and established home . . . ." *Id.*

Here, the plain language of Mary's policy restricts and limits coverage thereunder to Mary and her "family member[s]," which are unambiguously defined by the policy as someone who is "related to [Mary] by blood, marriage or adoption *who is a resident* of [Mary's] household." (Emphasis added). The uncontroverted facts establish that neither Jean nor Marina had ever lived in Mary's house, and were not living in Mary's home on the date of the accident. It is impossible to invent a scenario to show individuals had established the intent to remain at a residence where neither ever lived.

Viewed in the light most favorable to the Defendants, Mary's home was never Jean nor Marina's "place of abode for more than a temporary

period of time" or their "permanent and established home . . . ." *Id.* Even under the broadest interpretation of the term "resident", neither Jean nor Marina can demonstrate they meet the definition of "insureds" under the Farm Bureau policy issued to and owned by Mary.

II. "Household"

The Martins also argue that the term "household" should be broadly interpreted to find that Marina and Jean were residents of Mary's household. They assert because they lived in the separate house located upon Mary's family farm at the time of the accident, they are entitled to coverage. We disagree.

An insurance policy is "subject to judicial construction only where the language used in the policy is ambiguous and reasonably susceptible to more than one interpretation." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999) (citation omitted). "[I]n construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary." *Id.* at 95, 518 S.E.2d at 817 (citation omitted).

Webster's New World College Dictionary defines household as "the person or *persons who live in one house*, apartment, etc." Webster's New World Dictionary (5th ed. 2014). The American Heritage Dictionary also defines household as "[a] person or *group of people occupying a single dwelling*." The American Heritage Dictionary (5th ed. 2019). Black's Law Dictionary defines "household" as "[a] *group of people who dwell under the same roof*." Black's Law Dictionary (10th ed. 2014).(emphasis added). Each of these definitions restrict a household to require a single structure.

Here, the meaning of the term "household" is plainly understood and not ambiguous in "the sense in which [it is] used in ordinary speech." *Buzz Off Insect Shield, L.L.C.*, 364 N.C. at 9, 692 S.E.2d at 612. It is not "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* at 10, 692 S.E.2d at 612 (citation omitted).

The Martins encourage us to gerrymander and torture the meaning of the term "household" to encompass multiple structures located on the same tract of land. We decline to do so. Words have specific meanings and the above definitions consistently and unambiguously demonstrate the plain meaning of the term "household" is limited to a single structure.

Here, the undisputed facts show the Martins lived in and occupied a separate house with a separate address and utilities, while Mary lived at a different address in her own house. The houses where Mary and the Martins resided were wholly independent structures with different

addresses. Although both structures were located on the same tract of land, the Martins and Mary did not occupy the same "household" pursuant to the plain and ordinary meaning of that term in Mary's policy. By definition, multiple and distinct houses, are not "one house", a "single dwelling" or the "same roof", and cannot be defined as a "household". Defendants' arguments are overruled.

III. *Farm Bureau Mutual Ins. Co. v. Paschal*

Defendants argue, and the dissent agrees, that the outcome of this case is governed by and is virtually identical to the facts in *Paschal*, and coverage under Mary's policy should be extended to Jean and Marina. However, neither *Paschal* nor any other North Carolina case has extended coverage to individuals who had never resided in the policyholder's household. *See Paschal*, 231 N.C. App. 558, 752 S.E.2d 775. Based upon an "individualized and fact-specific [review]," *Id.* at 565, 752 S.E.2d at 780, of the facts of this case, we reject Defendants' argument.

This Court determined in *Paschal* that a minor granddaughter was a resident of her grandfather's household, and thus, an insured for the purposes of an automobile insurance policy. There, a sixteen-year old minor child was injured while riding in a car driven by her cousin. *Id.* at 559, 752 S.E.2d at 776. The minor child brought suit against Farm Bureau, claiming that she was covered under her grandfather's insurance policy. *Id.* The trial court granted summary judgment for Farm Bureau, but this Court looked expansively at the relationship between the policy holder and his granddaughter when it "interpreted" the policy. *Id.* at 568, 752 S.E.2d at 781-82.

The grandfather owned "multiple houses [on] several hundred acres of farmland," which he deemed a "family farm." *Id.* at 560, 752 S.E.2d at 777. The grandfather lived in one house, while the girl and her father lived in another house on the farm. *Id.* Multiple family members had lived and worked on the farm over the years, including the girl's father. All the bills, maintenance, and appliance costs, and mail associated with the girl's home was paid for by and sent to the grandfather at a single address. The girl's father never paid rent or expenses. *Id.*

The grandfather cared for and had become the legal guardian of his granddaughter when the girl's father was sentenced to prison for approximately a year. *Id.* When the girl was not living with her grandfather, the grandfather and the minor girl saw each other "almost every day," and the girl had keys to his multiple structures on the farm and was "free to enter them any time." *Id.* at 561, 752 S.E.2d at 777. Upon these "individualized and fact-specific [facts]," *Id.* at 565, 752 S.E.2d at

780, this Court determined that the girl was entitled to coverage under the grandfather's policy because the grandfather was the minor's legal guardian, her *de facto* parent, "was the most constant caregiver," and "a regular participant in [the girl's] life." *Id.* at 568, 752 S.E.2d at 781. The grandfather frequently took the girl to her scheduled appointments and paid the "vast majority of [the girl]'s expenses," including all her basic necessities such as food and clothing. *Id.*

The analysis and determination in *Paschal* was grounded largely in the specific facts of the grandfather's particular and pervasive involvement in the girl's life in the absence of her father, and not due solely to the physical facts of her residence, which included intermittent periods of cohabitation under the same roof. This Court in *Paschal* did not establish a new "most constant caregiver" standard. It was "in light of [*Paschal*'s] very particular circumstances" that the minor child was deemed a resident of the grandfather's household and entitled to coverage. *Id.* at 568, 752 S.E.2d at 782.

The holding in *Paschal* is an application of prior precedent that whether a person is a resident of an insured's household is an "individualized and fact-specific" inquiry. *Id.* at 565, 752 S.E.2d at 780. Here, the facts are not in dispute. The trial court properly concluded that neither Jean nor Marina had ever lived with Mary, and no evidence tends to show Mary had ever supplanted either her son, David or his wife, Jean, as Marina's "most constant caregiver," *Id.* at 568, 752 S.E.2d at 776, so as to bring this case under the very narrow purview of *Paschal*. Defendant's arguments are overruled.

Conclusion

Jean and Marina never lived with Mary in her house. They do not qualify as "insureds" under the plain meaning of the Farm Bureau policy because they are not "family members" of Mary who were "residents of her household" at the time of the accident. Defendants have failed to show reversible error in the trial court's judgment. Accordingly, we affirm the trial court's entry of summary judgment.

AFFIRMED.

Judge TYSON concurs.

Judge INMAN dissents with separate opinion.

INMAN, Judge, dissenting.

Because the majority opinion violates binding precedent, I respectfully dissent.

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 437-38, 146 S.E.2d 410, 416 (1966).

North Carolina's appellate courts have for decades held that the terms "resident" and "household" as used in insurance policies to define who is insured "should be given the *broadest construction . . . by any reasonable construction*" possible. *Great Am. Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986) (citations omitted) (emphasis added). This rule is consistent with the canon of construction that ambiguous terms in a contract should be construed against the drafter of a contract—in the case of insurance policies, the insurer. *Jamestown*, 266 N.C. at 437-38, 146 S.E.2d at 416.

Our Supreme Court has explained the reason for this canon in the insurance context:

> Policies of insurance differ somewhat from other contracts, however, in respect to the rules of construction to be applied to them. They are unipartite. They are in the form of receipts from insurers to the insured, embodying covenants to compensate for losses described. They are signed by the insurer only. In general, the insured never sees the policy until after he contracts and pays his premium, and he then most frequently receives it from a distance when it is too late for him to obtain explanations or modifications of the policy sent him. The policy, too,

> is generally filled with conditions inserted by persons skilled in the learning of the insurance law and acting in the exclusive interest of the insurance company. Out of these circumstances the principle has grown up in the courts that these policies must be construed liberally in respect to the persons insured, and strictly with respect to the insurance company.

Barker v. Iowa Mut. Ins. Co., 241 N.C. 397, 400, 85 S.E.2d 305, 307 (1955) (quoting *Union Mut. Life Ins. Co. v. Wilkinson*, 80 U.S. 222, 232, 20 L. Ed. 617 (1871)).

The interpretation of the term "resident" in insurance policies "has been the subject of numerous appellate court decisions." *Great American*, 78 N.C. App. at 655 56, 338 S.E.2d at 147 (citations omitted). "It is difficult to give an exact or even satisfactory definition of the term 'resident,' as the term is flexible, elastic, slippery and somewhat ambiguous." *Id.* at 656, 338 S.E.2d at 147. The term "resident," if not defined in the insurance policy, "is capable of more than one definition *and is to be construed in favor of coverage*." *Fonvielle v. S.C. Ins. Co.*, 36 N.C. App. 495, 497, 244 S.E.2d 736, 738 (1978) (citing *Jamestown*, 266 N.C. at 437-38, 146 S.E.2d at 416) (emphasis added).

This Court has recognized two categories of insurance policies defining an insured's covered family members: "those involving clauses that exclude from coverage members of the insured's household, and those that extend coverage to such persons." *Davis v. Md. Cas. Co.*, 76 N.C. App. 102, 105, 331 S.E.2d 744, 746 (1985). Clauses excluding coverage are "restrictively defined," while clauses that invite or extend coverage are to be "broadly interpreted" and "*members of a family need not actually reside under a common roof to be deemed part of the same household*." *Id.* (emphasis added). Both adults and minors may be "resident[s] of more than one household for insurance purposes." *Id.* at 106, 331 S.E.2d at 746. In *Davis*, as in this case, the insurance policy extended coverage to any "family member" of the policyholder.

Mary's insurance policy, like the policies at issue in *Jamestown*, *Fonvielle*, *Great American*, and *Davis*, includes a clause that extends coverage to family members residing in her household. Specifically, the policy defines as "the Insured" Mary "or any family member" of Mary, and further defines a "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household."

Because Mary's policy extends coverage to her family members, its definition of that term, including the clause "resident of your household,"

"should be given the broadest construction[,] and that all who may be included, by any reasonable construction of [it], within the coverage of an insurance policy using such [a term], should be given its protection." *Great American*, 78 N.C. App. at 656, 338 S.E.2d at 147.

The majority criticizes this Court's interpretations of the term "resident" in prior insurance coverage decisions, analogizing them to a "snapped rubber band" stretched beyond its "defined and rational limits." But the fundamental doctrine requiring us to follow precedent provides no exception for decisions we view as irrational. "[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Our Supreme Court has not overturned this Court's holdings in *Fonvielle*, *Great American*, or *Davis*. Nor has our Supreme Court overturned its own decisions in *Jamestown* and *Barker*.

The majority declares that the term "resident" as used in Mary's policy is plain enough to cast aside the tools of construction mandated by *Jamestown*, *Fonvielle*, *Great American*, and *Davis*. No matter how sharply the majority disagrees with prior decisions extending the meaning of "resident" to afford insurance coverage to extended family members of a policyholder, absent direction by our Supreme Court, we are bound by them.

The majority also discounts this Court's prior decisions as "gerrymandered and stretched interpretations" of the term "resident" in insurance policies. It then summarily declares that the "plain language of Mary's policy restricts and limits coverage" because it "unambiguously" defines Mary's family members as "resident[s] of [Mary's] household." This is the very same language that a half century of precedent has held to be ambiguous, requiring a broad interpretation of this policy language. *Jamestown*, 266 N.C. at 437-38, 146 S.E.2d at 416; *Fonvielle*, 36 N.C. App. at 497, 244 S.E.2d at 738; *Great American*, 78 N.C. App. at 656, 338 S.E.2d at 147; *Davis*, 76 N.C. App. at 104-05, 331 S.E.2d at 745-46. Indeed, in this case, a representative for Farm Bureau testified at a deposition that he was not sure when Farm Bureau's auto policy was last updated or changed.

The majority's assertion that "the plain meaning of the term 'household' is limited to a single structure" conflicts with the rule that a family member can be a resident of multiple households, which, by extension, logically means that one need not reside in the same dwelling as the

insured to be covered. *See Davis*, 76 N.C. App. at 105, 331 S.E.2d at 746 ("[M]embers of a family need not actually reside under a common roof to be deemed part of the same household."); *N.C. Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 565, 752 S.E.2d 775, 780 (2014) (same (quoting *Davis*, 76 N.C. App. at 105, 331 S.E.2d at 746)); *N.C. Farm Bureau Mut. Ins. Co. v. Lowe*, 180 N.C. App. 215, 219, 636 S.E.2d 207, 209 (2006) ("[I]t is generally recognized that a person may be a resident of more than one household for insurance purposes." (quoting *Davis*, 76 N.C. App. at 106, 331 S.E.2d at 746)).[1] In lieu of this precedent, the majority relies on multiple dictionaries to narrowly define the term "household" as persons who live in a single house or dwelling, and then declares that Jean and Marina cannot be considered members of Mary's household because they never lived in her house.

The majority's analysis exceeds the authority of this Court. "This Court is an error correcting court, not a law-making court." *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012). Only our Supreme Court can change the law in this manner.

The majority also reasons that this case is distinguishable from this Court's decision in *North Carolina Farm Bureau Mutual Insurance Co. v. Paschal*, 231 N.C. App. 558, 752 S.E.2d 775 (2014), and therefore requires a different result. In *Paschal*, sixteen year old Harley was injured while riding in a car driven by her cousin. *Id.* at 559, 752 S.E.2d at 776. She claimed coverage under an auto insurance policy held by her grandfather, who owned a family farm where Harley resided, and whose automobile insurance provided coverage for "resident[s] of [the grandfather's] household." *Id.* at 564, 752 S.E.2d at 779.

Harley's grandfather, like Mary, "owned multiple houses [on] several hundred acres of farmland," which he called a "family farm." *Id.* at 560, 752 S.E.2d at 777. He lived in one house while Harley and her father lived in another house on the farm. *Id.* Multiple family members lived and worked on the farm; all the bills, maintenance costs, and appliance

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1. *Lowe* reversed the trial court's order granting summary judgment in favor of a tortfeasor who claimed liability coverage under her parents' homeowner's policy, even though she had moved in with her boyfriend. *Id.* at 220, 636 S.E.2d at 210. This Court, reviewing the evidence in the light most favorable to the non-moving party (the insurance company), held that a genuine issue of material fact existed regarding whether the tortfeasor was a resident of her parents' household and remanded the matter for trial. *Id.* at 219-20, 636 S.E.2d at 209-10. In this case, the parties filed cross motions for summary judgment and neither contends that a genuine issue of disputed fact must be resolved by a jury.

costs were paid for by her grandfather; and Harley's grandfather did not charge them rent. *Id.* "When Harley could not stay with [her father] due to [his] legal problems, she stayed with [her grandfather], at" two of her grandfather's houses. *Id.* For a period of about one year a few years before the accident, when Harley's father was in prison, her grandfather cared for her and temporarily became her legal guardian. *Id.* at 568, 752 S.E.2d at 781-82. We held that the evidence showed Harley's grandfather "was the most constant caregiver" and "a regular participant in Harley's life." *Id.* at 568, 752 S.E.2d at 781. Coupled with the fact that both Harley and her grandfather considered themselves part of the same household, we concluded that Harley was a "family member" as defined by her grandfather's insurance policy. *Id.* at 568, 752 S.E.2d at 781-82.

The majority asserts that "neither *Paschal* nor any other North Carolina case has extended coverage" to a family member who never resided in the policyholder's house. It may be true that no reported case has extended coverage in this manner, but this Court's unpublished opinion in *Integon National Insurance Co. v. Mooring*, No. COA14–1303, 2015 WL 2062042 (N.C. Ct. App. May 5, 2015), refutes the majority's assertion. We held in *Integon* that "*[e]ven though [the appellee] lived under a separate roof owned by [the insured]*," she was dependent enough on the insured to be a resident of the insured's household. *Id.* at *5; *see also id.* at *4 ("[M]embers of a family need not actually reside under a common roof to be deemed part of the same household." (quoting *Paschal*, 231 N.C. App. at 567, 752 S.E.2d at 780)). It is also worth noting that, at the time of the accident in *Paschal*, Harley's grandfather was not her legal guardian nor was Harley residing in any of the houses her grandfather lived in. *Paschal*, 231 N.C. App. at 568, 752 S.E.2d at 781-82.

The majority reasons that *Paschal* was "grounded largely in the specific facts" of the insured grandfather's "particular and pervasive involvement in the girl's life in the absence of her father," and was not "solely" based on the "physical facts of her residence." Of course, it is unlikely that any fact specific analysis relies on a single factor. The "rest of the story" in *Paschal* that the majority omits to mention reflects similarities to this case:

> Thurman owned the Branson house where Harley was living at the time of the accident. Thurman did not charge any rent for Reggie, Harley, or her brothers to live there. Thurman had a key to the Branson house, and freely entered it whenever he desired. Thurman paid the utility bills for the Branson house, and bought appliances for the house as needed. The Branson house and the Brush

> Creek house were connected to each other by contiguous land owned by Thurman. Thurman considered these two houses to be part of his farm, which he considered to be a family farm. To this extent, Harley and Thurman could both be considered residents of Thurman's "family farm." Thurman spent much of his time at the Brush Creek house, and had most of his mail, including important documents, delivered to that address.

Paschal, 231 N.C. App. at 568, 752 S.E.2d at 781. This Court's analysis in *Paschal* emphasizes not only the policyholder's role as caregiver for his granddaughter, but also his responsibility for the other house on his farm, where his granddaughter resided.

Jean and Marina lived in one of two houses on the farm, for which Mary charged them no rent. All family members had keys to both houses with unrestricted access, and Jean and Marina had their mail delivered to Mary's house. Mary supported her family members financially, interacted with them almost every day, and considered them a part of her own household.

Martin Farm also only received income during the harvest season and the Martins only worked on Martin Farm during that timeframe without any other means of income, relying on food stamps outside of the working season. Although Mary paid the Martins wages, the Martins' income was conditioned on the profitability of Martin Farm. Mary would only pay them wages if Martin Farm accumulated enough profit and, if Martin Farm's revenue stream fell short, Mary would resort to her personal bank account to pay the necessary expenses.[2] All the while, Mary paid the insurance premiums for both Farm Bureau policies, paid all costs associated with the guest house, and allowed Marina and Jean, and David, to live there rent free.

All of Marina's and Jean's "personal expenses" were paid with funds provided by Mary, whether from her business or personal account. The Martins derived their entire income from Mary and relied on her for shelter and financial support, while Mary relied on them for labor and, regardless of Martin Farm's economic status, perpetually allowed the Martins to reside on Martin Farm at no cost. Adding to these facts, the "evidence discloses that there existed between [Mary] and [Marina

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2. The record shows that Mary tried to bifurcate her business and personal expenses by creating two bank accounts. But, because Martin Farm's income was sporadic and inconsistent, Mary commonly utilized both accounts to pay for various expenditures.

and Jean] a continuing and substantially integrated family relationship." *Davis*, 76 N.C. App. at 106, 331 S.E.2d at 747.

The majority concludes that "neither Jean nor Marina had ever lived with Mary, and no evidence tends to show Mary ever had supplanted" David or Jean as "Marina's 'most constant caregiver,' so as to bring this case under the very narrow purview of *Paschal*." The majority's reasoning seems to contradict its assertion that "[t]his Court in *Paschal* did not establish a new 'most constant caregiver' standard." In any event, as discussed above, *Paschal* is hardly the only precedent requiring a broader interpretation of the term "family member" in the insurance contract at issue here. *See, e.g.*, *Davis*, 76 N.C. App. at 105, 331 S.E.2d at 746.

Finally, the undisputed testimony by Mary and the Martins that they considered themselves residents of the same household is evidence that this Court and our Supreme Court have held is an important factor to consider when determining residency for insurance coverage purposes. *See Fonvielle*, 36 N.C. App. at 498, 244 S.E.2d at 738 ("Intent to remain at a place seems determinative, although not intent to remain permanently."); *see also Great American*, 78 N.C. App. at 656, 338 S.E.2d at 147 ("[T]he intent of that person is material to the question[.]"); *Paschal*, 231 N.C. App. at 565, 752 S.E.2d at 780 ("Not only are relevant facts considered in [determining whether a person is a resident of someone's household], but intent, as well[.]" (citing *Great American*, 78 N.C. App. at 656, 338 S.E.2d at 147)).

For the reasons explained above, and because all parties have stipulated that no material facts are in dispute, I would reverse the trial court's order entering summary judgment in favor of Farm Bureau and remand for the trial court to enter summary judgment in favor of Marina and Jean.

NEWMAN v. STEPP

[267 N.C. App. 232 (2019)]

DELIA NEWMAN, ET UX, PLAINTIFFS
v.
HEATHER STEPP, ET UX, DEFENDANTS

No. COA19-112

Filed 3 September 2019

Emotional Distress—negligent infliction of emotional distress—foreseeability—sufficiency of facts—judgment on the pleadings

In an action against a couple who ran an at-home childcare business, where one of the couple's children fatally shot plaintiffs' two-year-old daughter with a loaded gun that lay on the kitchen table while the children were left unsupervised, the trial court improperly granted judgment on the pleadings in favor of the couple on plaintiffs' negligent infliction of emotional distress (NIED) claim. Although plaintiffs did not witness the shooting, they sufficiently alleged facts—including how they both saw their wounded daughter within minutes of the incident and how plaintiff mother held the dead girl in her arms for as long as hospital personnel would allow—showing the severe emotional distress they suffered as a result was reasonably foreseeable. Additionally, plaintiffs' related claim for loss of consortium was also sufficiently pled and, consequently, remanded to the trial court along with the NIED claim.

Judge ZACHARY concurring with separate opinion.

Judge TYSON dissenting.

Appeal by plaintiffs from order entered 9 January 2019 by Judge Gregory Horne in Henderson County Superior Court. Heard in the Court of Appeals 22 May 2019.

F.B. Jackson & Associates Law Firm, PLLC, by Frank B. Jackson, for plaintiffs-appellants.

Ball Barden & Cury P.A., by Ervin L. Ball, Jr., and J. Boone Tarlton, for defendants-appellees.

BRYANT, Judge.

Where plaintiffs properly alleged severe emotional distress to support foreseeability in their claim of negligent infliction of emotional distress, we reverse the trial court's ruling for judgment on the pleadings in favor of defendants and remand this case for further proceedings.

Plaintiffs Delia Newman and Jeromy Newman (collectively "plaintiffs") appeal from the trial court's judgment on the pleadings in favor of defendants Heather Stepp and James Stepp (collectively "defendants"), whose negligence caused the death of plaintiffs' two-year-old daughter, "Abby." Plaintiffs filed their complaint asserting claims for negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), violation of a safety statute, and loss of consortium. Defendants filed an answer¬¬—denying negligence and wrongdoing—which contained a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure.

According to the complaint, on 26 October 2015, plaintiff Delia Newman (hereinafter "Delia") left Abby in the temporary care of defendants at their residence while she attended class for her Ultrasound Technician degree. Defendants operated an unlicensed childcare facility at their residence and regularly cared for other children, including Abby, during the day. At the time of the incident, about 8:00 a.m. that morning, the kitchen was left unattended with no adult supervision. Abby and defendants' minor children were present and had "unfettered access to [a] loaded shotgun which was lying on the kitchen table." The loaded 12 gauge shotgun was owned by defendants, and defendant Heather Stepp had not completed a firearms safety course. Defendants also had not utilized the safety or trigger guard to prevent discharge.

The shotgun was discharged in Abby's direction by one of defendants' children, who was under the age of five. Abby was struck at close range and the shotgun blast penetrated her chest causing her to bleed profusely. Abby was transported to a nearby hospital, where she was pronounced dead upon arrival due to the chest wound she sustained.

Plaintiff Jeromy Newman (hereinafter "Jeromy") heard about Abby's shooting over a CB radio—her injury was dispatched as a "young female child [who] was critically wounded by the discharge of a shotgun at close range at the babysitter's home and that her condition was extremely critical." Jeromy heard defendants' address over the radio and proceeded to defendants' house. While on the way to their house, Jeromy saw the ambulance that he learned "contain[ed] his daughter who was still alive at the time" and followed it to the hospital. He observed Abby as she was removed from the ambulance. When Jeromy

inquired about Abby's condition, he was told that Abby had died in the ambulance or immediately after arriving at the hospital. Delia arrived at the hospital shortly after the incident due to the close proximity of her school to the hospital. Upon arrival, she was informed of Abby's death. Delia held Abby's lifeless body until she was forced to leave the room.

On 3 December 2018, a hearing was held on defendants' 12(c) motion in Henderson County Superior Court before the Honorable Gregory Horne, Judge presiding. Judge Horne, after reviewing the pleadings and hearing arguments of counsel, dismissed plaintiffs' claims with prejudice.[1] Plaintiffs timely appeal.

On appeal, plaintiffs contend the trial court erred by entering judgment on the pleadings in favor of defendants. Plaintiffs appear to only challenge the trial court's ruling as to the NIED claim; therefore, the remaining claims are not subjects of this appeal.

We consider whether plaintiffs asserted the claim in their complaint with sufficient specificity to withstand judgment on the pleadings, and review "[the] trial court's order granting a motion for judgment on the pleadings *de novo*." *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 241, 742 S.E.2d 803, 807 (2013).

"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." *Id.* (citation omitted). In considering a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *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.* "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.*

In the instant case, plaintiffs alleged severe emotional distress resulting from Abby's tragic death and sought recovery of damages for NIED. The dispositive issue surrounding plaintiffs' claim for NIED is foreseeability.

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1. The trial court's memo refers to cases cited in a trial brief by defendant's counsel, seemingly in regard to the foreseeability issue, as critical to his decision. However, defendant's counsel's trial brief was not made a part of the record.

North Carolina has long recognized claims of NIED arising out of concern for another person. *See Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916) (holding that the plaintiff can bring a cause of action for emotional distress after the death of his wife arising from his concern for another person). To establish a claim for NIED, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as 'mental anguish'), and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). "Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.*

Our Supreme Court has stated:

> In making this foreseeability determination, the factors to be considered include, *but are not limited to*: (1) the plaintiff's proximity to the negligent act causing injury to the other person, (2) the relationship between the plaintiff and the other person, and (3) whether the plaintiff personally observed the negligent act.
>
> However, such factors *are not* mechanistic *requirements* [such that] the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. The presence or absence of such factors simply is not determinative in all cases. Therefore, North Carolina law forbids the mechanical application of any arbitrary factors—such as a requirement that the plaintiff be within a zone of danger created by the defendant or a requirement that the plaintiff personally observe the crucial negligent act—for purposes of determining foreseeability.
>
> Rather, the question of reasonable foreseeability under North Carolina law must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury.

Sorrells v. M.Y.B. Hosp. Ventures of Asheville, 334 N.C. 669, 672–73, 435 S.E.2d 320, 322 (1993) (internal citations and quotation marks omitted). "[A]bsent reasonable foreseeability, the defendant will not be liable for

the plaintiff's severe emotional distress." *Riddle v. Buncombe Cty. Bd. of Educ.*, __ N.C. App. __, __, 805 S.E.2d 757, 760 (2017).

Here, plaintiffs asserted factual allegations in their complaint that set forth a proper claim for NIED showing: 1) defendants engaged in negligent conduct, 2) it was foreseeable that such conduct would cause severe emotional distress to plaintiffs, and 3) their conduct did in fact cause severe emotional distress. The factual allegations are as follows:

> 32. Defendants failed to unload the firearm prior to laying it on the kitchen table, where it was readily available to the minor children that had unfettered access to the entire home.
>
> 33. Defendants failed to "check" the firearm to [ensure] it was unloaded prior to allowing the [p]laintiffs' child inside their home.
>
> 34. Defendants failed to properly educate their young children regarding firearms and the dangers involved with "playing" with said firearm.
>
> 35. Defendants failed to [ensure] that they had the proper training prior to possessing such a firearm.
>
> 36. Defendants failed to properly supervise the minor children that were in their home.
>
> 37. That the actions of the [d]efendants were a direct and proximate cause of the injuries and death of [Abby.]
>
> . . .
>
> 39. It was reasonably foreseeable that the conduct of the [d]efendants, and the wounding and death of [Abby] would cause the [p]laintiffs severe emotional distress, including but not limited to:
>
> a. Both [p]laintiffs have incurred severe emotional distress. The mother [Delia] has incurred such severe emotional distress that she has been under constant psychiatric care and has been placed on numerous strong anti-depressants as well as other medications.
>
> b. The mother has had etched in her memory the sight of her lifeless daughter in her arms at Mission Hospital.

c. The mother has convinced herself that she also is going to die, because God would not allow her to suffer as she has suffered without taking her life also.

d. The mother is still unable to deal with the possessions of her dead daughter but has kept every possession in a safe place.

e. At times[,] the mother has wished death for herself.

f. The mother has not been able to tend to her usual household duties and has stopped her efforts to obtain the degree she had sought[.]

g. There are days the mother has trouble leaving her home.

h. Both [p]laintiffs have lost normal husband and wife companionship and consortium.

i. As a result of all the aforesaid, the mother has been rendered disabled for periods of time since her daughter's death.

Taking these allegations as true, plaintiffs sufficiently stated facts, which set forth their severe emotional distress as a direct, reasonable, and foreseeable result of defendants' negligence, to enable them to proceed with a claim for NIED.

The relevant facts show that plaintiffs arrived at the hospital within minutes of the shooting incident and observed Abby wounded by the shotgun blast—Jeromy, in particular, observed Abby as she arrived at the hospital and was transported from the ambulance to the hospital. Delia arrived immediately thereafter and held her fatally wounded two-year-old in her arms for as long as hospital personnel would allow. Plaintiffs—who, as parents to Abby, experienced the events immediately prior to and following Abby's death in the aftermath of her arrival at the hospital—asserted severe emotional distress from the manner in which they suffered the death of their daughter. The existence of the close parent-child familial relationship, of which defendants were well aware of, supports foreseeability.

"Common sense and precedent tell us that a defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages,

depending upon their relationship and other factors present in the particular case." *Ruark*, 327 N.C. at 300, 395 S.E.2d at 95. Thus, we reject defendants' erroneous contention that plaintiffs cannot support a NIED claim because they were not physically present to observe the actual shooting of Abby, and therefore, their injury was not reasonably foreseeable. *See id.* at 291, 395 S.E.2d at 89 ("[O]ur law includes no arbitrary requirements to be applied mechanically to claims for negligent infliction of emotional distress.").

Further, granting judgment on the pleadings was inappropriate, especially where, as here, plaintiffs allege defendants' negligence was *in fact* the foreseeable and proximate cause of plaintiffs' severe emotional distress. We note that defendants admitted the following, in relevant part, in their answer: 1) they operated an unlicensed child care facility, 2) they had young children in their home, 3) defendant James Stepp owned the shotgun, 4) the loaded shotgun was on the kitchen table, 5) the shotgun was discharged at their residence, 6) Abby was shot and bled from the wound caused by the discharge of the shotgun, and 7) Abby died as a result of the shotgun blast. However, allegations regarding whether defendants' negligence was in fact the foreseeable and proximate cause of plaintiffs' injury are proper questions for the jury to decide. *See id.* at 292, 395 S.E.2d at 90 ("The difficulty of measuring damages to the feelings is very great, but the admeasurement is submitted to the jury in many other instances, . . . and it is better it should be left to them, under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice or wantonness of others, to go without remedy." (citation omitted)).

Therefore, we conclude that plaintiffs sufficiently alleged a claim for NIED as the facts as set forth in the complaint support foreseeability. Additionally, since plaintiffs' claim for loss of consortium was sufficiently pled and derived from the claim for NIED, we recommend that on remand the trial court re-evaluate its ruling on the loss of consortium claim as well. *See Nicholson v. Hugh Chatham Mem'l Hosp., Inc.*, 300 N.C. 295, 304, 266 S.E.2d 818, 823 (1980) ("[A] spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.").

The dissenting opinion erroneously contends a loss of consortium claim is only properly brought with a claim under the wrongful death statute and relies on this Court's ruling in *Keys v. Duke Univ.*, 112 N.C.

App. 518, 435 S.E.2d 820 (1993). In *Keys*, the plaintiff sought to bring an independent claim for loss of consortium and wrongful death. *Id.* This Court emphasized that a loss of consortium claim is derivative in nature and that, where the loss of consortium claim is covered under the wrongful death statute, the plaintiff could not independently bring a separate claim for loss of consortium. Thus, it is incorrect to say that a claim of loss of consortium is *only* properly asserted under a wrongful death statute. As *Nicolson* recognized, an action for loss of consortium based on the negligent act of a third party may be joined in *any* suit by a spouse to recover for personal injuries. *See Nicholson*, 300 N.C. at 304, 266 S.E.2d at 823.

Accordingly, for the foregoing reasons, we reverse the trial court's judgment on the pleadings for defendants and remand this case for further proceedings as to plaintiffs' claim for NIED and loss of consortium.[2]

REVERSED AND REMANDED.

Judge ZACHARY concurs with separate opinion.

Judge TYSON dissents with separate opinion.

ZACHARY, Judge, concurring.

In the instant case, it is clearly alleged that Defendants' negligence proximately caused the shooting death of Plaintiffs' minor daughter, Abby, and that Plaintiffs suffered severe emotional distress as a result. The issue before us is whether it was reasonably foreseeable that Defendants' actions would cause Plaintiffs' severe emotional distress, as they allege in the complaint.

Plaintiffs did not observe, nor were they in close proximity to, their daughter's shooting by another young child at Defendants' residence. This "militates against [Defendants] being able to foresee . . . that [Plaintiffs] would subsequently suffer severe emotional distress" as a result of Defendants' negligence. *Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993).

Nevertheless, as our Supreme Court has consistently reiterated, the *Ruark* factors are neither elements nor "requisites nor exclusive

2. Although dicta, we note for plaintiffs' benefit that the trial court's ruling regarding the IIED claim appears to be a proper ruling, as plaintiffs failed to plead the IIED claim with specificity.

determinants in an assessment of foreseeability[.]" *Id.* at 666, 435 S.E.2d at 327; *accord Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993) ("[S]uch factors *are not* mechanistic *requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress."). To the contrary, the *Ruark* factors are exactly what they claim to be: factors. In setting forth these factors, the *Ruark* Court "focused on *some* facts that could be particularly relevant in any one case in determining the foreseeability of harm to the plaintiff." *Gardner*, 334 N.C. at 666, 435 S.E.2d at 327. But "[t]he presence or absence of such factors simply is not determinative in all cases." *Sorrells*, 334 N.C. at 672, 435 S.E.2d at 322. Under North Carolina law, questions of reasonable foreseeability "must be determined *under all the facts presented*, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Id.* at 673, 435 S.E.2d at 322 (emphasis added) (quoting *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 305, 395 S.E.2d 85, 98, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990)).

Viewing all facts and permissible inferences in the light most favorable to Plaintiffs, as we must do, I believe that the allegations in Plaintiffs' complaint are sufficient to withstand Defendants' motion for judgment on the pleadings. In addition to those allegations set forth in the majority opinion, Plaintiffs' complaint also alleges, *inter alia*:

> 9. At approximately 8:00 a.m. on October 26, 2015, the Mother delivered the temporary care of [Abby] to the Defendants at their residence . . . [in] Hendersonville, North Carolina.
>
> 10. The Defendants were engaged in keeping other people's children during the day at their home . . . for a fee.
>
> 11. Upon information and belief, the Defendants were not licensed in child care services[.]
>
> 12. The Defendants themselves had young children who roamed in the Stepp home . . . .
>
> 13. A loaded 12 guage [sic] shotgun was left on the kitchen table of the Stepp residence . . . .
>
> 14. No safety or trigger guard was engaged on the aforesaid shotgun.
>
> 15. Upon information and belief, said shotgun was owned and possessed by the Defendants on the morning of October 26, 2015.

> 16. The Stepp children had unfettered access to the loaded shotgun which was lying on the kitchen table on the morning of October 26, 2015.
>
> 17. Upon information and belief, the Defendant Heather Stepp had not completed a firearms safety class.
>
> 18. [Abby] had access to the kitchen area of the Stepp home on the morning of October 26, 2015.
>
> . . . .
>
> 21. No adult was present to observe or supervise the children, either the Stepp children or [Abby] on October 26, 2015 at about 9:00 a.m[.] in the room where the shotgun was lying on the kitchen table.
>
> . . . .
>
> 23. Both Defendants knew or should have known that the loaded shotgun was left on the kitchen table but took no action to secure the gun such that it would be unavailable to the children, both their own and [Abby].

In my view, the facts alleged in these paragraphs tend to favor the foreseeability of Plaintiffs' *severe* emotional distress. It is evident that the parties in this case were not strangers, but were instead well acquainted with one another. *Cf. Sorrells*, 334 N.C. at 674, 435 S.E.2d at 323 ("[T]he plaintiffs' alleged *severe* emotional distress arising from their concern for their son was a possibility 'too remote' to be reasonably foreseeable. Here, it does not appear that the defendant had any actual knowledge that the plaintiffs existed."). Moreover, although not licensed in childcare services, Defendants "were engaged in keeping other people's children during the day at their home . . . for a fee."

It is in this context—considering *all* of the facts presented—that we must determine whether it was reasonably foreseeable that (1) Defendants' negligence in leaving a loaded, safety-off shotgun unattended (2) in a location readily accessible to a group of young, unsupervised children (3) would result in Abby's fatal shooting by another young child present at Defendants' home, (4) which would, in turn, cause Plaintiffs to suffer severe emotional distress. *Cf. id.* ("We conclude as a matter of law that the *possibility* (1) the defendant's negligence in serving alcohol to Travis (2) would combine with Travis' driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause Travis' parents (if he had any) not only to become distraught, but also

to suffer 'severe emotional distress' as defined in *Ruark*, simply was a possibility too remote to permit a finding that it was reasonably foreseeable."); *Robblee v. Budd Servs., Inc.*, 136 N.C. App. 793, 797, 525 S.E.2d 847, 850 ("Budd's negligence in failing to retrieve the access card and Shipley's emotional distress are simply too attenuated to support a finding of reasonable foreseeability. There is no evidence that Budd was told, or had any specific notice of the relationship between Shipley and Antilak which would support an inference that Budd could have taken actions to prevent this specific injury to Shipley. The possibility that (1) defendant's negligence in failing to retrieve the temporary access card (2) would combine with Antilak's rage against his former employer (3) to result in a workplace shooting (4) which would cause Shipley to suffer emotional distress, was, like the situation in *Sorrells*, too remote to permit a finding that it was reasonably foreseeable." (citation and quotation marks omitted)), *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000).

Candidly, I am concerned by the need for limits on a defendant's liability under this tort. *See Sorrells*, 334 N.C. at 673, 435 S.E.2d at 322 ("[S]ome may fear that such reliance on reasonable foreseeability, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering . . . ." (citation and quotation marks omitted)). However, "[i]f recovery is limited to instances where it would be generally viewed as appropriate and not excessive, then, by definition, the defendant's liability is commensurate with the damage that the defendant's conduct caused." *Ruark*, 327 N.C. at 306, 395 S.E.2d at 98.

Here, Plaintiffs allege that Defendants acted in a negligent manner, that it was reasonably foreseeable that Defendants' negligent conduct would cause severe emotional distress to Plaintiffs, and that Plaintiffs did, in fact, suffer severe emotional distress as a result. Viewing all facts and permissible inferences in the light most favorable to Plaintiffs, judgment on the pleadings was prematurely granted in favor of Defendants.

Accordingly, I concur.

TYSON, Judge, dissenting.

The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss. While nothing can change these facts nor restore the child plaintiffs have lost, the law affords these parents a claim and remedy of monetary compensation for damages they suffered through a claim for wrongful death. N.C. Gen. Stat. § 28A-18-2

(2017); *see Bailey v. Gitt*, 135 N.C. App. 119, 120, 518 S.E.2d 794, 795 (1999) ("To bring an action under G.S. § 28A-18-2 (the wrongful death statute), a plaintiff must allege a wrongful act, causation, and damages. Negligence is a 'wrongful act' upon which a wrongful death claim may be predicated.").

Plaintiffs' complaint and defendants' answer support the trial court's conclusion and its order is properly affirmed. The trial court properly reviewed the parties' arguments and authorities they cited, reviewed under Rule 12(c) and not Rule 12(b)(6). In the light most favorable, plaintiffs have not alleged and cannot prove it was reasonably foreseeable to defendants that plaintiffs would suffer severe emotional distress based upon defendants' negligence. Plaintiffs' allegations do not and cannot sustain a claim for negligent infliction of emotional distress ("NIED") to survive defendants' motion for judgment on the pleadings.

As tragic and compelling as the facts are before us, the trial court properly granted defendants' motion for judgment on the pleadings. N.C. Gen. Stat. § 1A-1, Rule 12(c). Plaintiffs failed to carry their burden to show any reversible error on appeal. I vote to affirm the trial court's Rule 12(c) dismissal of plaintiffs' claims. I respectfully dissent.

I. Factors of Reasonable Foreseeability

Nearly thirty years ago, the Supreme Court of North Carolina stated in order to establish a claim for negligent infliction of emotional distress, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) *it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress* . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (emphasis supplied) (citations omitted).

"Further, a plaintiff may recover for his or her severe emotional distress arising due to concern for another person, *if* the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.* (emphasis in original) (citations omitted).

This Court recently held, "absent reasonable foreseeability, the defendant will not be liable for the plaintiff's severe emotional distress." *Riddle v. Buncombe Cty. Bd. of Educ.*, ___ NC. App, ___, 805 S.E.2d 757, 760 (2017). Since plaintiffs' alleged emotional distress was caused by concern for the well-being of another, the "reasonable foreseeability" prong typically requires significant allegations, evidence, and analysis. *See id.* at ___, 805 S.E.2d at 760-61.

To properly show and analyze whether a defendant had "reasonable foreseeability", our Supreme Court in *Johnson* set forth and considered three factors including, but not limited to: "the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98.

Our Supreme Court has stated, "such factors are not mechanistic requirements [such that] the absence of which will inevitably defeat a claim for negligent infliction of emotional distress." *Sorrells v. M.Y.B. Hosp. Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 322 (1993). Further, the Court stated, "North Carolina law forbids the mechanical application of any arbitrary factors." *Id.*

Plaintiffs' allegations in the complaint, as fully answered by defendants, and assertions on appeal provide no basis to support any finding of reasonable foreseeability that defendants' actions "would cause the plaintiff[s] severe emotional distress." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97.

Plaintiffs' allegations rely *solely* upon the existence of a parent-child relationship and the aftermath and effects they suffered from the wrongful death of their child. The trial court properly concluded these allegations, taken as true, are insufficient as a matter of law to sustain a claim for NIED.

A. *Proximity and Personal Observation Factors*

Plaintiffs' complaint does not allege and the majority's opinion does not explain how both plaintiffs' absence from being in close "proximity *to the negligent act*" when it occurred or that either "plaintiff *personally observed* the negligent act" can sustain an NIED claim. *Johnson*, 327 N.C. at 305, 395 S.E.2d at 98.

The negligent act at issue occurred prior to the fateful moment: leaving a loaded shotgun on the kitchen table, the failure to keep the shotgun from being available to children, the lack of supervision of the children resulting in unfettered access to the loaded shotgun. Defendants' five-year-old child, who pulled the trigger discharging the weapon, is legally incapable of forming ill intent or culpability for the act. *See* N.C. Gen. Stat. § 7B-1501(7) (2017). Neither plaintiff can show either close proximity to or personal observation of any such negligence, only the wrenching experiences of its tragic aftermath.

Plaintiffs argue that a parent need not see either their child's injury or death in order to suffer severe emotional pain. That argument is correct, as applied to a child's wrongful death, but it cannot solely serve as a basis for *further* liability under a separate and distinct NIED claim, as alleged here. This is the reason our Supreme Court specifically preserved the independent "reasonable foreseeability" allegation and proof factors to assert an NIED claim in *Johnson*. *See id.* at 307, 395 S.E.2d at 99 (Meyer, J., dissenting) (noting that reasonable foreseeability tests for bystander recovery under NIED "are conscientious efforts to avoid what would otherwise become a tort-feasor's unlimited liability to any bystander suffering foreseeable serious emotional distress.").

Plaintiff Jeromy Newman is the father of the deceased child. He alleges he overheard the 911 call while physically at work over a CB radio, which he carried as a volunteer firefighter. Upon hearing the nature of the call, plaintiff left work and headed towards defendants' home.

Nothing in the call specifically named his child nor indicated she had been injured, or that she was the child being transported in the ambulance. He followed the ambulance to the hospital, where he was told the child had died while in the ambulance or immediately upon arrival, but before he saw her. This fact is omitted and misrepresented in the majority's opinion, which intimates the child was alive and receiving emergency services after arrival at the hospital.

At no point in the pleadings does Jeromy assert that he recognized or identified the child as his daughter until *after* she had died. In their brief to this Court, plaintiffs specifically and candidly acknowledge they "were not physically present at the scene of the incident nor did they observe the incident" and they "did not see their child alive after the incident, but instead saw her immediately after her death." The majority's opinion elides this fact, and implies Plaintiff knew the child inside the ambulance was his daughter before he arrived at the hospital. While the distinction of when Jeromy learned the fatally injured child was, in fact, his daughter is deeply relevant to the emotional trauma he suffered in that moment for a wrongful death claim, it is wholly irrelevant to the determination of "reasonable foreseeability" to support a valid NIED claim to survive judgment on the pleadings.

In the similarly tragic case of *Gardner v. Gardner*, our Supreme Court stated: "That plaintiff suffered severe emotional distress upon seeing her son in the emergency room undergoing resuscitative efforts a period of time after the accident, and upon learning subsequently of his death, is stipulated. Nevertheless, absent reasonable foreseeability, this

is not an injury for which defendant is legally accountable." *Gardner v. Gardner*, 334 N.C. 662, 667, 435 S.E.2d 324, 328 (1993). The Supreme Court decided *Gardner* three years after that Court's decision in *Johnson*.

While plaintiffs unquestionably suffered a grievous sense of emotional suffering and loss from the wrongful death of their child, neither of the plaintiffs witnessed the negligent act, were physically present at the scene of the child's injuries, nor did either parent personally observe any suffering by or the death of their child to support a viable claim of NIED. *Id.*

B. *Relationship Factor*

Even though the relationship between a young child and her parents is obvious, the parent-child relationship, standing alone, is not *per se* proof of satisfying the second prong in *Johnson*. *See id.*; *see also Hickman v. McKoin*, 337 N.C. 460, 463-64, 446 S.E.2d 80, 83 (1994). The court in *Gardner* suggested an additional consideration: whether the defendant would have reasonable foreseeability or any reason to know that the plaintiff shared a close or familial relationship with the victim or that the plaintiff was susceptible to severe emotional distress brought about by the defendant's negligent actions. *Gardner*, 334 N.C. at 667-68, 435 S.E.2d at 328. The defendant's knowledge, or lack thereof, of the plaintiff's susceptibility has been applied to the facts in several cases since.

In *Gardner*, a child was riding inside his father's vehicle when the father crashed the vehicle. *Gardner*, 334 N.C. at 663-64, 435 S.E.2d at 326. The child's mother raced to the hospital upon hearing the news of the injury, only to witness a failed attempt to resuscitate the child. *Id.* at 664, 435 S.E. 2d at 326. The mother sued the father for damages resulting from his negligent conduct that caused her emotional distress over the well-being of another. *Id.*

Our Supreme Court held that the mother had failed to meet the first and third factors of the *Johnson* guidelines because, as both plaintiffs admitted here, she did not witness the accident, nor was she in close proximity to it. *Id.* at 667, 435 S.E. 2d at 328. Her emotional distress claim was held to be "too remote from the negligent act itself to hold [the] defendant liable for such consequences." *Id.* at 668, 435 S.E.2d at 328. The Supreme Court reversed this Court's decision and remanded for the trial court to reinstate an order of summary judgment for defendant on plaintiff's claim for NIED. *Id.*

In *Riddle*, the plaintiff alleged defendants' negligent actions leading to the death of a third person legally and foreseeably caused his severe

emotional distress, where he was physically present and witnessed the death, and that the defendants' actions had combined such that they were jointly and severally liable under NIED for his injuries. *Riddle v. Buncombe Cty. Bd. of Educ.*, ___ NC. App. ___, ___, 805 S.E.2d 757, 759 (2017). The defendants denied negligence and also filed a motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Id.* The trial court granted the motion to dismiss for failure to state a claim. *Id.* at ___, 805 S.E.2d at 759-60.

On appeal, the plaintiff argued that the trial court erred by granting the motion to dismiss because he had sufficiently alleged NIED arising from concern for both himself and his brain-injured teammate and friend. *Id.* at ___, 805 S.E.2d at 760.

The only part of the plaintiff's claim in *Riddle* arising from concern for himself was his narrowly escaping being hit by a John Deere field vehicle, an allegation of temporary fright. *Id.* at ___, 805 S.E.2d at 761. However, allegations of "temporary fright" are also insufficient to satisfy the element of severe emotional distress. *Id.*; *see also Johnson*, 327 N.C. at 303-04, 395 S.E.2d at 97 (mere temporary fright, disappointment or regret will not suffice to allege that severe emotional distress was the foreseeable and proximate result of such negligence). Temporary fear, such as hearing a call and riding behind an ambulance with an unidentified patient, is insufficient to sustain an NIED claim. *Id.*

Further, the plaintiff in *Riddle* cited no other cases allowing a bystander claim involving death to a third party, in which the relationship between the plaintiff and the person for whom he was afraid was merely a friend and teammate. *Id.* Nothing suggested how close their friendship was; simply being nearby and observing the victim getting killed was not enough. *Id.* at ___, 805 S.E.2d at 762. The Rule 12(b)(6) dismissal was affirmed. *Id.*

In another post-*Johnson* precedent, this Court in *Fields v. Dery* affirmed the trial court's granting defendant's motion to dismiss for failure to state a claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Fields v. Dery*, 131 N.C. App. 525, 509 S.E.2d 790 (1998). The narrative in this case, as in the present case, also asserted very compelling and egregious facts. The plaintiff filed suit for NIED, alleging "plaintiff was driving behind her mother's car, she witnessed the collision, and she was first person [sic] to reach her mother's side." *Id.* at 527, 509 S.E.2d at 791 (1998).

This Court concluded plaintiff had failed to allege or show reasonable foreseeability because the complaint contained "no 'allegation[s]

nor forecast of evidence' that defendant had knowledge of plaintiff's relationship to the decedent, nor that defendant knew plaintiff was subject to suffering severe emotional distress as a result of defendant's conduct." *Id.* at 529, 509 S.E.2d at 792. This Court relied upon our Supreme Court's holding in *Andersen v. Baccus*, 335 N.C. 526, 439 S.E.2d 136 (1994). *Id.*; *see also Butz v. Holder*, 113 N.C. App. 156, 159, 437 S.E.2d 672, 674 (1993) (no allegation nor forecast of evidence that defendant knew plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence).

In *Andersen*, another case with horrific facts, the plaintiff's complaint alleged claims for wrongful death, NIED, and punitive damages after his near-term, pregnant wife was involved in a severe automobile accident. *Andersen*, 335 N.C. at 527-28, 439 S.E.2d at 137. The plaintiff did not witness the accident but arrived upon the accident scene prior to his wife's removal and rescue from the vehicle's wreckage and her subsequent transport to the local hospital. *Andersen*, 335 N.C. at 527, 439 S.E.2d at 137. The next day, the plaintiff's wife gave birth to a stillborn baby and later died herself from injuries she had sustained in the accident. *Id.*

Despite the plaintiff's extreme suffering and distress dealing with the after-effect of both his wife's and child's wrongful deaths, the court granted defendant's motion for summary judgment on NIED, and held that plaintiff's severe emotional distress was not reasonably foreseeable. *Id.* at 533, 439 S.E.2d at 140. The court reasoned:

> Both *Gardner* and *Sorrells* teach that the family relationship between plaintiff and the injured party for whom plaintiff is concerned is insufficient, standing alone, to establish the element of foreseeability. In this case as in *Sorrells* the possibility that the decedent might have a parent or spouse who might live close enough to be brought to the scene of the accident and might be susceptible to suffering a severe emotional or mental disorder as the result of [defendant's] alleged negligent act is entirely too speculative to be reasonably foreseeable.

Id.

The majority's and the concurring opinion makes no effort to analyze, distinguish, or reconcile these post-*Johnson* precedents with their decision to reverse. The reason for their failure to do so is that they cannot.

C. *Implementation of the Factors*

Before adoption of the three "reasonable foreseeability" considerations of proximity, personal observation of the event, and relationship to the injured party provided in *Johnson*, under prior law a plaintiff was required to prove: (1) the defendant's negligence caused emotional distress by physical impact or injury; or (2) the defendant's negligence caused extreme emotional distress followed by physical manifestations. Donna L. Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. 247, 248 (1992); *see*, *e.g.*, *King v. Higgins*, 272 N.C. 267, 158 S.E.2d 67 (1967) (permitting recovery for emotional distress accompanying plaintiff's physical injuries in an auto collision); *Britt v. Carolina N. R.R.*, 148 N.C. 37, 61 S.E. 601 (1908) (holding mental suffering to be a proper element of damages where train severed plaintiff's leg); *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 42 S.E. 983 (1902) (allowing recovery for emotional distress caused by blasting damage to plaintiff's property followed by physical manifestations including sleeplessness and loss of attention).

Additionally under prior law, in order for a "bystander" plaintiff to recover in a claim for NIED for injuries or death to a third party, the plaintiff had to show: (1) he was within the "zone of danger"; and, (2) "suffered a subsequent manifestation of the emotional distress." Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. at 248.

Over time, several other states began to abandon the "zone of danger" and "impact" requirements, instead adopting a "foreseeable plaintiff" test or adopting a version of California's broad, factorial "*Dillon* test." *Johnson*, 327 N.C. at 289, 395 S.E.2d at 89. In *Johnson*, our Supreme Court concluded over sharp dissents; that a plaintiff need not allege or prove physical impact, injury, or manifestation of emotional distress in order to establish severe emotional distress as a foreseeable and proximate result of the defendant's negligence to recover on a claim for NIED. *Id.* at 304, 395 S.E.2d at 97.

Instead, the Supreme Court adopted the factors of proximity, personal observation of the event, and relationship to the injured party to analyze questions of foreseeability "under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Id.* at 305, 395 S.E.2d at 98.

As the majority's opinion notes, the above "guidelines" in *Johnson* are factors to consider and the "law includes no arbitrary requirements

to be applied mechanically." *Id.* at 291, 395 S.E.2d at 89. Even so, and as shown above, North Carolina trial courts, this Court, and our Supreme Court have consistently applied these factors to NIED claims and decisions since *Johnson*. *See id.* Given the horrific facts before us, the majority's opinion does not and cannot reconcile these precedents applying *Johnson* with its holding here. The majority's opinion also does not acknowledge the challenge and consequences addressed in *Johnson* of imposing unlimited liability for unforeseen acts on unaware and attenuated defendants.

The Court in *Johnson* "noted that, '[a]s the courts have faced new and more compelling fact patterns, the tests have progressed in a linear fashion towards allowing greater degrees of recovery." *Id.* at 290, 395 S.E.2d at 89 (citation omitted). California itself "has found it necessary to strictly construe the *Dillon* requirements and has in fact begun a retreat from the broad rule set out in *Dillon*." *Id.* at 308-09, 395 S.E.2d at 100 (Meyer, J., dissenting) (citing *Thing v. La Chusa*, 771 P.2d 814 (1989) for the "difficulties encountered after *Dillon*" and "establishing strict requirements of physical presence, contemporaneous awareness that the event is causing injury, and close consanguine or marital relationship to the primary victim.").

The majority's opinion fails to acknowledge that other jurisdictions have found the consideration and application of these *Dillon/Johnson* factors to be ineffective in providing or reserving any real limits on foreseeability and liability.

The concurring opinion expressly admits, "[c]andidly, I am concerned by the need for limits on a defendant's liability under this tort. *See Sorrells*, 334 N.C. at 673, 435 S.E.2d at 322 ("[S]ome may fear that such reliance on reasonable foreseeability, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering[.]" (citation and quotation marks omitted))." (Zachary J., concurring).

By disregarding or treating the three thresholds narrowly, rather than as factors of foreseeability, a plaintiff is allowed multiple "bites at the apple" to multiple unrelated acts and defendants to show that the plaintiff's emotional distress was "reasonably foreseeable" from the defendant's attenuated negligent act, without being physically present when the negligence occurred, without showing the relationship of the parties, and without witnessing the injury or death that results.

Without requiring plaintiffs to allege and satisfy the three factors of reasonable foreseeability, the majority's opinion broadens the scope

and class of defendants for liability and, as was warned in *Johnson*, has "reopened the Pandora's box of unlimited liability problems that one hundred years of case law had successfully closed." Shumate, *Tort Law: The Negligent Infliction of Emotional Distress - Reopening Pandora's Box* - Johnson v. Ruark Obstetrics, 14 Campbell L. Rev. at 260.

Also, the majority's reasoning disregards the teaching of one of the most quoted and basic tort cases addressing foreseeability that every law student learns. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928). (The question before the court was whether defendant could be held liable for negligence for actions that cannot be reasonably foreseen? No. The court held that under the foreseeability test, it was not reasonable to hold that the railroad's alleged negligence was the cause of the passenger's injuries. It concluded that a duty of care must be ascertained from the risk that can be reasonably foreseen. Long Island Railroad Company could not have reasonably foreseen that the package contained explosives and posed a threat to anyone. It was the explosion that was the proximate cause of the injury, and the railroad could not have reasonably expected such a disaster.) The order appealed from is properly affirmed.

II. Loss of Consortium

The majority's opinion also erroneously directs the trial court to "re-evaluate its ruling on the loss of consortium claim." The concurring opinion does not address this issue at all. This purported "loss of consortium claim" is not even before us on appeal.

When a claim for loss of consortium is asserted as damages resulting from a death, it is properly brought only as an ancillary claim under the wrongful death statute. *Keys v. Duke University*, 112 N.C. App. 518, 520, 435 S.E.2d 820, 821 (1993). The plaintiff in *Keys* brought both a wrongful death claim and a loss of consortium claim following the death of her husband. *Id.* at 519, 435 S.E.2d at 821. The plaintiff appealed the dismissal of her loss of consortium claim. *Id.*

This Court concluded "that any common law claim which is now encompassed by the wrongful death statute must be asserted under that statute . . . loss of consortium is a common law claim." *Id.* at 520, 435 S.E.2d at 821 (citations and internal quotation marks omitted).

This Court further concluded that

> by the plain language of the wrongful death statute, and in light of the statement made by our Supreme Court in *Nicholson*, *supra*, the North Carolina wrongful death

> statute encompasses a claim for loss of consortium, and we hold, therefore, that plaintiff's claim in the present action should have been brought under that statute.

Id. at 522, 435 S.E.2d at 822.

Since plaintiffs' action for wrongful death is not before us on appeal, this Court cannot consider a stand-alone claim for loss of consortium as a result of a wrongful death. *Id.*

Our Supreme Court has also expressly limited claims and recovery for damages for loss of consortium to injuries to married individuals:

> If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured. *Strangers to the marriage partnership cannot maintain such an action*, and there is no need to worry about extension of proximate causation to parties far removed from the injury.

Nicholson v. Hugh Chatham Mem'l Hosp., Inc., 300 N.C. 295, 303, 266 S.E.2d 818, 822-23 (1980) (emphasis supplied).

This holding was reaffirmed by our Supreme Court nine years later, when a party sought to expand the claim for loss of consortium to the parent-child relationship: "a child's claim for loss of parental consortium against one who is alleged to have negligently injured the parent ought not to be recognized." *Vaughn v. Clarkson*, 324 N.C. 108, 111, 376 S.E.2d 236, 238 (1989).

In the same analysis, a parent's claim for loss of consortium between married partners due to the wrongful death or loss of a child is not recognized under our precedents or statutes. *See id.*; *see also Edwards v. Edwards*, 43 N.C. App. 296, 302, 259 S.E.2d 11, 15 (1979) ("the relation of parent and child supports no legal right similar to that of consortium"), *Laughter v. Aventis Pasteur, Inc.*, 291 F. Supp. 2d 406, 413 (M.D.N.C. 2003) (interpreting North Carolina law as not recognizing purported claims of loss of consortium based on the death of children).

III. Conclusion

Without proof of the three factors of reasonable foreseeability set out in *Johnson* and applied in all cases since to support an independent tort, considering the horrific facts in this case, we are left with a claim

solely based upon the undeniable aftermath and consequences of defendants' alleged negligence in the wrongful death of the plaintiffs' child.

These consequences and sufferings are the same any surviving parent must bear as the after-the-fact loss and reality arising from the tortious conduct of wrongful death, but not as a separate independent tort for NIED without allegations and a showing of the three required foreseeability factors in *Johnson*. *See id.*

Plaintiffs specifically and candidly acknowledge they "were not physically present at the scene of the incident nor did they observe the incident" and they "did not see their child alive after the incident, but instead saw her immediately after her death." Even considering the allegations and showing of shock, untimely death, and loss suffered to these facts, as well as those similar facts and consequences present in *Gardner*, *Sorrells*, *Riddle*, *Fields*, and *Andersen*, plaintiffs failed to allege or show any facts to support *Johnson*'s first or third foreseeability prongs, or to allege more than a parent-child relationship under its second prong, to survive defendant's Rule 12(c) motion for dismissal.

Reviewed in the light most favorable to them, plaintiffs' allegations and defendants' answer, arguments, and all authorities show the parents' loss and anguish suffered in the aftermath and struggles to survive the consequences all result from their child's wrongful death, and not from a separate tort of NIED.

I close with where I started: The shock and anguish suffered by plaintiffs upon learning of the wholly unexpected death of their young daughter is unfathomable to anyone not experiencing a similar loss. Unchallenged precedents and statutes compel me to vote to affirm the trial court's Rule 12(c) order dismissing the NIED claim. I respectfully dissent.

PATTON v. VOGEL

[267 N.C. App. 254 (2019)]

DAVID PATTON, PLAINTIFF
v.
BOEBORA ANNE VOGEL, PATSY JONES PATTON, DEFENDANTS

No. COA19-62

Filed 3 September 2019

1. Process and Service—sufficiency of service of process—evidence of defendant's residence—lack of personal jurisdiction

In an action arising from a motor vehicle accident, the trial court properly granted defendant's motion to dismiss plaintiff's complaint based on lack of personal jurisdiction due to insufficiency of service of process. Plaintiff failed to present any evidence tending to show that defendant did not reside at the address listed on the accident report, and plaintiff's only information connecting defendant to the address at which she was purportedly served came from plaintiff's private investigator, who did not attend the hearing or file an affidavit. The Court of Appeals also rejected plaintiff's arguments that there was a presumption of effective service (plaintiff's only evidence was a FedEx receipt with the signature "R. Price," which was not defendant's name) and that Civil Procedure Rule 4(j2)(2) (which, among other things, applies only in default judgments) entitled plaintiff to another sixty days to properly serve defendant.

2. Process and Service—sufficiency of service of process—motion for continuance—plaintiff's notice of insufficiency of service—trial court's discretion

The trial court did not abuse its discretion by denying plaintiff's motion for a continuance to allow additional time to conduct discovery where plaintiff became aware of the insufficiency of service of process on defendant when defendant filed her motion to dismiss, which gave plaintiff time to address the deficiency before expiration of the alias and pluries summons and before the hearing on defendant's motion to dismiss.

Appeal by plaintiff from order entered 11 October 2018 by Judge Anderson Cromer in Guilford County Superior Court. Heard in the Court of Appeals 8 August 2019.

Schwaba Law Firm, PLLC, by Andrew J. Schwaba and Zachary D. Walton, for plaintiff-appellant.

Hoffman Koenig Hering PLLC, by G. Clark Hering, IV and Daniel W. Koenig, for defendant-appellee Vogel.

TYSON, Judge.

David Patton ("Plaintiff") appeals from an order granting Boebora (Barbara) Anne Vogel's ("Defendant") motion to dismiss. We affirm the trial court's order.

I. Background

This action arose from a motor vehicle accident, which occurred on 10 May 2015 in Greensboro, North Carolina. Plaintiff was a passenger inside of a vehicle being driven by his wife. Plaintiff's wife stopped when the vehicle in front made a right turn. Plaintiff and his wife's vehicle was struck from behind by Defendant's vehicle.

Plaintiff filed his complaint on 19 January 2018 and amended the complaint on 5 February 2018. Plaintiff deposited a file-stamped copy of the amended complaint and summons with FedEx Corporation ("FedEx") and signed a request for a return receipt on 15 February 2018. Plaintiff addressed the complaint to 3531 Cherry Lane in Greensboro, North Carolina, the address Defendant had listed on the accident report. The package was returned to Plaintiff by FedEx, which indicated 3531 Cherry Lane was vacant.

Plaintiff retained a private investigator to determine Defendant's current address. The private investigator responded that Defendant resided at 3896 North Elm Street in Greensboro, North Carolina. Plaintiff deposited a file-stamped copy of the complaint and summons with FedEx with a request for a return receipt on 13 March 2018. Plaintiff received a signed receipt of delivery on 15 March 2018, signed by "R. Price."

Plaintiff filed an affidavit of service, alleging to have served Defendant on 14 March 2018 at 3896 North Elm Street in Greensboro, North Carolina. Plaintiff obtained an alias and pluries summons on 26 March 2018.

Defendant preserved her challenges and answered Plaintiff's complaint on 17 May 2018. She alleged Plaintiff lacked jurisdiction to bring the claim due to insufficient process and service of process. Defendant requested the complaint be "dismissed pursuant to Rule 12(b)(2)(4)(5)." Defendant filed a separate motion to dismiss on 28 August 2018, based upon the grounds contained in her answer.

Defendant included an affidavit with her motion to dismiss. She averred she lived at 3531 Cherry Lane in Greensboro, North Carolina on and after the date of the accident, had neither lived nor worked at 3896 North Elm Street in Greensboro, North Carolina, had not

authorized "R. Price" or anyone else to accept legal papers for her, and had never been served with a copy of the summons, complaint, or amended complaint.

Plaintiff filed a brief in response to Defendant's motion to dismiss and requested the trial court to deny Defendant's motion. In the alternative, Plaintiff requested the court to continue the hearing on Defendant's motion for Plaintiff to be allowed additional time for discovery. Following a hearing on Defendant's motion to dismiss, the trial court denied Plaintiff's request for a continuance and entered an order granting Defendant's motion to dismiss on 10 October 2018. Plaintiff timely appealed.

II. Jurisdiction

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

III. Issues

Plaintiff argues the trial court: (1) erred by granting Defendant's motion to dismiss for lack of jurisdiction; and, (2) abused its discretion by denying Plaintiff's motion to continue for additional time for discovery.

IV. Standards of Review

This Court reviews "questions of law implicated by . . . a motion to dismiss for insufficiency of service of process" *de novo*. *New Hanover Cty. Child Support Enf't ex rel Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012). "The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Edmundson v. Lawrence*, 187 N.C. App. 799, 801, 653 S.E.2d 922, 924 (2007) (citation and internal quotation marks omitted).

V. Analysis

A. Motion to Dismiss

1. Personal Jurisdiction

[1] Plaintiff asserts the trial court erred by granting Defendant's motion to dismiss for lack of personal jurisdiction. This Court has previously held "[w]here there is no valid service of process, the court lacks jurisdiction over a defendant, and a motion to dismiss pursuant to Rule 12(b)

should be granted." *Davis v. Urquiza*, 233 N.C. App. 462, 463-64, 757 S.E.2d 327, 329 (2014) (citation omitted). "On a motion to dismiss for insufficiency of process where the trial court enters an order without making findings of fact, our review is limited to determining whether, as a matter of law, the manner of service of process was correct." *Thomas & Howard Co. v. Trimark Catastrophe Servs.*, 151 N.C. App. 88, 90, 564 S.E.2d 569, 571 (2002) (alteration and citations omitted).

For the court to acquire personal jurisdiction over a party, the manner of service must accord with our statutes and Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4 (2017). One method to achieve proper service of process is "[b]y depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(d).

Proper service may also be achieved "[b]y delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a).

Plaintiff asserts the documents were properly delivered to the North Elm Street address after he was unable to serve Defendant at her provided address: 3531 Cherry Lane, Greensboro, North Carolina. Plaintiff's only information connecting Defendant to the North Elm Street address came from his own private investigator, who did not attend the hearing or file an affidavit.

Aside from the information provided by the private investigator on the North Elm Street address, every other source of information, including the accident report, stated Defendant's address was 3531 Cherry Lane, Greensboro, North Carolina. Defendant's affidavit asserts her only residence was located at 3531 Cherry Lane, she had no connection to the North Elm Street address, had no knowledge of "R. Price," and had not authorized "R. Price" to sign for her or to act as her agent.

The relevant North Carolina Rules of Civil Procedure require that the summons and complaint be served at Defendant's "dwelling house or usual place of abode." *See* N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(a). No evidence presented to the trial court tends to show 3896 North Elm Street was ever Defendant's "dwelling house or usual place of abode." *Id.* The purported service at the North Elm Street address was not in

compliance with the statutes. *Id.* The court never acquired jurisdiction over this claim. Plaintiff's argument on this ground is overruled.

2. Presumption of Effective Service of Process

Plaintiff asserts Defendant failed to meet her burden to overcome the presumption of effective service of process. We disagree.

Plaintiff argues Defendant's single affidavit averring she did not reside at the North Elm Street address does not overcome the presumption that the North Elm Street address was Defendant's dwelling. A party may assert the presumption of effective service. "A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 491, 586 S.E.2d 791, 796 (2003) (citations omitted).

The trial court must consider the evidence and conclude whether or not the service was valid. *See J&M Aircraft Mobile T-Hangar, Inc. v. Johnston Cty. Airport Auth.*, 166 N.C. App. 534, 546, 603 S.E.2d 348, 355 (2004). Plaintiff produced no evidence other than the "R. Price" receipt from FedEx to support the presumption of effective service. Plaintiff's argument on this issue is overruled.

3. Additional Time to Complete Service

The alias and pluries summons obtained by Plaintiff on 26 March 2018 expired after 90 days without Plaintiff obtaining a further endorsement. N.C. Gen. Stat. § 1A-1, Rule 4(d)(2). Plaintiff asserts it was not necessary to renew the summons. Rule 4(j2)(2) provides that if a party's attempted service is deemed invalid, the serving party must be given an additional sixty days to complete service before a claim may be dismissed as a result of the invalid service. N.C. Gen. Stat. § 1A-1 Rule 4(j2)(2).

Rule 4(j2)(2) does not apply to the facts in this case. "Rule 4(j2)(2) . . . is only applicable in default judgments." *Hamilton v. Johnson*, 228 N.C. App. 372, 378, 747 S.E.2d 158, 163 (2013). This case does not involve a default judgment. Instead, it comes before us upon dismissal, after Defendant had challenged the service of the summons. *See* N.C. Gen. Stat. § 1-75.10(a) (2017).

Also, Rule 4(j2)(2) only applies to situations where a person who was unauthorized to sign the delivery receipt signed while present "*in the addressee's dwelling house or usual place of abode.*" N.C. Gen. Stat. 1A-1, Rule 4(j2)(2) (emphasis supplied). Defendant avers by affidavit she never resided at the North Elm Street address, did not know "R. Price,"

or authorize him or her to act as an agent or to receive and sign for the document in question for her.

Plaintiff failed to meet the conditions set out in Rule 4(j2)(2). *See id.* This rule is not pertinent to the facts and does not apply to this order. Plaintiff is not entitled to another sixty days to properly serve Defendant. Plaintiff's argument is dismissed.

B. Motion for Additional Time to Conduct Discovery

[2] Plaintiff asserts the trial court abused its discretion by refusing to grant Plaintiff's motion for continuance to allow additional time to conduct discovery. "Motions to continue pursuant to Rules 56(f) and 40(b) of our Rules of Civil Procedure are granted in the trial court's discretion." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 612 (1998) (citations omitted).

Over thirty-five years ago, this Court held ordinarily, "[t]he granting of a motion for a continuance is within the trial court's discretion and its exercise will not be reviewed absent a manifest abuse of discretion." *Gillis v. Whitley's Disc. Auto Sales, Inc.*, 70 N.C. App. 270, 273, 319 S.E.2d 661, 664 (1984) (citation omitted). As noted earlier, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Edmundson*, 187 N.C. App. at 801, 653 S.E.2d at 924.

Plaintiff argues the trial court abused its discretion by refusing to grant Plaintiff's motion for additional time to conduct discovery and the court ignored facts set forth in Kayla Carmenia's affidavit. Ms. Carmenia is employed as a paralegal in Plaintiff's attorney's office. Her affidavit avers she attempted to serve the summons and complaint upon Defendant at 3531 Cherry Lane, Greensboro, North Carolina twice, and FedEx returned the process and informed her both times that address was vacant. Ms. Carmenia further avers, per the recommendation of a private investigator hired by Plaintiff, she sent the summons and complaint to a senior living facility located at the North Elm Street address where the documents were delivered and signed for by "R. Price."

The trial court heard and rejected Plaintiff's arguments. During the hearing, the trial court noted that Defendant's affidavit averred "she's never lived anywhere but [3531 Cherry Lane]. It's on the accident report. Everything is consistent except for your investigator, who is not here."

Plaintiff was on notice of the lack of service issue since 14 May 2018, when Defendant first presented a motion to dismiss, asserting the court lacked jurisdiction under Rules 12(b)(2), (4) and (5). *See* N.C. Gen. § 1A-1,

Rule 12(b) (2017). Plaintiff had time to address the matter prior to the expiration of the alias and pluries summons and before the hearing on 19 September 2018. Plaintiff has failed to show trial court's discretionary ruling was "manifestly unsupported by reason." *Edmundson*, 187 N.C. App. at 801, 653 S.E.2d at 924. Plaintiff's argument is overruled.

VI. Conclusion

The trial court correctly granted Defendant's motion to dismiss. Defendant has failed to show the trial court abused its discretion to deny Plaintiff's motion to continue. We affirm the trial court's order. *It is so ordered.*

AFFIRMED.

Judges INMAN and HAMPSON concur.

TODD EDWARD ROTRUCK, Plaintiff
v.
GUILFORD COUNTY BOARD OF ELECTIONS and JANELLE ROBINSON, Defendants

No. COA19-303

Filed 3 September 2019

1. Administrative Law—voter registration challenge—residency—burden of proof—not misallocated

Where plaintiff owned property in Greensboro and Summerfield, the trial court properly affirmed a county board of elections' decision sustaining a challenge to plaintiff's voter registration in Summerfield, since plaintiff did not meet the definition of a Summerfield "resident" within the meaning of N.C.G.S. § 163A-918. The trial court properly allocated the burden of proof when reviewing the board's order where, in applying the whole-record test to the factual issues, the court upheld the board's findings that defendant challenger had substantiated her allegation by affirmative proof and that plaintiff had failed to rebut this proof with his own evidence.

2. Elections—voter registration challenge—authentication of email—by unsworn testimony—testimony regarding party bias—relevancy

Where plaintiff owned property in Greensboro and Summerfield, the trial court properly affirmed a county board of elections'

decision—which sustained a challenge to plaintiff's voter registration in Summerfield—because the board followed proper procedure when admitting evidence on the matter. Even if the board had erred by admitting unsworn testimony to authenticate an email describing where plaintiff had voted in previous years, such error was harmless where other evidence in the record provided the same information. Further, the board properly excluded testimony regarding the defendant's political motivations for challenging plaintiff's voter registration because such testimony was irrelevant to the question at issue: whether plaintiff "resided" in Summerfield.

3. Elections—voter registration challenge—order by board of elections—findings of fact—sufficiency—no prejudice

Where plaintiff owned property in Greensboro and Summerfield, the trial court properly affirmed a county board of elections' decision sustaining a challenge to plaintiff's voter registration in Summerfield, since plaintiff did not meet the definition of a Summerfield "resident" within the meaning of N.C.G.S. § 163A-918. Although the board's finding that the N.C. Real Estate Commission listed Greensboro as plaintiff's residence was unsupported by competent evidence, this error was nonprejudicial where the board's remaining findings of fact were supported by competent and substantial evidence showing plaintiff "resided" in Greensboro for purposes of section 163A-918.

Appeal by Plaintiff from order entered 4 October 2018 by Judge John O. Craig in Guilford County Superior Court. Heard in the Court of Appeals 6 August 2019.

Forrest Firm, P.C., by Patrick S. Lineberry and John D. Burns, and Allman Spry Davis Leggett & Crumpler, P.A., by D. Marsh Prause, for Plaintiff-Appellant.

Office of the Guilford County Attorney, by J. Mark Payne, for Defendant-Appellee Guilford County Board of Elections.

COLLINS, Judge.

Plaintiff Todd Rotruck appeals from the trial court's 4 October 2018 order which affirmed Defendant Guilford County Board of Elections' (the "BOE") 24 April 2018 order sustaining Defendant Janelle Robinson's challenge to Plaintiff's eligibility to vote in Guilford County Precinct NCGR2 in the Town of Summerfield. Plaintiff contends that the trial

court erred by affirming the BOE Order because the trial court misallocated the applicable burden of proof in its review of the BOE Order, and because the BOE deviated from permissible procedure in conducting the BOE Hearing, relied upon unsworn witness testimony and unauthenticated documentary evidence, and made findings of fact that were not supported by competent and substantial evidence in the BOE Order. Finding no merit to Plaintiff's arguments, we affirm.

I. Background

The evidence presented to the BOE tended to show the following: Prior to 2016, Plaintiff lived with his family in a home on Lewiston Road in Greensboro (the "Greensboro property"). In the summer of 2016, Plaintiff purchased a home on Strawberry Road in Summerfield (the "Summerfield property"). Plaintiff and his family moved in to the Summerfield property in September 2016, but did not sell the Greensboro property at that time. Plaintiff and his family continued to use the Greensboro property, e.g., as a home office for Plaintiff and his wife, throughout the period that they lived at the Summerfield property. Plaintiff and his family contemplated moving back to the Greensboro property at an unspecified point in the future because they wanted to renovate the Summerfield property.

Renovations began on the Summerfield property sometime in early 2017, and Plaintiff's family, but not Plaintiff, moved back to the Greensboro property in April 2017. In July 2017, Plaintiff filed paperwork with the North Carolina State Board of Elections declaring his candidacy for the Summerfield Town Council, listing his mailing address as that of the Summerfield property. Around the same time, Plaintiff registered to vote in the precinct covering the Summerfield property, listing the Greensboro property as the site of his prior voter registration. Plaintiff listed the address of the Greensboro property as his mailing address on a number of documents throughout the period he lived at the Summerfield property.

In November 2017, Plaintiff was elected to the Summerfield Town Council. That same month, Plaintiff and his wife sold the Greensboro property, indicating that the Greensboro property was their "primary residence" in the deed. Plaintiff negotiated a temporary lease of the Greensboro property with the new owner that would allow Plaintiff's family to live at the Greensboro property while the renovations of the Summerfield property were completed. Plaintiff moved back to the Greensboro property in December 2017. As of the 17 April 2018 BOE Hearing, Plaintiff and his family had not moved back to the Summerfield property or completed renovations thereupon.

In February 2018, Robinson filed an N.C. Gen. Stat. § 163A-911[1] challenge to Plaintiff's qualification to vote in Guilford County Precinct NCGR2 in the Town of Summerfield, wherein Robinson alleged that Plaintiff was not a resident of the Summerfield property within the meaning of N.C. Gen. Stat. § 163A-842 and therefore that Plaintiff was not qualified to vote in Summerfield. The BOE held a preliminary hearing on Robinson's challenge on 20 February 2018. The BOE subsequently held a full hearing on 17 April 2018 in which the BOE received evidence and testimony from both Robinson and Plaintiff, among others (the "BOE Hearing").

On 24 April 2018, the BOE entered an order sustaining Robinson's challenge (the "BOE Order"). In the BOE Order, the BOE made a number of findings of fact including, *inter alia*, that: (1) Plaintiff was registered to vote in Summerfield, and Plaintiff's voter registration on file indicated that the Summerfield property's address was Plaintiff's "residence address[;]" (2) Robinson had presented a number of documents to support her allegation that Plaintiff resided at the Greensboro property including, *inter alia*, "the address on file with the Real Estate Commission," which used the Greensboro property's address as Plaintiff's "residential address[;]" and (3) Plaintiff "partially moved from the Greensboro [property] to the Summerfield [property] with the intention of moving back to Greensboro while the Summerfield [property] is being renovated." Based upon these findings of fact, the BOE concluded that: (1) "[t]he evidence adduced showed that [Plaintiff] had not established the Summerfield [property] as a residence within the meaning of the statutes as of the time of the hearing" and that "the Summerfield [property] was a temporary residence;" and (2) Robinson "ha[d] shown by affirmative proof that [Plaintiff] is not a resident of precinct NCGR2 or of the Town of Summerfield" within the meaning of N.C. Gen. Stat. § 163A-842 *et seq*.

Plaintiff filed the instant lawsuit on 26 April 2018 in Guilford County Superior Court (the "trial court") petitioning for review of the BOE Order pursuant to N.C. Gen. Stat. § 163A-919(c) and moving for injunctive relief. In his complaint/petition, Plaintiff (1) alleged that the BOE (a) failed to follow proper procedures for quasi-judicial hearings and

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1. While Plaintiff's appeal of the trial court's order was pending before this Court, the General Assembly recodified N.C. Gen. Stat. § 163A to current N.C. Gen. Stat. §§ 120C, 138A, and 163. 2018 N.C. Sess. Laws ch. 146, § 3.1(a). The subsections of former N.C. Gen. Stat. § 163A that control our analysis of this appeal are currently codified at N.C. Gen. Stat. §§ 163-55, -57, -85, -90.1, and -90.2 (formerly N.C. Gen. Stat. §§ 163A-841, -842, -911, -918, and -919, respectively).

(b) failed to make findings of fact sufficient to support its decision, and (2) requested a temporary restraining order and preliminary injunction prohibiting the BOE from changing Plaintiff's voter registration pending the resolution of this litigation.

On 21 May 2018, the BOE answered, moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), and asserted a number of affirmative defenses. On 25 May 2018, Robinson answered, moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (6), and asserted a number of her own affirmative defenses.

The trial court apparently entered an order on 12 June 2018 granting Plaintiff a temporary stay in the case pending resolution of the appeal.[2]

On 4 October 2018, the trial court entered an order affirming the BOE Order (the "Trial Court Order"). In the Trial Court Order, the trial court concluded that, based upon its review of the BOE Order and the whole record before the BOE, the BOE Order contains no errors of law and the BOE Order's findings of fact and conclusions of law were "supported by competent, material and substantial evidence and by affirmative proof." The trial court accordingly affirmed the BOE Order and dissolved the 12 June 2018 order temporarily staying the modification of Plaintiff's voter registration.

Plaintiff timely appealed.

II. Discussion

A. Standard of Review

When conducting a hearing regarding a voter registration challenge brought pursuant to N.C. Gen. Stat. § 163A-911, a county board of elections sits as a quasi-judicial body. *See Knight v. Higgs*, 189 N.C. App. 696, 699, 659 S.E.2d 742, 745 (2008). A decision by a county board of elections on a voter registration challenge is appealable to the superior court of the county in which the offices of that board are located. N.C. Gen. Stat. § 163A-919(c) (2018).

In reviewing a county board of elections' decision on a voter registration challenge, "the Superior Court acts as an appellate court." *Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745. Our Supreme Court has said:

> [T]he task of a court reviewing a decision . . . [of] a quasi-judicial body includes:

2. The order entering the stay is not included in the record on appeal.

> (1) Reviewing the record for errors in law,
>
> (2) [E]nsuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) [E]nsuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) [E]nsuring that decisions [] are supported by competent, material and substantial evidence in the whole record, and
>
> (5) [E]nsuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980); *see Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745 (applying *Coastal Ready-Mix* in reviewing a voter registration challenge heard before a county board of elections). "The superior court should apply *de novo* review to a petitioner's allegation of error implicating one of the first three [*Coastal Ready-Mix* considerations] and whole-record review to the last two." *Jeffries v. Cty. of Harnett*, 817 S.E.2d 36, 43 (N.C. Ct. App. 2018). Whole-record review "necessitates an examination of all competent evidence before the Board and a determination as to whether the Board's decision was based upon substantial evidence." *Farnsworth v. Jones*, 114 N.C. App. 182, 185, 441 S.E.2d 597, 600 (1994). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference. The court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* at 185, 441 S.E.2d at 600 (internal quotation marks, brackets, and citations omitted); *see also Bennett v. Hertford Cty. Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 (1984) ("As distinguished from the any competent evidence test and a *de novo* review, the whole record test gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." (internal quotation marks and citations omitted)).

"Subsequent review by this Court is limited to whether the trial court committed any errors of law." *Knight*, 189 N.C. App. at 699, 659 S.E.2d at 745. Accordingly, "[w]e review a superior court's *certiorari* review of a [] quasi-judicial decision to determine whether the superior court: (1) exercised the appropriate scope of review and, if appropriate, (2) decide

whether the court did so properly." *Jeffries*, 817 S.E.2d at 43 (quotation marks and citation omitted).

B. Analysis

Plaintiff contends that the trial court erred by affirming the BOE Order because (1) the trial court misallocated the applicable burden of proof in its review of the BOE Order, and because the BOE (2) deviated from permissible procedure in conducting the BOE Hearing and relied upon unsworn witness testimony and unauthenticated documentary evidence and (3) made findings of fact that were not supported by competent and substantial evidence in the BOE Order. We address each argument in turn.

1. Scope of review/misallocation of burden of proof

[1] Our first task is to determine whether the trial court exercised the appropriate scope of review. In the Trial Court Order, the trial court concluded, in relevant part, as follows:

> The Court has heard and considered the oral arguments of counsel for all parties, has considered memoranda submitted by all parties through counsel, and has reviewed the file, the record, the exhibits and the transcript of the proceedings before the BOE. The Court has conducted a de novo review and finds that the findings and conclusions of the BOE in [the BOE Order] contain no errors of law. The Court has conducted a whole record review of the evidence, findings and conclusions of the BOE, and applying the whole record test, the Court finds that the findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof.

This language indicates that the trial court reviewed the BOE Order in light of the BOE record and the evidence it contained, and reviewed alleged errors of law in the BOE Order *de novo* and alleged factual errors therein using the whole-record test, as required. *Jeffries*, 817 S.E.2d at 43. We therefore conclude that the trial court exercised the appropriate scope of review.

The Trial Court Order then elaborated upon its application of the whole-record test to the alleged factual issues being reviewed, as follows:

> The evidence tends to show that [Plaintiff] never convincingly severed his residency at the [Greensboro property] to

> live at the [Summerfield property]. [Plaintiff] never showed sufficient proof that he meant to leave the [Greensboro property] and live at the [Summerfield property]. Without sufficient evidence of an abandonment of the [Greensboro property], the BOE properly found that [Plaintiff's] alleged assertion of a temporary departure from [the Summerfield property], and his avowed intention to return there permanently after construction was completed, did not constitute sufficient proof of his position that his return to the [Greensboro property] was merely temporary.

Plaintiff argues that this language demonstrates that, in reviewing the BOE Order, the trial court misallocated the burden of proof, believing it was Plaintiff who was required to prove to the BOE that Summerfield was his residence. We disagree.

N.C. Gen. Stat. § 163A-918(b) reads as follows: "No [voter registration] challenge shall be sustained unless the challenge is substantiated by affirmative proof. In the absence of such proof, the presumption shall be that the voter is properly registered or affiliated." N.C. Gen. Stat. § 163A-918(b) (2018). Since Plaintiff was registered to vote in Summerfield, we agree with Plaintiff that the burden was on Robinson to substantiate her challenge by affirmative proof that Plaintiff was not a resident of Summerfield. *Id.*

However, we read the Trial Court Order as concluding that (1) Robinson had substantiated her allegation that Plaintiff resided at the Greensboro property by affirmative proof[3] and (2) Plaintiff had failed to rebut Robinson's affirmative proof with evidence of his own proving that he resided at the Summerfield property sufficient to defeat Robinson's challenge. The trial court concluded that the "findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof[.]" The language of N.C. Gen. Stat. § 163A-918(b) setting forth that "the presumption shall be that the voter is properly registered or affiliated" specifically applies only "[i]n the absence of [affirmative] proof[.]" N.C. Gen. Stat. § 163A-918(b). Since the trial court concluded that affirmative proof supported the BOE's findings of fact and conclusions of law, including the BOE's ultimate conclusion that Plaintiff was not a Summerfield resident within the meaning of N.C. Gen. Stat. § 163A, the trial court evidently

3. Indeed, the record on appeal—which Plaintiff filed—contains an email from Judge Craig to the parties stating: "I believe that the challenger met her burden of providing affirmative proof to the BOE[.]"

concluded that Robinson had met her burden of proof, and subsection 918(b)'s presumption was not implicated. We accordingly reject Plaintiff's argument that the trial court misallocated the burden of proof.

2. Impermissible procedure/unsworn testimony/ unauthenticated evidence

[2] Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE denied him the opportunity to cross-examine Charlie Collicutt, whose unsworn testimony was used to authenticate Robinson's Exhibit 12 ("Exhibit 12"), which the BOE admitted and relied upon in finding that Plaintiff voted in Greensboro in 2016. We disagree.

Exhibit 12 is an email between Collicutt and Robinson in which Collicutt tells Robinson that Plaintiff voted in Greensboro in 2016 and Summerfield in 2017. Collicutt testified at the BOE Hearing without being placed under oath that the document was authentic. Plaintiff takes issue with Exhibit 12 because it was not authenticated by sworn testimony—let alone testimony subjected to cross-examination—and thus, Plaintiff argues, is not competent evidence to support the BOE's finding of fact that Plaintiff voted in Greensboro in 2016.

Even assuming *arguendo*[4] that Plaintiff was not given the opportunity to cross-examine Collicutt, Plaintiff testified that he was both registered to vote and did in fact vote in Greensboro in 2016, and the record contains Plaintiff's 2017 registration to vote in Summerfield. Exhibit 12 thus merely corroborates other evidence in the record. As such, any error resulting from (1) the BOE's consideration of or reliance upon Exhibit 12 or (2) Collicutt's testimony purporting to authenticate Exhibit 12 was harmless, and cannot be the basis for reversal. *See Andrews v. Haygood*, 188 N.C. App. 244, 249, 655 S.E.2d 440, 443 (2008) ("verdicts and judgments will not be set aside for harmless error, or for mere error and no more. Instead, [an appellant] must show not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right." (internal quotation marks and citations omitted)). Plaintiff's argument is therefore unavailing.

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4. Following Collicutt's unsworn colloquy with the BOE—during which time Robinson was sworn in as a witness—Robinson's counsel asked Robinson two more questions and then rested. BOE Chairman Jim Kimel then asked Plaintiff: "Is there any Cross-Examination? Mr. Rotruck, are there any questions you would like to ask the witness here?" Although Chairman Kimel's questions may be reasonably construed as inviting Plaintiff to cross-examine Robinson, rather than Collicutt, if Plaintiff wanted to ask Collicutt questions about Exhibit 12 or cross-examine him in some way, Plaintiff could have done so at this point (or subsequently by putting Collicutt on as his own witness), but did not.

Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE refused to allow Plaintiff to elicit testimony from witness Elizabeth McClellan regarding Robinson's purported motivations for bringing the voter registration challenge. We reject this argument as well.

At the BOE Hearing, Chairman Kimel told Plaintiff that any testimony McClellan might provide regarding whether "there have been other [Summerfield Town C]ouncil members where the residency has not come into question"—ostensibly in order to establish Robinson's "political motivation" for bringing the voter registration challenge—would be "not relevant" to the question at issue. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2018). We agree with Chairman Kimel that what did or did not happen to other Summerfield Town Council members is not relevant to the question of Plaintiff's residence, and testimony to that effect would therefore be properly excluded. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2018) ("Evidence which is not relevant is not admissible."). Moreover, the record shows that Plaintiff had a full opportunity to test Robinson's credibility and purported biases on cross-examination following her testimony, but chose not to do so. Plaintiff's argument accordingly fails.

3. Unsupported findings of fact

[3] Plaintiff also argues that the trial court erred by affirming the BOE Order because the BOE found that Plaintiff's address on file with the North Carolina Real Estate Commission ("NCREC") was the address of the Greensboro property without receiving any evidence from the NCREC.

In the BOE Order's finding of fact 5 ("Finding of Fact 5"), the BOE found that Plaintiff's "address on file with the [North Carolina] Real Estate Commission" showed he resided in Greensboro. We have found no evidence in the record to support that aspect of Finding of Fact 5.[5]

5. At the BOE Hearing, Plaintiff was asked to authenticate a document that Robinson's counsel represented as being produced in connection with a subpoena to the "North Carolina Association of Realtors[,]" and Plaintiff said that it appeared to him as coming from "Greensboro Regional Realtors[.]" In their respective briefs on appeal, both parties describe the document as coming from the local chapter of the "Realtors Association[.]" Wherever the document described by the parties—which is not included in the record on appeal—came from, the parties agree that it did not come from the NCREC, and it thus cannot provide evidentiary support for the challenged portion of Finding of Fact 5.

As a result, we agree with Plaintiff that the portion of Finding of Fact 5 regarding Plaintiff's address on file with the NCREC is without sufficient evidentiary basis in the record, and that the trial court erred by not so concluding.

This Court has said, however:

> Notwithstanding a particular finding of fact being unsupported by material and competent evidence, the action of a quasi-judicial body will be sustained if supported by remaining findings of fact upheld by substantial evidence, the erroneous finding being treated as mere surplusage. *See Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 576, 340 S.E.2d 111, 114 (1986) ("[w]here, after erroneous factual findings have been excluded, there remain sufficient findings of fact based on competent evidence to support the [Industrial] Commission's conclusions, its ruling will not be disturbed").

Tate Terrace Realty Investors, Inc. v. Currituck Cty., 127 N.C. App. 212, 222, 488 S.E.2d 845, 851 (1997). Following *Tate*, we discern no prejudicial error from the portion of Finding of Fact 5 regarding Plaintiff's address on file with the NCREC, since we conclude that the BOE Order is supported by other competent and substantial evidence in light of the whole record, including but not limited to the "deeds, tax records, [and] business records" presented by Robinson at the BOE Hearing listed in Finding of Fact 5 as indicating that Plaintiff had maintained the address of the Greensboro property as his residential address. We accordingly reject Plaintiff's argument that Finding of Fact 5 requires reversal.

Plaintiff finally argues that the trial court erred by affirming the BOE Order because the BOE concluded that Robinson affirmatively proved that Plaintiff was not a Summerfield resident without sufficient evidence to do so. This argument is also unavailing.

N.C. Gen. Stat. § 163A-842 sets forth the criteria used by election officials in determining residency for purposes of voter registration. Subsection 842 reads as follows: "That place shall be considered the residence of a person in which that person's habitation is fixed, and to which, whenever that person is absent, that person has the intention of returning[.]" N.C. Gen. Stat. § 163A-842(1) (2018). Subsection 842 also says that "[i]f a person removes to another . . . precinct . . . within this State, with the intention of remaining there an indefinite time and making that . . . precinct . . . that person's place of residence, that person

shall be considered to have lost that person's place of residence in th[e] . . . precinct . . . from which that person has removed, notwithstanding that person may entertain an intention to return at some future time." *Id.* at (5).

Our Supreme Court has said that "residence, when used in the election law, means domicile." *Hall v. Wake Cty. Bd. of Elections*, 280 N.C. 600, 606, 187 S.E.2d 52, 55 (1972). The *Hall* Court described domicile as follows:

> Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return (*animus revertendi*); it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave (*animus manendi*). Two things must concur to constitute a domicile: First, residence; second, the intent to make the place of residence a home.

Id. at 605-06, 187 S.E.2d at 55.

As mentioned above, a trial court reviewing a board of elections decision must conclude that the decision was "based upon substantial evidence"—i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"—in light of the whole record. *Farnsworth*, 114 N.C. App. at 185, 441 S.E.2d at 600. In the Trial Court Order, the trial court said that it had "conducted a whole record review of the evidence, findings and conclusions of the BOE, and applying the whole record test, the Court finds that the findings and conclusions of the BOE in [the BOE Order] are supported by competent, material and substantial evidence and by affirmative proof."

At the BOE Hearing, Robinson introduced documentary evidence and testimony tending to show that Plaintiff's residence was the Greensboro property. Although Plaintiff introduced documentary evidence and testimony of his own tending to show that Plaintiff's residence was the Summerfield property, the trial court did not err in concluding that, in light of the whole record, the BOE was presented with relevant evidence adequate to support its ultimate conclusion that Plaintiff did not reside in Summerfield. We accordingly reject Plaintiff's argument that the BOE's ultimate conclusion was unsupported by the whole record.

III. Conclusion

Because we conclude that the trial court did not err by affirming the BOE Order, we affirm.

AFFIRMED.

Chief Judge McGEE and Judge BERGER concur.

STATE OF NORTH CAROLINA
v.
ERVAN L. BETTS, DEFENDANT-APPELLANT

No. COA18-963

Filed 3 September 2019

1. Indecent Liberties—expert testimony—profiles of victims—limiting instruction—failure to request

In a prosecution for taking indecent liberties with a child, no plain error occurred by the trial court's failure to provide a limiting instruction to the jury regarding "profile" testimony from two experts—that is, the general characteristics of victims of sexual abuse and whether the victim's symptoms were consistent with any of those characteristics—since defendant failed to request such an instruction.

2. Evidence—indecent liberties—expert testimony—references to victim's "disclosure" of allegations

In a prosecution for taking indecent liberties with a child in which no physical evidence was introduced, no plain error occurred by the admission of expert testimony using the terms "disclosure," "disclose," and "disclosed" to describe the victim's recounting of alleged incidents involving defendant. That terminology did not constitute an improper vouching of the victim's credibility, and the jury had the opportunity to assess the evidence and make an independent determination about the victim's credibility.

3. Evidence—indecent liberties—forensic interview with child victim—redacted report—credibility vouching

In a prosecution for taking indecent liberties with a child, where defense counsel approved a redacted version of an expert's report

(which summarized a forensic interview the expert conducted with the victim) and did not renew an objection to the report, the report's admission did not constitute plain error. Although defendant argued the report impermissibly vouched for the victim's credibility by including the expert's impressions that the victim's demeanor appeared to be consistent with someone who was sexually abused and that the victim understood the difference between telling the truth versus a lie as well as a reference to defendant as the victim's "assailant," any error was invited.

4. Indecent Liberties—limiting instruction—expert testimony of victim's PTSD diagnosis—to explain delay in reporting abuse

In a prosecution for taking indecent liberties with a child, the trial court did not commit plain error by giving a limiting instruction to the jury to consider the testimony of an expert witness that the victim suffered from post-traumatic stress disorder (PTSD) for purposes other than to establish that abuse occurred, including whether the disorder explained a delay in reporting the crimes at issue.

5. Evidence—indecent liberties—past incidents of domestic violence—probative of victim's motivation—delay in reporting crimes

In a prosecution for taking indecent liberties with a child where the victim delayed reporting abuse, the trial court's admission of evidence relating defendant's past incidents of domestic violence against the victim and her mother did not constitute plain error. Pursuant to Evidence Rules 401 and 403, the evidence was more probative than prejudicial of the victim's fear or apprehension in reporting allegations of sexual abuse.

Judge TYSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 23 March 2018 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Catherine F. Jordan, for the State.

Craig M. Cooley for defendant-appellant.

BERGER, Judge.

Ervan L. Betts ("Defendant") appeals from his convictions of three counts of indecent liberties with a child. Defendant argues the trial court plainly erred by (1) not issuing a limiting instruction regarding "profile" testimony; (2) allowing testimony and reports that amounted to improper vouching for the credibility of the victim; (3) incorrectly instructing the jury on the proper use of testimony related to the victim's PTSD; and (4) admitting evidence of prior incidents of domestic violence by Defendant. Defendant also argues that he did not receive a fair trial due to the cumulative effect of these purported errors. We disagree.

Factual and Procedural Background

In 2013, Charity Luck ("Luck") gave birth to a daughter, B.C., who had illegal drugs in her system at birth. The Forsyth County Department of Social Services ("DSS") began investigating Luck and her children. On October 25, 2013, social worker Melony Archie ("Archie") conducted an interview with M.C., Luck's seven year old daughter. M.C. informed Archie that Defendant had touched her inappropriately. When Archie asked M.C. additional questions, she denied being touched inappropriately by Defendant, but described incidents of domestic violence between Luck and Defendant.

On November 4, 2013, Archie conducted a follow-up interview with M.C. at her elementary school. During this interview, M.C. stated that Defendant "rubbed and poked" her vagina while she had taken a nap in a bedroom. When M.C. rolled over, Defendant left the bedroom to watch T.V. in the living room. Based upon M.C.'s comments, Archie referred M.C. to Vantage Pointe Child Advocacy Center for a forensic interview. Archie also contacted Sergeant Crystal Prichard with the Winston-Salem Police Department.

On November 26, 2013, Fulton McSwain ("McSwain"), conducted a forensic interview with M.C. McSwain videotaped the interview and wrote a report ("McSwain Report") summarizing the forensic interview. M.C. told McSwain about instances of domestic violence by Defendant and referenced two specific instances in which Defendant touched her inappropriately. M.C. told McSwain that in March 2013, Defendant had said, "[expletive deleted] you [expletive deleted]," and "slapped [her] on the leg really hard." M.C. also reported that Defendant had punched her mother on one occasion, and tried to break into their apartment while holding a gun on another.

M.C. also informed McSwain that one night when she had slept in the bed with Luck and Defendant, Defendant "pulled up her nightgown then went inside of her underwear and touched her vagina . . . . in a

circular motion" when Luck had gone to the bathroom. M.C. rolled over, fell off the bed, and struck her head on a small refrigerator located next to the bed. When Luck returned from the bathroom, she picked M.C. up, and carried her to the living room. M.C. said Defendant approached her shortly thereafter and threatened to hurt her if she told anyone.

M.C. told McSwain that Defendant had touched her inappropriately on several occasions between January and March 2013, but Defendant had "never penetrated her vagina." M.C. was unable to state the exact number of times Defendant touched her inappropriately, but told McSwain that Defendant "kept on doing it over and over again." McSwain asked M.C. if Defendant had ever touched her on another part of her body. M.C. reported "one incident in which [Defendant] reached his hand inside of her shirt and rubbed her breasts" on the living room couch while Luck was outside smoking a cigarette.

In the conclusion of McSwain's report documenting his interview with M.C., McSwain wrote that M.C. had "disclosed that the alleged assailant, [Defendant], sexually abused her on multiple occasions" and M.C. "reported to being truthful and did not appear to display any overt signs of deception."

M.C. was also seen by Mary Kathryn Mazzola ("Mazzola"), a licensed clinical social worker with DSS. Mazzola also assessed M.C. for neglect, sexual abuse, and violence, and determined that M.C. had post-traumatic stress disorder ("PTSD"). Mazzola encouraged M.C. to prepare a "trauma narrative" as part of her treatment. The trauma narrative consisted of chapters entitled: "Meet the Author!"; "What Erv Did to My Mom; "When Erv Touched Me"; "When Erv Pulled [out] a Gun and Tried to Break Into My House"; and "When I Told."

M.C. told Mazzola of three occasions which were depicted in the trauma narrative. The first occurred when M.C. was sleeping in the middle of the bed in-between Defendant and Luck. M.C. stated in the trauma narrative:

> I was in the middle, and [Defendant] rolled over to me and touched me in my private part with his hand. . . . [H]e put his hand in my pants. . . . He started moving his fingers around on top of my private parts. Then he took his hand out of my pants, and rolled over and went back to sleep. . . . [Luck] was facing the other way. . . . I went to the bathroom, but I didn't really go to the bathroom. I went back to the living room. The next morning, [Defendant] left and my

> mom asked me where I went. And I told her that I thought I went to the bathroom, but I went to the living room.

M.C. wrote about another occasion in the trauma narrative:

> About two weeks later, I was sitting [o]n the floor and [Defendant] was helping me with my homework at the coffee table, and he reached over and put his hand inside my shirt. . . . He pulled his hand out and I pretended I had to go to the bathroom and I went to the bathroom and I cried. . . . I came back out and I waited until [Defendant] was gone, and I told [Luck]. She said she was going to call Grandma Sue and talk to her about it, but we forgot about it again.

M.C. described the third occasion in the trauma narrative as follows:

> One day, I was taking a nap on the couch and [Luck] was in the bathroom. [Defendant] came over and put his hand in my pants and touched me. I felt worried. He didn't say anything. . . . My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up, [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left[.]

The trauma narrative also included incidents of domestic violence between Luck and Defendant. According to Mazzola, M.C. "reported several incidents of her mom. . . getting a black eye, having a bloody nose, [and] having to call the ambulance" on occasions when she had been hit by Defendant. M.C. also told Mazzola of a time when Defendant had broken into Luck's apartment with a firearm.

On April 25, 2016, the Forsyth County Grand Jury indicted Defendant on three counts of indecent liberties with a child occurring between January and March 2013. At trial, witnesses for the State included M.C., Archie, McSwain, and Mazzola. McSwain and Mazzola were qualified as expert witnesses. Defense counsel initially objected to introduction of the McSwain Report into evidence; however, Defendant did not object to entry of a redacted version. The trauma narrative was also admitted into evidence without objection.

Defendant did not testify at trial, and the jury found Defendant guilty of all counts of taking indecent liberties with a child. For each count, the jury also found the presence of two aggravating factors which included the victim being very young, and Defendant taking advantage of a position of trust or confidence to commit the offenses. The trial

court sentenced Defendant to an active sentence of three consecutive terms of 31 to 47 months imprisonment. Defendant appeals.

Standard of Review

> In criminal cases, an issue that was not preserved by objection noted at trial and which 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). To establish plain error,

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

"The plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *Id.* The Supreme Court of North Carolina applied plain error review to a trial court's failure to strike, on its own motion, improper testimony from an expert witness vouching for the credibility of an alleged sexually abused child. *State v. Towe*, 366 N.C. 56, 61, 732 S.E.2d 564, 567 (2012).

Analysis

I. "Profile" Testimony

[1] Defendant first argues that the trial court plainly erred by not giving a limiting instruction to the jury regarding McSwain and Mazzola's "profile" testimony. We disagree.

Initially, we note that experts are permitted to testify about the profiles of victims of sexual abuse. *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002); *see also State v. Hall*, 330 N.C. 808, 817, 412 S.E.2d 883, 887 (1992) (permitting the use of expert testimony "that a particular child's symptoms were consistent with those of sexual or physical abuse

victims, but only to aid the jury in assessing the complainant's credibility."); *State v. Ware*, 188 N.C. App. 790, 656 S.E.2d 662 (2008). This type of profile evidence should be limited to its "permissible uses," and if admitted, the trial court should generally provide a limiting instruction. *See Hall*, 330 N.C. at 822, 412 S.E.2d at 891.

However, our courts have consistently held that "[t]he admission of evidence which is competent for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions." *State v. Allen*, 141 N.C. App. 610, 616, 541 S.E.2d 490, 495 (2000) (citation and quotation marks omitted); *see also State v. Cox*, 303 N.C. 75, 83, 277 S.E.2d 376, 381-82 (1981) (holding that, where a witness's testimony was admissible for corroborative purposes, there was no error when the defendant failed to request an instruction limiting that testimony to those permissible purposes).

Here, both McSwain and Mazzola provided versions of what is considered profile testimony. Defendant contends that the following testimony from McSwain required a limiting instruction:

> [Prosecutor]. And through the course of your employment, are you familiar with characteristics of children that have been sexually abused?
>
> [McSwain]. Yes, ma'am.
>
> [Prosecutor]. And what are those characteristics?
>
> [McSwain]. There's a number of different characteristics. For example, a lot of times children who've been exposed to sexual maltreatment, they're fearful of the offender. A lot of times, shame, they're embarrassed or feel a sense of guilt about the abuse happening to them. In some instances, kids may display signs of depression or anxiety, so there's a number of different characteristics that may come out. The thing about it is the characteristics are varied for each child. Not every child displays the exact same characteristics.
>
> [Prosecutor]. And are you trained to observe those characteristics when you're conducting forensic interviews?
>
> [McSwain]. Yes, ma'am.
>
> [Prosecutor]. And what, if any, characteristics did you observe during your forensic interview of [M.C.]?

> [McSwain]. [M.C.] expressed being fearful of [Defendant], feeling in danger, not feeling safe around him.

In addition, Defendant takes issue with Mazzola's testimony that she was familiar with characteristics of children who had been sexually abused, including anxiousness and nervousness, and that M.C. was hesitant to talk about sex, nervous, anxious, and worried.

As Defendant concedes, our case law is clear that experts may provide testimony regarding symptoms and characteristics of children that have been sexually abused. *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). However, Defendant takes issue with the trial court's failure to limit the testimony to its permissible use, and argues that the jury may have treated the testimony as substantive evidence. While it is true that the court did not offer a limiting instruction with respect to the experts' profile testimony, it is also true that Defendant never requested such an instruction. As our case law indicates, there is no error in neglecting to give the limiting instruction when the Defendant fails to request it. Because there was no error by the trial court, there can be no "fundamental error [that] occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations omitted). Thus, by definition, there cannot be plain error.

II. Vouching

A. "Disclosure"

[2] Defendant next asserts that the trial court plainly erred by admitting testimony from the State's experts and lay witnesses into evidence during which the witnesses repeatedly used the term "disclose," or variations thereof, when summarizing M.C.'s statements to them. Defendant contends use of the word "disclose" amounted to vouching for M.C.'s credibility. We disagree.

"[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted). Our Supreme Court has held "[t]he jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). "In child sexual abuse cases, where there is no physical evidence of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony." *State v. Crabtree*, ___ N.C. App. ___, ___, 790 S.E.2d 709, 714 (2016), *review on additional*

issues denied, *appeal dismissed*, 369 N.C. 195, 793 S.E.2d 687 (2016), *and aff'd*, 370 N.C. 156, 804 S.E.2d 183 (2017).

Based upon this principle, this Court held "[i]t is fundamental to a fair trial that the credibility of witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted). Therefore, expert witnesses may not vouch for the credibility of victims in child sex abuse cases when there is no evidence of physical abuse. *Stancil*, 355 N.C. at 266-267, 559 S.E.2d at 789. Our Supreme Court "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988).

Defendant relies on the unpublished opinion of *State v. Jamison*. In that case, a panel of this Court determined that use of the term "disclose" "lent credibility to [the victim's] testimony" and "is itself a comment on the declarant's credibility and the consequent reliability of what is being revealed." *State v. Jamison* ___ N.C. App. ___, 821 S.E.2d 665 (2018) (unpublished), *review denied*, ___ N.C. ___, 826 S.E.2d 701 (2019). In reaching this result, the *Jamison* panel relied almost exclusively on *State v. Frady*.

Frady, as here and in *Jamison*, involved a child sexual assault case with no physical evidence. There, the expert testified as follows:

> Q. Did you form an opinion as to whether [Debbie's] disclosure was consistent with sexual abuse?
>
> . . . .
>
> [Expert Witness]. Yes.
>
> Q. And what was your opinion?
>
> [Expert Witness]. Our report reads that her disclosure is consistent with sexual abuse.
>
> Q. And what did you base your opinion on?
>
> [Expert Witness]. The consistency of her statements over time, the fact that she could give sensory details of the event which include describing being made wet and the tickling sensation.... [a]nd her knowledge of the sexual act that is beyond her developmental level.

State v. Frady, 228 N.C. App. 682, 684, 747 S.E.2d 164, 166, *review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013). This Court granted a new trial because the expert stated "that [the victim]'s 'disclosure' was

'consistent with sexual abuse.' The alleged 'disclosure' was [the victim]'s description of the abuse. . . . [Thus, the expert] essentially expressed her opinion that [the victim] is credible. We see no appreciable difference between this statement and a statement that [the victim] is believable." *Id.* at 685-86, 747 S.E.2d at 167.

Defendant contends *Jamison* is persuasive.[1] However, the *Jamison* panel's reliance on *Frady* was misplaced as the reasoning in *Frady* was not based on defining "disclose" or prohibiting use of the word "disclose." As illustrated by this Court's discussion in *Frady*, the term "disclosure" merely means the content of the victim's description of abuse. *Id.* at 685, 747 S.E.2d at 167 ("The alleged 'disclosure' was [the victim's] description of the abuse."). It does not go to believability or credibility of the information provided, or the witness' opinion as to whether or not that information was believable. Contrary to the analysis in *Jamison*, *Frady* does not stand for the proposition that use of the word "disclosure" was error. Rather, the expert's testimony in *Frady* that the victim's description of the abuse "was consistent with sexual abuse" was the equivalent of testifying the victim was credible.

There is nothing about use of the term "disclose", standing alone, that conveys believability or credibility. *Jamison* should not be viewed as persuasive on this point and this Court is unaware of any opinion prior to *Jamison* that held that use of the word "disclose" amounted to error because that term was tantamount to testimony that a victim was "believable, had no record of lying, and had never been untruthful." *Aguallo*, 322 N.C. at 822, 370 S.E.2d at 678. Because *Jamison* is not controlling, not persuasive, and as discussed above, did not properly analyze *Frady*, we decline to follow that panel's reasoning.

Even if we assume there was error when the trial court did not intervene when the term "disclose" was used, Defendant has not demonstrated plain error. The victim testified about two incidents of sexual assault in which Defendant placed his hand under her clothing and rubbed her vagina, and one incident in which Defendant placed his hand in her shirt and rubbed her chest. The victim provided details and descriptions of these incidents and surrounding circumstances which the jury could consider and weigh in light of the other evidence

1. The Defendant highlights questions by the prosecutor and testimony which Defendant contends demonstrates the improper use of variations of the term "disclose" at trial. However, in each of these instances, "disclose" is synonymous with: admit, divulge, reveal, tell, communicate, bring to light, and make known. *See* DISCLOSE, www.thesaurus.com/browse/disclose. Each of these examples, and the uses throughout the trial, involve M.C. communicating to another individual what took place.

presented. In addition, the jury also observed the forensic interview of the victim by McSwain which was preserved on video, and considered the McSwain Report which is discussed further herein.

That there may have been inconsistencies in the victim's accounts is not the issue. The jury had the opportunity to observe the victim's testimony and make its own independent determination about her believability and credibility, and it is not for this Court to reweigh the evidence. There was substantial evidence from which the jury could find Defendant touched M.C. inappropriately. The jury had the opportunity to make its own independent assessment concerning the victim's credibility consistent with the trial court's instructions, and Defendant has not demonstrated that use of the word "disclose" had a probable impact on the jury's finding.

B. The McSwain Report

[3] Defendant next argues plain error in the trial court's admission of the McSwain Report. We disagree.

Defendant argues the "trial court plainly erred because the opinions and recommendations in the [McSwain Report] clearly establish McSwain found M.C. and her sexual abuse allegations credible and believed in [Defendant's] guilt."

As noted, McSwain was tendered and admitted as an expert in conducting forensic interviews of children. McSwain defined a "forensic interview" as "a structured conversation with the child designed to elicit details about a specific event or events that the child has . . . experienced." McSwain's report summarized the information M.C. had told him during the forensic interview, and contained his conclusions and recommendations. After Defendant's initial objections, a redacted version was also admitted into evidence.

Defendant highlights numerous portions of the McSwain Report that he contends improperly vouch for M.C.'s credibility, including the following sentences within a section entitled "Impressions":

> [M.C.] displayed age appropriate competencies across all spheres of functioning. . . . [M.C.] appeared resistant to suggestion, unaffected by the primacy-recency effect, with *appropriate* memory recall and a willingness to correct the clinician as needed. . . . [M.C.] engaged *appropriately* in dialogue, stayed focused and followed commands. . . . [M.C.'s] language skills . . . appeared *appropriate* for

> information gathering purposes. . . . [M.C.] demonstrated that she understood the difference between *telling the truth and telling a lie*. [M.C.] reported an acceptance of the obligation to report information truthfully.

(Alterations in original).

Defendant also asserts the following paragraph from a section entitled "Summary/Conclusion" as improper vouching:

> The interview notes that during the forensic interview session, [M.C.] appeared to be consistent with the information . . . about [Defendant] sexually abusing her. In addition, she reported to being truthful and did not appear to display any overt signs of deception. [M.C.]'s assessment was consistent with that of someone who has been sexually abused.

Defendant contends the use of "assailant" in the following sentence from a section entitled "Recommendations" constitutes an improper comment upon Defendant's guilt:

> 2. The interviewer would strongly encourage that [M.C.] remain inaccessible to the alleged assailant until the reasonable conclusion to this investigation and determination is made that [M.C.] is emotionally and physically safe when in *the assailant's* presence[.]

(Alteration in original).

However, upon review of the trial transcript, we must conclude Defendant is unable to show plain error with respect to any portion of the McSwain Report. At trial, defense counsel initially objected to the State's motion to introduce the McSwain Report. Following a colloquy with the trial court, defense counsel stated she would not object to the McSwain Report, if the State were to make certain redactions. The trial court permitted the State, with Defendant's consent, to review the McSwain Report during an evening recess and address statements within the report Defendant had found objectionable. The trial court took Defendant's objection under advisement and deferred ruling upon the objection until the State had reviewed and redacted portions of the McSwain Report, and Defendant had the opportunity to review the redacted version.

The next day, the State informed the trial court that it had made the redactions to the report. After reviewing the redacted version of the

McSwain Report, defense counsel told the trial court, "The objectionable materials have been removed." The State renewed its motion to admit the McSwain Report and the following exchange occurred:

> [Prosecutor]: Your honor, at this time, the state would move to introduce [the McSwain Report], which is the report from Fulton McSwain, the forensic interviewer.
>
> THE COURT: Any objection?
>
> [Defense Counsel]: No, your honor.
>
> THE COURT: Without objection, [the McSwain Report] is hereby admitted.

Under Section 15A-1443 of the North Carolina General Statutes, "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2017). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Bice*, ___ N.C. App. ___, ___, 821 S.E.2d 259, 264-65 (2018) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 14, 2019).

Defendant's counsel not only failed to renew Defendant's objection to the admission of the McSwain Report, but she affirmatively and explicitly represented that she had no objection to the admission of the McSwain Report after the State had made the requested redactions. To the extent there was error by the trial court in admitting the McSwain Report, including the statements Defendant takes issue with on appeal, it was invited error. *Id.* Defendant's arguments on appeal concerning the McSwain Report are waived.

III. PTSD Testimony

[4] Defendant also argues that the trial court plainly erred by giving the jury an impermissible limiting instruction with respect to Mazzola's testimony regarding M.C.'s PTSD diagnosis. We disagree.

Our Supreme Court addressed the question of admissibility of PTSD testimony in *State v. Hall*. While the Court declined to offer an "exhaustive" list of acceptable uses of such testimony, it did explicitly address a few: "For example, testimony on post-traumatic stress syndrome may assist in corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent." *Hall*, 330 N.C. at 822, 412 S.E.2d at 891. The Court also noted that "[i]f admitted, the

trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted. In no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Id.*

Here, the trial court gave the following instruction to the jury after the admission of the PTSD testimony:

> THE COURT: Let me interrupt for just a minute. Members of the jury, with regard to the testimony regarding the alleged victim having some type of post-traumatic stress disorder, that testimony is being admitted for two purposes for your consideration.
>
> One, is to corroborate the alleged victim's testimony, to the extent that you find it does so corroborate her testimony. The other purpose is to explain a delay of reporting crimes in this case. Except as it bears on one of those two decisions, you're not to consider that particular evidence for any other purpose. Sorry for the interruption. Go right ahead.

At the conclusion of the trial, the judge gave a virtually identical instruction to the jury. Defendant takes issue with the second part of this instruction, specifically the language about "explain[ing] a delay." He argues that the jury cannot consider the evidence for this purpose without also concluding that the sexual assault actually occurred. However, the *Hall* court specifically designated "explain[ing] delays" as a permissible purpose for PTSD evidence. *Id.*

The trial court's limiting instruction to permissible uses of the PTSD evidence clearly indicated that the evidence was not to be used for substantive purposes. Because the trial court did not err, Defendant cannot establish plain error.

IV. Evidence of Domestic Violence

[5] Defendant next argues that the trial court plainly erred by admitting evidence of Defendant's past incidents of domestic violence against Luck and M.C in violation of North Carolina Rules of Evidence 401 and 403. We disagree.

Rule 401 states that " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017).

Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

"[T]he balance under Rule 403 favors admissibility of probative evidence." *State v. Peterson*, 179 N.C. App. 437, 460, 634 S.E.2d 594, 612 (2006). This Court has held that incidents of domestic violence are "probative of the victim's motivation not to immediately report crimes" in sexual assault cases. *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 491, 692 S.E.2d 145, 151 (2010).

Here, Defendant argues that the domestic violence evidence "was of no consequence to the determination of whether [he] took indecent liberties with M.C." Yet *Espinoza* recognizes that this evidence can be permissible in cases like, as here, where the victim has delayed in reporting the alleged sexual abuse. The evidence of domestic violence was not substantially more prejudicial than probative, and went directly to the victim's fear or apprehension in reporting the sexual abuse. Thus, the trial court did not err in admitting the evidence of Defendant's domestic violence incidents.

Conclusion

Defendant received a fair trial, free from prejudicial error.[2]

NO PLAIN ERROR.

Chief Judge McGEE concurs.

Judge TYSON dissents with separate opinion.

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

The State's entire case against Defendant rests wholly upon the uncorroborated and inconsistent reconstructed memories of a witness, who was six years old when these events purportedly occurred. The evidence also shows the witness expressed motivations to lie. The credibility of the complainant was the sole evidence and issue before the jury. The State failed to call or present any one of a number of other persons

2. Because we find no prejudicial error, we need not address Defendant's argument that the cumulative effect of the purported errors rendered his trial fundamentally unfair.

named as either present or aware, who could have corroborated complainant's allegations, if true.

The State produced no other physical evidence, eyewitness testimony or anything else to corroborate these allegations, other than improper bolstering babble restating M.C.'s allegations. The trial court plainly erred in admitting evidence that improperly vouched for the credibility of the complainant, the sole province of the jury. This inadmissible testimony prejudiced Defendant to grant a new trial. I respectfully dissent.

I. Background

The majority's opinion details some factual background, but omits many critical facts, which directly impact the deliberation and outcome of this case. Charity Luck lived with her six-year old daughter, M.C., and a younger daughter, H.C., in a two-bedroom apartment. M.C is the sole complaining witness. Luck and her two daughters shared the two-bedroom apartment with a male roommate, Michael, between January to March 2013, the perimeter of times of M.C's allegations.

During this time, Luck was engaged in a relationship with Defendant. Defendant has no prior record of any sexual offenses. In the fall of 2013, Luck gave birth to another daughter, B.C. Defendant was excluded as the father of B.C. Post-natal testing conducted on B.C. revealed the presence of illegal drugs in her body at birth.

The Forsyth County DSS was informed and began an investigation of Luck, and her children. DSS social worker, Melony Archie was assigned to investigate the case. During Archie's initial interview on 25 October 2013, M.C. purportedly asserted Defendant had touched her inappropriately. When Archie asked M.C. additional questions, she denied being touched inappropriately by Defendant.

Archie conducted a second interview on 4 November 2013 with M.C. at her elementary school. During this interview, M.C. alleged one incident of inappropriate touching, which purportedly occurred as she was taking a nap in the bedroom. In this incident, M.C. alleged Defendant touched her near her vagina. Based upon her comment recounting the allegedly inappropriate touching, Archie referred M.C. to VPC for a forensic interview. Archie also reported M.C.'s allegation to Police Sergeant Prichard on 2 December 2013.

VPC's program manager, Fulton McSwain, conducted a "forensic interview" of M.C., from which he prepared in the McSwain Report. In asserting an instance of domestic violence, M.C. told McSwain: "My

mom talks to this guy [Defendant] and one day I was joking around with him and he got really mad and he slapped me on the leg really hard." M.C. also asserted Defendant had stated, "F[**]k you b[*]tch," when he slapped her. M.C stated this incident occurred sometime in March 2013. As noted by the majority opinion, M.C. also asserted Defendant had punched her mother, and had alleged another incident asserting Defendant had tried to break into their apartment while holding a gun. None of these allegations were either reported, independently documented, verified, or corroborated.

M.C. initially said the first incident of inappropriate touching had occurred in the summer of 2012, but later stated all incidents had occurred between January and March 2013. M.C. also told McSwain Defendant had "never penetrated her vagina."

Regarding alleged sexual contact, M.C. "disclosed" a purported incident on an unspecified date when she had slept in the bed with Luck and Defendant. During the night, Luck left the bed and while in the bathroom, M.C. alleged Defendant purportedly "rolled over" and "pulled up her nightgown then went inside of her underwear and touched her vagina . . . . in a circular motion."

M.C. rolled over, fell off the bed, and struck her head on a small refrigerator located next to the bed. Luck returned from the bathroom, picked her up off the floor, carried her to the living room, and placed her on the couch. M.C. alleged Defendant exited the bedroom shortly thereafter, approached her, and whispered, "If you tell anybody that I did this, I'm going to hurt you."

McSwain reported M.C. also asserted Defendant had "touched her private more than [one] time but was unable to state the exact number of times it happened." McSwain asked M.C. if Defendant had ever touched her on another part of her body. M.C. did not report the alleged "leg slapping" allegation, but recounted "one incident in which [Defendant] reached his hand inside of her shirt and rubbed her breasts" on the living room couch while Luck was outside the home smoking a cigarette.

In his report documenting his interview with M.C., McSwain concluded M.C. had "disclosed that the alleged assailant, [Defendant], sexually abused her on multiple occasions" and opined of M.C's credibility that she "reported to being truthful and did not appear to display any overt signs of deception."

In addition to reporting M.C.'s allegations to Sergeant Prichard on 2 December 2013, Archie also referred M.C. to Mary Katherine Mazzola,

a DSS licensed clinical social worker. Mazzola diagnosed M.C. with post-traumatic stress disorder.

Mazzola encouraged M.C. to prepare a written "trauma narrative" to help M.C. "process [her] trauma." Mazzola reported three occasions when Defendant had purportedly touched M.C. inappropriately inside Luck's apartment, including one time in the bedroom, and twice in the living room. The first occasion allegedly occurred when M.C. was sleeping between Defendant and Luck.

> I was in the middle and [Defendant] rolled over to me and touched me in my private part with his hand. [H]e put his hand in my pants. . . . He started moving his fingers around on top of my private parts. Then he took his hand out of my pants and rolled over and went back to sleep. . . . My mom [Luck] was facing the other way. . . . I went to the bathroom but I didn't really go to the bathroom, I went back to the living room. The next morning [Defendant] left and my mom asked me where I went and I told her that I thought I went to the bathroom but I went to the living room.

M.C. alleged the second event in her trauma narrative occurred as follows:

> About two weeks later I was sitting [o]n the floor and [Defendant] was helping me with my homework at the coffee table and he reached over and put his hand inside my shirt. . . . He pulled his hand out and I pretended I had to go to the bathroom and I went to the bathroom and I cried. . . . I came back out and I waited until [Defendant] was gone and I told [Luck]. She said she was going to call Grandma Sue and talk to her about it. But we forgot about it again.

M.C. alleged the third occasion in the trauma narrative occurred as follows:

> One day I was taking a nap on the couch and [Luck] was in the bathroom. [Defendant] came over and put his hand in my pants and touched me. I felt worried. He didn't say anything. . . . My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left[.]

The narrative also asserted domestic violence between Luck and Defendant that M.C. reported to Mazzola. According to Mazzola, M.C. "reported several incidents of her mom . . . getting a black eye, having a bloody nose, [and] having to call the ambulance" on occasions when Luck had been hit by Defendant. M.C. also told Mazzola of a time when Defendant had purportedly attempted to break into Luck's apartment with a firearm. No evidence was introduced by the State to corroborate any of these allegations or incidences.

Defendant was arrested and charged with taking indecent liberties with a child on 10 November 2015, two years after M.C. had first met with Archie at DSS and stated, then denied, Defendant had inappropriately touched her. The 25 April 2016 indictment alleged Defendant had committed three "lewd and lascivious acts" upon M.C. on three occasions between January and March, 2013, more than three years prior to the indictment.

The State did not present any physical evidence or call Luck, Grandma Sue, Aunt Tory or Luck's roommate, Michael, as witnesses to corroborate any of M.C.'s allegations at trial. McSwain and Mazzola were qualified and admitted as expert witnesses. After defense counsel's objections and later agreement, the trial court admitted a redacted version of the McSwain Report into evidence. The trauma narrative was also admitted into evidence without objection.

II. Issues

Defendant argues the trial court committed plain error by: (1) permitting the State's witnesses and the prosecutor to repeatedly use the terms "disclosure," "disclose," and "disclosed" to describe how M.C. had recounted the alleged incidences; (2) admitting portions of the McSwain Report; (3) not issuing a limiting instruction to the jury regarding certain profile testimony of McSwain and Mazzola; (4) permitting Mazzola to improperly vouch for M.C.'s credibility by testifying that M.C. had, in fact, experienced a number of traumas; (5) instructing the jury it could consider Mazzola's testimony regarding how M.C. having PTSD may have caused her to delay reporting Defendant's alleged acts of inappropriate touching; (6) permitting the State to introduce evidence and testimony regarding alleged incidents of domestic violence between M.C.'s mother and Defendant. and, (7) the cumulative effects of errors are prejudicial to award a new trial.

Defendant's appellate counsel concedes his trial counsel did not object to the admission of evidence and instruction he now challenges.

Defendant acknowledges these issues are reviewed on appeal for plain error, except the prejudice from cumulative effects of the errors.

III. Standard of Review

The majority opinion sets forth the proper standard of plain error review under Rule of Appellate Procedure 10(a)(4) and our case law.

Plain error review is applied in the absence of an objection "to a trial court's failure to strike, on its own motion, improper testimony from an expert witness vouching for the credibility of an alleged sexually abused child. *State v. Towe*, 366 N.C. 56, 61, 732 S.E.2d 564, 567 (2012).

IV. Disclosure

Defendant argues the trial court committed plain error by admitting testimony from the State's experts and lay witnesses during which the witnesses repeatedly used the terms "disclose" or "disclosed," or variants thereof, when summarizing M.C.'s allegations to them. Defendant contends these witnesses' uses of "disclose" or "disclosed" bolstered and constituted improper vouching for M.C.'s credibility.

A. *Rule Against Improper Vouching*

The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the *only proper entity* to perform the ultimate function of every trial—determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (emphasis supplied). Following our Supreme Court's long-standing rule this Court has held "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

Prior precedents have repeatedly admonished: "a witness may not vouch for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858-59 (2010). This prohibition against vouching for the credibility of another witness applies during the testimony of either an expert *or* a lay witness. *State v. Coble*, 63 N.C. App. 537, 541, 306 S.E.2d 120, 121 (1983). *See also State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) ("Expert opinion testimony is not admissible to establish the credibility of the victim as a witness" (citation omitted)), *aff'd per curiam*, 356 N.C. 428, 571 S.E.2d 584 (2002).

The Supreme Court of North Carolina "has found reversible error when experts have testified that the victim was believable, had no record of lying, and had never been untruthful." *State v. Aguallo*, 322

N.C. 818, 822, 370 S.E.2d 676, 678 (1988) (citations omitted). "This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness." *Dixon*, 150 N.C. App. at 53, 563 S.E.2d at 599 (citation omitted).

B. *Vouching Testimony by Use of "Disclose"*

The record and transcript show numerous instances in the testimony of the State's witnesses, and questions by the prosecutor of repeated uses of the terms "disclose," "disclosed," "disclosure" and variants thereof, to refer to what M.C. had asserted as sexual abuse by Defendant.

McSwain testified chiefly about the VPC forensic interview he had conducted with M.C. All through this testimony, he and the prosecutor repeatedly used the terms "disclosed," "disclose," and "disclosure." McSwain testified in relevant part, as follows:

> [McSwain]: I asked [M.C.] about how her *disclosure* came about, how the allegations of abuse came out in the open or if she ever told anybody, and she did make a comment that she eventually did tell her mom about the alleged abuse.
>
> . . . .
>
> [McSwain]: I asked [M.C.], well, what did her mom say or how did her mom respond after her *disclosure*, and she stated that her mom said, "Well, I guess he did. Life has moved on."
>
> . . . .
>
> [Prosecutor]: And after she gave you this particular *disclosure*, did she move on to another topic or did y'all continue to talk about *disclosure*?
>
> [McSwain]: Well, I questioned her about her concern. . . why she was concerned about her grandmother seeing the [forensic interview], the particular DVD [recording].
>
> . . . .
>
> [Prosecutor]: And was there any other *disclosure* that she made about being touched anywhere else on her body?

> [McSwain]: [M.C.] stated that she had not been touched any where else on her body outside of her private area and her breasts.
>
> . . . .
>
> [Prosecutor]: And what, if anything, did [M.C.] say about why she didn't *disclose*?
>
> [McSwain]: She stated she didn't tell anybody because [Defendant] had threatened to hurt her.
>
> . . . .
>
> [Defense counsel]: And, at that point in time, you started asking her questions about the alleged touching; is that right?
>
> [McSwain]: After she *disclosed* that when [Defendant] spends the night, sometimes he touches her private area. [Emphasis supplied].

The State's other expert witness, DSS social worker Mazzola, testified, in response to the prosecutor's questions, in relevant part:

> [Prosecutor]: And when you made the statement that you thought a lot of the trauma had to do with the domestic violence and the gun incident, and things of that nature, did that, in any way, *discount her disclosure* of sexual abuse? [Emphasis supplied]
>
> [Mazzola]: No.

In addition to the State's expert witnesses, the State elicited the testimony of lay witnesses, Archie and Sergeant Prichard, who used the terms "disclose," "disclosure," and "disclosed" numerous times during their testimonies:

> [Archie]: At a later interview, [M.C.] *disclosed* . . . . Oh. On this incident right here, she did not – at that time, she did not *disclose* anything during the first interview about – not saying anything to me or telling anyone (sic).
>
> . . .
>
> [Archie]: . . . [M.C.] also *disclosed* that he had – when I asked her about touching her vagina, I asked her, you know, what did he do, and she stated that he rubbed and poked at it.

. . .

> [Prosecutor]: And after this initial interview, what, if any, reports did you make based on [M.C.'s] *disclosure*? [Emphasis supplied]
>
> [Archie]: A report was made to law enforcement.

The prosecutor and Sergeant Prichard also repeatedly used the terms "disclosed" and "disclosure" to describe what M.C. had alleged:

> [Prichard]: In the course of [Archie's] investigation, additional information was *disclosed* by [M.C.] that she had been touched inappropriately by [Defendant], which was identified as Ms. Luck's boyfriend.
>
> . . .
>
> [Prichard]: Other than the biological information for the family, [Archie] had also indicated that a forensic interview had already been conducted prior to contacting me in which [M.C.] *disclosed*.
>
> . . .
>
> [Prosecutor]: What, if anything, else did you ask Ms. Archie with regard to the *disclosure* of sexual abuse?
>
> [Prichard]: What the details of the *disclosure* were?
>
> [Prosecutor]: And what details were you given at that time?
>
> [Prichard]: That [M.C.] had been touched by [Defendant] on her private area.
>
> . . .
>
> [Defense Counsel]: But you were aware that Ms. Archie had interviewed [M.C.] a couple of times prior to that?
>
> [Prichard]. I wasn't aware of how many times. Like I said, at that point, I was not given her dictation. She just advised that [M.C.] had *disclosed* in the neglect investigation some form of inappropriate touch, so she made the referral to Vantage Point. [Emphasis supplied].

Defendant argues this Court's opinion in *State v. Jamison* prohibits witnesses' frequent use of the term "disclose," and variations thereof, to describe M.C.'s allegations. *State v. Jamison*, __ N.C. __, 821 S.E.2d 665, 2018 WL 6318321 (2018) (unpublished) , *review denied*, __ N.C. __,

826 S.E.2d 701 (2019). Defendant complied with North Carolina Rule of Appellate Procedure 30(e)(3) and attached a copy of *Jamison* to his brief, and served a copy on the State. N.C. R. App. P. 30(e)(3).

In *Jamison*, the defendant was convicted of first-degree sex offense with a child, indecent liberties with a child, and felony child abuse by a sexual act. 2018 WL 6318321 at *1. On appeal, the defendant argued the trial court plainly erred by allowing an expert witness to bolster and vouch for the credibility of the child victim. *Id.* at *4.

As with McSwain here, the expert witness in *Jamison* was admitted as a specialist in child forensic interviews. *Id.* This Court highlighted the relevant portions of the expert's testimony, in part, as follows:

> [The expert witness] explained that when she conducts a forensic interview with a child, she assesses for "any kind of barriers there might be for their disclosure." [The child victim] provided [the expert witness] with "five separate episodic detailed events of times that she had been inappropriately touched." *At one point during [the expert witness's] testimony, the prosecutor repeatedly used the word "disclose" in her questions*. When asked, "Did [the child victim] disclose another incident to you?", [the expert witness] responded by parroting the prosecutor's wording, answering that [the child victim] "*disclosed* an incident." Later, [the expert witness] described "barriers to disclosure" as "things that are [going to] influence the child's ability and the extent to which they're able to disclose their experiences." [The expert witness] noted several barriers in [the child victim's] case, including "her emotional closeness to the defendant," the fact "that she had been threatened not to disclose" which "was very impactful for her in her interview and in other *disclosures*," and "a lack of support from her mother."

Id. (Emphasis supplied).

This Court concluded and held the admission of the expert's testimony was plain error, in part, under the following reasoning:

> First, we note the frequent use of the terms "disclosure" and "disclose." A disclosure is "[t]he act or process of making known something that was previously unknown; *a revelation of facts*[.]" *Disclosure*, *Black's Law Dictionary* (9th ed. 2009). The use of this word suggests that there was

> *something factual to divulge, and is itself a comment on the declarant's credibility and the consequent reliability of what is being revealed.* [The expert witness's] repeated use of this term lent credibility to [the child's] testimony.

Id. (Emphasis supplied).

This Court ultimately held other substantial and properly admitted evidence of guilt overcame this prejudice and sustained the conviction. *Id.* The other evidence of guilt in *Jamison* included, in part, the defendant never denying the child victim's accusation to police, and a video interview of the defendant with police in which the defendant told an officer he "should believe any kid that makes these allegations, and that [the child victim]—that it could be that [the child victim] was just crying out for help." *Id.* at *5.

This Court's analysis in *Jamison* confirmed the definitions and use of "disclose," "disclosure" or variants thereof by expert and lay witnesses to specifically refer to a child's statements alleging sexual abuse constitutes inadmissible bolstering and vouching. Comparing the very similar manner of the expert witness' use in *Jamison* of "disclosure" and as was used by the prosecutor and numerous witnesses here, this testimony clearly bolstered and improperly vouched for M.C.'s credibility. Unlike *Jamison*, here, there is absolutely no physical evidence or other substantial and properly admitted corroborating evidence of guilt to overcome this prejudice and sustain Defendant's conviction. *See id.*

Black's Law Dictionary's definition of disclosure quoted in *Jamison* is consistent with the meanings contained in other standard dictionaries of the English language. *See, e.g.*, *American Heritage Dictionary* 395 (3d ed. 1993) ("1. The act or process of revealing or uncovering; 2. Something uncovered; a revelation."); *Webster's New World College Dictionary* 419 (5th ed. 2014) ("1. A disclosing or being disclosed; 2: a thing disclosed; revelation.").

"Jurors are . . . presumed to understand the meaning of English words as they are ordinarily used." *State v. Withers*, 2 N.C. App. 201, 203, 162 S.E.2d 638, 640 (1968). The pervasive and repeated use of "disclosure" by the prosecutor and expert witnesses, Mazzola and McSwain, and the lay witnesses, Archie and Sergeant Prichard, "suggest[ed] that there was something factual to divulge, and [was] a comment on [M.C.'s] credibility and the consequent reliability of what [she had] revealed." *Jamison*, 2018 WL 6318321 at *4.

The majority's opinion quotes a thesaurus to support their reasoning, which only provides similar words and not a definition, instead of

defining "disclose" or "disclosure" by using a dictionary. The witnesses' repeated use of "disclosure" and variants thereof to describe M.C.'s allegations of indecent liberties by Defendant conveys the message to bolster and vouch that M.C.'s statements were "revelations" and were to be accepted and treated as factually true. *Id.*

The State's and its witnesses' pervasive use of "disclosure" and its variants, especially by the expert witnesses, amounted to testimony "to the effect that [M.C. was] believable, credible, or telling the truth[,]" which this Court has consistently held to be inadmissible. *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89 (1987) (citation omitted); *see State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533 (1987) ("our courts have held expert testimony inadmissible if the expert testifies that the prosecuting child-witness in a trial for sexual abuse is believable, or to the effect that the prosecuting child-witness is not lying about the alleged sexual assault." (citations omitted)).

McSwain and Mazzola repeatedly used the terms "disclose" and "disclosure" at other times in their testimony to refer to revelations of fact of sexual abuse by children in a general sense, and not specifically to M.C.'s statements of sexual abuse. For instance, McSwain also testified in relevant part:

> [Prosecutor]: Are you familiar with the ways in which children *disclose* sexual abuse?
>
> [McSwain]: Yes, ma'am.
>
> [Prosecutor]: And is *disclosure* an event or is it a process?
>
> [McSwain]: *Disclosure of abuse is a process*.
>
> . . . .
>
> [Prosecutor]: What types of factors, based on your training and experience, can affect how or when a child *discloses*?
>
> [McSwain]: There are a number of different factors that affect when a child *discloses* . . . [.]
>
> . . . .
>
> [McSwain]: I am aware of *patterns of disclosure* and things such as delayed *disclosure*.
>
> [Emphasis supplied].

Following this Court's holding in *Jamison* and reviewing the definitions and plain meanings of "disclose" and "disclosure," and their

variants, the admission of the witnesses' testimony, in which "disclosure" and its variants was pervasively and repeatedly used by the State and its witnesses to describe M.C.'s allegations of inappropriate touching by Defendant, was error. *See Jamison*, 2018 WL 6318321 at *4; *Dick*, 126 N.C. App. at 315, 485 S.E.2d at 89. *See also Oliver*, 85 N.C. App. at 11, 354 S.E.2d at 533.

C. *Prejudicial Impact*

The erroneous admission of the witnesses' repeated and improper use of "disclosure" to bolster and vouch for M.C.'s credibility was prejudicial error to award Defendant a new trial under plain error review.

In *State v. Ryan*, this Court concluded and held that the following testimony from a doctor admitted as an expert witness bolstered and improperly vouched for the credibility of a child victim:

> [Prosecutor]. [H]ave you ever diagnosed or made a finding that [a] child is not being truthful?
>
> [Doctor]. I have done that on several occasions.
>
> [Prosecutor]. Can you explain to the jurors what you look for, the clues that you look for, and do you do that in every case?
>
> [Doctor]. I do it in every case.
>
> ....
>
> [Prosecutor]. Was there anything about your examination of [the child] that gave you any concerns in this regard?
>
> [Doctor]. That gave me concerns that she was giving a fictitious story?
>
> [Prosecutor]. Yes.
>
> [Doctor]. Nothing. There was nothing about the evaluation which led me to have those concerns. And again, as I was getting into her history and considering this as a possibility, nothing came out.

State v. Ryan, 223 N.C. App. 325, 334, 734 S.E.2d 598, 604 (2012), *disc. review denied*, 366 N.C. 433, 736 S.E.2d 189 (2013).

This Court concluded the doctor's testimony stating she had no "concerns" that the child was giving "a fictitious story" was "tantamount to her opinion that the child was not lying about the sexual abuse." *Id.*

As with Defendant here, the defendant in *Ryan* did not object to the doctor's admitted testimony. *Id.*

This Court reviewed whether the admission of this disputed testimony constituted plain error. *Id.* In assessing the doctor's testimony, this Court prefaced its analysis by stating:

> Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, *or where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, . . . the error is generally found to be prejudicial, even on plain error review,* since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge. *See Aguallo*, 318 N.C. at 599-600, 350 S.E.2d at 82; *State v. Trent*, 320 N.C. 610, 615, 359 S.E.2d 463, 466 (1987); *State v. Bush*, 164 N.C. App. 254, 259-60, 595 S.E.2d 715, 718-19 (2004); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002); *State v. Parker*, 111 N.C. App. 359, 366, 432 S.E.2d 705, 710 (1993). [Emphasis supplied].

Id. at 337, 734 S.E.2d at 606.

This Court further noted that the credibility of the child victim was central to the State's case in *Ryan* because:

> [T]he State's evidence consisted of testimony from the child, her family members, her therapist, the lead detective on the case who was an acquaintance of the family, and an expert witness. *All of the State's evidence relied in whole or in part on the child's statements concerning the alleged abuse.* The only physical evidence presented that bolstered the State's case that the child had been sexually abused was a deep hymenal notch in the child's vagina and the presence of bacterial vaginosis. However, [the child's mother] testified that the child's symptoms of bacterial vaginosis predated the alleged sexual assaults by the defendant. In addition, more than two years had elapsed since the alleged sexual contact and the child's medical examination. Further, there was no physical evidence that bolstered the State's case that the child was anally assaulted or that defendant was the perpetrator of

> any such abuse. *There was no testimony presented by the State that did not have as its origin the accusations of the child.*

Id.

In *Ryan*, all of the evidence presented by the State "amounted to conflicting accounts from the child, defendant, and their families," except for the erroneously admitted testimony of the doctor, who had improperly vouched for the alleged child victim's testimony. *Id.* at 338, 734 S.E.2d at 607. This Court noted "[t]he child's account of what happened evolved over time[.]" *Id.* The Court concluded that, because the doctor was admitted as an expert witness in the treatment of sexually abused children, "her opinion likely held significant weight with the jury" and "had a probable impact on the jury's finding defendant guilty by enhancing the credibility of the child in the jurors' minds." *Id.*

D. *Absence of Other Evidence of Guilt - Motivation to Fabricate*

In other cases where defendants have: (1) admitted guilt; (2) physical evidence was presented; (3) eyewitnesses testified they had observed defendants having sexual or inappropriate contact with victims; or, (4) other properly admitted evidence corroborated the allegations, this Court has found defendant's showed insufficient prejudice in improperly admitted vouching credibility testimony in child sex offense cases to warrant a new trial on plain error review. *See*, *e.g.*, *State v. Crabtree*, __ N.C. App. __, __, 790 S.E.2d 709, 716-17 (2016) (holding the defendant had failed to show prejudice under plain error review from erroneous admission of expert testimony vouching for the victim where several eyewitnesses testified that they had observed the defendant and the victim sexually touching each other on several occasions); *State v. Black*, 223 N.C. App. 137, 146-47, 735 S.E.2d 195, 200-01 (2012) (holding the defendant had failed to show prejudice under plain error review from the erroneous admission of expert testimony vouching for the victim where other evidence showed defendant had given the victim a vibrator, shaved the victim's pubic hair, and sexually molested other children); *State v. Davis*, 191 N.C. App. 535, 540-41, 664 S.E.2d 21, 25 (2008) (holding the defendant had failed to show prejudice under plain error review from the erroneous admission of a statement in expert's report, which bolstered victim's credibility, where evidence showed the defendant's sperm was located on victim's skirt).

As distinguished from these cases noted above and similarly to the facts and evidence in *Ryan*, the entire foundation of the State's evidence here relies *solely* upon M.C.'s uncorroborated allegations of indecent

liberties taken by Defendant or other acts of domestic violence. *See id.* No physical evidence or eyewitness testimony, or prior reports or incidents or interventions recounted by M.C. was presented or admitted to corroborate her accusations that Defendant had touched her inappropriately or to support her other allegations of domestic violence had ever occurred.

In addition to M.C.'s uncorroborated and inconsistent accounts, other evidence tended to show M.C. was motivated to fabricate her claims of inappropriate touching against Defendant. In her trauma narrative, M.C. described the first time she had met Defendant.

Defendant had introduced himself to M.C. as Luck's boyfriend. M.C. wrote Luck had given Defendant a shirt for his birthday "and he opened it and he and my mom started kissing. I felt mad because I started to think about my mom and dad and I was afraid that [Defendant] and my mom would get married and I would have to call him dad."

M.C. also testified she had told her mother she did not like Defendant staying with them. M.C. recounted incidences of domestic violence between her mother and Defendant in her testimony, forensic interview, and trauma narrative. None of these alleged incidents were independently reported, corroborated or verified. M.C.'s stated ill motivations against Defendant placed her credibility directly into issue.

E. *Inconsistent Allegations - Credibility*

M.C.'s "disclosures" and accounts of alleged indecent touching by Defendant are inconsistent in the number of times, manner, and places Defendant allegedly touched her and whether M.C. had informed her mother, grandmother, aunt, friends, other family members, or teachers of the alleged incidences. These inconsistencies further call her credibility into question and shows prejudice to Defendant from the improper bolstering and vouching. *Id.* at 338, 734 S.E.2d at 607. A brief review is instructive.

DSS social worker Archie testified M.C. denied being touched inappropriately by Defendant when Archie initially interviewed her on 25 October 2013. When Archie interviewed M.C. a second time, in November 2013, M.C. "disclosed" and alleged only one act of Defendant's inappropriate touching. Defendant allegedly came into the bedroom while M.C. was taking a nap, touched M.C. near her vagina, and walked into the living room to watch television.

M.C. told Archie that she had spoken with her mother, Luck, about the incident. Luck allegedly responded for M.C. to tell her if it happened

again. M.C. did not recount this incident again to anyone else, either in her interviews with McSwain, in her trauma narrative, with Mazzola, to Sergeant Prichard, or in her testimony at trial.

The next time M.C. alleged any indecent liberties were taken by Defendant, occurred during McSwain's forensic interview on 26 November 2013. M.C. "disclosed" and described two incidences where Defendant had allegedly "made her feel uncomfortable."

In the first incident, Luck asked M.C. to "get in the bed with her and [Defendant]." M.C. was positioned in the bed between Luck and Defendant. Luck got out of bed and went into the bathroom. While Luck was in the bathroom, Defendant purportedly rolled over and started rubbing near M.C.'s vagina. M.C. "disclosed" she rolled away from Defendant, fell off the bed, and hit her head on a refrigerator next to the bed. Luck came out of the bathroom and asked "What was that?" M.C. described Defendant to McSwain as pretending to be asleep. She was on the floor crying and Luck picked her up and carried her to the living room couch.

In the forensic interview, M.C. stated she told Luck about Defendant touching her "private area" when they were at her "Aunt Tory's house." Luck's alleged response was, "Well, I guess he did it. And life has moved on." M.C. initially indicated that the abuse "would always occur in the bedroom" at Luck's home in the forensic interview.

In the second incident where M.C. "disclosed" in the forensic interview, she and Defendant were sitting on the living room couch. Defendant allegedly reached inside of her shirt and rubbed her chest. M.C. alleged this incident occurred while her mother, Luck, was outside of the home, smoking a cigarette.

The next version of M.C.'s allegations of inappropriate conduct by Defendant are asserted within the trauma narrative she allegedly prepared as part of her therapy with Mazzola. The writing and narrative appears well advanced beyond M.C.'s age and education. M.C. "disclosed" three incidences asserting Defendant had inappropriately touched her.

In the first incidence, M.C. stated she became scared one night when she was sleeping by herself in the living room. She went to Luck's bedroom and told her she did not want to sleep in the living room by herself. Luck told her she could sleep with Luck and Defendant. Luck did not tell M.C. she had to sleep in the bed with her and Defendant, as M.C. had told McSwain. M.C. laid between Defendant and Luck in the bed. Defendant

allegedly rolled over and put his hands inside her pants and touched her private parts. Defendant then rolled over and went back to sleep.

M.C. wrote she arose from the bed and pretended to go to the bathroom, but instead went back to the living room to sleep. The next morning, Luck asked M.C. about her going back into the living room. M.C. told her "I thought I went to the bathroom[.]" M.C. stated Luck responded with "I know you're not telling me the truth." M.C. then wrote she told her mother about Defendant touching her "in the private part last night." Luck then called Defendant and got into an argument with him about touching M.C. inappropriately. M.C. then wrote "And then we ate breakfast and forgot about it for the day."

In this version, M.C. did not recount falling out of bed and hitting her head on a refrigerator, her mother being in the bathroom, nor Defendant allegedly coming into the living room afterwards and threatening to hurt her if she told anyone about what had allegedly happened.

The second incidence M.C. recounted in her trauma narrative occurred "[a]bout two weeks later[.]" M.C. was sitting on the living room floor in front of the coffee table. Defendant was reportedly helping M.C. with her homework and "he reached over and put his hand inside [M.C.'s] shirt." M.C. went to the bathroom and waited until Defendant had left. She came out of the bathroom and told Luck about what had happened. Luck "said she was going to call Grandma Sue and talk to her about it. But we forgot about it again."

In the third incidence, M.C. said she had been taking a nap on the couch in the living room. Luck was in the bathroom. "Defendant came over and put his hand in [M.C.'s] pants and touched [her]." According to M.C.:

> My mom came out of the bathroom and [Defendant] rushed over to the recliner. I went back to sleep and when I woke up [Defendant] was acting weird. He was talking fast and he was shaky and acting like he did something wrong. He left and my mom asked me "Where did he touch you? and I told her "on my private part." She got mad and went outside and told Grandma Sue and she got mad too. . . . the next day we forgot about it again. My mom never did anything about [Defendant], she didn't care.

F. *Testimony at Trial*

The final time M.C. accused Defendant of inappropriately touching her was during her direct testimony at trial. M.C. described the

first incident had occurred at a time when she was sleeping in the bed between Luck and Defendant. Luck got out of bed and went to the bathroom. Defendant rolled over, wrapped his arm around M.C., placed his hand inside of her pajama pants, and rubbed her vagina. M.C. was eventually able to roll away from Defendant. M.C. initially testified she got out of the bed and went into the living room.

The prosecutor asked M.C. if she recalled anything else occurring before she went into the living room, to which she replied, "I guess he was trying to stop me. And. . . I kind of fumbled over. . . the mini refrigerator in the room. . . I fell out of the bed and the refrigerator tipped over because I hit my head on it."

M.C. testified Defendant followed her into the living room and told her "that if [she] told anyone, that he would hurt me." M.C. stated her mother remained in the bathroom when she fell out of bed and when Defendant followed her into the living room. M.C. testified she told her mother of the incident the next day, but her mother responded that she "needed to move on with life."

M.C. testified Defendant had touched her vagina on a second occasion. She stated, "we were in bed and my mom was asleep and I was in the middle of the bed and [Defendant] had rolled over and did the same thing[,]" that is, rubbed her vagina. M.C. testified she did not tell her mother nor anybody else about this incident. This testimony was inconsistent with what she had written in her trauma narrative about telling her mother the following morning and her mother getting into an argument with Defendant over the alleged incident.

The third, and final, incident M.C. testified to at trial involved Defendant allegedly touching her chest underneath her clothes. M.C. stated, "[Defendant] was sitting on the couch and I was at the coffee table sitting on the floor doing my homework[.]" M.C.'s mother was in the kitchen cooking dinner. M.C. testified Defendant "leaned over and put his hand in [M.C.'s] shirt" and "just kind of rubbed." M.C. stood up and Defendant took his hand out of her shirt. M.C. went to the bathroom and waited. When she left the bathroom, Defendant was gone. Inconsistent with what she had written in her trauma narrative, M.C. testified she did not actually tell her mother about this incident.

Aside from these three incidences, M.C. testified at trial that she did not recall any other time when Defendant had touched her inappropriately, and Defendant had not touched her any other times either in the bedroom or living room. M.C. testified she did not tell her maternal grandmother, Sue, or her school guidance counselor about Defendant

touching her, which testimony is inconsistent with what she had "disclosed" to McSwain in her forensic interview. Neither Sue nor the school guidance counselor testified at trial. M.C. did not testify about an incident when Defendant had allegedly touched her vagina while she was taking a nap on the couch in the living room, as she had described in her trauma narrative.

The record shows many other inconsistencies in M.C.'s disparate recollections of inappropriate touching by Defendant, a total lack of any physical evidence, a six-to-eight month delay in "disclosing" the alleged indecent liberties and a lack of eyewitness testimony or corroboration of the alleged incidences. The record also includes evidence of M.C.'s motive to fabricate the allegations, due to disliking Defendant because of his relationship with her mother.

The State's evidence and case is based *entirely* upon M.C.'s credibility. Neither her mother, grandmother, roommate Michael, her aunt, school counselor nor anyone else M.C. recounted as being present or having been contemporaneously told about Defendant's alleged acts of inappropriate touching testified. No physical evidence was introduced, as was present in other cases.

The State presented McSwain as an expert witness in the forensic interviewing of abused children, and Mazzola as an expert witness in sexual abuse and pediatric counseling. The jury heard McSwain's testimony involving his training in forensic interviewing and his two Master's degrees, including one in forensic psychology. The jury heard Mazzola's testimony involving her training in counseling, her Master's degree in social work, and how she had treated over 1,000 children for sexual abuse.

Based upon their qualifications, McSwain and Mazzola's expert testimonies was likely given significant weight by the jury. Additionally, the improper use of "disclosure" by all four of the State's witnesses and prosecutor placed particular significance upon the witnesses' descriptions and interpretations of M.C.'s statements. With the absence of *any* corroborative witnesses, documents, or physical evidence, the witnesses' improper bolstering testimony and vouching for M.C.'s credibility was prejudicial to Defendant and had a probable impact upon the jury's finding of guilt. *See Ryan*, 223 N.C. App. at 338, 734 S.E.2d at 607.

As with the State's evidence in *Ryan*, the State's case rested entirely on M.C.'s accounts and allegations of what had occurred. *See id.* (holding admission of expert's improper vouching testimony constituted plain error where there was a lack of corroborating evidence). Following our analysis and conclusion in *Jamison* and holding in *Ryan*, the admission

of the witnesses' testimony, which improperly vouched for M.C.'s credibility by referring to her statement's alleging sexual abuse as "disclosures" prejudiced Defendant, and constitutes plain error. *See id.* Defendant's conviction and the judgment entered is properly reversed and remanded for a new trial.

V. The McSwain Report

The majority's opinion addresses Defendant's argument regarding the trial court's admission of the "McSwain Report" into evidence. Defendant argues the "trial court plainly erred because the opinions and recommendations in the [McSwain Report] clearly establish McSwain found M.C. and her sexual abuse allegations credible and believed in [Defendant's] guilt."

As noted above, McSwain was tendered and admitted as an expert witness in conducting forensic interviews of children. McSwain defined a "forensic interview" as "a structured conversation with the child designed to elicit details about a specific event or events that the child has . . . experienced." McSwain prepared his Report, which summarized information M.C. had "disclosed" or "revealed" to him during the forensic interview, and his conclusions, opinions, and recommendations. After Defendant's initial objections, a redacted written McSwain Report was also admitted into evidence.

Defendant highlights numerous portions of the McSwain Report he contends improperly bolster and vouch for M.C's credibility, including the following sentences within a section of the report, entitled "Impressions":

> [M.C.] displayed age appropriate competencies across all spheres of functioning. [M.C.] appeared resistant to suggestion, unaffected by the primacy-recency effect, with appropriate memory recall and a willingness to correct the clinician as needed. . . . [M.C.] engaged appropriately in dialogue, stayed focused and followed commands. [M.C.'s] language skills. . . appeared appropriate for information gathering purposes. . . . *[M.C.] demonstrated that she understood the difference between telling the truth and telling a lie. [M.C.] reported an acceptance of the obligation to report information truthfully.* (Emphasis supplied).

Defendant also casts the following paragraph from a section entitled "Summary/Conclusion" as improper bolstering and vouching:

> The interviewe (sic) notes that during the forensic interview session, [M.C.] appeared to be consistent with the information . . . about [Defendant] sexually abusing her. In addition, *she reported to being truthful and did not appear to display any overt signs of deception. [M.C.'s] assessment was consistent with that of someone who has been sexually abused*. (Emphasis supplied).

Defendant also contends the use of "assailant" in the following sentence from a section entitled "Recommendations" in the Report constitutes an improper comment upon Defendant's guilt:

> 2. The interviewer would strongly encourage that [M.C.] remain inaccessible to the alleged assailant until the reasonable conclusion to this investigation and determination is made that [M.C.] is emotionally and physically safe when in the assailant's presence[.]

With regards to the "Summary/Conclusion" section of the McSwain Report, this Court has held very similar expert testimony constitutes improper vouching for the credibility of a witness and was erroneously admitted in *State v. Frady*, 228 N.C. App. 682, 747 S.E.2d 164, *disc. review denied*, 367 N.C. 273, 752 S.E.2d 465 (2013).

In *Frady*, a medical doctor, Dr. Brown, was admitted as an expert witness and testified that a six-year-old child, Debbie's, "disclosure" was "consistent with sexual abuse." *Id.* at 684, 747 S.E.2d at 166. Dr. Brown testified that her opinion was based upon "[t]he consistency of [the child's] statements over time, the fact that she could give sensory details of the event . . . and her knowledge of the sexual act that is beyond her developmental level." *Id.* (original alterations omitted).

This Court stated:

> In order for an expert medical witness to render an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. *Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding the victim's credibility*.

Id. at 685, 747 S.E.2d at 1667 (emphasis supplied) (citation omitted).

Reviewing Dr. Brown's testimony, this Court held that:

> [w]hile Dr. Brown did not diagnose Debbie as having been sexually abused, she essentially expressed her opinion

> that Debbie is credible. We see no appreciable difference between this statement and a statement that Debbie is believable. The testimony neither addressed the characteristics of sexually abused children nor spoke to whether Debbie exhibited symptoms consistent with those characteristics.

Id. at 685-86, 747 S.E.2d at 167 (citation omitted).

This Court held "the contested testimony amounted only to an impermissible opinion regarding the victim's credibility, and the trial court erred in admitting it." *Id.* at 686, 747 S.E.2d at 167; *see also Oliver*, 85 N.C. App. at 11, 354 S.E.2d at 533.

The State argues *Frady* is inapplicable to support Defendant's appeal because, unlike McSwain, Dr. Brown did not personally interview the child victim. This Court noted "the record contains no physical evidence indicating that Debbie was sexually abused, and Dr. Brown never personally examined or interviewed her; she merely reviewed the forensic interview and the case file." *Frady*, 228 N.C. App. at 686, 747 S.E.2d at 167.

A close reading of this Court's analysis indicates Dr. Brown's failure to interview or personally examine the child was not a determinative factor of this Court's holding that her testimony constituted inadmissible opinion testimony vouching for the child's credibility. *Id.*

Before noting Dr. Brown had not personally interviewed or examined the child, this Court held Dr. Brown "essentially expressed her opinion that Debbie is credible. We see no appreciable difference between this statement and a statement that Debbie is believable." *Id.*

Even if Dr. Brown had personally interviewed or examined the child, no testimony established her opinion that the child's " 'disclosure' is consistent with sexual abuse" was based upon a comparison of the victim's characteristics to the known characteristics of sexually-abused children. *Id.* at 685, 747 S.E.2d at 166.

In *Frady*, this Court held the doctor's expert testimony, concerning her opinion on the credibility of the child, was not dependent upon whether that doctor had interviewed or examined the child witness. In the present case, the State's characterization and limiting of this Court's holding in *Frady* is inconsistent with that opinion's analysis. *See id.*

No meaningful distinction exists between the expert testimony excluded in *Frady* and the "Summary/Conclusion" paragraph challenged

in the McSwain Report. McSwain based his conclusion asserting "[M.C.'s] assessment was consistent with that of someone who has been sexually abused" upon his opinion that "[M.C.] appeared to be consistent with the information . . . about [Defendant] sexually abusing her" and "she reported to being truthful and did not appear to display any overt signs of deception."

Like the inadmissible testimony in *Frady*, this paragraph in the McSwain Report "essentially expresse[s] [his] opinion that [M.C.] is credible." *See Frady*, 228 N.C. at 685, 747 S.E.2d at 167. Following our opinion in *Frady*, I "see no appreciable difference between [McSwain's] statement and a statement that [M.C.] is believable. The [statement] neither addressed the characteristics of sexually abused children nor spoke to whether [M.C.] exhibited symptoms consistent with those characteristics." *See id*. at 686, 747 S.E.2d at 167.

The "Summary/Conclusion" section from the McSwain Report constitutes inadmissible expert testimony attesting to the credibility of M.C. *See In re T.R.B.*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003) ("An expert witness may not attest to the victim's credibility, as he or she is in no better position than the jury to assess credibility.").

VI. Invited Error

The majority's opinion correctly concludes Defendant cannot show plain error with respect to the erroneous admission of any portion of the McSwain Report on this appeal. Based upon Defendant's invited error, I concur with the majority's opinion that he is unable to establish plain error on the otherwise erroneous, but invited admission of the McSwain Report on this ground.

VII. Conclusion

Defendant's arguments concerning the erroneous admission of the McSwain Report are waived. Based upon Defendant counsel's invited error, I concur with the majority's opinion that Defendant cannot to establish plain error on this ground.

The State's case rested entirely upon M.C's credibility and lacked any corroborating physical evidence or independent testimony. The trial court's admission of bolstering testimony by McSwain, Mazzola, Archie, and Sergeant Prichard to vouch for M.C.'s credibility was error. The witnesses' bolstering testimony likely had a probable impact on the jury's verdict, given the shifting and inconsistent versions of alleged incidents M.C. "disclosed" and motivations for M.C. to fabricate against and prejudice Defendant.

The State's introduction of alleged domestic violence by Defendant, without any corroborating evidence, was also error. These errors are prejudicial and constitute plain error. Plain error and the cumulative effect of the errors at trial prejudiced Defendant, and necessitates reversal.

I vote to reverse Defendant's conviction and judgment and remand for a new trial. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
AMANDA KAY CANADY, DEFENDANT

No. COA18-985

Filed 3 September 2019

Evidence—photographs—murder scene—Rule 403—probative value

The introduction of nearly seventy photographs of a murder scene in a first-degree murder trial was not cumulatively excessive or unfairly prejudicial to defendant given the other overwhelming evidence of defendant's guilt. The trial court reviewed the photographs in camera, considered arguments from both sides, and made a reasoned decision as to each photograph's usefulness in illustrating either the crime scene or the victims' injuries.

Appeal by defendant from judgments entered 28 March 2018 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 9 April 2019.

Attorney General Joshua H. Stein, by General Counsel W. Swain Wood, for the State.

Michael E. Casterline for defendant-appellant.

BERGER, Judge.

On March 28, 2018, Amanda Kay Canady ("Defendant") was convicted of first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and attempted first degree murder. Defendant appeals, arguing that the trial court abused its discretion when it admitted several crime scene photographs into evidence. Defendant claims

the photographs were more prejudicial than probative, and argues that, but for this error, there is a reasonable possibility that a different result would have occurred at trial. We disagree, and find no error.

Factual and Procedural Background

On December 31, 2013, Keshia Ward ("Ward") and her fiancé, Johnny Lee Tyler ("Tyler"), hosted a New Year's Eve cookout at their home. After the cookout and subsequent party had mostly concluded, in the early morning hours of January 1, 2014, a dispute arose over a cellular telephone. The cell phone was owned by Derrick Pierce ("Pierce") and had been left in Tyler's truck. Pierce, who was at the party with his associate Antwan Johnson ("Johnson"), had previously sold drugs to Tyler. Tyler initially claimed that he did not know where the cell phone was, but he eventually admitted that he had sold the phone.

This confession led Johnson to grab Tyler and take him into the home. Pierce and Johnson began beating Tyler once inside, with Johnson holding Tyler while Pierce struck him in the face. Ward attempted to stop the beating of her fiancé, at which point Defendant entered the home. Pierce instructed Defendant to "get her ass, too."

Defendant then grabbed a baseball bat and began to beat Ward, continuing her assault even as Ward fell to the floor. Defendant also swung the bat at Tyler, striking him in the head. After several minutes of continuous beating, Tyler and Ward were instructed to strip naked and perform sexual acts on one another. Throughout this time, Tyler and Ward's children were hiding in the back bedroom of the home. The eldest, Delanee Chavis ("Chavis"), heard male voices instruct Defendant to "go check on the kids." Chavis then saw Defendant open the bedroom door, enter the room holding a wooden leg of a barstool in her hand, look around, and then exit the room closing the door behind her.

The noise from the beatings eventually stopped, and Tyler heard someone say, "They're dead. Come on, let's go." Chavis heard someone say, "If y'all tell anybody, I'll kill y'all." Chavis awoke later that morning to find Tyler naked, badly injured, and asking for help. Chavis also saw Ward, her mother, naked and lying on the floor, covered with a blanket. Tyler spent nearly three weeks in the hospital recovering from his severe injuries. Ward died as a result of the injuries she had sustained during the beating.

Deputies from the Columbus County Sheriff's Department responded to the house the next day after Chavis had called family members seeking help. Deputy Joseph Graham ("Deputy Graham") found Tyler in the

living room and Ward in a bedroom near the front of the house. Deputy Graham observed blood on the walls, floor, furniture, and throughout the house. The Chief Medical Examiner for the State of North Carolina determined that Ward's death was the result of blunt trauma injuries to the head, chest, abdomen and extremities.

That same day, Johnson showed one of his associates, Antonio Murdock ("Murdock"), a video of the assault that he had recorded with his cell phone. In the fifteen second video, Defendant, who was known to Murdock and recognized by him, was sitting on top of another woman and swinging something at her head.

In January 2017, Johnson pleaded guilty to second degree murder and attempted first degree murder, and he agreed to testify at Defendant's trial on behalf of the State. Pierce was tried and convicted in June 2017.

Defendant's trial began on March 19, 2018. Before trial began, Defendant conceded to being present at the crime scene on the day of the incident. Throughout trial, Defendant consistently objected to the introduction of the many photographs of the victims and the crime scene. Defendant asserted that the photographs were more prejudicial than probative. To expedite this process, the trial court reviewed all of the photographs *in camera*, and ruled on each photograph Defendant had objected to during this process. Defendant objected to more than seventy of the photographs the State was seeking to introduce into evidence, and the trial court sustained roughly twenty objections to individual photographs.

Defendant was convicted by the jury for three crimes: (1) first degree murder of Ward under the three theories offered by the State—malice, premeditation and deliberation; felony murder rule; and murder by torture; (2) assault with a deadly weapon with intent to kill inflicting serious bodily injury on Tyler; and (3) attempted murder of Tyler. In addition to her sentence of life imprisonment without parole for the first degree murder conviction, Defendant was also sentenced to a term of 73 to 100 months for the Class C felony assault and 157 to 201 months for the attempted murder. Defendant appeals.

Analysis

Defendant only asserts one argument here on appeal. She argues that her conviction must be vacated, and a new trial granted, because the trial court erred in allowing "an excessive number of bloody and gruesome photographs of the crime scene" into evidence that "had little

probative value" and were "unfairly prejudicial," pursuant to Rule 403 of the North Carolina Rules of Evidence. We disagree.

Rule 403 states that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

> Whether to exclude relevant evidence under the Rule 403 balancing test lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.

State v. Lloyd, 354 N.C. 76, 98, 552 S.E.2d 596, 614 (2001) (*purgandum*).

"Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each is within the trial court's discretion under a totality of the circumstances analysis." *State v. Clark*, 138 N.C. App. 392, 399, 531 S.E.2d 482, 487 (2000).

> The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation.

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

> Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words. Photographs are admissible to illustrate testimony concerning the manner of a killing in order to prove circumstantially the elements of first-degree murder. Even gory or gruesome photographs are admissible so long as they are used for illustrative purposes and are not introduced solely to arouse the jurors' passions. When determining the admissibility of a photograph, the trial court should consider what a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is

> projected or presented, and the scope and clarity of the testimony it accompanies.

Lloyd, 354 N.C. at 98, 552 S.E.2d at 613-14 (*purgandum*).

Here, Defendant contends that the court abused its discretion in admitting roughly seventy photographs of the crime scene, arguing that "the sheer volume of photographs prominently displaying blood was excessive and unnecessary to prove the State's case against [Defendant]." She further argues that the evidence served no probative value and was "calculated to play to the jury's emotions; to horrify the jurors and incite them" in order to find Defendant guilty. Defendant focuses specifically on nine photographs of the victim as she was found at the crime scene and twelve more autopsy photographs. Defendant argues that this evidence did not "contain any information to help the jury assess [Defendant's] alleged role in [the victim's] death . . . [and that] the evidence should have focused on establishing [Defendant's] participation." In allowing "the State to flood the jury with these disturbing images, the trial court abused its discretion and prejudiced [Defendant]."

However, the trial court admitted the photographs only after careful *in camera* consideration of each photograph. Then, the trial court reviewed the photographs again, allowing the State and Defendant to argue on the record over whether certain photographs should or should not be admitted. The trial court, after hearing arguments on individual photographs sustained several of Defendant's objections, because it found that the evidence was either cumulative or unnecessary. The trial court admitted several other photographs, over the objection of Defendant, concluding that those photographs showed unique aspects of the crime scene or the victims' injuries. There were different categories of photographs that were introduced: crime scene and clothes; Tyler's injuries; Ward's body at the crime scene; the bedroom where Ward was found; and autopsy photographs.

The ruling of the trial court was not "manifestly unsupported by reason or [ ] so arbitrary that it could not have been the result of a reasoned decision." *Lloyd*, 354 N.C. at 98, 552 S.E.2d at 614. The admission of each photograph was a thoroughly reasoned decision. Each photograph was reviewed and discussed. Defendant does not even argue *which specific photographs* should have been excluded, only that the photographs, *cumulatively*, were prejudicial. As stated previously, it is "[t]he trial court's task . . . to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. The trial court completed its task here.

Furthermore, Defendant is unable to show that the admission of the photographs, cumulatively, was prejudicial because of the other overwhelming evidence of Defendant's guilt. Defendant stipulated that she was present in Tyler and Ward's home at the time these crimes were committed. Tyler, Chavis, and Murdock testified to Defendant's involvement in the murder, assault, and attempted murder in which two victims were savagely beaten. The photographs allowed into evidence in this case illustrated the testimonies that proved this to the jury, and the photographs were properly allowed into evidence by the trial court.

Conclusion

For the reasons stated above, the trial court did not err in allowing the State to introduce photographic evidence of Defendant's crimes. She received a fair trial, free from error.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
BRUCE WAYNE GLOVER, DEFENDANT

No. COA18-538

Filed 3 September 2019

1. Drugs—possession—jury instructions—acting in concert—as alternative theory to constructive possession

Where law enforcement searched defendant's home and found a metal tin inside his dresser containing various drugs, the trial court properly instructed the jury that it could find defendant acted in concert with another to possess the drugs, as an alternative to finding he constructively possessed them. Based on evidence showing that defendant's housemate had placed the metal tin inside defendant's dresser, that the drugs belonged to the housemate, and that she and defendant had taken drugs together in the past, a jury could infer defendant's knowledge and complicity with her actions where he admitted to having ingested the same types of drugs found inside the metal tin (and nowhere else in the house) just before the search.

2. Sentencing—prior record level—calculation—stipulation—worksheet—split crimes—out-of-state convictions

After defendant was convicted of various drug possession offenses, the trial court committed prejudicial error by miscalculating his prior record level at sentencing, which was based on a worksheet of defendant's prior convictions that the parties had stipulated to. The trial court properly considered two prior convictions for possession of drug paraphernalia in its calculation—even though the crime was later split into separate offenses, one of which was a Class 3 misdemeanor that could not be counted—because the parties stipulated that the facts underlying each conviction supported a Class 1 misdemeanor classification, which could be counted. However, the parties could not legally stipulate that any of defendant's out-of-state convictions were "substantially similar" to offenses that North Carolina classified differently, and therefore those convictions needed to be assigned the default classifications set forth in N.C.G.S. § 15A-1340.14.

3. Constitutional Law—effective assistance of counsel—sentencing—prior record level—improper stipulation—no prejudice

In a drug possession case, which was remanded because the trial court erroneously sentenced defendant as a Level VI offender instead of as a Level V offender, defendant's ineffective assistance of counsel claim was meritless where, allegedly, defendant's trial lawyer improperly stipulated to three prior convictions that should not have been included in the court's prior record level calculation. This error would not prejudice defendant's sentencing on remand, where correcting it would still result in a prior record level V.

Judge COLLINS concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 20 September 2017 by Judge W. Erwin Spainhour in Henderson County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan D. Shaw, for the State.

Appellate Defender Glenn Gerding by Assistant Appellate Defender Sterling Rozear, for the Defendant.

DILLON, Judge.

Defendant Bruce Wayne Glover appeals from the trial court's judgment entered upon a jury verdict finding him guilty of possession of various controlled substances. The jury was instructed on alternative theories of possession; namely, that Defendant was in "constructive" possession of the controlled substances and, alternatively, that Defendant "acted in concert" with another to possess the controlled substances. Defendant contends the trial court improperly instructed the jury on "acting in concert" and, thereafter, failed to properly calculate his prior record level ("PRL") in sentencing.

After careful review, we conclude that there was sufficient evidence to support an instruction on possession by "acting in concert." However, we conclude that the trial court committed prejudicial error in calculating Defendant's PRL and remand for the limited purpose of resentencing.

I. Background

This case arises out of officers' discovery of various drugs in Defendant's home. The evidence at trial tended to show as follows:

Defendant lived in a home shared with a number of people, including a woman referred to herein as Ms. Stepp.

In September 2016, officers arrived at Defendant's home to investigate drug complaints they had received. A detective spoke with Defendant in a bedroom of the home. Defendant told the detective that the bedroom was *his* private bedroom and that an alcove beyond the bedroom was also his "personal space." Defendant consented to a search of his bedroom and his personal space. Prior to the search, Defendant told the detective that he did not believe officers would find any illegal substances in his bedroom or personal space, but only drug paraphernalia. Also prior to the search, when asked if he had ingested any illegal substances, Defendant admitted to having used methamphetamine and prescription pills.

During the search of Defendant's bedroom, the detective found a white rectangular pill marked "G3722" masked in aluminum foil, a small bag of marijuana, scales, rolling papers, plastic bags, and a glass pipe in a dresser. But during the search of Defendant's "personal space" adjacent to the bedroom, the detective found more incriminating evidence; namely, a metal tin that contained, among other items, (1) methamphetamine, (2) cocaine, (3) heroin, and (4) a small white rectangular pill that was similar in size, shape, and markings to the white pill found in Defendant's bedroom.

Defendant was charged with and, following a jury trial, subsequently convicted of possession of methamphetamine, heroin, and cocaine, as well as having attained the status of an habitual felon. In sentencing, the trial court found Defendant to be a PRL VI and imposed two separate sentences of fifty (50) to seventy-two (72) months of imprisonment, running consecutively.

Defendant timely appealed.

II. Analysis

Defendant challenges his conviction in two respects, discussed below. In the alternative, Defendant contends that his sentencing based on a mistaken PRL was the result of ineffective assistance of counsel. We address each challenge in turn.

A. Jury Instructions on Acting in Concert

[1] At trial, over Defendant's objection, the court instructed the jury that it could find Defendant guilty of possession on the theory of acting in concert, in addition to constructive possession. Defendant contends that the evidence did not support an instruction on acting in concert.

Whether evidence offered at trial is sufficient to warrant a jury instruction is a question of law; "therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54, *aff'd per curiam*, 364 N.C. 417, 700 S.E.2d 222 (2010).

To support an acting in concert instruction, the State must provide sufficient evidence that the defendant (1) was "present at the scene of the crime" and (2) "act[ed] [] together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979); *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (noting that each person may be actually or constructively present and is equally guilty of any crime committed in pursuance of their common purpose). A defendant may be guilty through acting in concert even where another person "does all the acts necessary to commit the crime." *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993). "It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[.]" *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

Possession of drugs requires proof that the defendant (1) knowingly (2) possessed (3) a controlled substance. *See State v. Galaviz-Torres*,

368 N.C. 44, 772 S.E.2d 434, 437 (2015). Though we have stated that "[t]he acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt[,] [o]ur courts have instructed juries on both constructive possession and acting in concert in possession cases." *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) (internal citation omitted). "Under the doctrine of acting in concert, the State is not required to prove actual or constructive possession if it can establish that the defendant was present at the scene of the crime and the evidence is sufficient to show he [was] acting together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Holloway*, ___ N.C. App. ___, ___, 793 S.E.2d 766, 774 (2016) (quotation omitted).

We conclude that there was *not only* sufficient evidence from which the jury could find that Defendant constructively possessed controlled substances, *but also* sufficient evidence from which the jury could alternatively find that Defendant acted in concert with Ms. Stepp to possess the controlled substances.

Defendant does not challenge that there was sufficient evidence that he constructively possessed the substances found in the metal tin; and, indeed, the evidence was sufficient to support the jury's finding that Defendant constructively possessed those substances. *See State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (holding that a person is in constructive possession of narcotics when "he has both the power and the intent to control its disposition or use even though he does not have actual possession [of the narcotics on his person]"). Indeed, Defendant was present and identified the area where the metal tin was found as his "personal space." Further, the jury could have inferred that Defendant admitted to having just ingested methamphetamine and prescription pills, substances which were found in the metal tin and nowhere else (except for the white pill found in his bedroom). And the white pill found in his bedroom matched a pill found in the metal tin. Based on Defendant's own admissions to the detective and the results of the search, the jury could have determined that Defendant had both the power and the intent to control the disposition of the controlled substances found in the metal tin.

But we conclude that there also was sufficient evidence from which the jury could have alternatively determined that Defendant acted in concert to aid Ms. Stepp's constructive possession of the controlled substances found in the metal tin. Specifically, Defendant called Ms. Stepp, who testified that *she* placed the metal tin in the dresser in Defendant's

personal space, that the drugs therein were *hers*, that she intended to come back later to use them, and that she and Defendant had taken drugs together in the past. This testimony is evidence that Ms. Stepp possessed (constructively) the drugs in the metal tin. Further, based on Ms. Stepp's testimony along with the State's evidence, the jury could have found that Defendant was aware of the presence of the drugs in the metal tin: (1) he admitted to the detective to having just used methamphetamine, and the only methamphetamine found in the house was in the metal tin; *and* (2) he admitted to the detective to having just ingested prescription pills, and a pill found in his bedroom matched a pill found in the metal tin. And the evidence was sufficient to support findings that (1) Defendant facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others; (2) Defendant did not intend to exert control over the disposition of those remaining drugs, as they belonged to his friend, Ms. Stepp, and that she controlled their disposition; and (3) Defendant was actually present when the drugs were in Ms. Stepp's constructive possession.

We, therefore, conclude that the trial court did not err in instructing the jury on the theory of possession by "acting in concert." *See State v. Garcia*, 111 N.C. App. 636, 640-41, 433 S.E.2d 187, 189-90 (1993) (concluding that the evidence was sufficient to instruct on "constructive possession" *and* alternatively on possession by "acting in concert").

B. Calculation of Prior Record Level

[2] Defendant next contends that the trial court erred by sentencing him as a PRL VI with twenty-one (21) points. We agree that Defendant should have been assigned fewer than twenty-one (21) points. We conclude that he should have been assigned seventeen (17) points, which would qualify Defendant to be sentenced as a PRL V offender. Therefore, we remand for resentencing.

A trial court's determination of a defendant's PRL is a conclusion of law that is subject to *de novo* review on appeal. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009).

A sentencing judge must determine a defendant's PRL pursuant to Section 15A-1340.14 of our General Statutes. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). First, "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists." N.C. Gen. Stat. § 15A-1340.14(f) (2015). Second, the court determines the PRL by adding the points attributed to each of the defendant's prior convictions according to their classifications. N.C. Gen. Stat. § 15A-1340.14(a) (2015).

The State may prove a prior conviction "by . . . [s]tipulation of the parties[,]" among other methods. N.C. Gen. Stat. § 15A-1340.14(f). Typically, a "mere worksheet, standing alone, is insufficient to adequately establish a defendant's prior record level." *Alexander*, 359 N.C. at 827, 616 S.E.2d at 917. However, a worksheet that has been agreed upon by both parties will suffice to meet the State's "preponderance of the evidence" requirement for each conviction. *See Arrington*, ___ N.C. at ___, 819 S.E.2d at 333.

When the parties stipulate to a completed worksheet, they are stipulating that the facts underlying the conviction support the noted classification of each listed offense:

> This proof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. . . . Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, *he is stipulating that the facts underlying his conviction justify that classification*.

Id. (emphasis added). "Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense." *Id.*

Here, Defendant stipulated to the record pursuant to Section 15A-1340.14(f) when his defense attorney signed and stipulated to the validity of the entire worksheet used to determine Defendant's PRL. "Although we have found that [D]efendant stipulated to possessing a prior record level of [VI], we will review [D]efendant's record level to determine if it was unauthorized at the time it was imposed" or was otherwise invalid as a matter of law. *State v. Mack*, 188 N.C. App. 365, 380, 656 S.E.2d 1, 12 (2008).[1] In so doing, and insofar as the law allows, we will assume that the stipulated convictions listed in the worksheet are factually supported. *See Arrington*, ___ N.C. at ___, 819 S.E.2d at 334 (explaining that judges are not in the position to question convictions stipulated to by both parties).

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1. We briefly note, here, that Defendant did not object to his sentencing during the trial. Regardless, a defendant's appeal is statutorily preserved where he or she alleges the "[t]he 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." *State v. Meadows*, ___ N.C. ___, ___, 821 S.E.2d 402, 406 (2018) (quoting N.C. Gen. Stat. § 15A-1446(d)(18) (2017)).

Defendant's PRL worksheet contains a total of forty-seven (47) prior convictions from North Carolina, Georgia, and Florida. We must first determine which convictions were eligible for inclusion in Defendant's PRL calculation.

1. Convictions Supporting Habitual Felon Status

To start, we must first disregard the three convictions used by the jury to convict Defendant of obtaining habitual felon status. Concurrent with his conviction in this case of felony possession of controlled substances, Defendant was found to have attained habitual felon status. And "convictions used to establish a person's status as an habitual felon shall not be used" to determine that person's PRL. N.C. Gen. Stat. § 14-7.6 (2015). As the jury used three of Defendant's forty-seven (47) convictions to assign Defendant habitual felon status, they may not be used in his PRL calculations. This leaves forty-four (44) prior convictions.

2. Convictions Rendered in the Same Week or Session of Court

Next, though his convictions span nearly four decades, Defendant received many of his convictions in groups on the same day or session of court. "[I]f an offender is convicted of more than one offense in a single superior court during one calendar week [or in a single district court in one session of court], only the conviction for the offense with the highest point total is used." N.C. Gen. Stat. § 15A-1340.14(d) (2015).

On 30 June 2006, Defendant was convicted in Henderson County district court of twelve (12) crimes. The eleven (11) convictions with the lowest point total may not be used to determine his PRL. Therefore, we are left with a single Class I felony conviction from 30 June 2006. This reduces the number of prior convictions from forty-four (44) to thirty-three (33).

On 14 May 2007, Defendant was convicted in Henderson County superior court of four crimes. After removing the three convictions with the lowest points, we are left with one Class I felony conviction from 14 May 2007. Therefore, after removing three convictions, Defendant has thirty (30) remaining prior convictions.

On 16 October 2009, Defendant was convicted in Henderson County district court of two crimes. After removing the conviction with the lowest points, we are left with one Class 1 misdemeanor conviction from 16 October 2009. Therefore, Defendant has twenty-nine (29) remaining prior convictions.

On 12 February 2010, Defendant was convicted in Henderson County district court of five crimes. We must remove four of these convictions,

leaving a single Class 1 misdemeanor conviction with the most points from 12 February 2010. Therefore, after removing four convictions, Defendant has twenty-five (25) remaining prior convictions.

Lastly, on 2 August 2013, Defendant was convicted in Henderson County district court of six crimes. After removing his five convictions with the lower points, we are left with one Class I felony conviction from 2 August 2013. Therefore, after removing these five convictions, Defendant has twenty (20) prior convictions remaining that may be considered in calculating his PRL.

3. Irrelevant Misdemeanor Convictions

Only prior felonies, "Class A1 and Class 1 nontraffic misdemeanor offense[s], impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle" may be used to calculate a PRL in felony sentencing. N.C. Gen. Stat. Ann. § 15A-1340.14(b) (2015). Other misdemeanor traffic offenses, including driving while license revoked, may not be used to calculate a felony PRL. *Id.*; *State v. Flint*, 199 N.C. App. 709, 728, 682 S.E.2d 443, 454 (2009) ("Being that driving while license revoked is a misdemeanor traffic offense, which is not included in Section 15A–1340.14(b)(5), it is not a conviction that can be used in determining a defendant's prior record level.").

Of the remaining twenty (20) convictions on Defendant's worksheet, five are either classified as Class 2 or lower misdemeanor offenses or are factually described as "DWLR," a conviction for driving while license revoked. These five convictions may not be used to calculate Defendant's PRL following his present, felony conviction. After removing these five convictions, Defendant has fifteen (15) prior convictions remaining.

4. Split Crimes

Defendant's remaining fifteen (15) convictions include two convictions for possession of drug paraphernalia, from 1983 and 2008. Defendant contends that these two convictions were improperly considered in the PRL calculation because the crime has since been split into two categories, one of which is a Class 3 misdemeanor not eligible for calculation.

It is true that "the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is sentenced [was] committed." N.C. Gen. Stat. § 15A-1340(c). Defendant committed the crimes for which he is being sentenced in 2016. In 2014, possession of drug paraphernalia was split into two separate crimes: (1) possession of marijuana paraphernalia under N.C. Gen.

Stat. § 90-113.22A (2014), a Class 3 misdemeanor; and (2) possession of drug paraphernalia under N.C. Gen. Stat. § 90-113.22 (2014), a Class 1 misdemeanor. Defendant argues that the two instances of possession of drug paraphernalia on his worksheet should be considered Class 3 misdemeanors, and therefore not included in the PRL calculus, rather than Class 1 misdemeanors, because no evidence was presented as to what sort of drug paraphernalia was possessed.

However, following our Supreme Court's recent decision in *Arrington*, we must assume that the classifications stipulated to by the parties on the worksheet are correct and sufficiently supported by the underlying facts of the crime. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 333. Each of Defendant's possession of drug paraphernalia charges is classified as a Class 1 misdemeanor, and may be considered in the present PRL calculation. Fifteen (15) of Defendant's prior convictions still remain.

5. Out-of-State Convictions

Of the fifteen (15) remaining convictions, six arise from offenses committed outside of North Carolina. Defendant contends that these crimes were incorrectly classified and received more points than allowed as a matter of law.

Out-of-state felony convictions are, by default, treated as Class I felony convictions under North Carolina law. N.C. Gen. Stat. § 15A-1340.14(e) (2015). Similarly, out-of-state misdemeanor convictions are, by default, treated as Class 3 misdemeanor convictions, *id.*, and are initially not usable in a felony PRL calculation, N.C. Gen. Stat. § 15A-1340.14(b)(5) (2015). However, either party may overcome these presumptions by proving, by a preponderance of the evidence, that the out-of-state conviction reflects an offense that is substantially similar to an offense that North Carolina classifies differently. N.C. Gen. Stat. § 15A-1340.14(e). If proven, the felony conviction is not treated as a Class I felony, but rather is treated as the classification given to the substantially similar North Carolina offense. *Id.*

Our Court has long held that, while the parties may stipulate that a defendant was convicted of an out-of-state offense and that the offense was considered either a felony or misdemeanor under that state's law, neither party may stipulate that the out-of-state conviction is substantially similar to a North Carolina felony or misdemeanor.[2] We have

2. *State v. Burgess*, 216 N.C. App. 54, 59, 715 S.E.2d 867, 871 (2011) ("This Court has repeatedly held a defendant's stipulation to the substantial similarity of offenses from

traditionally held that "the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court." *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006).

It may be argued that our Supreme Court's reasoning in *Arrington* overrules this line of precedent. In *Arrington*, our Supreme Court held that a conviction's classification may be stipulated to because it is, in essence, "fact driven." *Arrington*, ___ N.C. at ___, 819 S.E.2d at 331. For the purposes of in-state convictions, when the defendant stipulates to a conviction, "he is stipulating that the facts underlying his conviction justify that classification." *Id.* at ___, 819 S.E.2d at 333. Similarly, it can be said that, when the parties stipulate to an out-of-state conviction and its appropriate classification in North Carolina, they are stipulating that the underlying facts correspond to a particular North Carolina offense and its respective classification. We do not believe this is the appropriate interpretation of our Supreme Court's holding.

Allowing this form of stipulation requires an additional logical step that was not present in *Arrington*. The facts of *Arrington* concern the appropriate classification of the defendant's prior conviction for second-degree murder. *Arrington*, ___ N.C. at ___, 819 S.E.2d at 332. Between the time the defendant was convicted of second-degree murder and the time of the sentencing at issue in the case, our General Assembly split second-degree murder into two separate sentencing classifications, B1 and B2, depending on the nature of the offender's conduct. *Id.* The defendant in *Arrington* stipulated that his conviction was classified as B1, but later argued that this classification was improper as a matter of law because questions of law are not subject to stipulation. *Id.* Our Supreme Court held that the defendant had stipulated that the nature of his conduct underlying his murder conviction supported a B1 classification, and that such a stipulation was proper. *Id.* at ___, 819 S.E.2d at 333.

Notably, there was never any doubt that the facts underlying the conviction corresponded to the crime of second-degree murder and the Court considered only the classifications that may be attributed to that offense. For instance, if the offense in consideration had been

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another jurisdiction is ineffective because the issue of whether an offense from another jurisdiction is substantially similar to a North Carolina offense is a question of law."); *see also State v. Powell*, 223 N.C. App. 77, 81, 732 S.E.2d 491, 494 (2012); *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 125 (2011); *State v. Moore*, 188 N.C. App. 416, 426, 656 S.E.2d 287, 293-94 (2008); *State v. Palmateer*, 179 N.C. App. 579, 581-82, 634 S.E.2d 592, 593-94 (2006).

forgery instead of second-degree murder, we do not interpret *Arrington* to allow a stipulation to a conviction for forgery with a classification of Class A felony. While second-degree murder may be classified as either Class B1 or B2, N.C. Gen. Stat. § 14-17(b)(1)-(2) (2017), there are no facts possible which would support a conviction for a Class A forgery, as no such crime exists, *see* N.C. Gen. Stat. § 14-119–125 (2017) (stating that each forgery crime is punishable as either a Class G, H, or I felony).

In the same respect, in order to equate an out-of-state conviction with a North Carolina offense, the parties must first establish that the elements of the out-of-state offense are similar to those of a North Carolina offense. This additional legal comparison must be made before an appropriate range of classifications can be determined. A stipulation that a defendant committed "burglary" in another state does not necessarily mean that he or she satisfied the elements of burglary in North Carolina. Once the legal similarities have been drawn between an out-of-state offense and its North Carolina corollary, it may be that the North Carolina offense can have an array of classifications; only then may a stipulation determine the underlying facts and the respective classification.

For these reasons we do not interpret the holding in *Arrington* to overrule our longstanding precedent that the parties may not stipulate to the substantial similarity of an out-of-state conviction, nor its resulting North Carolina classification. Here, the State put on no evidence to support a comparison of any of Defendant's out-of-state convictions to North Carolina offenses. Therefore, we must classify each misdemeanor conviction as a Class 3 misdemeanor and each felony conviction as a Class I felony.

On the worksheet, the parties appropriately stipulate that three of Defendant's six out-of-state convictions are misdemeanors in their state of origin, two are felonies, and one does not have a classification noted. We must classify these misdemeanors as Class 3 misdemeanors, and therefore may not include them in Defendant's felony PRL calculations. We must classify the two felony convictions as Class I felonies in our calculations. There is no information regarding the remaining conviction's classification, so we elect to exclude it from our calculations.

After removing the three out-of-state misdemeanors *and* the conviction without a classification, the total prior convictions eligible for calculating Defendant's PRL is reduced from fifteen (15) to eleven (11).

6. Calculation

Our *de novo* review of Defendant's sentencing worksheet shows a total of eleven (11) convictions that may be used to calculate his felony PRL. The eleven convictions, their stipulated or required classifications, and the point values assigned to those classifications are as follows:

Offense	Date	State	N.C. Classification Misdemeanor (M) Or Felony (F)	Point Value[3]
Possession of Drug Paraphernalia	12/5/1983	N.C.	M - Class 1	1
Felony Possession SCH II CS	5/14/2007	N.C.	F - Class I	2
Assault on a Female	10/11/1988	N.C.	M - Class 1	1
Driving While Impaired	10/20/1988	N.C.	M - Class 1	1
Felony Possession SCH II CS	06/30/2006	N.C.	F - Class I	2
Possession of Drug Paraphernalia	7/2/2008	N.C.	M - Class 1	1
Simple Possession SCH II CS	2/12/2010	N.C.	M - Class 1	1
Receiving Stolen Goods/Property	10/16/2009	N.C.	M - Class 1	1
Possession Methamphetamine	8/2/2013	N.C.	F - Class I	2
Delivery of Cocaine w/i 1000 Ft of a Place of Worship	8/5/2003	FL	F - Class I	2
VOP on Delivery of Cocaine	3/26/2004	FL	F - Class I	2
			Total Points:	16

3. The point values are derived from Section 15A-1340.14(b). *See* N.C. Gen. Stat. § 15A-1340.14(b).

Additionally, Defendant receives an extra point because his worksheet includes previous convictions for felony possession of controlled substances, the same crime he was convicted of in this case. N.C. Gen. Stat. § 15A-1340.14(b)(6) (2015) ("If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point."). Per our calculations, the Defendant should have received only seventeen (17) total points, giving him a PRL of V. *See* N.C. Gen. Stat. § 15A-1340.14(c) (2015). Therefore, as Defendant is entitled to have his sentence bated, we remand to the trial court for the limited purpose of sentencing Defendant within the range corresponding to PRL V.

C. Ineffective Assistance of Counsel

[3] Lastly, Defendant has filed a Motion for Appropriate Relief (MAR) alongside his appeal, arguing that he received ineffective assistance of counsel. We disagree, and deny Defendant's MAR.

The necessary components of ineffective assistance of counsel are "(1) 'counsel's performance was deficient,' meaning it 'fell below an objective standard of reasonableness,' and (2) 'the deficient performance prejudiced the defense,' meaning 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' " *State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985).

Specifically, Defendant argues that his trial attorney was deficient because he stipulated to the underlying facts and classifications of three prior convictions from Florida in March of 2004 that should not have been considered at all. Defendant contends that he was materially prejudiced because the trial court's consideration of these offenses raised his PRL. Further, Defendant argues, there is no rational trial strategy that would warrant stipulation to a higher class of offense than what was actually committed. Attached to the MAR, Defendant provides the Florida court records concerning the convictions and an affidavit by a Florida attorney.

Defendant has filed a MAR with our Court based on his erroneous classification as a PRL VI offender. But we cannot say that any error by his trial counsel prejudiced the sentence Defendant will receive on remand as a PRL V offender. Our *de novo* review of Defendant's convictions already removes most of his out-of-court convictions from the PRL calculation. If we were to assume the allegations in Defendant's MAR

were true, we would remove only the conviction for "VOP on Delivery of Cocaine," as "VOP" likely refers to a violation of probation that may not be appropriately considered as a distinct crime. *See State v. Clayton*, 206 N.C. App. 300, 305, 697 S.E.2d 428, 432 (2010). Removing this conviction would reduce Defendant's point total from seventeen (17) to fifteen (15) points, leaving him still within a PRL of V. Therefore, any deficient performance by Defendant's trial counsel was not prejudicial. We deny Defendant's MAR.

III. Conclusion

We conclude that the trial court's decision to instruct the jury on the theory of acting in concert was not error, as there was sufficient evidence to support the instruction. However, we further conclude that the trial court erred by sentencing Defendant as a PRL VI, because the worksheet stipulated to by the parties supported a PRL of V. Therefore, we remand the trial court's judgment for the limited purpose of entering a sentence appropriate for a PRL V. Further, by this opinion, we deny Defendant's MAR because, based on our disposition, any possible deficiency by his trial counsel in the calculation of Defendant's PRL did not cause Defendant to be classified as a PRL V.

NO ERROR IN PART; REVERSED AND REMANDED IN PART FOR RESENTENCING.

Judge INMAN concurs.

Judge COLLINS concurs in part and dissents in part by separate opinion.

COLLINS, Judge concurring in part and dissenting in part.

I concur in the majority's opinion regarding Defendant's prior record level. However, I would not reach that issue because I conclude there was insufficient evidence to support the trial court's jury instruction on the theory of acting in concert. I further conclude the trial court's erroneous instruction was not harmless error and entitles Defendant to a new trial. I therefore respectfully dissent.

Defendant was found guilty of possession of methamphetamine, possession of heroin, and possession of cocaine. The elements of possession of a controlled substance are that defendant (1) knowingly (2) possessed (3) a controlled substance. *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015).

The "knowingly possessed" elements of possession of a controlled substance may be established by a showing that: "(1) the defendant had actual possession; (2) the defendant had constructive possession; or (3) the defendant acted in concert with another to commit the crime." *State v. Diaz*, 155 N.C. App. 307, 313, 575 S.E.2d 523, 528 (2002) (citing *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993). "According to well-established North Carolina law, 'it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence.' " *State v. Malachi*, 371 N.C. 719, 731, 821 S.E.2d 407, 416 (2018) (quoting *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970) (citations omitted)).

"Actual possession requires that a party have physical or personal custody of the item." *Malachi*, 371 N.C. at 730, 821 S.E.2d at 416 (2018) (quotation marks and citation omitted). In this case, it is undisputed that neither Defendant nor Ms. Stepp actually possessed the narcotics found in the metal tin in the dresser drawer.[1]

"Constructive possession of contraband material exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it." *State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984). Where an accused has nonexclusive possession of the premises where the contraband is found, "constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Id.* at 569, 313 S.E.2d at 588-589 (citation omitted). The State's evidence showed the metal tin containing methamphetamine, heroin, and cocaine was found in a dresser drawer in Defendant's personal space. The personal space was separated from Defendant's bedroom by a door. Four people were in this personal space, while Defendant was in his bedroom, when officers knocked on Defendant's bedroom door and asked to search the surrounding areas. Defendant admitted to officers to having ingested methamphetamine, a substance found in the metal tin and nowhere else in the residence, and the white, rectangular pill found in his bedroom was similar in shape and markings to a pill found in the metal tin. As Defendant concedes on appeal, this evidence was sufficient to support a jury instruction on constructive possession of a controlled substance.

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1. Although the trial court instructed the jury on actual possession, Defendant did not object to this instruction at trial and did not argue plain error on appeal. N.C. R. App. P. 10(a)(2), (a)(4). Any argument related to this instruction is thus deemed abandoned. N.C. R. App. P. 28(a).

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). While it is not "necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle[,]" the defendant must be "present at the scene of the crime and the evidence [must be] sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 357, 255 S.E.2d at 395. Where a defendant did not do any particular act forming a part of the crime charged, evidence of the existence of concerted action must come from other facts. *Id.* at 356-57, 255 S.E.2d at 395. "The acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt." *Diaz*, 155 N.C. App. at 314, 575 S.E.2d at 528 (*citing State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986)).

Although Defendant was present when the narcotics were found in the dresser drawer, and was thus present at the scene of the crime, there is no evidence that Defendant was present when the tin containing the narcotics was placed in the dresser drawer. Moreover, Ms. Stepp admitted on the stand to her possession of the narcotics. Ms. Stepp testified that the tin was hers and that the last place she had it was at Southbrook Drive, where she and Defendant used to live amongst other people. When asked where she last left the tin, Ms. Stepp answered,

> I put it inside a drawer. I want to say I tried to put something over it. But I didn't intend – I wasn't there. I wasn't arrest that day, because I had just left. I didn't intend to be gone long. But I didn't get back as quickly as I would like to, and I didn't tell anybody it was there, because I didn't think it was relevant.

While the evidence presented was sufficient evidence of Defendant's constructive possession, and the evidence presented was sufficient evidence of Ms. Stepp's constructive possession, the State failed to produce any evidence of concerted action – Defendant *acting together* with Ms. Stepp pursuant to a *common plan or purpose* to possess the contraband in the metal tin. *Joyner*, 297 N.C. at 356, 255 S.E.2d at 395. The majority concludes that the evidence was sufficient to support a finding that "Defendant facilitated Ms. Stepp's constructive possession by allowing her to keep her drugs in a place where they would be safe from others[.]" I discern no evidentiary support for this conclusion, and believe the acting in concert theory of possession has become confused

with the constructive theory of possession in this case, which is precisely why "[t]he acting in concert theory is not generally applicable to possession offenses[.]" *Diaz*, 155 N.C. App. at 314, 575 S.E.2d at 528 (citation omitted).

As there was insufficient evidence to support an acting in concert instruction, the trial court erred in giving such instruction. *Malachi*, 371 N.C. at 731, 821 S.E.2d at 416. The trial court's error, however, is subject to harmless error analysis. *Id.* at 738, 821 S.E.2d at 421. Thus, Defendant must show " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* at 738, 821 S.E.2d at 421 (quoting N.C. Gen. Stat. § 15A-1443(a) (2017)). Our North Carolina Supreme Court has emphasized the serious nature of instructional error, as occurred in this case, and the close scrutiny required, explaining that

> the history of this Court's decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no "reasonable possibility" that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Malachi, 371 N.C. at 738, 821 S.E.2d at 421.

While the State's evidence was adequate to support a conclusion of Defendant's constructive possession, and thus sufficient to support a jury instruction, it was not "exceedingly strong evidence" of Defendant's guilt based on a constructive possession theory. On the other hand, the State's evidence of Ms. Stepp's constructive possession is "exceedingly strong" and disputes the evidence of Defendant's guilt. Ms. Stepp testified, "The yellow tin is mine. . . . I put it inside a drawer. . . . I didn't tell anybody it was there, because I didn't think it was relevant. . . ." When asked, "You realize that you are admitting now that you had possession of drugs correct?", Ms. Stepp responded, "Yes. Yes."

Where the evidence of Defendant's constructive possession was not exceedingly strong, Ms. Stepp admitted to possession of the controlled substances, and the jury was allowed to convict Defendant for acting in concert with Ms. Stepp, there is certainly a "reasonable possibility" that the jury elected to convict Defendant on the basis of the unsupported legal theory of acting in concert to possess the controlled substances. Accordingly, I would vacate Defendant's convictions for possession of methamphetamine, possession of heroin, possession of cocaine, and having attained habitual felon status, and remand the case for a new trial.

STATE OF NORTH CAROLINA
v.
KENNETH TYRELL HOLLEY, DEFENDANT

No. COA18-1089

Filed 3 September 2019

1. Search and Seizure—reasonable suspicion—walking away from marked patrol car—not evasive

The trial court erred in concluding that defendant's arrest for resisting, delaying, or obstructing a public officer (RDO) was supported by probable cause where defendant saw a marked patrol car, continued walking down the street in a direction away from the patrol car, and ran when the officer—who had received a report of suspicious activity in the area—ordered him to stop. Defendant's actions were not evasive, and there were no other incriminating circumstances, so the officer lacked reasonable suspicion to effect a lawful investigatory stop in these circumstances; therefore, defendant's flight did not provide probable cause to arrest him for RDO.

2. Search and Seizure—voluntarily abandoned firearm—before seizure by police—admissible

A firearm was not the fruit of an unlawful seizure where a law enforcement officer without any reasonable suspicion ordered defendant to stop, defendant fled, and defendant voluntarily abandoned his firearm underneath a shed before he was seized by officers. Therefore, the firearm's admission at trial did not violate the Fourth Amendment.

Appeal by Defendant from judgment entered 2 February 2018 by Judge Wayland J. Sermons, Jr. in Chowan County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.

Sarah Holladay for defendant-appellant.

MURPHY, Judge.

A defendant's flight from a lawful investigatory stop may provide law enforcement officers with probable cause to arrest the defendant for resisting, delaying, or obstructing a public officer. However, a defendant's flight from a consensual encounter with officers or from an unlawful investigatory stop that is unsupported by reasonable suspicion does not provide an officer with probable cause to arrest the defendant for that offense. Here, the officer lacked reasonable suspicion to effect a lawful investigatory stop; thus, Defendant's flight from that encounter did not provide the officer with probable cause to arrest him for resisting, delaying, or obstructing a public officer. Defendant's arrest was therefore unlawful and in violation of the Fourth Amendment.

Evidence obtained as a result of an unlawful seizure is generally inadmissible in a criminal prosecution of the individual subjected to unconstitutional conduct. However, property voluntarily abandoned by a defendant before a seizure has occurred is not fruit of that seizure and may be admitted as evidence. A person is not seized while in flight from an unlawful investigatory stop, but rather only when that person submits to the show of authority. The evidence at trial established that the firearm sought to be admitted by the State was voluntarily abandoned by Defendant prior to him being seized by officers. Defendant fails to show error, much less plain error, in its admission at trial.

BACKGROUND

On 14 June 2016, Police Chief Jay Fortenbery ("Chief Fortenbery") of the Edenton Police Department received a call from an informant from whom he had previously received information approximately two to three times. The informant reported that "a drug deal had just gone down at the corner store which is located at Granville Street and Carteret Street and that two guys had left walking that were involved in it and they were headed down Granville Street." The informant described the two men as "two black males" and that "one was wearing a black T-shirt

and one was wearing a white shirt." Chief Fortenbery was familiar with the area described by the informant, stating, "[w]e have had several arrests at that location for narcotics in the area" and that he recalled three narcotics arrests he personally made in that area.

Chief Fortenbery sent out a radio transmission to other officers regarding reported suspicious activity near the corner store. Chief Fortenbery did not communicate the identity of the informant, his or her reliability, or the contents of what the informant reported. Officer Jeff Church ("Officer Church"), also of the Edenton Police Department, was approximately three blocks away from that location and responded to Chief Fortenbery's radio transmission. Officer Church was also familiar with the area, having responded to issues at that location ranging from "loitering" and "loud music" to "shots fired" at a vehicle. Upon arriving at the location in his marked patrol car, Officer Church observed "two black males, one wearing a white shirt, [and] one wearing a black shirt walking [on the sidewalk] towards North Broad Street away from the store." Officer Church stated the men saw him arrive and park in his marked patrol car. The man in the white shirt, later identified as Defendant, walked to the driveway of a home and "went to the first door that was available[.]" As Defendant was touching the door handle of the home, Officer Church yelled for Defendant to stop, at which time Defendant looked at Officer Church and ran.

As Officer Church gave chase, Defendant attempted to jump over a fence in a wooded area north of the home. After an unsuccessful attempt, Defendant "pulled out a handgun out of his waistband[,]" and Officer Church could see the firearm in Defendant's right hand. Officer Church radioed other officers and reported that Defendant had a firearm and provided the officers with a description of Defendant and the direction in which Defendant was traveling. Defendant again attempted to jump the fence and was successful, causing Officer Church to lose sight of Defendant as he fled.

Officer Austin Wynn ("Officer Wynn") responded to the "radio traffic" about these events and went to the street Officer Church reported Defendant was heading towards. Officer Wynn did not see Defendant and returned to the street where Defendant was initially seen before fleeing. On this street, Officer Wynn observed Defendant walking and noted that Defendant "was very sweaty[] and had a lot of grass on him from head to toe." Officer Wynn asked Defendant to stop and provide identification, and Defendant continued to walk. After Officer Wynn asked Defendant to stop "a few more times[,]" Defendant did so. Officer Wynn contacted Officer Church over the radio, and Officer Church joined

Officer Wynn and Defendant. Officer Church confirmed Defendant was the individual who fled. Defendant was placed under arrest for resisting, delaying, or obstructing a public officer. The firearm was not found on Defendant's person.

The K-9 unit was called in to assist in the search along the "flight path" for the firearm Officer Church observed on Defendant's person. A black firearm was "tucked up underneath a shed, an outbuilding, and there was foliage overtop of it." Defendant was subsequently indicted on 18 July 2016 for possession of a firearm by a felon, and the State later dismissed the resisting, delaying, or obstructing a public officer charge. Defendant filed a motion to suppress evidence which the trial court denied after a pretrial hearing. Defendant did not object to the introduction of the evidence at trial. A jury convicted Defendant of being a felon in possession of a firearm, and the trial court sentenced Defendant to 22 to 36 months' imprisonment. Defendant gave oral notice of appeal.

ANALYSIS

A. Standard of Review

When a defendant challenges the denial of a motion to suppress evidence, our review is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal "even if the evidence is conflicting." *State v. Hammonds*, 370 N.C. 158, 161, 804 S.E.2d 438, 441 (2017) (citation and internal quotation marks omitted). Similarly, unchallenged findings of fact are binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "Conclusions of law are reviewed de novo and are subject to full review." *Id.* Under a *de novo* review, we consider the matter anew, freely substituting our own judgment for that of the trial court. *Id.*

Generally, when a defendant fails to object to the admission of evidence at trial, he or she completely waives appellate review of his or her Fourth Amendment claims regarding that evidence. *See State v. Miller*, 371 N.C. 266, 273, 814 S.E.2d 81, 85 (2018). However, where a defendant has moved to suppress evidence and "both sides have fully litigated the suppression issue at the trial court stage," but the defendant fails to object to its admission at trial, we apply plain error review. *Id.* at 272, 814 S.E.2d at 85; *State v. Grice*, 367 N.C. 753, 755, 764, 767 S.E.2d 312, 315, 320, *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d. 882 (2015). Here,

Defendant filed a motion to suppress the firearm but failed to object to its admission at trial. Accordingly, we review for plain error.

Our Supreme Court has established the plain error standard of review:

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

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, alterations, and internal quotation marks omitted).

B. Denial of Defendant's Motion to Suppress

[1] The trial court denied Defendant's motion to suppress the firearm, concluding the arrest for resisting, delaying, or obstructing a public officer was supported by probable cause and that the evidence seized was available for trial. We conclude the trial court erred in its conclusion that the arrest was supported by probable cause.

1. Legal Principles

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV. An arrest is, of course, a seizure protected by the Fourth Amendment, and law enforcement officers who make a warrantless arrest are required to have probable cause that the individual has committed a criminal offense. *Biber*, 365 N.C. at 168, 712 S.E.2d at 879. "Probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Id.* at 168-69, 712 S.E.2d at 879 (citation and internal quotations marks omitted); *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145 (1964). While probable cause "does not demand any showing that such a belief be correct or more likely true than false" and only requires a "practical, nontechnical probability[,]" *Texas v. Brown*, 460 U.S. 730, 742, 75 L. Ed. 2d 502, 514 (1983) (citation and internal quotation marks omitted), "a finding of probable cause must be supported by more than mere suspicion."

State v. Simmons, 201 N.C. App. 698, 706, 688 S.E.2d 28, 33 (2010). We look to the totality of the circumstances in determining whether the arresting officer had probable cause to arrest the individual. *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527, 543-44 (1983).

N.C.G.S. § 14-223 makes it a criminal offense for an individual to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[.]" N.C.G.S. § 14-223 (2017). "The conduct proscribed under [N.C.G.S. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989). "For example, [we have] concluded that flight from *a lawful investigatory stop* may provide probable cause to arrest an individual for violation of N.C.G.S. § 14-223." *State v. Washington*, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008) (citation, alteration, and internal quotation marks omitted) (emphasis added).

In *Washington*, a detective was conducting surveillance when she discovered that a vehicle had an expired registration and no liability insurance. *Id.* at 672-73, 668 S.E.2d at 624. The detective approached the vehicle, displaying her badge and announcing herself as a detective. *Id.* at 681, 668 S.E.2d at 629. The driver asked the detective "what she wanted[,]" and the detective indicated that defendant's passenger "had warrants" and was being placed under arrest. *Id.* The driver stated, "Well, if y'all need him, then you don't need me . . . and then proceeded to walk away." *Id.* After the detective instructed the defendant to stop multiple times, the defendant "took off running." *Id.* We held that the detective had a right to make an investigatory stop of the driver based upon reasonable suspicion of criminal activity given his "operation of a motor vehicle with no insurance and with an expired registration plate." *Id.* at 681-82, 668 S.E.2d at 629. It was this flight from a lawful investigatory stop that provided the probable cause for the defendant to be arrested for violating N.C.G.S. § 14-223. *Id.* at 682, 668 S.E.2d at 630.

In contrast, an individual's "flight from a consensual encounter or from an unlawful investigatory stop [lacking reasonable suspicion] cannot be used to justify his arrest for resisting, delaying, or obstructing a public officer." *State v. White*, 214 N.C. App. 471, 479, 712 S.E.2d 921, 927-28 (2011).

The Fourth Amendment does not prohibit law enforcement officers from generally asking questions of an individual, "even when officers have no basis for suspecting" that individual. *Florida v. Bostick*, 501 U.S. 429, 434-35, 115 L. Ed. 2d 389, 398 (1991). Just as officers may pose

questions to an individual in such a manner, the individual may decline to answer those questions and go about his or her business. *Id.* at 434, 115 L. Ed. 2d at 398. However, when the officers conduct would communicate "to a reasonable person that he was not at liberty to ignore the police presence and go about his business[,]" the encounter loses its consensual nature and requires reasonable suspicion to support the investigatory stop. *Id.* at 437, 115 L. Ed. 2d at 400 (citation and internal quotation marks omitted).

An officer has the reasonable suspicion necessary to effectuate an investigatory stop "if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (citation and internal quotation marks omitted). In describing the reasonable suspicion standard, the United States Supreme Court has stated:

> The reasonable suspicion necessary to justify [a brief investigatory 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, 397, 188 L. Ed. 2d 680, 686 (2014) (citations and internal quotation marks omitted).

In *White*, law enforcement officers responded to a complaint of loud music in an area that a detective regarded as "a high-crime area in which he had made previous drug arrests." *White*, 214 N.C. App. at 479, 712 S.E.2d at 927. The defendant was standing near a dumpster at an intersection with two or three other men. *Id.* at 472, 712 S.E.2d at 923. As the detective exited the patrol vehicle, he heard another officer yell "Stop! Police," at which time the defendant "took off running around the back side of the vehicle." *Id.* The officers gave chase and arrested the defendant for resisting, delaying, or obstructing a public officer. *Id.* at 472-73, 712 S.E.2d at 923-24.

We stated:

> [T]he only articulable facts to support an investigatory stop were that the police officers were responding to a

> complaint of loud music and [the detective] regarded the area as a high-crime area in which he had made previous drug arrests. [The detective] testified that he did not see [the defendant] engaged in any suspicious activity and did not see any device capable of producing loud music. [The d]efendant was merely standing outside at night, with two or three other men.

Id. at 479, 712 S.E.2d at 927. Although the State correctly noted that "presence in a suspected drug area, coupled with evasive action, may provide the reasonable suspicion necessary for an investigatory stop," we held the State "failed to establish a nexus between [the defendant's] flight and the police officers' presence" because the State "provided no evidence that [the defendant's] flight was in response to the officer's presence." *Id.* at 479-80, 712 S.E.2d at 928. Accordingly, we held that these facts did not support the reasonable suspicion necessary to justify an investigatory stop, and as such, the encounter that the detective was attempting to make with the defendant, "would have been a consensual encounter, an encounter that [the defendant] would have been free to ignore." *Id.* at 479, 712 S.E.2d at 927.

2. Findings of Fact

In denying Defendant's motion to suppress, the trial court made the following relevant Findings of Fact:

> 1. On or about June 14, 2016, Chief Jay Fortenbery of the Edenton Police Department received a phone call about possible drug activity taking place at a store located on the corner of N. Granville Street and Carteret Street.
>
> 2. The caller provided information about the vehicle involved in the possible drug activity as well as the description of two individuals walking away from the location.
>
> 3. The caller stated that the two men walking away, on foot, were two black males and one was wearing a white shirt.
>
> 4. Chief Fortenbery relayed the information to the patrol officers over the radio and then spoke with Officer Church on the phone to give him a description of the individuals.
>
> 5. Officers Wynn and Church responded to the area of the call once hearing it over the radio.

> 6. This area had been the scene of several drug investigations and shootings in the previous months.
>
> 7. Officer Church noticed two individuals matching the description walking towards N. Broad Street near the home of [] W. Carteret Street.
>
> 8. The individual wearing the white shirt, later identified as the defendant, began walking briskly away from Officer Church when he exited his marked patrol vehicle.
>
> 9. The defendant reached the backdoor of the house on [] W. Carteret St. when Officer Church asked him to stop and to provide him some identification.
>
> 10. Defendant then took off running towards W. Freemason Street and Officer Church pursued him on foot.

Defendant contends Finding of Fact 6, which states that the area described in the tip by the informant "had been the scene of several drug investigations and shootings in the previous months[,]" is unsupported by competent evidence. Chief Fortenbery testified at the suppression hearing that he had been with the Edenton Police Department for approximately seven years when the incident in question occurred. When asked how many narcotics arrests he had experience with in this area, he answered "about three just from memory" for "drugs, marijuana." Chief Fortenbery did not testify that these arrests took place in the past several months. Officer Church testified that his "very first call was for shots fired . . . where a car had been shot several times[.]" Since that time, the issues he had responded to in that area were for "loitering [and] loud music."

We agree with Defendant that this evidence does not support the trial court's finding of fact. While Chief Fortenbery testified that he had experience with "several" drug arrests in the area, he did not testify when those arrests had taken place over the seven years he had been with the Edenton Police Department. Additionally, Officer Church testified that he had responded to only one shooting during his time with the department and did not indicate when that incident occurred. Accordingly, while there was evidence that there had been drug arrests in the area at some point in the preceding seven years and one shooting in the preceding two years, the evidence does not support the trial court's finding that there had been "several drug investigations and shootings in the previous months."

Defendant also contests Finding of Fact 8, which states, "The individual wearing the white shirt, later identified as the defendant, began walking briskly away from Officer Church when he exited his marked patrol vehicle." In particular, Defendant argues the term "walking briskly away" is unsupported by competent evidence. At the suppression hearing, Officer Church testified that when he responded to the area he observed two black males, one in a white shirt and another in a black shirt, walking. Specifically, Officer Church testified that the man later identified as Defendant was "just walking down the sidewalk" in front of his patrol car and in the direction away from the patrol car. Additionally, Officer Church testified that when he exited his patrol vehicle, the two males were already on private property.

We agree with the State that Officer Church did not have to explicitly use the term "briskly" in his testimony for this finding of fact to be supported by competent evidence. However, the above evidence cannot support such a characterization of Defendant's actions. Officer Church did not testify that Defendant was walking in an unusual manor in response to his presence, such as with speed. Rather he simply stated that Defendant was "just walking down the sidewalk" in a direction away from the patrol vehicle. The State argues that Officer Church's testimony at trial that Defendant "kept walking away from me faster and faster" supports the trial court's finding of fact; however, this testimony was not before the trial court at the suppression hearing from which the trial court made its findings of fact. The competent evidence that was presented at the suppression hearing does not support this finding of fact.

3. Conclusions of Law

The trial court made the following Conclusions of Law based on its Findings of Fact:

> 1. Based on the Totality of the Circumstances, officers had Reasonable Suspicion to stop and Probable Cause to arrest Defendant.
>
> 2. There were no violations of State or Federal law.
>
> 3. Evidence seized is available for trial.

Assuming *arguendo* that Officer Church's directive for Defendant to "stop" was not a consensual encounter which Defendant would have been free to ignore, but rather an attempt to effectuate an investigatory stop, we first address whether Officer Church had a reasonable, articulable suspicion that criminal activity was afoot at that time. The State points us to our caselaw holding "when an individual's presence at a

suspected drug area is *coupled* with evasive actions, police may form, from those actions, the quantum of reasonable suspicion necessary to conduct an investigatory stop[,]" *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997), to support the trial court's conclusion that Officer Church had reasonable suspicion when he told Defendant to stop. While this is a correct statement of law, the trial court's supported findings of fact in the present case do not support such a conclusion.

An individual's presence in a high-crime area alone is insufficient to "create reasonable suspicion that the person is involved in criminal activity." *White*, 214 N.C. App. at 479, 712 S.E.2d at 928. When the State seeks to also show evasive action by a defendant, it must "establish a nexus between Defendant's flight and the police officers' presence." *Id.* at 480, 712 S.E.2d at 928. That is, the defendant's flight or other evasive actions must be in response to the officer's presence. *See State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) ("[U]pon making eye contact with the uniformed officers, defendant immediately moved away, behavior that is evidence of flight[.]"); *State v. Mello*, 200 N.C. App. 437, 446-47, 684 S.E.2d 483, 490 (2009) ("After [the officer] became suspicious and approached [the defendant] and the two pedestrians, the two pedestrians fled and [the d]efendant began to drive off."). The defendant must be *evading* the officers.

For example, in *State v. Jackson*, 368 N.C. 75, 772 S.E.2d 847 (2015), the defendant "stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations" when he and another individual "split up and walked in opposite directions upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing" the officer's return. *Id.* at 80, 772 S.E.2d at 850. Our Supreme Court held that the defendant's evasive actions, coupled with his presence in a high-crime area, provided the officer with a reasonable suspicion that the defendant was involved in criminal activity. *Id.* at 80, 772 S.E.2d at 850-51.

Similarly, in *State v. Goins*, 248 N.C. App. 265, 789 S.E.2d 466 (2016) (Tyson, J., dissenting), *rev'd per curiam for reasons stated in the dissent*, 370 N.C. 157, 804 S.E.2d 449 (2017), the defendant was driving a vehicle that pulled into an apartment complex parking lot that was in "a high drug and crime-ridden area." *Id.* at 282, 789 S.E.2d at 477. As the car came around the corner, an individual, who appeared to be waiting on the vehicle, looked at the officers in their marked patrol vehicle and "yelled something [to the vehicle], which caused them to speed up and leave the complex" while the individual went back into an apartment.

Id. at 280, 789 S.E.2d at 476. In light of the defendant's presence in a high-crime area and that officers observed the defendant "accelerate and quickly exit the . . . apartment complex and flee the area" after he was "warned[,]" the officers had reasonable suspicion that criminal activity was afoot. *Id.* at 283-84, 789 S.E.2d at 477-78.

Here, the trial court's finding of fact that Defendant "briskly" walked away from Officer Church's marked patrol vehicle was unsupported by competent evidence. Thus, the evidence presented at the suppression hearing only established the following: Defendant and the other individual were walking down Carteret Street away from a store when Officer Church arrived in his marked patrol vehicle. When Officer Church parked his patrol vehicle, he stated Defendant continued "just walking down the sidewalk" in front of the patrol vehicle and in the direction away from the patrol vehicle.

While the evidence established that Defendant was aware of Officer Church's presence in the marked patrol vehicle, the evidence does not establish that Defendant attempted to evade Officer Church. There was no testimony that Defendant changed his actions in response to his becoming aware of Officer Church's presence. There was no testimony that Defendant changed the direction in which he was walking before Officer Church arrived or altered his course in any way after Officer Church's arrival. Rather, the evidence established that Defendant was walking down the sidewalk and continued on his path. *See State v. Fleming*, 106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992) (stating it is "neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers"). This evidence does not establish a nexus between Defendant's act of walking in a direction away from the patrol vehicle and Officer Church's presence and stands in contrast to the types of evasive actions found in *Jackson* and *Goins*. Defendant's actions were not evasive.

Even if we were to conclude that the area in which this incident took place was a high-crime area, this alone is insufficient to create reasonable suspicion that Defendant was engaged in criminal activity. To hold otherwise would be to justify investigatory stops on persons merely because they are walking in the neighborhood in which they live. Without evasive actions or other incriminating circumstances[1],

1. The State briefly notes that Officer Church "had a tip from an informant giving a description of Defendant and another man, which Officer Church corroborated with his own observations." The State does not further argue whether the tip should be considered anonymous or make any arguments as to its reliability. Nevertheless, the tip cannot be considered in determining whether Officer Church had a reasonable suspicion that

Officer Church was left with no more than an unparticularized suspicion or hunch. The Fourth Amendment does not so permit. *See United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (Reasonable suspicion requires something more than an "unparticularized suspicion or hunch.").

The totality of the circumstances indicate that Officer Church lacked a reasonable, articulable suspicion that criminal activity was afoot when he directed Defendant to stop. As such, Defendant was not fleeing from a lawful investigatory stop. The trial court therefore erred in its order denying the motion to suppress when it concluded there was probable cause to arrest Defendant for resisting, delaying, or obstructing a public officer.

C. Admission of the Abandoned Firearm

[2] Despite the trial court's error in its reasoning for denying Defendant's motion to suppress, Defendant has failed to show that the admission of the firearm as evidence was error, much less plain error, as it was not the fruit of the eventual seizure.

The Fourth Amendment protects individuals from unreasonable seizures. U.S. Const. amend. IV. "Fourth Amendment rights are enforced primarily through 'the exclusionary rule,' which provides that evidence derived from an unconstitutional . . . seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006). However, where there has been no seizure within the meaning of the Fourth Amendment, the Fourth Amendment affords no protection. "Only evidence discovered *as a result* of unconstitutional conduct constitutes fruit of the poisonous tree" and is excludable. *Id.* (citation and internal quotation marks omitted) (emphasis added).

The United States Supreme Court has stated that a seizure occurs within the meaning of the Fourth Amendment "[o]nly when the officer, by means of physical force or show of authority, has in some way

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Defendant was engaged in criminal activity because it was a fact unknown to Officer Church. *See State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641-42 (1982) ("The search or seizure is valid when the objective facts known to the officer meet the standard required."). Chief Fortenbery testified that he did not tell Officer Church and other officers listening to the radio call that the reported suspicious activity came from an informant. Indeed, Officer Church testified that he received the radio transmission from Chief Fortenbery that merely "said there was some suspicious activity going down at Pearls Tobacco Plus[.]" Because we measure the reasonableness of an officer's suspicion by facts known to the officer when making the stop, we do not consider the informant's tip here.

restrained the liberty of a citizen . . . ." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 20 L. Ed. 2d 889, 904-05 (1968). The Supreme Court in *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d. 690 (1991), established when a seizure occurs pursuant to a show of authority absent physical force. *Id.* at 626, 113 L. Ed. 2d at 697. In such circumstances, a seizure occurs only when there has been both a show of authority from law enforcement officers *and* "submission to the assertion of authority" by the individual. *Id.*; *see also State v. Leach*, 166 N.C. App. 711, 603 S.E.2d 831 (2004) (holding that no seizure occurred until the defendant was physically restrained).

In determining whether there has been a show of authority by a law enforcement officer, "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (citation and internal quotation marks omitted). Relevant circumstances to be considered "include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *State v. Icard*, 363 N.C. 303, 309, 677 S.E.2d 822, 827 (2009).

Yet, a show of authority is "a *necessary*, but not a *sufficient*, condition for seizure . . . effected through a 'show of authority.' " *Hodari D.*, 499 U.S. at 628, 113 L. Ed. 2d. at 698. When it is not clear that the individual actually submitted to the law enforcement officer's show of authority, a court must determine the moment of submission, for, without actual submission, there is only an attempted seizure for which the Fourth Amendment provides no protection. *See Brendlin v. California*, 551 U.S. 249, 254, 168 L. Ed. 2d. 132, 138 (2007). "[W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Id.* at 262, 168 L. Ed. 2d. at 142.

In *Hodari D.*, law enforcement officers approached a group of individuals that included the defendant. *Hodari D.*, 499 U.S. at 622-23, 113 L. Ed. 2d at 695. As the officers approached, the defendant fled and officers gave chase. *Id.* at 623, 113 L. Ed. 2d. at 695. As the defendant was running from an officer, "he tossed away what appeared to be a small rock." *Id.* The officer tackled and handcuffed him a moment later

and subsequently discovered the discarded rock to be cocaine. *Id*. The United States Supreme Court held that the defendant had not submitted to any assumed show of authority until he was tackled, and he was not seized under the Fourth Amendment until that moment. Thus, "[t]he cocaine abandoned while he was running was . . . not the fruit of a seizure . . . ." *Id*. at 629, 113 L. Ed. 2d at 699.

The facts in the case before us are indistinguishable from those in *Hodari D*. Here, Officer Church directed Defendant to stop, and Defendant looked at Officer Church and fled. Officer Church gave chase and lost sight of Defendant when Defendant jumped over a fence. Officer Wynn eventually located Defendant walking down Carteret Street, where Defendant was then stopped and eventually arrested for resisting, delaying, or obstructing a public officer. Assuming Officer Church's directive for Defendant to stop was a show of authority, Defendant did not submit to that authority until his eventual interaction with Officer Wynn on Carteret Street.

At trial, Officer Church testified that the firearm was not recovered from Defendant when he was detained on Carteret Street. Rather, a K-9 unit was dispatched to search for the firearm that Officer Church observed along Defendant's "flight path." It was along Defendant's "flight path" after he ran from Officer Church that the K-9 unit recovered a firearm "underneath a shed, an outbuilding, [with] foliage overtop of it." Accordingly, Defendant voluntarily abandoned the firearm *before* he was seized by law enforcement officers. *See State v. Leach*, 166 N.C. App. 711, 717, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005). The Fourth Amendment does not bar "the Government's appropriation of such abandoned property." *See Abel v. United States*, 362 U.S. 217, 241, 4 L. Ed. 2d. 668, 687 (1960).

Defendant is correct that when an individual "discards property as the product of some illegal police activity, he will not be held to have voluntarily abandoned the property or to have necessarily lost his reasonable expectation of privacy with respect to it[.]" *State v. Cromartie*, 55 N.C. App. 221, 225, 284 S.E.2d 728, 731 (1981) (citing *State v. Cooke*, 54 N.C. App. 33, 282 S.E.2d 800 (1981)); *see also State v. Joe*, 222 N.C. App. 206, 730 S.E.2d 779 (2012) (holding that contraband that was seized *as a result* of an unlawful seizure was properly suppressed). However, this principle is inapplicable here. Defendant had not yet submitted to a show of authority and was thus not seized within the meaning of the Fourth Amendment when he voluntarily abandoned the firearm. Therefore, the firearm was not abandoned as a result of any unlawful seizure. Additionally, Officer Church's directive to stop that precipitated

Defendant's flight and subsequent abandonment of the firearm did not rise to the level of illegal police activity that renders abandonment involuntary. *See Cooke*, 54 N.C. App. at 44, 282 S.E.2d at 808 (holding that the officer's "*threat that an illegal search was about to take place*" precluded a finding of voluntary abandonment).

The firearm that the State sought to admit at trial was voluntarily abandoned by Defendant before he was seized by law enforcement officers. As such, the evidence was not the fruit of a seizure, and the Fourth Amendment does not preclude its admission at trial, "even though police did not have probable cause to obtain it in the absence of abandonment." *State v. Borders*, 236 N.C. App. 149, 170, 762 S.E.2d 490, 507 (2014). Defendant fails to show error.[2]

CONCLUSION

The trial court erred in denying Defendant's motion to suppress the firearm based on its reasoning that officers had the probable cause necessary to arrest Defendant for resisting, delaying, or obstructing a public officer. The firearm, however, was not the fruit of an unlawful seizure, as the evidence introduced at trial established that Defendant voluntarily abandoned the firearm before he was seized within the meaning of the Fourth Amendment. Therefore, despite the trial court's error in resolving the motion to suppress, Defendant has failed to show plain error in the admission of the firearm at trial.

REVERSED IN PART; NO ERROR AT TRIAL.

Judges DILLON and HAMPSON concur.

2. Defendant argues the State failed to present evidence of voluntary abandonment at the suppression hearing and that "[t]he suppression order cannot be retroactively justified by evidence the suppression court never heard." While we agree with Defendant that the State failed to present such evidence at the suppression hearing, evidence that the firearm was abandoned before a seizure took place was presented at trial. Accordingly, while the trial court's reasoning for denying the motion to suppress was erroneous, the firearm's admission at trial does not amount to error.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER A. HOLSHOUSER, DEFENDANT

No. COA18-1138

Filed 3 September 2019

1. Firearms and Other Weapons—possession of a firearm by a felon—jury instructions—defense of justification—defendant's testimony

In a possession of a firearm by a felon case, defendant was not entitled to a jury instruction on the affirmative defense of justification where he repeatedly testified that he did not possess the firearm in question.

2. Constitutional Law—effective assistance of counsel—direct appeal—capable of being resolved on cold record—jury instructions

The Court of Appeals considered the merits of defendant's ineffective assistance of counsel (IAC) claim where it was capable of being resolved based on the cold record. The court rejected defendant's argument that he received IAC due to his trial counsel's alleged failure to request a jury instruction on the defense of justification, because defendant was not entitled to that jury instruction.

Appeal by Defendant from Judgment entered 18 July 2017 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Edward Eldred for defendant-appellant.

MURPHY, Judge.

Where a criminal defendant testifies at trial that he did not commit the offense for which he has been charged, that defendant is not entitled to a jury instruction regarding the affirmative defense of justification. Defendant Christopher A. Holshouser testified at trial that he did not possess the shotgun he was charged with possessing in violation of our law against the Possession of a Firearm by a Felon ("PFF"). On appeal,

Defendant argues the trial court committed plain error in failing to provide a jury instruction regarding the affirmative defense of justification. Because Defendant repeatedly testified that he did not possess the firearm in question, the trial court did not commit plain error in forgoing an instruction regarding justification.

BACKGROUND

On 28 September 2015, Deputy Leo Hayes and Detective Chris Lambreth, both of the Iredell County Sheriff's Office, responded to a domestic dispute involving "a subject armed with a shotgun" at the home of Defendant. Upon their arrival, Defendant met the officers on the front porch of his residence and denied knowing anything about a shotgun. The officers explained that they had been told Defendant had thrown the gun into the woods behind his house. Deputy Hayes testified at trial that Defendant eventually admitted that he had thrown the shotgun into the woods and told the deputy where he had thrown it. Upon running Defendant's criminal history, the officers learned he was a convicted felon. The officers then placed Defendant under arrest for PFF.

At trial, Defendant testified that he had been involved in an altercation with his stepson, Nick, on the night in question but had never possessed the shotgun that was the subject of his indictment.[1] In relevant part, Defendant testified, "I don't think I remember taking [the shotgun] from [Nick,]" and—when asked directly whether he took possession of the gun—"[w]ell, that gun, no."

At the conclusion of Defendant's trial, the trial court read the pattern jury instruction regarding PFF verbatim. There were no objections lodged regarding the jury instructions. After deliberation, a jury unanimously found Defendant guilty of PFF. Defendant was also found guilty of having attained habitual felon status and sentenced to an active sentence of 120 to 156 months. Defendant timely appeals.

ANALYSIS

A. Jury Instruction

[1] Defendant's first argument on appeal is that the trial court committed plain error in failing to instruct "the jury that he was not guilty of being a felon in possession of a firearm if he acted in self-defense." This argument is inconsistent with our caselaw and overlooks the fact that Defendant testified at trial that he did not possess the firearm in

1. Defendant was indicted for possessing "a New England Firearms Pardner Model 12 Gauge Shotgun, which is a firearm."

question. The trial court did not err in foregoing a jury instruction as to the affirmative defense of justification.

Understanding Defendant's argument requires some background explanation of the crime of PFF and our caselaw relating to unpreserved jury instruction arguments. Under N.C.G.S. § 14-415.1(a), there are two elements of a PFF offense: "(1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016); N.C.G.S. § 14-415.1(a) (2017). Although self-defense is not, *per se*, a defense to PFF, it is inexorably intertwined with the defense of "justification" set out in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), and adopted by a number of courts in the context of PFF cases. *See, e.g.*, *State v. Mercer*, 818 S.E.2d 375, 380-81 (N.C. Ct. App. 2018); *State v. Monroe*, 233 N.C. App. 563, 564-65, 756 S.E.2d 376, 380 (2014), *aff'd*, 367 N.C. 771, 768 S.E.2d 292 (2015) (reviewing cases). The *Deleveaux* rationale

> requires a criminal defendant to produce evidence of the following to be entitled to an instruction on justification as a defense to a charge of [PFF]:
>
> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury;
>
> (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
>
> (3) that the defendant had no reasonable legal alternative to violating the law; and
>
> (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Edwards, 239 N.C. App. 391, 393-94, 768 S.E.2d 619, 621 (2015) (quoting *Deleveaux*, 205 F.3d at 1297).

Prior to 2018, where a defendant was denied a special instruction pursuant to *Deleveaux* at trial our court had repeatedly "assume[d] arguendo, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for [PFF]." *Mercer*, 818 S.E.2d at 379.[2] However, in

2. Shortly after we decided *Mercer*, our Supreme Court granted the State's *Motion for Temporary Stay*, 371 N.C. 480, 817 S.E.2d 209 (2018) (Memorandum), and subsequently

Mercer, we applied the *Deleveaux* test where the defendant "presented evidence that he grabbed the gun only after he heard guns cocking and witnessed his cousin struggling with the gun[,]" and requested a special instruction as to justification at trial. *Id.* at 380. The trial court explicitly denied the defendant's motion for special instruction regarding justification and, in essence, did so a second time when—during their deliberation—the jury sent the trial court a note asking for clarification as to whether justification applies as an affirmative defense in PFF cases. *Id.* at 378. Based on the unique facts of *Mercer*, we held the defendant "was entitled to have the jury instructed on justification as a defense to the charge of possession of a firearm by a felon." *Id.* at 380-81.

Based on our application of the *Deleveaux* factors in *Mercer*, Defendant argues the justification defense is a substantial and essential feature of a PFF charge and that, consequently, the trial court was required to present it to the jury. In making this argument on appeal, Defendant relies upon our opinion in *State v. Scaturro*, 802 S.E.2d 500 (N.C. Ct. App. 2018), which holds, "[a] defendant's failure to request an instruction as to a substantial and essential feature of the case does not vitiate the trial court's affirmative duty [to instruct the jury upon that feature]." *Id.* at 506. The facts of this case are markedly different from those of *Scaturro*, and Defendant's argument to the contrary is unavailing.

In *Scaturro*, the Defendant was charged with felony hit and run resulting in serious bodily injury after he struck a cyclist with his car, drove the victim to the hospital, and failed to return to the scene. *Id.* at 502-03. In charging the jury, the trial court instructed that an essential element of the offense was that "the defendant's failure to remain at the scene of the crash was willful, that is intentional." *Id.* at 504. Willful action on the part of the defendant is an essential element of the hit and run offense as it is set out in our criminal statutes. *See* N.C.G.S. § 20-166 (2017). We held the trial court committed plain error by failing to instruct the jury "that an act is willful if it is without justification or excuse" and by "conflat[ing] willful acts with intentional ones." *Scaturro*, 802 S.E.2d at 507. At trial, the defendant's sole defense was that he was authorized and required by statute to leave the scene in order to take the victim to

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granted the State's Petition for Writ of Supersedeas and Discretionary Review, 371 N.C. 573, 820 S.E.2d 809 (2018) (Memorandum). We do not cite *Mercer* as binding authority, but only to show why Defendant advances this specific argument on appeal. For the purposes of this case, we follow our precedent as it stood when Defendant's case was still before the trial court and assume arguendo without deciding that the *Deleveaux* test applies in North Carolina PFF prosecutions. *Mercer*, 818 S.E.2d at 379 (citing *Monroe*, 233 N.C. App. at 569, 756 S.E.2d at 380).

the hospital. *Id.* We held the jury instruction deprived the defendant of the "gravamen of his basis for acquittal" and ordered a new trial. *Id.*

In contrast to *Scaturro*, even assuming *arguendo* the *Deleveaux* rationale applies in North Carolina it is not clear a justification defense is a "substantial and essential feature" of a PFF charge. Again, the only two elements of PFF are (1) a prior felony conviction, and (2) possession of a firearm. Unlike in *Scaturro*, there is nothing in the PFF statute that describes justification or self-defense as an element of the offense. *Compare* N.C.G.S. § 14-415.1 *with* § 20-166. Additionally, there is no North Carolina pattern jury instruction on the "justification" defense and the PFF pattern instruction does not include any language regarding justification, necessity, or self-defense. This is markedly different from the circumstances in *Scaturro*, where willfulness was explicitly set out in the governing statute and defined in the pattern instruction but the trial court chose not to read that instruction in its entirety.

Nevertheless, Defendant's own testimony rendered an instruction on the justification defense unavailable to him. Our self-defense caselaw dictates that a defendant is not entitled to a self-defense instruction where he testifies that he did not commit the underlying offense. *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996); *State v. Cook*, 254 N.C. App. 150, 153, 802 S.E.2d 575, 577 (2017), *aff'd*, 370 N.C. 506, 809 S.E.2d 566 (2018). As is true in the context of self-defense claims, a defendant seeking to avail himself of the affirmative defense of justification must show that he reasonably believed he was under an impending threat of death or serious bodily injury. *Williams*, 342 N.C. at 872-73, 467 S.E.2d at 394; *Deleveaux*, 205 F.3d at 1297. Indeed, the affirmative defense of justification "does not negate any element of [the charged crime]," but "serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense." *Deleveaux*, 205 F.3d at 1297-98. Consistent with our self-defense caselaw, a defendant is not entitled to an instruction regarding justification where he testifies that he did not commit the criminal act at all.

Here, Defendant was indicted for possessing "a New England Firearms Pardner Model 12 Gauge Shotgun, which is a firearm." At trial, Defendant testified that he never possessed that gun, stating: "I don't think I remember taking [the shotgun] from [Nick,]" and—when asked directly whether he took possession of the gun—"[w]ell, that gun, no." Defendant repeatedly testified that he never committed PFF because he never possessed the shotgun at issue. Consequently, Defendant was not entitled to an instruction regarding justification, which is premised upon

a defendant's having committed the offense with which he is charged but being legally excused from punishment. The trial court did not err in forgoing such an instruction during its jury charge.

B. Ineffective Assistance of Counsel

[2] Defendant's second argument on appeal is that his attorney rendered ineffective assistance when he failed to request a special jury instruction regarding the affirmative defense of justification.

To prove his counselor rendered ineffective assistance, a defendant must show (1) "counsel's representation fell below an objective standard of reasonableness[,]" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (*quoting Wiggins v. Smith*, 539 U.S. 510, 521, 534, 156 L. Ed. 2d 471, 484, 493 (2003)). IAC claims should be resolved through a Motion for Appropriate Relief ("MAR") in the trial court, rather than on direct appeal, unless "the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). Defendant's IAC claim is exceptional in that it may be resolved based on the cold record alone.

Defendant's sole purported reason that he received IAC is that "his attorney's failure to ask for the instruction [regarding justification] constituted [IAC.]" Defendant was not entitled to a justification instruction because he repeatedly testified that he did not possess the shotgun he was charged with possessing. Consequently, even if Defendant's counsel had requested such an instruction the trial court should not have granted his request. The fact that his attorney did not ask for such an instruction did not have any impact on Defendant's trial. As the lack of prejudice is apparent from the cold record, we deny Defendant's IAC argument.

CONCLUSION

The trial court did not err in forgoing a jury instruction as to the affirmative defense of justification as Defendant's testimony at trial made such a defense unavailable. Likewise, Defendant's counsel did not render IAC by failing to request a special instruction regarding the affirmative defense.

NO ERROR.

Judges DILLON and HAMPSON concur.

STATE v. MAHATHA

[267 N.C. App. 355 (2019)]

STATE OF NORTH CAROLINA
v.
CORY ANTWON MAHATHA, DEFENDANT

No. COA18-734

Filed 3 September 2019

1. Crimes, Other—felony fleeing to elude arrest—lawful performance of officer's duty—sufficiency of evidence

In a prosecution for felony fleeing to elude arrest, a law enforcement officer was lawfully performing his duties when he activated his blue lights in an attempt to initiate a traffic stop, after which defendant kept driving and accelerated away. The officer's action did not constitute a seizure requiring a reasonable articulable suspicion of criminal activity but was merely a show of authority, and defendant's subsequent actions, including multiple traffic violations such as speeding, crossing a double-yellow line to turn into oncoming traffic, and driving through a stop sign, provided sufficient support for the officer's pursuit and eventual traffic stop.

2. Constitutional Law—right to counsel—waiver—statutory inquiry—sufficiency

In a prosecution for felony fleeing to elude arrest, the trial court violated defendant's right to counsel by allowing him to waive counsel without conducting a proper colloquy (pursuant to N.C.G.S. § 15A-1242) to inform defendant of the nature of the charges against him and the range of permissible punishments and to ensure his waiver was made knowingly and voluntarily.

Appeal by Defendant from judgment entered 24 January 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 Forrest P. Fallanca, for the State-Appellee.

Morgan & Carter PLLC, by Michelle F. Lynch, for the Defendant-Appellant.

COLLINS, Judge.

Defendant Cory Antwon Mahatha appeals from judgment entered upon a jury's verdicts finding him guilty of felony speeding to elude arrest and attaining habitual felon status. After careful review, we conclude that the trial court failed to provide adequate information to ensure that Defendant knowingly, intelligently, and voluntarily waived his right to be represented by counsel. We therefore vacate Defendant's convictions and judgment and grant a new trial.

I. Factual Background and Procedural History

On 28 March 2017, Detective Patrick Schmeltzer of the Rowan County Sheriff's Office was assigned to the crime reduction unit in the Airport Road area. Schmeltzer, accompanied by Detective Cody Trexler and Deputy Naturile, patrolled the area in an unmarked black Chevrolet Tahoe. Schmeltzer received a "be on the lookout" ("BOLO") from his supervisor, Sergeant Weston, who radioed that an assault had occurred and that the suspect vehicle, a white Dodge Challenger, was heading his way. Schmeltzer pulled his vehicle onto the shoulder, waited, and spotted a white Dodge Challenger drive past him. Schmeltzer pulled onto the highway and followed the vehicle for some distance but did not observe Defendant speed, commit any traffic violations, or engage in suspicious behavior. Schmeltzer activated the Tahoe's blue lights and siren in order to initiate a traffic stop of the vehicle.

Defendant was driving the white Dodge Challenger but did not pull over when Schmeltzer activated the Tahoe's blue lights and siren. Instead, Defendant maintained a speed of approximately 45 miles per hour and continued driving until he reached South Main Street. Once Defendant reached South Main Street, he turned right and accelerated to speeds of 90-100 miles per hour. The officers pursued Defendant onto South Main Street and witnessed Defendant: cross into turn lanes and onto the shoulder of the road in order to pass other vehicles; "almost wreck" before swerving back into traffic; fish-tail across lanes; pass over the double-yellow lines; and turn into oncoming traffic.

Defendant next drove through an intersection, failed to stop at a stop sign, and pulled his car into a driveway; he then took off on foot and ran into a cow pasture. Schmeltzer and Naturile pursued Defendant on foot, discovered him hiding in a ditch, and took Defendant into custody. Upon searching Defendant, the officers found $3000 on his person and later found a small amount of marijuana inside Defendant's vehicle.

On 15 May 2017, a grand jury indicted Defendant for felony speeding to elude arrest in violation of N.C. Gen. Stat. § 20-141.5(B) (2017). On

12 June 2017, a grand jury indicted Defendant for having attained habitual felon status in violation of N.C. Gen. Stat. § 14-7.1 (2017).

On 11 September 2017, Defendant was arraigned in Rowan County Superior Court. The trial court told Defendant of the crimes with which he was charged: "obtaining the status of a habitual felon; possession of a firearm by a felon; attempted robbery with a firearm; fleeing to allude arrest; driving while license revoked, not an impaired revocation; and assaulting a female." The trial court asked Defendant whether he wished to have a lawyer represent him, to which Defendant replied that he was going to represent himself. The trial court also asked Defendant if he understood how much time he was facing and told him that he was "looking at . . . 231 months." At the end of his arraignment, Defendant entered a plea of not guilty.

On 23 January 2018, prior to the start of Defendant's jury trial, the State dismissed the charges of driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a felon; and attempted robbery with a dangerous weapon. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status.

On 24 January 2018, the jury returned verdicts finding Defendant guilty of both charges. The trial court entered judgment upon the jury's verdicts, sentencing Defendant to a term of 97 months' to 129 months' imprisonment. From entry of judgment, Defendant gave proper notice of appeal.

II. Discussion

Defendant argues that the trial court erred (1) in failing to dismiss the charge of speeding to elude arrest where there was no evidence that the officer was lawfully performing his duties at the time of the traffic stop and (2) by allowing Defendant to represent himself when his waiver of counsel was not valid and by later denying his request for appointed counsel.

A. Speeding to Elude Arrest

[1] Defendant first argues that the trial court erred in failing to dismiss the charge of speeding to elude arrest when there was no evidence that Schmeltzer was lawfully performing his duties when he initiated an investigatory traffic stop of Defendant. Defendant's argument is misplaced.

1. Standard of Review

In considering whether to grant a motion to dismiss for insufficiency of the evidence, the trial court must determine (1) whether the State offered substantial evidence of each essential element of the offense charged, whether direct, circumstantial, or both, and (2) whether the defendant is the perpetrator of the offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). Substantial evidence is relevant evidence "that a reasonable mind might accept as adequate to support a conclusion." *State v. Lambert*, 341 N.C. 36, 42, 460 S.E.2d 123, 127 (1995) (citation omitted). "[T]he evidence presented must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *Id.* A trial court's denial of a motion to dismiss for insufficient evidence is reviewed *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007).

2. Sufficiency of the Evidence Analysis

The crime of speeding to elude arrest is defined as operating "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." N.C. Gen. Stat. § 20-141.5(a) (2017). While a violation of N.C. Gen. Stat. § 20-141.5 is ordinarily a misdemeanor, the offense is a felony if two or more aggravating factors are present, including speeding in excess of 15 miles per hour over the legal speed limit and reckless driving as proscribed by N.C. Gen. Stat. § 20-140. *See* N.C. Gen. Stat. § 20-141.5(b) (2017). Thus, for purposes of N.C. Gen. Stat. § 20-141.5, an individual's guilt hinges upon the extent to which he attempts to flee from an officer who is lawfully performing his official duties. *State v. Sinclair*, 191 N.C. App. 485, 489-90, 663 S.E.2d 886, 870 (2008).

"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) (quotation marks and citations omitted). "[B]rief investigatory detentions such as those involved in the stopping of a vehicle" are subject to Fourth Amendment protections. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citation omitted). "A police officer may effect a brief investigatory seizure of an individual where the officer has reasonable, articulable suspicion that a crime may be underway." *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) (citation omitted).

A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). There must be "a physical

application of force or submission to a show of authority" for a seizure to be found. *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431 (1996) (citation omitted). However, a simple show of authority by law enforcement does not rise to the level of a seizure unless the suspect submits to that show of authority. *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *see State v. Mangum*, 250 N.C. App. 714, 726, 795 S.E.2d 106, 116-17 (2016) (determining that the activation of an officer's blue lights does not constitute an official stop and therefore a seizure, but is merely an assertion of authority and order to stop, with no concomitant seizure of the person).

Accordingly, this Court considers the totality of the circumstances, both before and after an officer signals his intention to stop a defendant, in determining whether there was reasonable suspicion of criminal activity to justify a traffic stop. *Id.* The reasonable suspicion "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[,]" *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70, and we must consider "the whole picture in determining whether a reasonable suspicion exists to justify an officer's investigatory traffic stop." *State v. Jones*, 813 S.E.2d 668, 670 (N.C. Ct. App. 2018) (quotation marks and citation omitted).

Defendant argues that he was seized at the moment Schmeltzer activated his blue lights, but Defendant's argument is without merit. Schmeltzer's activation of his blue lights was merely a show of authority and an order to stop. *Mangum*, 250 N.C. App. at 726, 795 S.E.2d at 116-17. As Defendant did not heed this order and pull over, he did not submit to Schmeltzer's show of authority; therefore, Defendant was not seized at the time Schmeltzer activated his blue lights. *Id.* Instead, Defendant was seized once the officers placed him in handcuffs; this "physical application of force" effectuated the seizure of Defendant and was the point at which reasonable suspicion must have existed. *Cuevas*, 121 N.C. App. at 563, 468 S.E.2d at 431.

Defendant further argues that the BOLO, based on an anonymous tip, was not on its own sufficient to create reasonable suspicion for the stop. As to the tip, we agree that an anonymous tip, absent "sufficient indicia of reliability[,]" is not on its own sufficient to create reasonable suspicion for the stop. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000). Nevertheless, "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.* Here, we need not determine

whether the BOLO provided sufficient reasonable suspicion on its own, as the reasonable suspicion inquiry includes all circumstances prior to when Defendant was seized. *Mangum*, 250 N.C. App. at 726, 795 S.E.2d at 116-17.

Schmeltzer's subsequent observations of Defendant's traffic crimes enabled Schmeltzer to "buttress[] the tip through sufficient police corroboration," and to form the basis for suspicion of criminal activity. *Mangum*, 250 N.C. App at 729, 795 S.E.2d at 118 (internal quotation marks, brackets and citation omitted); *see United States v. Arvizu*, 534 U.S. 266, 277 (2002) (determining that an officer's subsequent observations of criminal activity may combine to "form a particularized and objective basis" for reasonable suspicion). Schmeltzer first observed Defendant accelerate to speeds of 90-100 miles per hour, despite a maximum speed limit of 45 miles per hour. Schmeltzer testified that Defendant drove "quite recklessly" and almost hit other cars, pulled onto the shoulder of the road in order to pass other cars, swerved and fishtailed across multiple lanes, and crossed over a double-yellow line to turn into oncoming traffic. Trexler and Naturile also testified that Defendant fled from them, drove at speeds of 90-100 miles per hour, pulled onto the shoulder in order to pass other cars, swerved and fishtailed across lanes, and turned into oncoming traffic.

Defendant then ran a stop sign, drove through an intersection, parked in a driveway, and took off running into a cow pasture. Schmeltzer and Naturile pursued Defendant into the cow pasture, and eventually found him hiding in a ditch.

Considering the totality of the circumstances, we conclude that Schmeltzer had reasonable suspicion that criminal activity was underway, *Barnard*, 184 N.C. App. at 29, 645 S.E.2d at 783, and thus Schmeltzer was lawfully performing his duties at the time of the stop. Accordingly, the trial court did not err by denying Defendant's motion to dismiss for insufficient evidence.

B. Waiver of Counsel

[2] Defendant next argues that the trial court committed reversible error by failing to comply with the statutory mandate of N.C. Gen. Stat. § 15A-1242 (2017) before allowing him to represent himself. We agree.

1. Standard of Review

"We review the question of whether a trial court complied with N.C. Gen. Stat. § 15A-1242 *de novo*." *State v. Frederick*, 222 N.C. App. 576, 581, 730 S.E.2d 275, 279 (2012) (citation omitted).

2. Analysis

"Before allowing a defendant to waive in-court representation by counsel, . . . the trial court must [e]nsure that constitutional and statutory standards are satisfied." *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). Thus, a trial court "must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citations omitted). A thorough inquiry into the three substantive elements of N.C. Gen. Stat. § 15A-1242 satisfies constitutional requirements. *State v. Fulp*, 355 N.C. App. 171, 175, 558 S.E.2d 156, 159 (2002).

N.C. Gen. Stat. § 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. "[T]he critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary." *State v. Carter*, 338 N.C. 569, 583, 451 S.E.2d 157, 164 (1994). If the trial court fails "to make the inquiry mandated by [N.C. Gen. Stat.] § 15A-1242 before permitting the defendant to proceed to trial without counsel, the defendant is entitled to a new trial." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986) (citations omitted).

Defendant's waiver of counsel took place at the arraignment hearing on 11 September 2017. At that time, Defendant was charged with the following: driving while license revoked, not an impaired revocation, a class III misdemeanor carrying a maximum sentence of 20 days in jail; assault on a female, a class A1 misdemeanor carrying a maximum sentence of 150 days in jail; possession of a firearm by a felon, a class G felony; attempted robbery with a dangerous weapon, a class D felony; speeding to elude arrest, a class H felony; and having attained habitual felon status. The habitual felon charge would have elevated the charges

of possession of a firearm by a felon and attempted robbery with a dangerous weapon to class C felonies, each carrying a maximum prison term of 231 months, and the charge of speeding to elude arrest to a class D felony, carrying a maximum prison term of 204 months. If convicted of all charges, Defendant could have faced a maximum of 666 months (55.5 years) in prison plus 170 days in jail.

At the hearing, the following discussion took place between the trial court, the prosecutor, and Defendant:

> THE COURT: Okay. And, Mr. Mahatha, you are here today charged with obtaining the status of a habitual felon in which -- which class is he going to be? A "C" or a "D"?
>
> MR. GOULD: Your Honor, it will be --
>
> THE COURT: Or an E?
>
> MR. GOULD: -- a Class D.
>
> THE COURT: Okay. -- which will be a Class D felony, which has a possible maximum sentence of 204 months. You're also charged with possession of a firearm by a felon. A Class G felony. A possible maximum sentence of 47 months. Attempted robbery with a firearm. Is that a G?
>
> MR. GOULD: Your Honor, it was actually -- the possession of a firearm by a convicted felon is going to be a C. The attempted robbery is going to be a C.
>
> THE COURT: Okay. Because of the habitual?
>
> MR. GOULD: Yeah.
>
> THE COURT: Yeah. Yeah. Fleeing to allude (sic) arrest and driving while license revoked, not an impaired revocation, which is a Class III misdemeanor. A possible maximum sentence of 20 days in jail. On assaulting a female, a maximum sentence of 150 days. Do you wish to have a lawyer represent you on these matters?
>
> THE DEFENDANT: I'm going to represent myself.
>
> THE COURT: Do you understand how much time you're looking at? 231 months.
>
> THE DEFENDANT: Yeah, I understand.

The trial court failed to inform Defendant of "the nature of the charges and proceedings and the range of permissible punishments" he faced. N.C. Gen. Stat. § 15A-1242. First, the trial court erroneously indicated that "obtaining the status of a habitual felon . . . will be a Class D

felony, which has a possible maximum sentence of 204 months." "Being a habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977).

The trial court also erroneously indicated to Defendant that he could face "[a] possible maximum sentence of 47 months" for the possession of a firearm by a felon charge when, if determined to be a habitual felon, Defendant could have faced a possible maximum sentence of 231 months on that charge. The trial court did not inform Defendant that for the attempted robbery with a dangerous weapon charge, if determined to be a habitual felon, Defendant could have faced a maximum prison term of 231 months. Furthermore, the trial court erroneously referred to the speeding to elude arrest charge as "fleeing to [e]lude arrest" and failed to inform Defendant that the speeding to elude arrest charge was a felony which carried a maximum habitualized prison term of 204 months. Finally, the trial court queried Defendant if he understood that he could face "231 months" where Defendant could actually have faced a maximum of 666 months (55.5 years) in prison plus 170 days in jail.

As the trial court failed to inform Defendant of "the nature of the charges and proceedings and the range of permissible punishments" he faced, the trial court's inquiry failed to satisfy the requirements of N.C. Gen. Stat. § 15A-1242. Accordingly, Defendant's waiver of counsel was not knowing, intelligent, or voluntary, *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476, and failed to satisfy constitutional requirements. *Carter*, 338 N.C. at 583, 451 S.E.2d at 164. Defendant is therefore entitled to a new trial.

III. Conclusion

Defendant's argument that Schmeltzer was not lawfully performing his duties when he stopped Defendant fails, as Schmeltzer had reasonable suspicion to believe that criminal activity had occurred based on his observations of Defendant committing traffic crimes.

However, as the trial court failed to inform Defendant of "the nature of the charges and proceedings and the range of permissible punishments," we conclude that the trial court failed to comply with the requisite Constitutional and statutory mandates before allowing Defendant to represent himself. We thus vacate Defendant's convictions and the trial court's judgment, and remand for a new trial. *It is so ordered.*

NEW TRIAL.

Judges DILLON and INMAN concur.

STATE v. SMITH

[267 N.C. App. 364 (2019)]

STATE OF NORTH CAROLINA
v.
MARIO SMITH, DEFENDANT

No. COA19-92

Filed 3 September 2019

1. Appeal and Error—writ of certiorari—sufficiency of petition—trial counsel's error—importance of issue on appeal

The Court of Appeals issued a writ of certiorari to review defendant's appeal from two assault convictions, where defendant's petition for certiorari fully complied with Appellate Rule 21(c), defendant's untimely notice of appeal was attributable to his trial counsel, and where declining to review defendant's double jeopardy argument would have yielded serious consequences.

2. Appeal and Error—preservation of issues—requirements—constitutional argument—double jeopardy

Defendant preserved a double jeopardy defense to his two assault convictions for appellate review where his trial counsel argued that the State "pursued basically two different legal theories against my client" based on "one instance that happened just one time." Not only did the trial court engage with the argument by questioning the State about it, but the court also ruled on it (albeit implicitly) by imposing two separate, consecutive sentences.

3. Constitutional Law—double jeopardy—lesser-included offense—assault with a deadly weapon inflicting serious injury—assault by a prisoner with a deadly weapon inflicting bodily injury

Where defendant was convicted of assault with a deadly weapon inflicting serious injury (ADWISI) and assault by a prisoner with a deadly weapon inflicting bodily injury, the trial court did not violate the Double Jeopardy Clause of the Fifth Amendment by imposing two consecutive sentences because ADWISI was not a lesser-included offense of the other assault crime. Although the offenses share similar elements, the essential elements of "serious injury" and "bodily injury" are distinct from each other.

Appeal by Defendant from judgment entered 27 June 2018 by Judge Tanya Wallace in Anson County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Orlando L. Rodriguez, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.

BROOK, Judge.

I. Background

On 4 August 2017, two corrections officers transported a prisoner to a new housing unit within the Lanesboro Correctional facility in Anson County, North Carolina. When they entered the new unit, two prisoners rushed forward and attacked the prisoner being transferred. Mario Smith ("Defendant") was identified as one of these attackers. The prisoner being transferred had four stab wounds on his back, one of which caused a hemopneumothorax. A shank was retrieved from Defendant's possession.

On 11 September 2017, Defendant was indicted with one count of Assault with a Deadly Weapon Inflicting Serious Injury ("ADWISI") and one count of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury.[1] The jury returned guilty verdicts for both charges following the 26 June 2018 trial. Immediately following the verdicts and outside the presence of the jury, a sentencing hearing was held. During the hearing, the following exchange between counsel for the Defendant and the State as well as the trial judge occurred:

> MR. McCRARY: [H]e'd just ask the Court to be as kind to him as you can on this. I know the State had mentioned the possibility of boxcarring[2] these. My concern being that

1. Throughout the briefs this charge is referred to as "Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury." However, this charge has various titles. In the indictment it is listed as "Possess Dangerous Weapon in Prison Inflict Injury." This crime is codified in the North Carolina General Statutes as "Possession of Dangerous Weapon in Prison." N.C. Gen. Stat. § 14-258.2 (2017). It is referred to in the North Carolina Pattern Jury instructions as "Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury." N.C.P.I – Crim. 208.65. And, finally, at trial, the parties referred to the charge as "Assault with a Weapon Capable of Inflicting Serious Bodily Injury or Death, thereby Inflicting Bodily Injury while a Prisoner." We will use the Pattern Jury Instructions title as the parties do in their briefing.

2. Boxcarring is a term commonly used in the North Carolina court system and case law to describe when multiple prison sentences run consecutive to one another. *See State v. Jacobs*, 233 N.C. App. 701, 704-05, 757 S.E.2d 366, 368-69 (2014) (quoting the trial court transcript where consecutive sentences are proposed and referred to as "boxcar" sentencing).

> while I understand the Court's point that it's possible to do so because there's that different element, the logic of why you can't boxcar, say, alphabet assault with assault with a deadly weapon still applies. It may not legally—but it still applies. I mean, this is one instance that happened just one time. And the State pursued basically two legal theories against my client. I don't know that that necessarily makes things substantively different. . . .
>
> THE COURT: Mr. McCrary, what's your position?
>
> MR. McCRARY: The State would ask that, Your Honor. But given our conversation at the bench – I mean, the State wasn't really expecting it.
>
> THE COURT: Well, that didn't have anything to do with boxcarring. . . .

The trial court determined Defendant to be a prior record level II. The court sentenced Defendant to the presumptive range of 29 to 47 months for ADWISI and the presumptive range of 15 to 27 months for Assault by a Prisoner with a Deadly Weapon Inflicting Serious Bodily Injury. The sentences were ordered to run consecutively.

The trial concluded at 12:30 p.m. on 27 June 2018, but the Court was called back later that afternoon and Defendant's trial counsel gave an oral notice of appeal at 3:25 p.m. Due to the time gap between the conclusion of trial and the oral notice of appeal, Defendant has filed a petition for writ of certiorari. We grant Defendant's petition and the writ shall issue for the reasons that follow. We also reject Defendant's Fifth Amendment double jeopardy argument and affirm the trial court's ruling.

II. Appellate Jurisdiction

a. Notice of Appeal

As stated previously, Defendant's trial counsel gave oral notice of appeal shortly after the conclusion of Defendant's trial. The State argues that this failed to comply with Rule 4(a) of the North Carolina Rules of Appellate Procedure, which requires notice of appeal at trial. N.C. App. R. P. 4(a)(1). As we see fit to grant Defendant's petition for certiorari, we need not resolve the question of whether Defendant complied with Rule 4(a). *Compare State v. Holaneck*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015) (deciding the oral notice of appeal was ineffective when it was entered six days after trial had concluded) *with State v. Smith*, 246 N.C. App. 636, 784 S.E.2d 236, 2016 WL 1010526, at *3

(2016) (unpublished opinion) (holding the oral notice of appeal given twelve minutes after the conclusion of trial as valid).

b. Writ of Certiorari

[1] Due to questions about trial counsel's notice of appeal, Defendant has filed a petition for writ of certiorari in order to preserve his right to appeal the immediate matter. Writs of certiorari are considered to be "extraordinary remedial writ[s]" and can serve as substitutes for an appeal. *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964) (citation omitted). Rule 21 of the North Carolina Rules of Appellate Procedure indicates that a petition must include "a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion[.]" N.C. R. App. P. 21(c). Our Rules of Appellate Procedure further permit the issuance of a writ of certiorari in this Court's discretion "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Given the writ's sufficiency and the fact that questions about the timeliness of Defendant's appeal turn on his trial attorney's action, we exercise our discretion and grant the petition in accordance with the analysis below.

First, Defendant's writ complies with the requirements of Rule 21(c). Defendant's petition includes reasons why the writ should issue and the requisite certified documents relevant to the writ's issuance. While the petition for writ of certiorari does not include a statement of facts, the Court will recognize the statement of facts presented in the brief since the petition and the brief were filed contemporaneously.

Second, it is within the Court's discretion to issue the writ of certiorari in the current controversy pursuant to Rule 21(a)(1). *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) (granting petition for certiorari where there was no evidence that respondent contributed to the error and the consequences of the adjudication order were serious). As noted above, the alleged defect was attributable to Defendant's trial counsel. Further, as discussed below, the consequences of rejecting Defendant's double jeopardy argument are surely serious.

Thus, the petition for certiorari is legally sufficient and within our discretion to issue. Accordingly, we grant the petition and issue the writ.

c. Preservation of Issue

[2] The State also argues that Defendant waived the issue now before our Court: that he is being punished twice for the same crime in violation

of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent." N.C. R. App. P. 10(a)(1). Constitutional arguments such as the "double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court." *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (citation omitted). "[T]he complaining party [must also] obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(a)(1). The denial of the relief sought is an implicit rejection of the argument in support of which it is offered. *See In re Hall*, 238 N.C. App. 322, 329, 768 S.E.2d 39, 44 (2014) (citation omitted) (noting trial court denial of petition sought by defendant terminating his sex offender registration requirement constituted "reject[ion] [of] petitioner's *ex post facto* argument[]").

Defendant preserved his double jeopardy argument at trial. "[T]he constitutional guaranty against double jeopardy protects a defendant from multiple *punishments* for the same offense." *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 700 (2004) (citation omitted). Though not a model of clarity, trial counsel made a double jeopardy argument when he asserts that the State "pursued basically two different legal theories against my client" based on "one instance that happened just one time." He further requested that the court "be as kind to him as you can on this." Further, the trial court engaged with the argument made by Defendant's trial counsel by questioning the State about boxcarring, revealing not only that the argument had been brought to the court's attention, but also that the court understood it. Finally, in imposing two consecutive sentences based on the respective convictions, the trial court rejected Defendant's double jeopardy argument. This satisfies the preservation requirement of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure in that the Defendant raised and obtained a ruling (albeit implicit rather than explicit) on the issue now raised before our Court. *See In re Hall*, 238 N.C. App. at 329, 768 S.E.2d at 44.

III. Merits

[3] Defendant contends that the ADWISI charge he was convicted of is a lesser included offense of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury and thus his consecutive sentences for these respective convictions violate the Double Jeopardy Clause of the Fifth Amendment. We disagree.

A lesser included offense occurs where "the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment." *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978). "By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citations omitted). Of particular relevance to Defendant's argument, "[i]f neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy." *Id.* at 50, 352 S.E.2d at 683 (citing *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982)).

To determine whether a charge is a lesser included offense of another charge, we look to the definition of the offense, not to the facts surrounding the situation. *See State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993) ("the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime."). Here, the charge of ADWISI is classified as a Class E Felony with the following elements: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury. *See* N.C. Gen. Stat. § 14-32(b) (2017). The charge of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury is classified as a Class F felony with the following elements: (1) an assault; (2) with a weapon capable of inflicting serious bodily injury; (3) inflicting bodily injury; (4) while in the custody of the Section of Prisons in the Department of Adult Corrections. *See* N.C. Gen. Stat. § 14-258.2 (2017).

While the offenses bear similarities, they are distinct for two reasons pertaining to the respective injuries required to prove the charges. "The term 'inflicts serious injury,' under G.S. 14-32(b), means physical or bodily injury" and hinges upon a jury determination of whether such injury was indeed serious. *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 87 (1994). The need for that factual determination underlines the obvious: not every bodily injury is serious. *See id.* The inverse is true as well; not every serious injury is a bodily injury. A "serious mental injury" satisfies the injury prong of the ADWISI offense, *see State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 393 (1990), while, of course, it cannot satisfy the "inflicting bodily injury" prong of the Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury charge, *see* N.C. Gen. Stat. § 14-258.2 (2017). For these reasons, "serious injury" and

"bodily injury" are not synonymous and, thus, Defendant's double jeopardy argument fails.

IV. Conclusion

We grant Defendant's petition for writ of certiorari and find Defendant's constitutional argument properly preserved for this Court's review. Given the distinctions between the two charges, we must reject Defendant's Fifth Amendment argument and affirm the lower court's ruling.

NO ERROR.

Judges DILLON and ZACHARY concur.

FRANKIE DELANO WASHINGTON AND
FRANKIE DELANO WASHINGTON, JR., PLAINTIFFS
v.
TRACEY CLINE, ANTHONY SMITH, WILLIAM BELL, JOHN PETER, ANDRE T. CALDWELL, MOSES IRVING, ANTHONY T. MARSH, EDWARD SARVIS, BEVERLY COUNCIL, STEVEN CHALMERS, PATRICK BAKER, THE CITY OF DURHAM, NC, AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA18-1069

Filed 3 September 2019

Constitutional Law—North Carolina—right to a speedy trial—private cause of action

In a case of first impression, consistent with federal case law, the Court of Appeals declined to recognize a private cause of action by which a person who has been deprived of the right to a speedy trial under the North Carolina Constitution (Article I, section 18) may sue for injunctive relief and money damages.

Appeal by Plaintiff from order entered 11 May 2018 by Judge C. Winston Gilchrist in Durham County Superior Court. Heard in the Court of Appeals 24 April 2019.

Ekstrand & Ekstrand LLP, by Robert Ekstrand and Stefanie Smith, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn H. Shields, for Defendants-Appellees.

COLLINS, Judge.

Plaintiff Frankie Delano Washington ("Plaintiff") appeals from an order granting Defendants Tracey Cline and the State of North Carolina's ("Defendants") motion for summary judgment pursuant to North Carolina Rule of Civil Procedure 56, denying Plaintiff's motion for partial summary judgment, and dismissing Plaintiff's claims. Plaintiff contends that the trial court erred by granting Defendants and denying Plaintiff summary judgment on his cause of action seeking injunctive relief and money damages directly under Article I, section 18, of the North Carolina Constitution for harms he allegedly suffered as a result of the deprivation of his right to a speedy trial thereunder. We affirm.

I. Background

Plaintiff was arrested in 2002 as a suspect in a Durham home invasion that involved an armed robbery and an attempted sexual assault. Plaintiff was held in custody for over a year following his arrest pending investigation by the State Bureau of Investigation ("SBI") of various articles of evidence. Plaintiff was eventually released from jail on bond, and moved the trial court twice to compel SBI analysis of the State's evidence. The trial court ordered the SBI to conduct the analysis in 2004, but the SBI was never notified of the trial court's order. Plaintiff moved to dismiss the charges in 2005 for violation of his right to a speedy trial, but the trial court denied Plaintiff's motion. In February 2007, approximately four years and nine months following his arrest, Plaintiff was tried and convicted of various offenses in connection with the home invasion.

Plaintiff appealed the convictions to this Court, and on 2 September 2006, in *State v. Washington*, 192 N.C. App. 277, 665 S.E.2d 799 (2008), this Court concluded that Plaintiff had been deprived of his right to a speedy trial as guaranteed by the United States and North Carolina Constitutions, vacated the convictions, and dismissed the underlying indictments with prejudice.

On 21 September 2011, Plaintiff[1] sued the State of North Carolina, the City of Durham, and various individuals who worked for the SBI, the Durham Police Department, and the Durham County District Attorney's Office (including Defendant Cline, the principal prosecutor of Plaintiff's criminal case) for a permanent injunction and money damages to redress harms allegedly suffered in connection with Plaintiff's pre-trial

1. Plaintiff's son was also a plaintiff in the underlying proceedings in this case, but is not a party to this appeal.

detention, investigation, and prosecution. In his complaint, Plaintiff brought 23 causes of action, including a direct cause of action under the North Carolina Constitution against Defendant Cline in her official capacity as District Attorney and Assistant District Attorney for North Carolina's Fourteenth Prosecutorial District, seeking redress for harms allegedly caused by, *inter alia*, the denial of Plaintiff's right to a speedy trial as guaranteed by North Carolina Constitution Article I, section 18 (the "direct constitutional claim").

On 11 January 2012, Defendants moved to strike and dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 8, 10, and 12. On 9 February 2012, Plaintiff moved for partial summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, including on his direct constitutional claim. On 5 August 2016, the trial court entered an order that, in relevant part, denied Defendants' motion to dismiss Plaintiff's direct constitutional claim, and reserved ruling on Plaintiff's motion for summary judgment on the same. On 13 September 2017, Defendants moved for summary judgment pursuant to Rule 56 on the remaining claims, including on Plaintiff's direct constitutional claim.

On 11 May 2018, the trial court entered an order granting Defendants' motion for summary judgment on all remaining claims (including the direct constitutional claim), denying Plaintiff's motion for partial summary judgment on the same, and dismissing all remaining claims as to all defendants.

Plaintiff timely appealed.

II. Discussion

On appeal, Plaintiff contends that the trial court erred by granting Defendants' and denying Plaintiff's respective motions for summary judgment on Plaintiff's direct claim under North Carolina Constitution Article I, section 18, for the deprivation of his right to a speedy trial.

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 (2018). We review a trial court's order granting or denying summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). "If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

North Carolina Constitution Article I, section 18, sets forth that "[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. Our Supreme Court has said that "[e]very person formally accused of crime is guaranteed a speedy and impartial trial by Article I, section 18 of the Constitution of this State and the Sixth and Fourteenth Amendments of the Federal Constitution." *State v. Tindall*, 294 N.C. 689, 693, 242 S.E.2d 806, 809 (1978). If a criminal defendant establishes that he has been deprived of his right to a speedy trial, any convictions secured in connection therewith must be vacated, and the underlying indictments dismissed. *State v. Washington*, 192 N.C. App. 277, 298, 665 S.E.2d 799, 812 (2008) (concluding right to speedy trial violated; "As such, we must vacate defendant's convictions and dismiss all charges with prejudice."); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) ("The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived.").

As mentioned above, this Court already concluded in Plaintiff's criminal case that Plaintiff was deprived of his right to a speedy trial, and vacated his convictions and dismissed the underlying indictments accordingly. *Washington*, 192 N.C. App. at 298, 665 S.E.2d at 812. Defendants argue that, as a result, Plaintiff has received the "only possible remedy" available for the violation of his constitutional right to a speedy trial, and Defendants support their argument by citing to a number of criminal cases.

Defendants are correct that, in the context of his criminal prosecution, Plaintiff has already received the only acceptable remedy for the violation of the speedy trial right. *Barker*, 407 U.S. at 522. But this is a civil lawsuit, not a criminal prosecution, and Plaintiff here seeks not to overturn his criminal convictions, but to redress harms he allegedly suffered as a result of the denial of his right to a speedy trial. The holdings from the criminal cases cited by Defendants are not applicable in the civil context. *See Hart v. Mannina*, 798 F.3d 578, 595 n.4 (7th Cir. 2015) (noting that in *Barker*, "the Supreme Court said that dismissal of the charges was the 'only possible remedy,' but it said this in a direct criminal appeal where the prosecutor had argued that less drastic remedies such as applying the exclusionary rule to certain evidence or granting a new trial would be more appropriate than outright dismissal. The Court had no occasion to consider whether damages are available in a civil case" under federal law (citation omitted)).

In this civil lawsuit, Plaintiff invokes this Court's conclusion that his constitutional right to a speedy trial was violated in seeking to redress harms allegedly caused by his constitutionally-deficient detention, investigation, and prosecution, including a permanent injunction and money damages for "economic loss, physical harm, emotional trauma, loss of liberty, loss of privacy, loss of education and training, loss of earning capacity, and irreparable harm to his reputation," as well as various costs and expenses he allegedly incurred in connection with his defense. However, Plaintiff cites no legal authority recognizing a private cause of action by which one deprived of his right to a speedy trial under North Carolina Constitution Article I, section 18, can sue for injunctive relief and/or money damages in connection with harms allegedly suffered because of the constitutional violation, and we are aware of no such authority. Accordingly, Plaintiff in essence asks us to recognize a new right to relief, and therefore presents us with a question of first impression.

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the United States Supreme Court held that victims of a violation of the Fourth Amendment to the United States Constitution caused by a federal agent can sue the agent in federal court for damages despite the absence of any statute creating such a cause of action. *Id.* at 389. The *Bivens* Court allowed the petitioner in that case to sue for the violation of the Fourth Amendment right to be free from unreasonable searches and seizures, and thereby recognized the first so-called *Bivens* cause of action. *Id.*

Since *Bivens* was decided in 1971, the Supreme Court has extended its holding only twice, to alleged violations of the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14, 23-24 (1980). The Supreme Court has expressly declined to recognize a *Bivens* cause of action for alleged violations of the First Amendment. *See Bush v. Lucas*, 462 U.S. 367, 390 (1983).

Bivens has never been extended to allow a claim for damages in connection with the deprivation of the right to a speedy trial as guaranteed by the Sixth Amendment. *See Witchard v. Keith*, No. 6:10-cv-474-Orl-31GJK, 2011 U.S. Dist. LEXIS 7620, at *10 (M.D. Fla. Jan. 26, 2011) ("The Supreme Court has not expressly extended *Bivens* liability to Sixth Amendment claims."); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). And some federal courts have expressly rejected such a cause of action.

See Patterson v. Hinds Cty., Miss., No. 3:13-CV-432-CWR-FKB, 2016 U.S. Dist. LEXIS 172814, at *12-13 (S.D. Miss. June 10, 2016) (holding that the damages sought by a plaintiff suing in connection with the violation of his speedy trial right are "simply foreclosed by law"); *Bauman v. Hidalgo Cty., Tex.*, No. M-04-145M-04-145, 2005 U.S. Dist. LEXIS 48355, at *16 n.1 (S.D. Tex. July 6, 2005) ("While the Constitution does afford a person a constitutional right to a speedy trial, the remedy for a violation is dismissal of any criminal charges, not money damages."). Consistent with federal case law, we decline to recognize a private cause of action in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of our North Carolina Constitution.

As a result of the deprivation of his right to a speedy trial, in his criminal case, Plaintiff successfully petitioned this Court to vacate his convictions and dismiss the underlying indictments with prejudice. Invoking the same right, in this civil case, Plaintiff brought a number of claims seeking injunctive relief and damages, but the trial court dismissed those claims. Following the trial court's ruling, Plaintiff appealed only the dismissal of his direct claim under the North Carolina Constitution. Regardless of whether Plaintiff could have established a claim for injunctive relief or damages under one of his other legal theories,[2] since he has appealed only the dismissal of his direct constitutional claim, our conclusion that no private cause of action for injunctive relief or damages lies in connection with the deprivation of the right to a speedy trial as guaranteed by Article I, section 18 of the North Carolina Constitution mandates the corresponding conclusion that Plaintiff has placed before us no right to relief which the trial court could have recognized.

III. Conclusion

Because we decline to recognize the private cause of action that Plaintiff seeks to bring, we conclude that the trial court did not err by granting Defendants' motion for summary judgment on Plaintiff's direct constitutional claim, or by denying Plaintiff's motion for summary judgment on the same.

AFFIRMED.

Judges BRYANT and STROUD concur.

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2. Because Plaintiff has not appealed the trial court's decisions regarding any of his causes of action except his direct constitutional claim, and because we decline to recognize the right to relief that Plaintiff suggests, we have no occasion to analyze the parties' arguments concerning other causes of action that might have been available to Plaintiff.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 SEPTEMBER 2019)

DIMMETTE v. DIMMETTE No. 19-194	Guilford (14CVD8065)	Dismissed
EPPS v. CONT'L TIRE THE AMS. No. 18-768	N.C. Industrial Commission (885634)	Affirmed
FIRST TECH. FED. CREDIT UNION v. SANDERS No. 19-187	Guilford (18CVD4641)	Affirmed
GILLIS v. GILLIS No. 18-430	Guilford (14CVD7368)	Affirmed
IN RE M.C.M. No. 18-1197	Scotland (18JB22)	Affirmed
J. FREEMAN PROPS., LLP v. CROSS DEV. CC CHARLOTTE S., LLC No. 18-1176	Mecklenburg (17CVS15562)	Dismissed
LOYD v. LOYD No. 18-641	Catawba (13CVD1111)	Affirmed in Part and Remanded
NEWELL v. CONT'L TIRE THE AMS. No. 18-767	N.C. Industrial Commission (891834)	Affirmed
SHIPMAN v. MURPHY BROWN, LLC No. 18-1243	N.C. Industrial Commission (14-038782)	Affirmed
SMITH v. N.C. DEPT. OF PUB. SAFETY No. 18-1047	N.C. Industrial Commission (TA-24884)	Affirmed
STATE v. BOBBITT No. 19-9	Wake (17CRS1482) (17CRS215380)	No Error
STATE v. CURLEE No. 19-285	Davie (13CRS50224) (14CRS358)	Judgment arrested in part; Reversed and remanded in part.
STATE v. JOHNSON No. 19-109	Catawba (16CRS2021-23)	Vacated and Remanded

STATE v. McCANN No. 18-1053	Alleghany (17CRS50046)	NO PREJUDICIAL ERROR
STATE v. ORR No. 18-1050	Buncombe (17CRS85151)	No Error
STATE v. SCOTT No. 18-1152	Forsyth (17CRS1855) (17CRS55659) (17CRS55660)	No Error
STATE v. SHAMBERGER No. 18-1143	Guilford (16CRS71857)	NO PLAIN ERROR IN PART; NO ERROR IN PART
STEWART v. MESHESHA No. 18-1013	Mecklenburg (17CVS148)	Dismissed
TOMPKINS v. LAUGHLIN No. 18-1191	Randolph (18CVD614)	Affirmed
WELCH v. CONT'L TIRE THE AMS. No. 18-769	N.C. Industrial Commission (886704)	Affirmed
WILSON v. CONT'L TIRE THE AMS. No. 18-766	N.C. Industrial Commission (887719)	Affirmed
WOODARD v. N.C. DEP'T OF COMMERCE No. 19-135	Wilson (18CVS241)	Affirmed
YOUNG v. McCLAIN No. 18-646	Mecklenburg (15CVD792)	Affirmed in Part and Remanded

DILLINGHAM v. RAMSEY

[267 N.C. App. 378 (2019)]

KELLI DILLINGHAM, PLAINTIFF
v.
SCOTT RAMSEY, DEFENDANT

No. COA18-811

Filed 17 September 2019

1. Child Custody and Support—child support arrears—argument on appeal regarding amount—invited error

In an action involving past due child support, a mother's argument on appeal that the trial court miscalculated the amount of arrears was dismissed because the amount found by the trial court, $24,400, was specifically requested by the mother's counsel in his closing statement, making any error invited.

2. Child Custody and Support—child support arrears—lengthy period of repayment—ability to pay immediately—abuse of discretion

In a case involving a father's unilateral reduction in child support after two children reached the age of majority, the trial court abused its discretion by allowing the father to repay arrears at a rate of $100.00 per month, despite the father's high income and ability to immediately pay all of the arrears, because the full repayment would take more than 20 years. Further, the trial court's decision not to require interest amounted to granting the father an interest-free loan from the mother. The mother's delay in filing a motion to enforce the child support order and the father's voluntary payment of expenses for the adult children were not sufficient bases for the lengthy repayment schedule. Moreover, the mother was not required to request a specific monthly payment to challenge the repayment scheme on appeal.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 26 January 2018 by Judge Andrea F. Dray in District Court, Buncombe County. Heard in the Court of Appeals 13 February 2019.

Sharpe & Bowman, PLLC, by Brian W. Sharpe, for plaintiff-appellant.

Siemens Family Law Group, by Brenda Coppede, for defendant-appellee.

STROUD, Judge.

Mother appeals the trial court's order based upon its calculation of past due child support and allowing Father to pay arrears at the rate of $100.00 per month. Mother invited any error in the calculation of the child support arrears. Where Father was obligated under a 2009 order to pay child support and failed to pay Mother $24,400.00, the trial court abused its discretion by ordering Father to pay the arrears at the rate of $100.00 per month—or over a period of 20 years and 4 months—when, based on Father's high income, he had the ability to pay the entire amount.

I. Background

Mother and Father married in 1996 and divorced in 2006. Together they have four children. Father was required to pay $4,877.00 per month in child support under a 30 October 2009 order. At the time of the 2009 order, his monthly gross income was $28,401.00, and his monthly expenses were $16,282.00. Mother's monthly gross income was $3,927.00, her monthly expenses were $5,313.00, and her expenses for the children were $3,491.00. Because of the parties' high combined income, the trial court set child support based upon the parties' incomes and the needs of the parties and children. The October 2009 order decreed that "[Father] shall pay child support to Plaintiff in the sum of $4,877.00 per month, retroactive to February 1, 2009." The order did not address any reduction in child support upon a child turning 18; in fact, the order failed to address cessation of child support at all.

In September 2015, after the parties' oldest child started attending college, Father unilaterally reduced his child support payment by 25 percent. Father reduced his monthly child support payment by an additional 25 percent once their second oldest child began attending college. Father did not file any request for modification with the court before reducing the payments.

On 3 November 2016, Mother filed a motion for contempt and show cause requesting Father be found in contempt of court for failure to pay child support as required by the 2009 order, requesting the past due child support and attorney's fees. On 24 January 2017, Father filed a motion to modify child support and custody, seeking modification of custody and a reduction of child support. On 23 February 2017, Mother filed a response to Father's motion and requested modification of child support due to father's increase in income and the needs of the children. The parties agreed on the issues of child custody and child support modification and entered a consent order before the hearing on the contempt motion.

On 5 December 2017, a hearing was held on Mother's motion for contempt for failure to pay child support. The trial court entered an order on 26 January 2018 finding Father failed to pay as required by the 2009 order, but was not in willful contempt, and required him to pay $24,400.00 in child support arrears in $100.00 monthly installments.[1] Mother timely appealed and Father cross-appealed.[2]

II. Calculation of Arrearage

[1] Mother argues that the trial court "miscalculated the child support arrearage as $24,400 when it should have been $26,840." But, at trial, Mother's counsel only requested $24,400.00 in his closing statement:

> Based on the testimony I heard that would be a total reduction in aggregate of $24,400 from the time period beginning in September 2015 when the first reduced payment was made through December 2016, the month immediately preceding defendant's filing of his motion to modify the support amount.

Mother asked the trial court for $24,400.00, and the trial court ordered Father to pay that amount in child support arrears. To the extent that it was an error not to include child support payments for January 2017 in the trial court's calculations, it is invited error, and Mother "may not base an appeal on an alleged error that she invited." *See Quevedo-Woolf v. Overholser*, ___ N.C. App. ___, ___ 820 S.E.2d 817, 835 (2018). This argument is dismissed.

III. Payment of Arrearage

[2] Mother argues that "[t]he trial court abused its discretion by enforcing the arrearage in installments of only $100 per month[,]" as this will extend the payment of the arrears over 20 years, until the children who were to benefit from the child support are in their thirties, while Father earns over $1,700,000 per year and has the ability to pay all of the arrears.

No prior cases address a trial court's determination of how child support arrears should be paid in this context—where it appears the payor has the ability to pay arrears immediately—but as in child support

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1. The order also provided "[t]hat nothing herein will prohibit [Father] from paying the total amount due, or higher amounts at any time, until the arrears are paid in full." Since neither party has raised an issue of mootness with this Court, we presume Father has thus far not elected to pay off the arrears in full.

2. Father subsequently withdrew his cross-appeal pursuant to North Carolina Rule of Appellate Procedure 37(e)(1).

matters generally, the trial court has broad discretion to order a remedy supported by the facts and circumstances in the particular case:

> Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal. In exercising sound judicial discretion, a trial judge is guided by the following general principles:
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> > By the exercise of his discretion, a judge ought not to arrogate unto himself arbitrary power to be used in such a manner so as to gratify his personal passions or partialities. A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

Plott v. Plott, 313 N.C. 63, 69, 326 S.E.2d 863, 867-68 (1985) (citation, parentheticals, and ellipsis omitted) (quoting *Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E.2d 58, 63 (1980)).

Mother does not challenge any specific findings of fact as unsupported by the evidence in her brief, but she argues that "[i]n the order on appeal, the trial court offered no reasoning or findings of fact to support its ruling for periodic payments of $100 per month towards a substantial arrearage." Father argues that Mother abandoned any issue of the amount of the monthly payments toward arrears by not requesting a specific amount before the trial court.

We first reject Father's argument that Mother abandoned the issue of how the arrears would be paid by not requesting a specific monthly payment. Here, there would have been no reason for Mother to request any particular monthly payment. Father has not raised any inability to promptly pay the entire arrears at trial or on appeal.

As the order on appeal notes, the allegations of Mother's "motion to Show Cause are uncontroverted." Father unilaterally reduced his child support payments based on his belief that he had the right to do so, but he did not. As the trial court's order acknowledges, Father had no right to reduce his payments and he violated the 2009 order by reducing the payments. In addition, Mother had a clear legal right to enforce the 2009 order. The trial court's rationale for not finding Father in civil or criminal contempt was based upon his voluntary payment of expenses for the adult children. Mother does not challenge on appeal the trial court's

conclusion that Father was not in willful contempt, so that portion of the order is final, and we express no opinion on that portion of the ruling.

The order includes findings of fact regarding Father's payment for college expenses for the parties' children who had turned 18 and were attending college. The trial court found as of the hearing, Father had paid "total additional funds and payment of expenses" for the two older children of $120,861.30. In addition, he "has paid thousands [of dollars] in school trips and sporting equipment, computers, and vehicles, and in fact, anonymously purchased new equipment for [one child's] entire high school football team." He also continued to provide health insurance for all four children and paid 100 percent of unreimbursed or uncovered healthcare expenses for all of the children, although the order required him to pay only 90 percent. Based upon Father's voluntary payment of these substantial additional expenses for the children, the trial court found that Father was not in willful contempt of the 2009 order, because he "fairly believed, albeit mistakenly, that the custody and Support order permitted him to reduce the original support amount by one-fourth (1/4) whenever each of the parties' children in common reached the age of majority and graduated from high school."

The trial court also found that Father had no legal right to unilaterally reduce his child support, citing to *Craig v. Craig*, and determined that the order is enforceable and that Father owed the arrears. 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991) ("[W]hen one of two or more minor children for whom support is ordered reaches age eighteen, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment. The supporting parent must apply to the trial court for modification."). The trial court found that although Father's voluntary support of the college-age children was "commendable," those contributions "must be excluded from this Court's determination of whether to award [Mother] recovery of the child support underpayment and arrearage." The trial court also found that Father was not precluded from filing a motion to modify child support by "any of the grounds set forth in NC Gen Stat §405-13.10(a)(2) [sic]," and he was not affected by "any physical disability, mental incapacity, indigency, misrepresentation of another party, nor any compelling reason that might have reasonably prevented him from filing a motion to modify the child support obligation before his monthly payments came due."[3] Because

3. The trial court was clearly referring to North Carolina General Statute § 50-13.10(a): "Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this

of Father's voluntary support of the adult children, the trial court determined that "no sanctions or penalty should be imposed" upon him, and Mother does not argue otherwise.

Instead, despite Father's apparent ability to pay the entire amount immediately, the trial court ordered him to pay $100.00 per month. At this rate, it will take 20 years and 4 months for him to pay the entire arrears. When he completes payment in 2038, the youngest child will be age 35 and the second-oldest will be 38. Most of the arrearages will be paid long after all four children have become adults.

Mother argues that since the primary goal of child support is to ensure the welfare of the minor children, there is no reasonable explanation for extending payment of the arrearages owed over more than 20 years. Instead of having the arrearages paid while the two youngest children are still minors living with Mother—while they can still benefit directly from the child support—nearly all of the arrearages will be paid long after all of the children have become adults. According to Father's own evidence, his income for 2017 was $144,196.00 *per month*, or approximately $4,800 per day. The entire arrears is five days of earnings for Father. The $100.00 monthly payment is .069% of Father's monthly gross income. In contrast, Mother's *annual* gross income is $46,054.44; the entire arrears is over half of her annual gross income.

It is well-established, as the trial court noted, that Father had no right to unilaterally reduce his child support:

> As this Court has held, the "proper procedure for the father to follow was to apply to the trial court for relief. This he failed to do. He had no authority to unilaterally attempt his own modification." Quoting *Halcomb v. Halcomb*, 352 So.2d 1013, 1016 (La.1977), this Court explained:
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> > Support for this rule is found in a proper regard for the integrity of judgments. Such a regard does not condone a practice which would allow those cast in judgment to invoke self-help and unilaterally relieve themselves of the obligation to comply. Any

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State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either: (1) Before the payment is due or (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded." N.C. Gen. Stat. § 50-13.10(a) (2017).

> other rule of law would greatly impair the sanctity of judgments and the orderly processes of law. To condone such a practice would deprive the party, in whose favor the judgment has been rendered, of an opportunity to present countervailing evidence, and at the same time deny the judge an opportunity to review the award in light of the alleged mitigating cause which had developed since its rendition. This policy applies equally in North Carolina.

Griffin v. Griffin, 96 N.C. App. 324, 327-28, 385 S.E.2d 526, 528-29 (1989) (citation and ellipsis omitted).

Of course, the trial court did not forgive Father's arrears but instead allowed him to pay the arrears over a period of over 20 years with no interest. Although the trial court made extensive findings regarding Father's voluntary payments for the adult children, it also stated these voluntary payments "must be excluded from this Court's determination of whether to award [Mother] recovery of the child support underpayment and arrearage." We agree that Father's voluntary payments are not a proper factor for consideration as to the trial court's decision as to how the arrears should be paid. The only other rationale we can find in the order for the extraordinarily extended term for payment of the arrears is this finding:

> 57. [Mother] waited one year and two months to file the Motion to Show Cause from the date that [Father] first reduced his monthly payments. That at the time of the filing of her motion, the two older children were no longer in her home and [Father] was providing exclusively for their financial support. That [Mother] had been complicit in the [sic] allowing [Father] to believe for over a year, that his reduction in child supports [sic] payments was not resisted by [Mother].

Although Mother does not challenge this finding as unsupported by the evidence, she argues that the trial court erred in its interpretation of the law as applied to these facts. By finding Mother "complicit" in "allowing [Father] to believe" that his reduction of child support was "not resisted," the trial court essentially found fault with Mother for waiting to enforce the order.[4] There is no basis in the law for punishing Mother

4. As noted above, the trial court specifically found that Father was not entitled to relief for his failure to file a motion for modification under North Carolina General Statute § 50-13.10(a)(2) based upon any "misrepresentation of another party."

for "waiting" for a year and two months to file a motion to force Father to do what he was legally obligated to do. Even had Mother agreed for Father to reduce his payments without an order from the court modifying the support, the 2009 order would still be enforceable.

In *Griffin*, the husband was ordered in 1974 to pay the wife child support of $200.00 per month. *Id.* at 325, 385 S.E.2d at 527. A few months after entry of the order, the husband lost his job and then got new job paying less than his former job. *Id.* He wrote a letter to the wife announcing that he would "send the kids $100 a month because I do not think that it take [sic] two hundred dollars for my kids to live on and I do not intend to pay your way living the way you are." *Id.* He then paid $80.00 per month until 1981, and $40.00 a month until the younger child reached 18 years of age. Id. Eight months after husband ceased his payments, in 1987, wife filed a motion to reduce the arrears to judgment. *Id.* The trial court determined that the wife had abandoned her rights to enforce the child support obligation by waiting approximately 12 years from the husband's unilateral reduction of support to file her motion. *Id.* This Court reversed:

> Plaintiff's argument, based on his ex-wife's alleged silence and inaction in enforcing what he characterizes as her rights, is misguided. The touchstone in cases involving child custody and support is the welfare of the children, not freedom of contract. As our Supreme Court has observed,
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> > no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.
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> Just as our case law does not countenance agreements between parents that operate to the detriment of their children's rights, so it does not allow one parent to evade the obligations of child support by citing the failure of the other parent to insist immediately on such support.

Id. at 328, 385 S.E.2d at 529 (citations omitted).

Although the trial court has broad discretion in ordering the remedy for Father's failure to pay child support as ordered, this Court has

never had the opportunity to address any factor bearing upon the trial court's decision to delay payment of child support arrears other than the payor's ability to pay. In every prior case regarding payment of child support or arrears, the primary issue has been the ability of the payor to pay the arrears. Since the "touchstone in cases involving child custody and support is the welfare of the children," normally courts require that child support arrears be paid as soon as possible since prompt payment benefits the children. *Id.* But ability to pay is not an issue in this case. Our prior cases have also noted "the sanctity of judgments and the orderly processes of law." *Id.* at 327, 385 S.E.2d at 528. Any ruling which could be interpreted as encouraging unilateral reductions of child support without court approval endangers the sanctity of judgments. *See id.* The trial court abused its discretion by fashioning a remedy for Father's failure to pay child support as ordered without considering the purpose of child support, the welfare of the minor children, and without considering Father's ability to pay.

Here, with payment of child support so long delayed past the date it vested, the trial court also had the discretion to award interest upon the unpaid child support.[5] Since the trial court failed to consider interest when child support is so long delayed, it essentially granted Father an interest-free loan from Mother.

> Under North Carolina law, past due child support payments vest when they accrue. Allowing plaintiff to defer payment for years of his obligations ensuing from the date of the filing of the complaint, without paying interest on the award, would effectively grant him an interest-free loan from his ex-wife. When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy. This discretion has been expanded in recent years due to the broad language of N.C. Gen. Stat. § 50-13.4. The North Carolina Supreme Court, moreover, upheld an award including interest when a defendant failed to meet his child support obligations under the parties' separation and modification agreements. This Court also recognized the broad scope of remedies available to a trial judge in a child support case and upheld an

5. "Except as otherwise provided in G.S. 136-113, the legal rate of interest shall be eight percent (8%) per annum for such time as interest may accrue, and no more." N.C. Gen. Stat. § 24-1 (2017).

> award including interest "from the date defendant filed the motion to have the arrearages reduced to judgment." We hold, accordingly, that interest may be awarded on child support accruing on the date the complaint is filed.

Taylor v. Taylor, 128 N.C. App. 180, 182, 493 S.E.2d 819, 820 (1997) (citations omitted).

Although the trial court here ordered Father to pay the arrears, as required by North Carolina General Statute § 50-13.10, the only purpose we can find for the trial court's extension of payment over 20 years without even the benefit of interest at the legal rate is to punish Mother for filing a motion to enforce the child support order where Father was providing entirely voluntary support to their two adult children. The trial court placed the burden upon Mother to file a motion to enforce the child support obligation immediately upon Father's unilateral reduction by finding she waited over a year to move to show cause. But it was Father's obligation to seek to reduce his own child support *before* he reduced his payments, and Father was far more financially able to pay to hire an attorney to file a motion to modify his support.

In addition, it was not at all obvious when Mother filed her motion to show cause that Father's child support obligation would be subject to reduction based upon either of the older two children turning 18. Father's gross monthly income at the time of the prior order in 2009 was $28,401.00 but had increased to $144,196.00 as of the time of the motion to show cause, while Mother's income was about the same as in 2009. Living expenses and children's needs tend to increase over time, and Mother's response to Father's motion requested modification of child support for these reasons. Further, Father's child support obligation was not based upon the Child Support Guidelines but on the needs of the children and ability of the parents to provide support. Mother had no obligation to move to enforce the order immediately or to seek modification of Father's child support just because he had unilaterally reduced his payments or because he voluntarily paid for college and other expenses for the adult children. Although his voluntary support for the parties' adult children is admirable, it does not change the law regarding his child support obligation under the 2009 order.

The trial court's uncontested findings of fact and conclusions of law cannot support its decree allowing Father to pay the $24,400.00 arrears at the rate of $100.00 per month. Under these unusual circumstances, the trial court abused its discretion by ordering payment of the $24,400.00 arrears at the rate of $100.00 per month. The trial court's order wrongly

placed on Mother the burden to seek enforcement or modification of the prior order promptly after Father unilaterally reduced his payments.

IV. Conclusion

We reverse the trial court's order as to the schedule for payment of the arrears and remand for entry of an order requiring Father to pay any remaining arrears. Although the timing of the payment of any remaining arrearages owed on remand falls within the trial court's discretion, that discretion is not without bounds but should take into account the fact that one child of the parties is still a minor who may directly benefit from the support and Father's ability to pay promptly. As the trial court correctly noted, Father's voluntary payment of expenses for the adult children or other expenses not required by the order "must be excluded from" its "determination of whether to award [Mother] recovery of the child support underpayment and arrearages," and this factor should also be excluded from the trial court's determination of how and when Father must pay the arrearages. In addition, the trial court should exclude from its determination any provision which would punish Mother for any delay in filing her motion to show cause.

REVERSED IN PART AND REMANDED.

Judge ARROWOOD concurs.

Judge TYSON concurs in part and dissents in part.

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

Mother failed to properly preserve for appellate review the issues of both the amount and frequency of arrearage payments. I vote to affirm the trial court's order in full. I concur in part and respectfully dissent in part.

I. Unpreserved Issues

A. Standard of Review

A party may not raise for the first time on appeal an issue that was not raised and argued before the trial court. *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803, *cert. denied*, 358 N.C. 550, 600 S.E.2d 469 (2004). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). It has long been the rule that "the law does

not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934).

Where an appellant purports to raise an issue on appeal after failing to present any evidentiary support before the trial court and failing to make any argument during trial on this issue, the party has failed to preserve the issue for appellate review. *Chafin v. Chafin*, __ N.C. App. __, __, 791 S.E.2d 693, 698-99 (2016), *disc. review denied*, 369 N.C. 486, 795 S.E.2d 219 (2017). Such issue is waived and precedent hold this Court will not address it. *Id.*

B. Analysis

Mother's brief purports to raise issues for the first time on appeal that were not presented to the trial court. Mother failed to present any evidence related to her need for a specific periodic arrearage amount. She never addressed nor argued this issue during the trial. Mother also references income information in her appellate brief's statement of facts, which arose in Father's prior cause of action to modify child support. This information was not presented or admitted during the hearing on her motion to show cause. Father's request for modification was the basis for the parties' income affidavits. The child support matter was resolved prior to trial on the motion to show cause, which is the only order Mother appealed and which is at issue in the present appeal. These income affidavits were not before the trial court and were included in the supplement to the record on appeal over Father's objection.

Mother did not offer into evidence the income affidavits or any other documentary evidence to support her alleged current income, need for a specific periodic arrearage payment, or any payment for the minor children's best interests. During Mother's limited testimony, she offered no testimony to show her income, her assets, her employment, or admitted into evidence anything that could be considered to assist the trial court with a determination of a specific periodic arrearage payment. Mother purports on appeal to present documents not presented for consideration by the trial court in entering the order at issue on appeal, and which are not properly considered in this appeal via inclusion in the supplement to the record. While Mother has a different opinion about what terms of arrearage payments would be reasonable, a difference of opinion does not render the trial court's unchallenged findings of fact unreasonable. It is not this Court's responsibility to assess the merits of factual issues and arguments not presented to the trial court. N.C. R. App. 10(a)(1). The amount of past due child support is not challenged

by Father. Mother was awarded the amount she requested and her assertion of additional sums was invited error. Her challenge to the timing of payment of the apparent past due child support is not properly before us. Mother's arguments are properly dismissed.

II. Payment Schedule of Arrearages

Father argues the trial court properly found and appropriately ordered payments of $100.00 per month toward child support arrearages.

A. Standard of Review

It is well established and the majority's opinion acknowledges that the trial court is vested by both statutes and long standing precedents with broad discretion to determine the amount and payment of child support. "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." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002) (emphasis supplied) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "Under this standard of review, the trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation and internal quotation marks omitted).

B. Analysis

Plaintiff has shown no abuse of discretion in the amount and frequency of arrearage payments ordered to warrant a reversal of the trial court's order. As the trial court found and stated, and as is unchallenged by Mother, the trial court is in the unique position of observing the demeanor of witnesses, determining their credibility, and deciding the appropriate weight to lend their testimony.

"It is well-settled that when acting as the finder of fact, the trial court has the opportunity to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Balawejder v. Balawejder*, 216 N.C. App. 301, 318, 721 S.E.2d 679, 689 (2011) (citation and quotation marks omitted). The trial court's findings of fact are conclusive on appeal even if evidence was presented to support findings to the contrary. *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009).

As the trial court stated in finding of fact 21, which is unchallenged by Mother, "[t]hat the Court took the direct and sworn testimony of the parties and was able to observe their tenor, tone and demeanor, which

the Court took into consideration in determining the competent and credible evidence." The trial court further described the exact evidence it considered in exercising its discretion to determine the amount of the child support arrearage payments. Appellate judges cannot usurp and substitute personal preferences to replace a decision so clearly committed to the trial court's discretion. *See Balawejder*, 216 N.C. App. at 318, 721 S.E.2d at 689.

The trial court's decision was neither arbitrary nor unsupported by the evidence. *See Yurek*, 198 N.C. App. at 80-81, 678 S.E.2d at 747. Findings of fact that support the order are unchallenged by Mother. The trial court did not abuse its discretion in determining the manner and method by which the arrearages will be paid to Mother. The trial court's order is properly affirmed.

III. Conclusion

Mother failed to preserve the two issues she argues on appeal before this Court. The trial court's unchallenged findings of fact were supported by the evidence presented at trial. Nothing in the evidence presented or challenged in the findings support a conclusion that the trial court abused its discretion by entering payment and terms of the child support arrearages. *White*, 312 N.C. at 777, 324 S.E.2d at 833 (the trial court's ruling "will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.").

Mother has not challenged the trial court's findings and has not shown the order "could not have been the result of a reasoned decision." *Id*. The trial court's order is properly affirmed in its entirety. I concur in part on Mother's invited error on the arrearage amount and respectfully dissent in part of any abuse of discretion being shown to reverse the trial court's order.

IN RE D.W.L.B.

[267 N.C. App. 392 (2019)]

IN THE MATTER OF D.W.L.B.

No. COA19-163

Filed 17 September 2019

Crimes, Other—false report of mass violence on educational property—juvenile delinquency petition—sufficiency

In a juvenile delinquency proceeding based on allegations that defendant wrote "bomb incoming" on a bathroom wall in his elementary school, the trial court lacked jurisdiction to adjudicate defendant delinquent for making a false report concerning mass violence on educational property (N.C.G.S. § 14-277.5) because the delinquency petition insufficiently alleged the "report" element of the offense. Specifically, the petition failed to allege that defendant directed his graffiti message to anyone in particular or that anyone actually saw it. Furthermore, the graffiti did not constitute a credible "report" that a reasonable person would construe as a true threat.

Appeal by Defendant from orders entered 11 May 2018 and 8 June 2018 by Judge Richard Walker in Jackson County District Court. Heard in the Court of Appeals 4 June 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Lucas, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for the Defendant.

DILLON, Judge.

Defendant D.W.L.B. ("Dexter"),[1] a juvenile, appeals from the trial court's orders adjudicating him delinquent and entering a Level 1 disposition. After careful review, we vacate and remand for further proceedings, as explained in the Conclusion section of this opinion.

I. Background

Dexter is an elementary school student in Sylva. On 11 April 2018, a janitor at Dexter's school cleaned certain graffiti from a stall in a boy's bathroom. About ten minutes later, while standing in a hallway,

1. We use a pseudonym for ease of reading and to protect the identity of the juvenile. N.C. R. App. P. 42.

the janitor observed a student lean out of that bathroom, look around, and then quickly dart back into the bathroom. The janitor went inside the bathroom to investigate and found Dexter and another boy. Dexter was standing next to the hand dryer by the sinks. Dexter left the bathroom immediately. The janitor then discovered new graffiti, the words "BOMB INCOMING" written in black magic marker on the wall above the hand dryer.

The janitor reported the incident to the principal. Later that day, Dexter was called to the principal's office. Dexter was found to be carrying a black magic marker in his pants pocket. The principal and two officers spoke with Dexter and his parents and viewed surveillance footage of the hallway outside the bathroom.

Based on this investigation, the officers filed a petition seeking a declaration that Dexter was a delinquent juvenile, alleging that Dexter violated Section 14-277.5 of our General Statutes, a Class H felony, by making a false report concerning mass violence on educational property. After a hearing on the matter, the trial court orally found that Dexter had violated Section 14-277.5 *and* entered a written order adjudicating Dexter delinquent, ordering a Level 1 disposition, and prescribing twelve (12) months of probation.

Dexter timely appealed.

II. Analysis

A. Sufficiency of the Petition

Dexter argues that the trial court lacked jurisdiction over him because the delinquency petition did not sufficiently allege each element of the offense for which he was charged. For the following reasons, we conclude that the petition failed to allege the elements of a violation of Section 14-277.5.

We typically hold juvenile petitions to the same standards as adult criminal indictments, *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004), and therefore review the sufficiency of a petition *de novo* as a question of law, *see State v. White*, ___ N.C. ___, ___, 827 S.E.2d 80, 82 (2019) ("The sufficiency of an indictment is a question of law reviewed de novo.").

The petition in this case stated that Dexter:

> did make a report by writing a note on the boy's bathroom wall at [his] Elementary School stating, "bomb incoming"; that being an act of violence is going to occur on

> educational property, that being [his] Elementary School, a public school in Jackson County; knowing and having reason to know that the report is false. GS 14-277.5

Section 14-277.5 criminalizes the communication of any false report of mass violence to occur on educational property, expressly stating that:

> A person who, by any means of communication *to any person or groups of persons*, *makes a report*, knowing or having reason to know the report is false, that an act of mass violence is going to occur on educational property or at a curricular or extracurricular activity sponsored by a school, is guilty of a Class H felony.

N.C. Gen. Stat. § 14-277.5(b) (2018) (emphasis added).

Dexter argues that the petition is defective because it fails to allege "an act of mass violence." We disagree. Certainly, a threat of "bomb incoming" could reasonably be construed as something that could cause mass violence, potentially causing permanent physical injury to two or more people. *See* N.C. Gen. Stat. § 14-277.5(a)(2) (defining "mass violence").

Nonetheless, we conclude that the petition otherwise fails to allege a violation of Section 14-277.5. Specifically, it fails to allege that Dexter was "ma[king] a report" when he wrote the graffiti. We so conclude for two independent reasons.

First, we so conclude because the petition fails to allege that Dexter directed his "bomb incoming" graffiti message to anyone in particular or that anyone in particular actually saw it. Indeed, the essence of a Section 14-277.5 violation is not so much uttering or writing a statement, but rather making a report of the statement to someone else.[2] By way of illustration, if Dexter had written the "BOMB INCOMING" message and then immediately erased it, he would not be guilty of making a report as described in Section 14-277.5. But the petition in this case, if held valid, would serve to initiate criminal proceedings for such behavior all the same.

Second, and alternatively, we so conclude because it would not be reasonable for a person seeing the graffiti on the bathroom wall to

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2. We note that the petition recites that Dexter did "make a report," but then the petition described exactly what he did. The mere fact that the petition states that he made a report does not cure the fact that the allegation itself does not constitute a report. Certainly, a petition that alleged that "Defendant made a report by dreaming about making a bomb threat to his principal" would be determined to be defective, notwithstanding that it stated that a report was made.

construe said graffiti as *a report* of a credible threat. Indeed, a visitor to the bathroom seeing the graffiti would not know when the graffiti was written.

We note that our research has not revealed any case law or General Assembly official comment indicating what type of conduct constitutes the "mak[ing of] a report" within the meaning of Section 14-277.5. We construe statutory language to proscribe *as a Class H felony under this Section* only credible reports, that is, those that a reasonable person would believe could represent a threat. Again, by way of illustration, if a person calls in a threat that "Martians will be invading the school with heat rays this afternoon," no reasonable person would believe that she was in danger of imminent death by Martian invasion. Such a phone threat might be a crime, such as a Class 2 misdemeanor under Section 14-196(a), but we do not believe that the General Assembly contemplated criminalizing such behavior as a Class H felony. *See* N.C. Gen. Stat. § 14-196(a) (2018) (criminalizing the use of a telephone for harassment).

In the same respect, we conclude that no one would reasonably believe that the words "BOMB INCOMING," written in a bathroom at some unknown time in the past and obviously by an elementary-school-aged student, represented a report of an actual threat that a bomb was incoming to the school. Such behavior may constitute a crime, but not a Class H felony.[3]

Accordingly, we vacate the orders of the trial court adjudicating Dexter a delinquent juvenile and ordering a Level 1 disposition.

VACATED.

Chief Judge McGEE and Judge ZACHARY concur.

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3. We note that the petition does allege facts which could constitute the crime of "graffiti vandalism," codified in Section 14-127.1 of our General Statutes, which states that anyone who "unlawfully write[s] or scribble[s] on . . . the walls of [] any real property, whether public or private," is guilty of a Class 1 misdemeanor. N.C. Gen. Stat. § 14-127.1(a), (b) (2018). However, since the clear intent of the drafter of the petition was to charge Dexter with a violation of Section 14-277.5 and since "graffiti vandalism" is not a lesser-included offense of that Class H felony, Dexter was not on notice that he needed to defend against a "graffiti vandalism" charge. *See State v. Langley*, 371 N.C. 389, 396, 817 S.E.2d 191, 197 (2018) (recognizing that "[w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser"); *State v. Wortham*, 318 N.C. 669, 673, 351 S.E.2d 294, 297 (1987) (holding that trial court lacked jurisdiction to sentence for an offense which was not a lesser-included offense for the crime charged in the indictment). Therefore, it would not be appropriate for our Court to remand and allow the trial court to enter a disposition based on a finding of "graffiti vandalism," based on the language of the petition in this case.

IN RE E.A.

[267 N.C. App. 396 (2019)]

IN THE MATTER OF E.A.

No. COA19-277

Filed 17 September 2019

Juveniles—delinquency—evidence of mental illness—referral to area mental health services director required

The trial court erred by adjudicating a juvenile delinquent without referring the matter to the area mental health services director, as required by N.C.G.S. § 7B-2502(c), upon evidence that the juvenile was diagnosed with conduct disorder and required treatment for both substance abuse and mental illness.

Appeal by respondent-juvenile from order entered 12 October 2018 by Judge Robert Rader in Wake County District Court. Heard in the Court of Appeals 5 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for respondent-appellant juvenile.

ZACHARY, Judge.

Respondent-juvenile "Evan"[1] appeals from a disposition and commitment order adjudicating him to be a Level 2 delinquent juvenile. Evan argues on appeal that, after being presented with evidence that he was mentally ill, the trial court erred by failing to refer him to the area mental health services director. After careful review, we vacate the disposition and commitment order and remand to the trial court for a referral to the area mental health services director.

Background

The relevant facts are few. Between 14 December 2017 and 5 January 2018, a Wake County juvenile court counselor approved a petition alleging that Evan (1) committed an assault with a deadly weapon with intent to kill; (2) possessed stolen property; and (3) committed malicious conduct upon a government official by spitting on him. Evan admitted to the

1. We employ a pseudonym to protect the identity of Respondent, a minor.

charges of assault with a deadly weapon with intent to kill and malicious conduct, and the State dismissed the charge of possession of stolen property. The Honorable Craig Croom adjudicated Evan as delinquent, entered a Level 2 disposition, and ordered twelve months' probation. One month later, a juvenile court counselor filed a motion for review, alleging that Evan violated his probation. On 9 October 2018, the motion for review came on for hearing before the Honorable Robert Rader in Wake County District Court. Judge Rader found Evan in willful violation of his probation, revoked his probation, and ordered that Evan be committed to a youth development center with the Division of Adult Correction and Juvenile Justice for an indefinite period, to end no later than Evan's eighteenth birthday.

Grounds for Appellate Review

Preliminarily, we address our jurisdiction to consider the merits of Evan's appeal. Evan filed written notice of appeal on 10 October 2018. Typed into the trial court's order at the bottom of the page is the date "10/9/2018." However, the order is additionally—and quite noticeably—stamped with "2018 OCT 12 A 11:07," indicating that the order was filed *after* Evan filed his notice of appeal on 10 October.

Before a party may file notice of appeal, there must first be an entry of judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 58 (2017) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5."). "When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *See State v. Webber*, 190 N.C. App. 649, 651, 660 S.E.2d 621, 622 (2008) (quotation marks omitted). Consequently, Evan would need to request—and we would need to issue—a writ of certiorari to have his case reviewed. *See* N.C.R. App. P. 21(a). No petition for writ of certiorari was ever filed. However, this Court has the discretionary authority, pursuant to Appellate Rule 21, to "treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." *Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008).

For reasons more fully explained below, we find the facts of Evan's case worthy of treating his brief as a petition for writ of certiorari. We also note that the State has not raised this jurisdictional issue in its brief, and we do not contemplate any resulting prejudice to the State. Thus, in our discretion, we invoke this Court's authority pursuant to our caselaw and Appellate Rule 21, and proceed to the merits of Evan's appeal.

Discussion

Evan argues on appeal that the trial court erred by failing to refer him to the area mental health services director, after being presented with evidence that Evan was mentally ill. We agree.[2]

Prior to disposition in a juvenile delinquency action, "the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert as may be needed for the court to determine the needs of the juvenile." N.C. Gen. Stat. § 7B-2502(a) (2017). When presented with evidence that the juvenile is mentally ill, the trial court is required to take further action:

> If the court believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is developmentally disabled, the court shall refer the juvenile to the area mental health, developmental disabilities, and substance abuse services director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, developmental disabilities, and substance abuse director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent, guardian, or custodian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, developmental disabilities, and substance abuse director, the signature and consent of the court may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by the court and an area mental health, developmental disabilities, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of the juvenile's treatment, the hospital shall submit to the court a written

2. Because the trial court's failure to refer Evan to the area mental health services director is dispositive, we need not address his remaining arguments on appeal.

> report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question.

Id. § 7B-2502(c). Notwithstanding a party's failure to object at trial, the trial court's violation of a statutory mandate is reversible error, reviewed *de novo* on appeal. *In re E.M.*, ___ N.C. App. ___, ___, 823 S.E.2d 674, 676, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2019).

"Faced with any amount of evidence that a juvenile is mentally ill, a trial court has a statutory duty to refer the juvenile to the area mental health services director for appropriate action." *Id.* at ___, 823 S.E.2d at 677 (quotation marks and ellipses omitted). Section 7B-2502(c) "envisions the area mental health services director's involvement in the juvenile's disposition and responsibility for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet the juvenile's needs." *Id.* at ___, 823 S.E.2d 677-78 (brackets and quotation marks omitted).

In *E.M.*, the trial court improperly committed the juvenile to a youth development center despite "a plethora of evidence demonstrating that [the juvenile] was mentally ill." *Id.* at ___, 823 S.E.2d at 677. The record before the trial court established that the juvenile had received—and still required—significant mental health treatment. *Id.* at ___, 823 S.E.2d at 677. A disposition report presented to the trial court revealed that the juvenile had been diagnosed with several mental disorders. *Id.* at ___, 823 S.E.2d at 677. Accordingly, this Court vacated the order and remanded to the trial court with instructions to include a referral to the area mental health services director. *Id.* at ___, 823 S.E.2d at 678.

The State concedes that the instant case is indistinguishable from *E.M.*, and agrees that the trial court erred in failing to refer Evan to the area mental health services director. The concession is well warranted. In its order, the trial court stated that it received and considered a predisposition report, a risk assessment, and a needs assessment. The predisposition report referred to a clinical assessment completed by Haven House Services, which diagnosed Evan with conduct disorder, and recommended intensive outpatient services. In addition, the Haven House Assessment stated that (1) Evan's conduct disorder "causes clinically significant impairment in social, academic, or occupational functioning"; (2) Evan needs substance abuse treatment; and (3) Evan's behavior indicates a need for additional mental health assessment and treatment.

Conclusion

It is patently clear that the evidence before the trial court presented Evan as being mentally ill. Pursuant to N.C. Gen. Stat. § 7B-2502, the trial court's failure to refer Evan to the area mental health services director constitutes reversible error. Accordingly, we vacate the order and remand to the trial court for referral to the area mental health services director.[3]

VACATED AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

3. We recognize that the position of "area mental health, developmental disabilities, and substance abuse services director" no longer exists as referenced in N.C. Gen. Stat. § 7B-2502(c). *See* Jacquelyn Greene, *Mental Health Evaluations Required Prior to Delinquency Dispositions, On the Civil Side*, UNC School of Government (Jan. 22, 2019, 8:00 a.m.), [https://perma.cc/TN5N-HHQS]. In 1974, the General Assembly mandated referral to the "area mental health director" when the trial court was presented with evidence that the juvenile suffered from a mental illness. 1973 N.C. Sess. Laws 271, 271, ch. 1157. The area director referenced in § 7B-2502(c) is now identified as the "local management entity/managed care organization" found in N.C. Gen. Stat. § 122C-3(20b). Greene, *supra*. We strongly encourage the General Assembly to update the language of § 7B-2502(c) to reflect the current understanding and need for mental health treatment for juveniles. *See* K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 Campbell L. Rev. 1, 54 (1990) ("[The child's] right to mental health care is derived, if at all, from statutes, and legislatures have been reluctant to mandate the delivery of such care.").

IN RE WORSHAM

[267 N.C. App. 401 (2019)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY REBECCA WORSHAM AND GREG B. WORSHAM DATED JANUARY 8, 2007 AND RECORDED IN BOOK 21638 AT PAGE 600 IN THE MECKLENBURG COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA18-1302

Filed 17 September 2019

1. Mortgages and Deeds of Trust—foreclosure—default—evidence—no mortgage payments

Competent evidence supported the trial court's finding that respondents were in default on their promissory note where respondents had failed to make any mortgage payments for several years (by their own admission) and presented no contrary evidence at the hearing.

2. Negotiable Instruments—promissory note—transfer—weight of evidence

The trial court's findings that petitioner bank was currently in possession of the original promissory note on a mortgage and that the note contained a chain of valid and complete indorsements were supported by competent evidence. The Court of Appeals rejected respondents' argument disputing the effectiveness and validity of the allonges transferring the note to petitioner because that argument went to the weight of the evidence and thus was a matter for the trial court to determine.

3. Mortgages and Deeds of Trust—foreclosure—showing of default—new order after remand

Where the Court of Appeals had reversed and remanded the trial court's order allowing foreclosure of respondents' property and the trial court on remand entered a new order (replacing the original order) allowing the foreclosure, the trial court did not violate *In re Lucks*, 369 N.C. 222 (2016), by allegedly allowing petitioner to foreclose twice on the same default. Petitioner was not required to show a new default simply because the earlier order was remanded for findings and conclusions required by statute.

4. Mortgages and Deeds of Trust—foreclosure—ultimate findings—evidentiary findings

The Court of Appeals rejected respondents' argument that the trial court was required to make evidentiary findings to support its

ultimate findings regarding petitioner's authority to foreclose on respondents' property.

5. Appeal and Error—preservation of issues—foreclosure under power of sale—Rule 2

Even though respondents failed to raise their argument regarding the trustee's authority to foreclose on their property at the time of the hearing, the Court of Appeals invoked Appellate Procedure Rule 2 to consider the merits of the argument, because of the historic policy that foreclosure under power of sale is not favored by the law.

6. Mortgages and Deeds of Trust—trustees—substitution—authority to foreclose—evidence

Where substitutions of trustees were recorded with the county register of deeds, filed with the clerk of court, and submitted to the trial court as certified copies, there was competent evidence supporting the authority of the substitute trustee to foreclose under respondents' deed of trust.

7. Mortgages and Deeds of Trust—foreclosure—authority to foreclose—appointment of substitute trustee

The appointment of a substitute trustee after the clerk of court's decision to allow foreclosure did not require the foreclosure to be noticed a second time before review by the superior court. Further, where the deed of trust provided for the appointment of the mortgage servicer and of substitute trustees, the trial court's findings and conclusions related to petitioner's authority to foreclose were supported by competent evidence.

Appeal by Respondents from order entered 13 August 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 August 2019.

Bradley Arant Boult Cummings LLP, by Brian M. Rowlson, for Petitioner-Appellee.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, for Respondents-Appellants.

BROOK, Judge.

Rebecca and Greg Worsham ("Respondents") appeal the trial court's order allowing foreclosure of their home to proceed. In a prior

appeal, we reversed the order of the trial court allowing foreclosure of Respondents' home to proceed, remanding the matter for further proceedings. *See In re Worsham*, ___ N.C. App. ___, 815 S.E.2d 746, 2018 WL 3233086 (2018) (unpublished) ("*Worsham I*"). The present appeal originates from those proceedings. For the reasons that follow, we affirm the order of the trial court.

I. Background

The facts of this dispute are set out more fully in our opinion in *Worsham I* and we recount only those necessary to resolve the instant appeal. On 12 April 2005 Respondents purchased a home located at 3501 Providence Road, in Charlotte, North Carolina, financing the purchase with a loan secured by a deed of trust. On 8 January 2007, Respondents refinanced the home, securing the refinancing with a deed of trust. The deed of trust from the 2007 refinancing was recorded with the Mecklenburg County Register of Deeds. Respondents have not made any payments on the note from the 2007 refinancing since 2012.

The note provides in relevant part that if the borrower is "in default, the Note Holder may send [] a written notice telling [the borrower] that if [the borrower] do[es] not pay the overdue amount by a certain date, the Note Holder may require [the borrower] to pay immediately the full of amount of Principal which has not been paid and all the interest that [the borrower] owe[s] on that amount." On 21 March 2016 Respondents were notified that they were in default and that foreclosure proceedings would be initiated if the default was not cured.

On 19 July 2016 the substitute trustee initiated foreclosure proceedings with the clerk of Mecklenburg County Superior Court. The matter was dismissed by the clerk on 6 December 2016 because the clerk did not believe there was sufficient evidence of the substitute trustee's authority to foreclose under the deed of trust. On 8 December 2016, HSBC Bank USA, N.A. ("Petitioner") appealed the clerk's order for a *de novo* hearing in superior court.

Judge Hugh B. Lewis presided over a hearing on 13 March 2017, during which the original note, a certified copy of the deed of trust, and a certified copy of the assignment of the deed of trust were submitted to the court. On 12 April 2017, the court entered an order allowing foreclosure to proceed. Respondents timely appealed.

In an unpublished opinion, this Court on 3 July 2018 reversed the trial court's order and remanded the matter for further proceedings. *See Worsham I*, at *1. In our opinion we explained that reversal was required

because the trial court had not found in the 12 April 2017 order that Petitioner was the holder of the debt evidenced by the note, as N.C. Gen. Stat. § 45-21.16(d) requires. *Id.* at *3. We therefore remanded the matter for further proceedings because the trial court had "*summarily* concluded that Petitioner had the right to foreclose on the property without first having made a finding whether Petitioner was the holder of the debt at issue." *Id.* (emphasis added). We noted in conclusion that "[o]n remand, the trial court *may* . . . make additional findings based on the existing record." *Id.* at *4 (emphasis added).

After the mandate of our 3 July 2018 opinion had issued, on 13 August 2018, without further hearing on remand, the trial court entered an order allowing the foreclosure to proceed, finding as follows:

> 1. That Respondent Rebecca Worsham originally executed a promissory note in the amount of $249,000 in favor of lender Delta Funding Corporation.
>
> 2. That the promissory note was secured by a Deed of Trust executed by both Respondents, with such Deed of Trust being an encumbrance on the real property located at 3501 Providence Road, Charlotte, North Carolina 28211 ("Property"). The Deed of Trust contains a valid and enforceable power of sale provision.
>
> 3. That Petitioner is currently in possession of the original promissory note and presented the original promissory note to the court at the hearing without objection by the Respondents.
>
> 4. That the original promissory note provided by Petitioner contains a chain of valid and complete indorsements from Delta Funding Corporation to Petitioner HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2007-1.
>
> 5. That Petitioner produced certified copies of the recorded 1) Deed of Trust securing the Property, 2) the assignment of the deed of trust to Petitioner, and 3) appointment of substitute trustees.
>
> 6. That the evidence provided by Petitioner, including the affidavit, loan payment history and correspondence, and by Respondents' own admission at the hearing, show that the Respondents have repeatedly failed to make each of

the monthly payments as required by the promissory note for several years. Respondents did not provide evidence at the hearing refuting this evidence of this continuing and ongoing default.

7. That Petitioner sent Respondent Rebecca Worsham a pre-foreclosure notice dated March 21, 2016, advising of Petitioner's intent to foreclose if the ongoing and continuing default was not corrected within 45 days. Respondent failed to correct the default.

8. That the Respondents are not in the military and received the required notice of hearing.

The trial court therefore made the following conclusions of law:

1. Service. Each person/entity entitled to notice was duly served with proper notice as provided by law.

2. Holdership of Note and Validity of Debt: That Petitioner HSBC Bank USA, N.A., as Indenture Trustee for the Registered Noteholders of Renaissance Home Equity Loan Trust 2007-1 is the holder of said promissory note and Deed of Trust to be foreclosed, and that the promissory note evidences a valid debt owed by Respondents.

3. Default: That Respondents are now in default of the promissory note, and the Deed of Trust gives Petitioner the right to foreclose under a power of sale and is enforceable according to its terms.

4. Home Loan Status: That the underlying promissory note is a home loan as provided by N.C. Gen. Stat. § 45-101(1b), the requisite pre-foreclosure notice was provided in all material respects, and that all relevant periods of time have elapsed prior to the filing of a notice of hearing in this foreclosure proceeding.

5. Military Status: That the foreclosure sale is not barred by N.C.G.S. § 45-21-12A because the provisions of N.C.G.S. § 45-21-12A are inapplicable to this current proceeding and Respondents do not challenge this statutory element.

6. That no valid defense or evidence was presented to the Court by the Respondents as to why the foreclosure should not proceed.

> 7. Per the July 3, 2018 decision of the North Carolina Court of Appeals, this Order is intended to replace and supersede the Order Authorizing the Foreclosure of the Property Through the Power of Sale Authorized by the Deed previously entered by this Court on April 12, 2017.

Respondents timely appealed the trial court's 13 August 2018 order.

II. Analysis

Respondents raise a number of arguments on appeal, which we address in turn. We begin, however, with an overview of the relevant law. We go on to hold (1) that the trial court's challenged findings were supported by competent evidence; (2) that the trial court's findings were made with adequate specificity, and included the findings necessary to support the conclusions the trial court reached; (3) that the trial court's findings did, in fact, support its conclusions of law; and (4) that the trial court's conclusions of law were not erroneous. We therefore affirm the trial court's order.

A. Standard of Review

> The applicable standard of review on appeal where, as here, the trial court sits without a jury is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings. . . . The trial court, in an appeal of a foreclosure action, was to conduct a *de novo* hearing to determine the same four issues determined by the clerk of court: (1) the existence of a valid debt of which the party seeking foreclosure is the holder, (2) the existence of default, (3) the trustee's right to foreclose under the instrument, and (4) the sufficiency of notice of hearing to the record owners of the property.

Trustee Servs., Inc. v. R.C. Koonts and Sons Masonry, Inc., 202 N.C. App. 317, 321, 688 S.E.2d 737, 740-41 (2010) (internal marks and citation omitted).

> Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding. . . . 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.

City of Asheville v. Aly, 233 N.C. App. 620, 625-26, 757 S.E.2d 494, 499 (2014) (internal marks and citation omitted).

B. Legal Framework for Power of Sale Foreclosures

A power of sale is a contractual provision in a deed of trust conferring upon the trustee the power to sell real property pledged as collateral for a loan in the event of default. *In re Adams*, 204 N.C. App. 318, 321, 693 S.E.2d 705, 708 (2010) (internal marks citation and omitted). The benefit of power of sale foreclosure is the avoidance of "lengthy and costly foreclosure[] by action . . . in favor of a private contractual remedy[.]" *Id.*

Chapter 45 of the North Carolina General Statutes sets out the requirements that must be met for a power of sale foreclosure to proceed:

> If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . , and (vi) that the sale is not barred by G.S. 45-21.12A, [the military status exception,] then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

N.C. Gen. Stat. § 45-21.16(d) (2017). As the Supreme Court has observed, the General Assembly enacted Chapter 45 to be the "comprehensive and exclusive statutory framework governing non-judicial foreclosures by power of sale." *In re Lucks*, 369 N.C. 222, 226, 794 S.E.2d 501, 505 (2016).

Chapter 45 prescribes certain minimal judicial procedures, including a hearing in front of the clerk of the court to protect the debtor's interest "for the sole purpose of requiring a creditor to establish its right to proceed with the foreclosure." *Id.* During the hearing, the debtor is free to raise evidentiary objections that would negate any of the findings required under N.C. Gen. Stat. § 45-21.16. *In re Goforth Props.*, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993).

A party to the proceeding can challenge the clerk's determination in superior court and the trial judge will determine the competency, admissibility, and sufficiency of the evidence. *See In re Lucks*, 369 N.C. at 227-28, 794 S.E.2d at 506 (internal marks and citation omitted). After reviewing the determination of the clerk of court, the trial judge must,

in writing, (1) "find the facts on all issues of fact joined on the pleadings; (2) [] declare conclusions of law arising on the facts found; and (3) [] enter judgment accordingly." *In re Garvey*, 241 N.C. App. 260, 265, 772 S.E.2d 747, 751 (2015) (internal marks and citation omitted). The purpose of these requirements is to enable appellate review. *Id.* at 265, 772 S.E.2d at 751 (citation omitted).

C. The Trial Court's Findings and Conclusions

Respondents first challenge the trial court's finding that they were in default on the note from the 2007 refinancing. Respondents also challenge the trial court's findings regarding Petitioner's authority to foreclose. Respondents then argue alternatively that even if they were in default, Petitioner was barred from proceeding with foreclosure based on the Supreme Court's decision in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016). Respondents finally argue that foreclosure was not authorized as a matter of law, and that the record lacks the support required for the trial court to conclude that foreclosure was authorized. We reject these arguments in turn.

1. Default

[1] Respondents first challenge the trial court's finding that they were in default based on the terms of several loan modifications and the alleged failure of their mortgage servicer to accept several payments attempted in early 2012. However, it is undisputed that Respondents have not made any payments on the note since early 2012. The assertion by Respondents that they "never defaulted and [they] made payments in accordance with the Third Mod even after [their mortgage servicer] began wrongfully rejecting [their] payments" is belied by their failure to present any evidence at the 13 March 2017 hearing that they had made a single payment since 2012. None of Respondents' arguments on appeal about the amount due under the terms of the allegedly operative loan modification is truly responsive to the question of whether Respondents were in default at the time of the 13 March 2017 hearing. This is so because none of the iterations of Respondents' positions about the meaning of the terms of the various loan modifications explains how their failure to make *any* payments since 2012 did not constitute a default on the obligation owing under the note.[1]

1. The best Respondents have done to answer this question is to suggest that Petitioner should not be allowed to benefit from a default manufactured by the refusal of its mortgage servicer to accept certain payments in 2012. But this suggestion ignores a five-year period of non-payment between early 2012 and March 2017; Respondents do not dispute that no payments have been made since 2012.

"[W]hether a party is in default on a contract is a question of fact." *In re Manning*, 228 N.C. App. 591, 597, 747 S.E.2d 286, 291 (2013) (citation omitted). The question dispositive of Respondents' arguments related to whether they were in default at the time of the March 2017 hearing is whether "evidence [] a reasonable mind might accept as adequate to support [a] finding," *see Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499, "support[ed] the trial court's findings of fact . . . [regarding] the existence of default," *see R.C. Koonts and Sons Masonry, Inc.*, 202 N.C. App. at 321, 688 S.E.2d at 740-41. We hold that it did.

The competent evidence supporting the trial court's finding that Respondents were in default at the time of the March 2017 hearing for "repeatedly fail[ing] to make each . . . monthly payment[] . . . for several years" included "the evidence provided by Petitioner, including the affidavit, loan payment history[,] and correspondence, and by Respondents' own admission at the hearing," as the trial court noted in its 13 August 2018 order. The 27 January 2017 affidavit referenced by the trial court, for example, contained averments that "the last payment applied to the Loan was received January 13, 2012 and was applied to the payment due November 1, 2011"; that "Borrower remains in default under the terms of the Note and Deed of Trust due to nonpayment"; that "[t]he account is due for payment from December 1, 2011, and subsequent months"; that "[t]he outstanding principal balance is $265,522.15"; and that "[n]o further payments have been applied to the Loan, and the Loan remains due for December 1, 2011 and subsequent months." These averments are consistent with the payment history and the correspondence referenced by the trial court, all of which was evidence "a reasonable mind might accept as adequate to support the finding." *Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499. Respondents presented no contrary evidence at the 2017 hearing. Accordingly, "[a]s [R]espondents ceased making payments on a valid debt, we conclude that there is competent evidence of a default." *In re Manning*, 228 N.C. App. at 597, 747 S.E.2d at 291.

2. Holder of Debt and Indorsements

[2] Despite faulting the trial court on appeal for not crediting what they contend is evidence suggesting otherwise, Respondents did not present any evidence at the 13 March 2017 hearing that the assignment to the substitute trustee was ineffective, nor did Respondents present any evidence at the March 2017 hearing that the allonges containing the indorsements from the originator of the loan to Petitioner were improperly made or altered. Neither did Respondents dispute the authenticity of the original promissory note at the March 2017 hearing. Instead, Respondents disputed the effectiveness and validity of the allonges to

transfer the note to Petitioner because of the three allonges affixed to the note, one was marked "void," one was not dated, and the other post-dated the date the originator of the loan declared bankruptcy. Respondents reiterate these challenges on appeal.

These challenges, however, are "tantamount to attacks on the credibility of the evidence, which we will not review." *In re Frucella*, ___ N.C. App. ___, ___, 821 S.E.2d 249, 253 (2018) (citation omitted). "In the context of a superior court's *de novo* hearing on nonjudicial foreclosure under power of sale, the competency, admissibility, and sufficiency of the evidence is a matter for the trial court to determine." *In re Clayton*, ___ N.C. App. ___, ___, 802 S.E.2d 920, 924 (2017) (internal marks and citation omitted). We therefore hold that that the trial court's findings that Petitioner was "currently in possession of the original promissory note" and that the note "contain[ed] a chain of valid and complete indorsements from Delta Funding Corporation to Petitioner HSBC Bank USA, N.A." were supported by competent evidence, as the weight to afford the evidence in support of these findings was properly determined by the trial court.

3. Same Default

[3] Respondents contend in the alternative that even if there was a default at the time of the March 2017 hearing, it was the same default upon which the earlier, 12 April 2017 order allowing foreclosure to proceed was predicated, and under the Supreme Court's holding in *In re Lucks*, 369 N.C. 222, 794 S.E.2d 501 (2016), Petitioner cannot foreclose twice based on the same default. We disagree with Respondents' reading of *In re Lucks*. We hold that the Supreme Court's decision in *In re Lucks* is not implicated by the trial court's order to allow foreclosure to proceed in this case based on this Court's decision in *Gray v. Federal Nat'l Mortgage Assoc.*, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL 2528575 (2019).

In re Lucks involved a power of sale foreclosure that both the clerk of court and the trial court on appeal from the clerk's decision had *dismissed*. *See* 369 N.C. at 223-24, 794 S.E.2d at 503-04. The petitioner appealed and a divided panel of this Court reversed the trial court's dismissal, remanding the matter for further proceedings. *In re Lucks*, 246 N.C. App. 515, 785 S.E.2d 185 (2016) (unpublished opinion), *rev'd*, 369 N.C. 222, 794 S.E.2d 507. The Supreme Court then reversed the opinion of this Court. *See In re Lucks*, 369 N.C. at 229, 794 S.E.2d 501. The trial court's dismissal, and the Supreme Court's reversal of this Court, centered on the authenticity and reliability of what the Supreme Court

described as "the crucial document at issue in [the case]," which purported to be a limited power of attorney authorizing appointment of a substitute trustee under the deed of trust. *See id.* at 224, 794 S.E.2d at 504.

The Supreme Court identified a number of issues with this document that led it to conclude that the trial court was correct to dismiss the proceeding. *Id.* at 224-25, 794 S.E.2d at 504. First, the recording stamp on the final page of the document stated that it was recorded three years *prior* to its purported date of execution; and second, the stamp indicated that the document was eleven pages long, when it in fact was fourteen. *Id.* at 225, 794 S.E.2d at 504. Third, the stamp stated that the document was recorded with the Montgomery County Register of Deeds, when the home in question was located in Mecklenburg County, meaning that the document should have been recorded with the Mecklenburg County Register of Deeds. *Id.* The respondents had made a number of objections when this document was presented to the trial court. *Id.*

Amongst other things, the Supreme Court held that the doctrines of res judicata and collateral estoppel do not apply when the clerk of court or the trial court on appeal from the clerk's decision *deny* a request to proceed with a power of sale foreclosure. *Id.* at 227-28, 794 S.E.2d at 506. The Supreme Court noted that when the clerk of court or trial court *refuses* to authorize a foreclosure to proceed, "the creditor is prohibited from proceeding again with a non-judicial foreclosure on the *same* default[.]" *Id.* at 227, 794 S.E.2d at 506 (emphasis in original). "Likewise," the Supreme Court explained, "the creditor may proceed non-judicially on another default." *Id.* at 228, 794 S.E.2d at 506.

Courts in North Carolina, including this Court, have since grappled with the correct interpretation of the Supreme Court's holding in *In re Lucks*. *See Vicks v. Ocwen Loan Servicing, LLC*, No. 3:16-cv-00263, 2017 WL 2490007 (W.D.N.C. June 8, 2017) (unpublished); *In re Burgess*, 575 B.R. 330 (Bankr. E.D.N.C. 2017); *Gray v. Federal Nat'l Mortgage Assoc.*, ___ N.C. App. ___, ___ S.E.2d ___, 2019 WL 2528575 (2019).

Vicks involved a lawsuit against a mortgage servicer and others seeking to collaterally attack and set aside an order entered by the clerk of court in Union County Superior Court that allowed foreclosure of the plaintiffs' property to proceed. 2017 WL 2490007 at *1. In *Vicks*, the plaintiffs cited the Supreme Court's decision in *In re Lucks* in support of their collateral attack on the order entered by the clerk of court in Union County. *Id.* at *2, n. 3. Rejecting this argument, the court explained that it understood the Supreme Court's decision to mean that the doctrines of res judicata and collateral estoppel in a power of sale foreclosure

proceeding "do not apply in their 'traditional' sense [] [because] once the clerk or trial court denies authorization [of] a foreclosure sale, a creditor may not seek a non-judicial foreclosure based on the *same default*." *Id.* (emphasis in original). The court concluded, however, that *In re Lucks* did not stand for the proposition that the doctrine of res judicata did not bar the plaintiffs from collaterally attacking in federal court the decision by the clerk of court in Union County where the clerk had *allowed* the foreclosure to proceed. *See id.*

In re Burgess involved an analogous adversary proceeding in bankruptcy court in which the debtor sought to collaterally attack the clerk of court's order in Wake County Superior Court allowing foreclosure to proceed. *See* 575 B.R. at 338. Citing *Vicks*, the bankruptcy court concluded that the doctrines of res judicata and collateral estoppel prevented a collateral attack via an adversary proceeding in bankruptcy court of the decision by the clerk of court of Wake County Superior Court allowing the foreclosure of the debtor's home to proceed, despite language in *In re Lucks* potentially suggesting otherwise. *Id.* at 342-44 (citing *Hardin v. Bank of America, N.A. et al., LLC*, No. 7:16-CV-75-D, 2017 WL 44709 (E.D.N.C. Jan. 3, 2017) (unpublished)).

Gray similarly involved a lawsuit collaterally attacking the order of the clerk of court of Dare County Superior Court allowing foreclosure of the plaintiffs' home to proceed. ___ N.C. App. ___, ___, S.E.2d ____, ____, 2019 WL 2528575 *4. *Gray*, unlike *Vicks* and *In re Burgess*, was filed in state court, and was appealed to this Court from the trial court's interlocutory order denying one of the defendant's motions for summary judgment as to some of the claims in the case. *Id.* at *1.

Reviewing the federal decisions in *Vicks* and *In re Burgess*, a panel of this Court, noting that these federal decisions were persuasive authority only and not binding, held that while *In re Lucks* was controlling precedent, it "simply stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply in situations where foreclosure was *not* authorized by the clerk of court." *Id.* at *4 (emphasis added). The *Gray* Court explained further that in deciding *In re Lucks*, it "d[id] not believe the Supreme Court intended for its holding to apply . . . where a clerk enters an order authorizing foreclosure." *Id.* "Otherwise," the *Gray* Court reasoned, "a lender would potentially be forced to relitigate basic issues relating to the validity of the foreclosure that had already been decided in its favor, which would be inimical to the goal of establishing with finality the rights of the parties under these circumstances." *Id.* The *Gray* Court therefore concluded that the collateral attack on the clerk's order was barred by the doctrine of collateral

estoppel, notwithstanding language in *In re Lucks* potentially suggesting otherwise, and reversed the trial court's denial of a motion for partial summary judgment, remanding the matter with instructions. *Id.* at *5-6.

In the present case, the trial court court's order being appealed allowed the foreclosure of Respondents' home to proceed. The Supreme Court's decision in *In re Lucks*, therefore, by its express language, does not apply. *See* 369 N.C. at 227, 794 S.E.2d at 506 ("If the clerk or trial court does *not* find the evidence presented to be adequate to 'authorize' the foreclosure sale, this finding does not implicate res judicata or collateral estoppel") (emphasis added). Moreover, as this Court has held, *In re Lucks* "stands for the proposition that the doctrines of res judicata and collateral estoppel do not apply . . . where foreclosure was not authorized by the clerk of court." *Gray* at *4. That is, it does *not* "apply . . . where a clerk enters an order *authorizing* foreclosure." *Id.* (emphasis added).

We therefore hold that *In re Lucks* did not prevent the trial court from entering the 13 August 2018 order allowing foreclosure to proceed based on the same default because the trial court's 12 April 2017 order it superseded also allowed foreclosure to proceed. We do not believe the Supreme Court's decision in *In re Lucks* implies that the simple fact of this Court's earlier remand to the trial court to make the findings and conclusions required by N.C. Gen. Stat. § 45-21.16 prevents the trial court from making those required findings and conclusions, even if no new default has been shown.

4. Sufficiency of Findings

[4] Several of Respondents' challenges to the trial court's findings regarding Petitioner's authority to foreclose are iterations of the argument that the 13 August 2018 order did not contain evidentiary findings of a level of specificity necessary to support the ultimate findings in the order.[2] However, while under North Carolina law, evidentiary facts

2. *See, e.g.*, Respondent-Appellants' Brief, p. 31 ("[A]lthough Respondents argued to the trial court that the substitute trustees lacked authority to initiate this action, the 2018 Order lacks findings and conclusions relating to this legal defense and should be reversed."); *id.* ("The 2018 Order also lacks any findings or conclusions relating to the authority of all 'links in the chain' leading to the appointment of the substitute trustees in this action. As a result, the 2018 Order should be reversed."). Respondents reiterate the argument as follows:

> To even reach the conclusion that this action was authorized, the trial court had to make findings relating to, at a *minimum*, (a) Petitioner's authority to substitute trustees, (b) [the mortgage servicer's] authority to act as 'servicer on behalf of' Petitioner in appointing substitute

– sometimes also referred to as subsidiary facts – are the facts whose proof is required to establish the ultimate facts, a trial court's order need only include "specific findings of the ultimate facts," not the subsidiary or evidentiary facts. *Kelly v. Kelly*, 228 N.C. App. 600, 606-07, 747 S.E.2d 268, 276 (2013) (citation omitted). Importantly, in the 13 August 2018 order being appealed, the trial court made findings necessary to establish that the requirements of N.C. Gen. Stat. § 45-21.16(d) had been met, *i.e.*,

> the existence of (i) a valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . , and (vi) that the sale is not barred by G.S. 45-21.12A[.]"

N.C. Gen. Stat. § 45-21.16(d) (2017). We hold that it was not necessary for the trial court to make additional evidentiary findings in support of its ultimate findings in the August 2018 order. *See*, *e.g.*, *Medlin v. Medlin*, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) (trial court was "not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment") (citation omitted); *Kelly*, 228 N.C. App. at 608, 747 S.E.2d at 276 ("[B]revity is not necessarily a bad thing[.]") (citing Marcus Tulius Cicero, *On the Laws: Book III*, *in* The Treatises of M.T. Cicero 479 (C.D. Yonge trans., 1878)).

5. Authority to Foreclose

Near the conclusion of the 13 March 2017 hearing the trial court instructed the parties to submit supplemental briefs within fifteen days of the hearing. In a 21 March 2017 supplemental brief filed after the hearing, Ms. Worsham, proceeding *pro se*, disputed for the first time whether foreclosure by the substitute trustee was authorized at the time of the hearing. Citing *In re Lucks*, in which the Supreme Court described a limited power of attorney authorizing appointment of substitute trustees as "the crucial document at issue," Ms. Worsham argued that Petitioner's failure to present a power of attorney authorizing the appointment of substitute trustees at the 13 March 2017 hearing and recording of the appointment of the substitute trustee *after* the date on which the

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> trustees, (c) [the agent of the mortgage servicer's] authority to act as attorney-in-fact for [the mortgage servicer's] acting as servicer on behalf of Petitioner in appointing substitute trustees; and (d) the substitute trustees' own authority and standing to initiate this action.

Id. at 32 (emphasis in original).

hearing before the clerk of Mecklenburg County Superior Court was noticed demonstrated that foreclosure was not authorized at the time of the hearing. 369 N.C. at 224, 794 S.E.2d at 504. Expanding upon this argument on appeal, Respondents, now represented by counsel, argue that the absence of a document in the record establishing that the mortgage servicer acting on behalf of Petitioner in appointing the substitute trustee was authorized to appoint substitute trustees under the deed of trust shows that the trial court's findings and conclusions regarding whether foreclosure was authorized were incorrect and unsupported by competent evidence. We disagree.

i. Preservation

[5] We note that these arguments have not been properly preserved for our review. By failing to raise the issue of whether the substitute trustee was authorized to foreclose under the deed of trust at the time of the hearing, Respondents waived appellate review of this issue. *See* N.C. R. App. P. 10(a)(1) ("[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired[.]"). However, given the historic policy articulated by the Supreme Court that "foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy," *see In re Goforth Props.*, 334 N.C. at 375, 432 S.E.2d at 859 (internal marks and citation omitted), we will exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and address the issue, despite Respondents' failure to properly preserve it. *See* N.C. R. App. P. 2 ("[T]o expedite decision in the public interest, [the] court . . . may . . . suspend or vary the requirements or provisions of any of the[] rules . . . upon its own initiative[.]").

ii. Effectiveness of Substitutions

[6] The substitute trustee at the time of the 13 March 2017 hearing was appointed on 14 September 2016. The previous substitute trustee was appointed on 18 July 2016. Both substitutions were recorded with the Mecklenburg County Register of Deeds. Both substitutions were filed with the clerk of Mecklenburg County Superior Court on 9 November 2016. Certified copies of both were submitted to the trial court at the time of the 13 March 2017 hearing. We hold that both were competent evidence supporting the trial court's finding that "Petitioner produced certified copies of the . . . appointment of substitute trustees" because both are evidence "a reasonable mind might accept as adequate to support [this] finding." *Aly*, 233 N.C. App. at 625-26, 757 S.E.2d at 499.

iii. Substitution of Trustee After Notice of Foreclosure

[7] Two related arguments about the authority of the substitute trustee at the time of the hearing are advanced in Ms. Worsham's *pro se* trial brief and in Respondents' appellate brief. The first is that the substitute trustee at the time of the hearing being a different trustee than the trustee identified in the notice of hearing required that the hearing be re-noticed, preventing the trial court from concluding that the substitute trustee at the time of the hearing was authorized to foreclose. The second is that the absence of a document in the record demonstrating that the mortgage servicer named in the substitutions as Petitioner's agent was authorized to appoint substitute trustees on behalf of Petitioner shows that the trial court's findings and conclusions related to Petitioner's authority to foreclose were each, respectively, unsupported by competent evidence and erroneous as a matter of law. We reject both arguments.

North Carolina law embraces liberal substitution of trustees under a deed of trust authorizing such substitution. *See* N.C. Gen. Stat. § 45-10 (2017) ("noteholders may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee or a holder or owner of any or all of the obligations secured thereby"); *id.* § 45-17 (the right to substitution "may be exercised as often and as many times as the right to make such substitution may arise"). While a notice of foreclosure must identify the trustee at the time the foreclosure is noticed and the trustee at the time foreclosure is noticed may not simultaneously represent the petitioner seeking foreclosure, *see* N.C. Gen. Stat. § 45-21.16(c)(7)(b) (2017), the trustee at the time foreclosure is noticed may be substituted prior to *de novo* review in superior court of the clerk's decision allowing foreclosure to proceed and subsequently represent the petitioner at the hearing in superior court, *see In re Goddard & Peterson, PLLC*, ___ N.C. App. ___, ___, 789 S.E.2d 835, 840-42 (2016).

We hold that the authorized appointment of a substitute trustee after the decision by the clerk to allow foreclosure to proceed does not require the foreclosure to be noticed a second time before the superior court conducts *de novo* review of the clerk's decision. The liberality with which North Carolina law permits substitution of trustees under deeds of trust, and indeed, the expeditious resolution of mortgage defaults facilitated by the system established by the General Assembly through power of sale foreclosures would be significantly undermined by requiring a properly appointed substitute trustee to enter a new notice of foreclosure if the appointment occurred after an order of the clerk of court had been entered allowing foreclosure to proceed but before the hearing

in the respondent's appeal of that order on *de novo* review in superior court. We therefore reject Ms. Worsham's argument that the substitute trustee at the time of the hearing being a different trustee than the trustee identified in the notice of hearing required that the hearing be re-noticed, or prevented the trial court from correctly concluding that the substitute trustee at the time of the hearing was authorized to foreclose.

Further, the deed of trust signed by Respondents, a certified copy of which was submitted to the trial court at the March 2017 hearing, provided in relevant part as follows:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. . . . If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

The deed of trust also provides for substitution of trustees as follows:

> Lender may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder by an instrument recorded in the county in which this Security Instrument is recorded. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

The deed of trust to which Respondents agreed thus itself not only provides for the appointment of a mortgage servicer to service the indebtedness evidenced by the note, it also specifically provides for substitution of trustees.

Both appointments of substitute trustees presented to the trial court at the March 2017 hearing specifically reference in their recitals the provision of the deed of trust providing for substitution of trustees, and

were signed by a mortgage servicer on behalf of Petitioner, as contemplated by the express language of the deed of trust to which Respondents agreed. The deed of trust and appointments of substitute trustees, all of which were properly recorded with the Mecklenburg County Register of Deeds, are themselves record evidence competent to support the trial court's findings that "the original promissory note . . . contains a chain of valid and complete indorsements," and that "Petitioner produced certified copies of the recorded . . . appointment of substitute trustees." These findings in turn support the trial court's conclusion that "the Deed of Trust gives Petitioner the right to foreclose under a power of sale and is enforceable according to its terms." We hold that there was not an absence of competent record evidence that the mortgage servicer acting on behalf of Petitioner in appointing the substitute trustee was authorized to appoint substitute trustees where the deed of trust itself specifically provided for the appointment of the mortgage servicer and for the appointment of substitute trustees, and the mortgage servicer appointed by Petitioner validly exercised the right of substitution. *See In re Clayton*, ___ N.C. App. at ___, 802 S.E.2d at 924 ("The right to foreclose exists if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case.") (internal marks and citation omitted).

Again, *In re Lucks*, cited by Respondents in support of their argument that the absence in the record of a power of attorney in which Petitioner appointed the mortgage servicer and authorized the mortgage servicer to appoint substitute trustees under the deed of trust, is distinguishable from the present case. First, in *In re Lucks*, the validity of the substitution of trustees was actually contested in the trial court, unlike in the present case. *See* 369 N.C. at 228, 794 S.E.2d at 506. Second, there were significant issues with the document purportedly appointing the substitute trustee in *In re Lucks* that suggested the document had not been properly recorded, in that its recording purportedly occurred three years *prior* to the date it was executed, and in Montgomery County, North Carolina, when the proper county for recording the deed of trust in question would have been Mecklenburg County, if it had in fact been recorded at all. *Id*. at 228-29, 794 S.E.2d at 506. Finally, the argument that the appointment of the substitute trustee in *In re Lucks* was invalid was actually successful in the trial court: that is, on review of the trial court's decision, the Supreme Court was not answering the question of whether the absence of the document the trial court had excluded would always preclude a trial court from correctly concluding that foreclosure was authorized, but instead whether the exclusion of this document by the trial court was an abuse of discretion. *See id*.

Respondents' reliance on *In re Lucks* in support of this argument thus essentially reads the Supreme Court's decision in that case backwards, extrapolating a rule about what is required to prove authority to foreclose under a deed of trust in every foreclosure from the Supreme Court's decision upholding a trial court's evidentiary ruling on the exclusion of a particular document purportedly showing foreclosure was authorized in an individual case where the document was problematic, its validity was actually challenged before the trial court, and the trial court ruled that it did not establish what it purported to establish.

III. Conclusion

Respondents have not made any payments on the note from the 2007 refinancing of their home for over seven years. We hold that the trial court's findings of fact were supported by competent evidence, that the findings were sufficient to support the court's conclusions of law, and that the court's conclusions of law were correct, and supported by the findings of fact. We therefore affirm the order of the trial court allowing foreclosure of Respondents' home to proceed.

AFFIRMED.

Judges DILLON and ZACHARY concur.

RALEIGH HOUSING AUTHORITY, Plaintiff
v.
PATRICIA WINSTON, Defendant

No. COA18-1155

Filed 17 September 2019

1. Landlord and Tenant—public housing—notice of lease termination—due process—specific lease provision

Plaintiff housing authority's notice of lease termination to defendant complied with federal regulations and due process where the notice identified the specific lease provision that defendant had violated. Plaintiff was not required to describe defendant's specific conduct that was in violation of the lease.

2. Landlord and Tenant—public housing—termination of lease—disturbing neighbors' peaceful enjoyment—domestic violence

Plaintiff housing authority was entitled to immediate possession of the property that defendant had been leasing where defendant repeatedly violated a material term of the lease by disturbing other residents' peaceful enjoyment of their accommodations. Even though some of the noise complaints were the result of domestic violence (which may not serve as the basis of a lease termination), other incidents not involving domestic violence supported termination of the lease.

Appeal by defendant from order entered 26 June 2018 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 22 May 2019.

The Francis Law Firm, PLLC, by Charles T. Francis and Ruth A. Sheehan, for plaintiff-appellee.

Legal Aid of North Carolina, Inc., by Thomas Holderness, Daniel J. Dore, and Darren Chester, for defendant-appellant.

ZACHARY, Judge.

Defendant Patricia Winston appeals from the district court's order granting immediate possession of Defendant's leased premises to Plaintiff Raleigh Housing Authority. We affirm.

Background

On 17 April 2017, Defendant entered into a twelve-month Lease Agreement with Plaintiff for the rental of a one-bedroom apartment located in the Walnut Terrace Community in Raleigh. Between October and December of 2017, Plaintiff received three written, and multiple oral, complaints from Defendant's neighbors concerning noise disturbances coming from Defendant's apartment. Specifically, in the written complaints, Defendant's neighbors described being awoken late at night by "stomping, fighting, cursing and knocking over furniture" as well as "loud music." One complaint further alleged that it "look[ed] like drug exchanges [were] going on."

When the complaints continued after a written warning, on 1 December 2017 Plaintiff's property manager sent Defendant a Notice of Lease Termination for violation of Paragraph 9(f) of the parties' Lease Agreement, which required Defendant "[t]o conduct . . . herself and cause other persons who are on the premises with [her] consent to

conduct themselves in a manner which [would] not disturb the neighbors' peaceful enjoyment of their accommodations."

Thereafter, Defendant had an informal meeting with Plaintiff's property manager, during which Defendant informed the manager that the complaints had arisen from incidents of domestic violence committed against Defendant by her former partner, Walter Barnes. Defendant indicated that she had since obtained a Domestic Violence Protective Order against Mr. Barnes, thereby preventing him from returning to the Leased Premises and causing additional disturbances. Based on Defendant's explanation for the noise complaints, Plaintiff rescinded the lease termination.

However, Plaintiff soon received another written complaint from a neighbor of Defendant describing a disturbance caused by Defendant's conduct on the late evening and early morning hours of 5 February and 6 February 2018, to wit:

> I was awaken [sic] out of my sleep at 1:00 A.M. from my neighbor upstairs with loud fussing, cursing and yelling, which then proceeded down the steps, outside my door and continuing still into the parking lot.
>
> She approached me the next morning . . . when I came home for my break from her balcony, yelling saying that I'm trying to get her put out, and I told her no I wasn't. I can't continue letting them keep me awake when I have to get up at 3:00 A.M. to go to work. I'm sleepy at work because I'm not getting any sleep at night.
>
> She told me that I'm not suppose[d] to report anything to the office, that I should be telling her and not the office. I've spoken to her about this on several occasions and she apologized and said that it would not happen again, but it still continues to happen.
>
> She told me that if I continue reporting this to the office, they will evict both she and I.

Following this complaint, on 13 February 2018, Plaintiff sent Defendant a second Notice of Lease Termination notifying Defendant that Plaintiff

> intends to terminate your Lease to the premises . . . under the provisions in your Lease Agreement and pursuant to Raleigh Housing Authority's Grievance Procedure due to the following:

Inappropriate Conduct—Multiple Complaints

9. OBLIGATIONS OF RESIDENT

F. To conduct himself/herself and cause other persons who are on the premises with the Resident's consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations.

The Notice of Lease Termination further notified Defendant that

1. You have the right to request a private conference with **Carol McTearnen**, Property Manager of your development, to discuss informally the reasons for the proposed termination and to determine whether the dispute may be settled without a grievance hearing. You must contact the manager on or before **February 23, 2018**. If you do not request a private conference with the manager on or before **February 23, 2018**, you may not be entitled to a grievance hearing before the Hearing Officer as described below.

2. You have the right to examine Raleigh Housing Authority documents directly relevant to the termination or eviction. A request to examine such documents should be made in writing and delivered to the development manager. The manager will notify you of the time and place for this review.

3. If after a private conference as described above you are not satisfied with the decision of the Housing Authority, you will have the right to request a grievance hearing of your dispute before the Hearing Officer. The development manager will inform you how to request such a hearing at the informal private conference described above.

In response, on 17 February 2018, Defendant sent a letter to Plaintiff, in which she acknowledged that "there was a disturbance at my address which was caused entirely by me." Defendant further conceded that "[t]here are others who visit me who make too much noise," but she indicated that she "placed trespass orders on them." However, Defendant had "neither received a no[-]trespass order for any of the individuals nor ha[d] she made any affirmative efforts to do so" by the time of the 25 June 2018 district court hearing in this case.

Thereafter, Defendant followed the procedures outlined in the Notice of Lease Termination, and a grievance hearing was held on 6 March 2018. On 10 March 2018, the Hearing Officer affirmed Plaintiff's decision to terminate Defendant's Lease Agreement. Plaintiff then filed a Complaint in Summary Ejectment, which was heard before the Honorable Michael Denning in Wake County District Court. By order entered 26 June 2018, Judge Denning affirmed Plaintiff's decision to terminate the Lease Agreement and granted Plaintiff immediate possession of the Leased Premises. Defendant timely filed notice of appeal to this Court.

On appeal, Defendant argues that the trial court erred in granting Plaintiff immediate possession of the Leased Premises because (1) there was insufficient evidence that Defendant breached her lease so as to warrant its termination, and (2) the Notice of Lease Termination did not satisfy Defendant's due process right to notice of her alleged violations.

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." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quotation marks omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). It is well-settled law that "the appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997) (quotation marks omitted), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

Discussion

[1] We first address Defendant's argument that Plaintiff's Notice of Lease Termination violated Defendant's due process right to notice. Defendant maintains that the Notice's reference to Paragraph 9(f) of the Lease Agreement was insufficient, in that it failed to delineate the particular conduct that she allegedly committed in violation of that provision of the Agreement. We disagree that due process required the initial Notice of Lease Termination to describe the specific conduct at issue.

"A tenant in a publicly subsidized housing project is entitled to due process protection," including adequate notice of lease termination. *Roanoke Chowan Reg'l Hous. Auth. v. Vaughan*, 81 N.C. App. 354, 358, 344 S.E.2d 578, 581, *disc. review denied*, 317 N.C. 336, 347

S.E.2d 439 (1986). To that effect, federal regulation provides that a public housing agency's

> notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right . . . to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

24 C.F.R. § 966.4(l)(3)(C)(ii).

As explained above, Defendant interprets the requirement that a notice of lease termination state the "specific *grounds* for termination" as necessitating a description of the specific *conduct* upon which the termination is based. Not only does this interpretation directly contradict the plain language of the pertinent federal regulation, but this Court has also indicated that a notice of lease termination will satisfy the demands of due process so long as the information provided "is sufficient to put [the tenant] on notice regarding the *specific lease provision* deemed to have been violated." *Vaughan*, 81 N.C. App. at 358, 344 S.E.2d at 581 (emphasis added).

In the instant case, the Notice of Lease Termination identified—and quoted—the specific provision serving as the basis for Defendant's lease termination. The Notice of Lease Termination also advised Defendant of her right to examine the pertinent materials and documentation prior to the holding of her initial grievance hearing. Thus, the Notice of Lease Termination to Defendant was in compliance with the governing federal regulation. The trial court did not err in concluding that "Defendant ha[d] been afforded due process and been given adequate notice of her violations of Paragraph 9(f) of the Lease." *See id.* at 359, 344 S.E.2d at 581 ("*Before an eviction determination is administratively made*, due process requires, succinctly stated: (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the

reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker." (emphasis added)). Accordingly, the trial court's order cannot be disturbed on grounds of improper notice.

[2] We next address Defendant's argument that the trial court erred in concluding that Plaintiff was entitled to immediate possession of the Leased Premises. Specifically, Defendant argues that (1) the 2017 complaints were the result of domestic violence, and, therefore, could not serve as the basis for a lease termination, and (2) the February 2018 complaint, on its own, does not support a conclusion that Defendant breached a material term of the Lease Agreement as to warrant termination of the Lease.

Federal law provides that a "public housing agency may not terminate [a] tenancy except for serious or repeated violation of the terms or conditions of the lease." 42 U.S.C. § 1437d(l)(5). In addition, for termination to be appropriate, the serious or repeated violation must be of a "material term[ ] of the lease." 24 C.F.R. § 966.4(l)(2)(i).

"Material terms" of a lease include terms requiring a tenant "[t]o act, and cause household members or guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations." *See* 24 C.F.R. § 966.4(l)(2)(i)(B) & (f)(11). Thus, Paragraph 9(f) of the Lease Agreement in the instant case constitutes a "material term" as defined in the applicable regulations.

Substantial evidence in the record supports Defendant's repeated violation of Paragraph 9(f), thus supporting the trial court's decision to affirm the termination of Defendant's tenancy and order that Plaintiff be granted immediate possession of the Leased Premises.

Though the parties concede that several of the 2017 noise complaints were the result of domestic violence, and therefore may not serve as the basis of a lease termination, *see* 34 U.S.C. § 12491(b)(2),[1] Plaintiff presented substantial evidence of repeated incidents that were *not* the result of domestic violence. This evidence included (1) the early-morning altercation on 6 February 2018, which Defendant admitted "was caused entirely by me";[2] (2) Defendant's acknowledgment of "others who visit

1. *Accord* N.C. Gen. Stat. § 42-42.2 (2017).

2. Defendant's 17 February 2018 letter accepting responsibility referenced an incident that occurred on 11 February 2018. However, at trial, defense counsel noted that "there's only one incident," and that Defendant was actually "referring to the incident that occurred on February [6th]." Thus, Defendant either admitted to the 6 February 2018 incident, or she admitted to yet *another* incident constituting a violation of Paragraph 9(f) of the Lease Agreement.

me who make too much noise"; (3) Defendant's conduct later in the day on 6 February 2018, in which she approached her neighbor "from her balcony, yelling saying that I'm trying to get her put out, . . . [and] that if I continue reporting this to the office, they will evict both she and I"; and (4) the November 2017 complaint[3] referencing "loud music" and that it "look[ed] like drug exchanges [were] going on." These acts continuously impeded Defendant's neighbors' ability to peacefully enjoy their accommodations. The record therefore contains substantial evidence of repeated violations of Paragraph 9(f) of the Lease Agreement to support the trial court's conclusion that Plaintiff was entitled to immediate possession of the property.

Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
BOBBY LINDBERG CADDELL

No. COA18-1284

Filed 17 September 2019

Search and Seizure—search warrant—supporting affidavit—controlled drug purchase—confidential informant

An application for a warrant to search a residence for illegal drugs was supported by probable cause where the supporting affidavit averred the police detective's personal knowledge of the controlled purchase of crack cocaine from the residence and her own credibility determination of the confidential informant (whom she had worked with previously).

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3. We reject Defendant's argument that the written complaints submitted to Plaintiff in the fall and winter of 2017 did not fall under the "business record" exception to the hearsay rule and were therefore inadmissible. Not only did Defendant effectively admit to the conduct described therein, but the property manager's testimony sufficiently established that Plaintiff kept records of such complaints submitted by its tenants in the course of Plaintiff's regularly conducted business activity. *See* N.C. Gen. Stat. § 8C-1, Rule 803(6).

Appeal by Defendant from Judgments entered 8 May 2018 by Judge Eric C. Morgan in Forsyth County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padgett, for the State.

Patrick S. Lineberry, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural History

Bobby Lindberg Caddell (Defendant) appeals from the trial court's Order denying his Motion to Suppress (Motion to Suppress Order), and from Judgments entered on 8 May 2017 after Defendant entered *Alford*[1] pleas for one count of Felonious Trafficking in Opium/Heroin, two counts of Felonious Possession with Intent to Sell or Deliver a Schedule II Substance, three counts of Felonious Maintaining Dwelling Used for Controlled Substances, one count of Misdemeanor Possession of Drug Paraphernalia, two counts of Felonious Possession with Intent to Sell or Deliver a Schedule I Substance, and attaining Habitual-Felon status. The Record in this matter shows the following:

On 26 April 2017, Detective E.M. Branson (Detective Branson) from the Winston-Salem Police Department filed an Application for Search Warrant for 2309 Urban Street (the Residence). In support of the application, Detective Branson attached an Affidavit. The Affidavit set forth the following:

> During the month of March 2017, your AFFIANT received information from a confidential source "crack" cocaine, heroin, and marijuana was being sold by a white male they know as Bobby Caddell. Information was received that CADDELL lives and sells "crack" cocaine, heroin, and marijuana from 2309 Urban Street. . . . Your AFFIANT was able to identify Bobby Caddell through the Winston Salem Police PISTOL records.
>
> During the last 72 hours, your AFFIANT met with the confidential reliable and compensated informant in an attempt to purchase "crack" cocaine from CADDELL.

1. *See North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970).

> . . . The informant was provided with U.S. Currency from the Alcohol, Tobacco, Firearms and Explosives (ATF) buy fund and instructed to go directly to 2309 Urban Street to purchase "crack" cocaine from CADDELL. . . . The informant was observed making contact with CADDELL in the front yard of the residence. A short time later, the informant was observed exiting the front door of the residence followed by CADDELL. The informant responded to the predetermined location. The informant produced a quantity of "crack" cocaine that they advised they purchased from CADDELL inside of 2309 Urban Street. . . . The substance was subjected to a preliminary field test and showed a positive reaction to the schedule II controlled substance cocaine.
>
> The confidential informant who was used to make the controlled buys is of proven reliability. The informant has provided information in the past that has led to the seizure of narcotics. The informant has never mislead or provided false information in the past.
>
> . . . .
>
> Your AFFIANT, Detective E. M. Branson, has been a Police Officer with the Winston-Salem, North Carolina Police Department for over sixteen (16) years and has been assigned to the Special Investigations Division for approximately 5 years. Your AFFIANT has received approximately 200 hours of specialized training in the identification and investigation of narcotics. Furthermore, your AFFIANT has made in excess of 150 arrests for narcotic violations at both the State and Federal levels.

That same day, a Superior Court Judge issued the Warrant. The search was executed on 27 April 2017. As a result of the search, the Winston-Salem Police Department seized heroin, fentanyl, "crack" cocaine, and other paraphernalia including digital scales, syringes, and plastic baggies. On 23 October 2017, Defendant was indicted on: one count of Felonious Trafficking in Opium/Heroin; Felonious Possession with Intent to Sell or Deliver a Schedule II Substance; Felonious Maintaining Dwelling Used for Controlled Substances; Misdemeanor Possession of Drug Paraphernalia; Felonious Possession with Intent to Sell or Deliver a Schedule I Substance; and, attaining Habitual-Felon status. On 7 May 2018, prior to trial, Defendant filed a Motion to Suppress evidence of the

items seized from the Residence alleging they were obtained as a result of an unlawful search and seizure under the United States and North Carolina Constitutions.

At a pretrial hearing also on 7 May 2018, the trial court conducted a hearing on Defendant's Motion to Suppress. The trial court denied Defendant's Motion and entered the Motion to Suppress Order. In the Motion to Suppress Order, the trial court made Findings of Fact. The relevant Findings of Fact are as follows:

> 4. As is set out in the application for the search warrant, in March 2017, Detective Branson received information from a confidential source that three types of drugs: "crack" cocaine, heroin, and marijuana were being sold by a white male known as Bobby Caddell, from a house located at 2309 Urban Street. Detective Branson also received information that the defendant was in possession of a .380 caliber handgun, a 9 mm handgun, and two shotguns.
>
> 5. After receiving this information, [D]etective Branson began an investigation, and checked the Winston-Salem Police data system known as PISTOL, and she was able to identify defendant through these records.
>
> 6. Thereafter, and as recited by the application for the search warrant, within 72 hours prior to applying for the warrant, Detective Branson met with a confidential reliable and compensated informant ("CI") in an effort to purchase "crack" cocaine from the defendant, Mr. Caddell.
>
> 7. Detective Branson had performed drug buys with this CI on three or four occasions prior, and the CI had never misled Detective Branson or provided false information, and had provided information in the past that led to the seizure of narcotics.
>
> 8. Prior to the drug purchase, the CI was searched, and was found to have no drugs, money, or contraband on their person.
>
> 9. The CI was provided with money from the ATF buy fund, and instructed to go to [the Residence] to purchase "crack" cocaine from defendant and then meet

officers at a predetermined location after the controlled purchase.

10. Detective Branson parked approximately 100 yards away, and watched the CI make contact with defendant in the front yard of [the Residence].

11. A short time later, the CI was observed by Branson exiting the front door of the residence followed by defendant, and the length of time that the CI and the defendant stayed in the residence is consistent, in Detective Branson's experience, with drug activity.

12. The CI thereafter provided Detective Branson with a quantity of "crack" cocaine that the CI stated was purchased from defendant inside [the Residence]. The informant was again searched and found to have no drugs, money, or contraband on their person.

13. The substance was subjected to a field test and tested positive for cocaine.

Based on the Findings of Fact, the trial court concluded, "on the totality of the circumstances, there was a sufficiently strong showing of probable cause for the issuance of the search warrant" and that "[t]he defendant's rights under the U.S. and North Carolina Constitutions and applicable statutes were not violated."

The following day, on 8 May 2018, Defendant entered into *Alford* pleas to one count of Felonious Trafficking in Opium/Heroin, two counts of Felonious Possession with Intent to Sell or Deliver a Schedule II Substance, three counts of Felonious Maintaining Dwelling Used for Controlled Substances, one count of Misdemeanor Possession of Drug Paraphernalia, two counts of Felonious Possession with Intent to Sell or Deliver a Schedule I Substance, and attaining Habitual-Felon status. On 16 May 2018, Defendant filed a written Notice of Appeal with the Forsyth County Superior Court.

Appellate Jurisdiction

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from . . . a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2017). To preserve the right to appeal, the defendant must notify his intent to appeal to both the State and trial court before plea negotiations are finalized. *State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). Defendant's trial counsel

and counsel for the State orally confirmed at the suppression hearing that Defendant gave prior notice to the State. Additionally, the Transcript of Plea states: "Defendant . . . reserves his right to appeal the ruling on the motion to suppress made in this case . . . if unfavorable to the defendant." Thus, this appeal is properly before this Court.

Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's Motion to Suppress in finding the Warrant was supported by probable cause. Defendant specifically argues that under the standard applicable to anonymous tips, the Warrant was unsupported by a sufficient showing of probable cause.

Analysis

I. Standard of Review

When reviewing the denial of a motion to suppress, "the reviewing court must determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012) (citations and quotation marks omitted). "The trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (citations and quotation marks omitted). Conclusions of law are reviewed *de novo*. *Id.* (citation omitted).

II. Motion to Suppress

A. Findings of Fact

Defendant challenges the trial court's Findings of Fact 7, 8, 10, 11, 12, and 13, asserting that they are not based on competent evidence. We conclude there is sufficient evidence to support the trial court's Findings of Fact and therefore they are binding on appeal. *Id.* ("The trial court's findings of fact on a motion to suppress are conclusive on appeal[.]" (citations and quotation marks omitted)).

Defendant challenges Findings of Fact 7, 10, and 11 on the grounds they contain information not asserted in the Affidavit. It is error for a reviewing court to rely upon facts elicited at a suppression hearing that go beyond the four corners of the warrant in determining probable cause. *See State v. Benters*, 367 N.C. 660, 673-74, 766 S.E.2d 593, 603 (2014).

Finding of Fact 7 states: "Detective Branson had performed drug buys with this CI on three or four occasions prior, and the CI had never

misled Detective Branson or provided false information, and had provided information in the past that led to the seizure of narcotics." The statement "Detective Branson had performed drug buys with this CI on three or four occasions prior[,]" comes from Detective Branson's testimony at the suppression hearing and is not expressly included in the Affidavit. Assuming it was error for the trial court to consider the facts elicited from Detective Branson at the suppression hearing in Finding of Fact 7, we conclude Defendant was not prejudiced. *See id.* The remaining Findings of Fact support the Conclusions of Law and the magistrate's finding of a substantial basis for probable cause. *See State v. McPhaul*, ___ N.C. App. ___, ___, 808 S.E.2d 294, 301 (2017). Moreover, the remaining portion of Finding of Fact 7 is consistent with the Affidavit, which states the CI "who was used to make the controlled buys is of proven reliability[,] . . . has provided information in the past that has led to the seizure of narcotics [and] has never mislead or provided false information in the past."

Defendant argues Findings of Fact 10 and 11 are not supported by competent evidence because "[t]here were no circumstances in the affidavit indicating that the visual identifications of Mr. Caddell outside the residence, before and after the controlled purchase, were reliable." The Affidavit unambiguously states: "The informant was observed making contact with CADDELL in the front yard of the residence. A short time later, the informant was observed exiting the front door of the residence followed by CADDELL." The Defendant, challenging these Findings of Fact, did not present conflicting evidence, and even so, "[t]he trial court's findings of fact on a motion to suppress are conclusive on appeal if supported by competent evidence, *even if the evidence is conflicting*." *Williams*, 366 N.C. at 114, 726 S.E.2d at 165 (emphasis added) (citations and quotation marks omitted). Thus, we conclude Findings of Fact 10 and 11 are supported by competent evidence in the Record.

Defendant challenges Findings of Fact 8, 12, and 13 on the grounds that Detective Branson's use of the passive voice in the Affidavit "did not attribute these observations to any particular source[.]" However, to conclude from her use of the passive voice that Detective Branson lacked knowledge of the events described therein would amount to a hypertechnical, rather than a commonsense, reading of her Affidavit. *See State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) ("Reviewing courts should *not* invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." (emphasis added) (citations and quotation marks omitted)). Detective Branson's Warrant indicated she received an anonymous tip and

thereafter described her observations of the controlled purchase by the CI at the Residence to be searched. We decline to apply a hypertechnical reading to the Affidavit and hold that Findings of Fact 8, 12, and 13 are supported by competent evidence. Because we hold the trial court's Findings of Fact are supported by competent evidence, they are binding on appeal. *See Williams*, 366 N.C. at 114, 726 S.E.2d at 165.

B. Conclusions of Law

Defendant further argues the challenged Findings of Fact ultimately do not support Conclusions of Law 2 and 3—that probable cause for the search existed under the totality of the circumstances. Reviewing the trial court's Conclusions of Law *de novo*, we conclude under the totality of the circumstances, the Findings of Fact support the trial court's conclusion there was a sufficient basis to find probable cause to support issuance of the Warrant.

The Fourth Amendment of the U.S. Constitution and Article 1, Section 20, of the Constitution of North Carolina protect against unreasonable searches and seizures by requiring the issuance of a warrant only on a showing of probable cause. *See Allman*, 369 N.C. at 293, 794 S.E.2d at 302-03. A court determines whether probable cause exists under the Fourth Amendment of the U.S. Constitution and Article 1, Section 20, of the Constitution of North Carolina with a totality-of-the-circumstances test. *Id.* ("[T]he probable cause analysis under the federal and state constitutions is identical." (citing *Illinois v. Gates*, 462 U.S. 213, 230-31, 76 L. Ed. 2d 527, 543-44 (1983); *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984))).

A determination of probable cause is made by a "neutral and detached magistrate," *id.* at 294, 794 S.E.2d at 303 (citations and quotation marks omitted), and is "based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (citations and quotation marks omitted). "To determine whether probable cause exists under the totality of the circumstances, a magistrate may draw '[r]easonable inferences from the available observations.' " *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (quoting *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434).

North Carolina law requires that all applications for search warrants contain "[a] statement that there is probable cause to believe that items subject to seizure . . . may be found in or upon a designated or described place" and "[a]llegations of fact supporting the statement" that are "supported by one or more affidavits particularly setting forth

the facts and circumstances establishing probable cause[.]" N.C. Gen. Stat. § 15A-244(2), (3) (2017). "A magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (citations and quotation marks omitted).

Defendant contends that we should apply the "anonymous tip standard" to the probable-cause analysis.

> When sufficient indicia of reliability are wanting, . . . we evaluate the information based on the anonymous tip standard. An anonymous tip, standing alone, is rarely sufficient, but the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to pass constitutional muster.

Benters, 367 N.C. at 666, 766 S.E.2d at 598-99 (alterations, citations, and quotation marks omitted). The anonymous-tip standard applies when the affiant has "nothing more than [a] conclusory statement that the informant was confidential and reliable[.]" *Id.* at 668, 766 S.E.2d at 600 (citations and quotation marks omitted).

The North Carolina Supreme Court, in *Benters*, declined to hold probable cause supported a warrant under the anonymous-tip standard. *Id.* at 673, 766 S.E.2d at 603. In *Benters*, the anonymous tip, stating the defendant was growing marijuana, was provided to the affiant from another detective who received the tip from a "confidential and reliable source of information[.]" *Id.* at 662, 766 S.E.2d at 596. The affidavit in *Benters* "[did] not suggest [the affiant] was acquainted with or knew *anything* about Detective Hasting's source or could rely on anything other than Detective Hasting's statement that the source was confidential and reliable." *Id.* at 668, 766 S.E.2d at 600 (emphasis added). Moreover, the affidavit "fail[ed] to establish the basis for Detective Hasting's appraisal of his source's reliability[.]" *Id.* Therefore, the affiant had no personal knowledge about the reliability of the source. Based on the assertions in the affidavit, the Court concluded the tip "amount[ed] to little more than a conclusory rumor" and was an anonymous tip. *Id.* at 669, 766 S.E.2d at 600.

When an anonymous tip is the source of information supporting a warrant, "the officers' corroborative investigation must carry more of the State's burden to demonstrate probable cause." *Id.* The corroboration of the tip in the *Benters* affidavit amounted to: statements on two years of the defendant's utility records, the expertise and experience of

Detective Hastings, and the observation of "multiple gardening items on defendant's property in the absence of exterior gardens or potted plants." *Id.* at 671-72, 766 S.E.2d at 602. Under the totality of the circumstances, our Supreme Court concluded the "verification of mundane information, Detective Hastings's statements regarding defendant's utility records, and the officers' observations of defendant's gardening supplies are not sufficiently corroborative of the anonymous tip or otherwise sufficient to establish probable cause[.]" *Id.* at 673, 766 S.E.2d at 603.

In contrast, in *State v. Lowe*, the North Carolina Supreme Court, citing *Benters*, held that there was a sufficient showing of probable cause. 369 N.C. 360, 365, 794 S.E.2d 282, 286 (2016) (citations omitted). In *Lowe*, "the anonymous tip was that the [suspect] was selling, using, and storing narcotics at his house." *Id.* (quotation marks omitted). The affidavit in support of the warrant listed the detective's training and experience, the history of the suspect's drug-related arrests, and stated that the detective "discovered marijuana residue in trash from [the suspect's] residence, along with correspondence addressed to [the suspect]." *Id.* at 365, 794 S.E.2d at 286. "[U]nlike in *Benters*, the affidavit presented the magistrate with direct evidence of the crime for which the officers sought to collect evidence." *Id.* (citations and quotation marks omitted). Therefore, our Supreme Court concluded "under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable cause existed." *Id.* at 366, 794 S.E.2d at 286.

Further, this Court held the circumstances were sufficient to support probable cause when a CI's tip was substantiated by a controlled purchase. *State v. Ledbetter*, 120 N.C. App. 117, 123-24, 461 S.E.2d 341, 345 (1995). In *Ledbetter*, the detective's affidavit "contained the statement he had received information from a confidential informant and thereafter described the controlled purchase of narcotics at the premises to be searched." *Id.* at 123, 461 S.E.2d at 345. This Court articulated the "statement [the detective] had received information was not the focal point of his affidavit, but rather his precise and detailed recitation of his observations regarding the controlled purchase." *Id.* (quotation marks omitted). The Court concluded "the search warrant herein was issued in reliance upon recitation in the affidavit of a controlled purchase of cocaine." *Id.* at 122, 461 S.E.2d at 344. Therefore, this Court determined the affidavit was sufficient "to establish that the warrant was issued upon probable cause." *Id.* at 124, 461 S.E.2d at 345.

Unlike in *Benters*, in the case *sub judice*, the Affidavit is supported by "more than [a] conclusory statement that the informant was confidential and reliable[.]" *Benters*, 367 N.C. at 668, 766 S.E.2d at 600

(citations and quotation marks omitted). In *Benters*, the affidavit was based on information provided to the affiant from another detective, and there was no basis for the appraisal of the source's reliability. *Id.* In contrast, the Affidavit in the instant case is supported by the Affiant's knowledge of the events therein, including the controlled purchase of "crack" cocaine, and her credibility determination of the CI, whom she met with both before and after the controlled purchase and had worked with previously. The trial court's Findings of Fact establish Detective Branson, as Affiant, had personal knowledge of the CI's reliability and witnessed the events averred to in the Affidavit. Therefore, in this case, we conclude there exist sufficient indicia of reliability and decline to apply the anonymous-tip standard set forth in *Benters*. *See id.* at 666, 766 S.E.2d at 598-99.

Furthermore, unlike *Benters*, where the corroboration of the anonymous tip consisted of "verification of mundane information, . . . statements regarding defendant's utility records, and the officers' observations of defendant's gardening supplies" *id.* at 673, 766 S.E.2d at 603, the Affidavit here "presented the magistrate with direct evidence of the crime for which the officers sought to collect evidence." *Lowe*, 369 N.C. at 365, 794 S.E.2d at 286 (citations and quotation marks omitted). Defendant was suspected of selling narcotics at the Residence. The magistrate was presented with direct evidence of the crime with Detective Branson's observations of the CI's controlled purchase of "crack" cocaine. Thus, as our Supreme Court held in *Lowe*, there was a sufficient basis for the magistrate's conclusion that probable cause existed under the totality of the circumstances. *Id.* at 366, 794 S.E.2d at 286.

Moreover, as this Court reasoned in *Ledbetter*, the initial tip here was not the focal point of Detective Branson's Affidavit. 120 N.C. App. at 123-24, 461 S.E.2d at 345 (holding that there was a substantial basis for concluding that probable cause existed where the focal point of the affidavit in question was the "recitation of [the affiant's] observations regarding the controlled purchase" and not an initial anonymous tip). The focal point of Detective Branson's Affidavit was her recitation of the controlled purchase of "crack" cocaine by the CI at the Residence to be searched, which in turn presented the magistrate with "direct evidence of the crime for which the officers sought to collect evidence." *Lowe*, 369 N.C. at 365, 794 S.E.2d at 286 (citations and quotation marks omitted). Thus, we conclude, as this Court held in *Ledbetter*, that the Warrant was issued upon a sufficient showing of probable cause. *See Ledbetter*, 120 N.C. App. at 123-24, 461 S.E.2d at 345.

Reviewing the trial court's Conclusions of Law *de novo*, we conclude "under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable caused existed." *Lowe*, 369 N.C. at 366, 794 S.E.2d at 286. Therefore, we affirm the trial court's denial of Defendant's Motion to Suppress and the Judgments entered as a result of his *Alford* pleas.

Conclusion

Accordingly, based on the foregoing reasons, we affirm the trial court's denial of Defendant's Motion to Suppress and Judgments entered pursuant to Defendant's *Alford* pleas.

AFFIRMED.

Judges INMAN and BROOK concur.

STATE OF NORTH CAROLINA
v.
STEVIE GOODWIN, JR., DEFENDANT

No. COA18-1157

Filed 17 September 2019

Constitutional Law—right to choice of counsel—incorrect standard—structural error

The trial court committed structural error by using the ineffective assistance of counsel standard when considering and denying defendant's request for new counsel during a pre-trial hearing on his drug possession charges. The structural error in violation of defendant's Sixth Amendment right to choice of counsel entitled him to a new trial.

Appeal by Defendant from judgment entered 4 May 2018 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for defendant-appellant.

MURPHY, Judge.

Where an indigent defendant requests a change of counsel from a court-appointed attorney to a private attorney during a pre-trial hearing, a trial court commits structural error when it makes its decision based solely on the effective assistance of the appointed attorney. Here, the trial court committed a structural error when it denied Defendant's request for new counsel using the standard for hearing an ineffective assistance of counsel argument rather than the standard for a counsel of choice argument. We reverse the trial court's denial of the right to hire new counsel and remand for a new trial.

BACKGROUND

On 5 February 2017 at approximately 1:00 A.M., Officer Taylor Lee Hager ("Officer Hager") and his partner stopped a vehicle when they observed it had an expired registration tag. The vehicle contained Defendant in the front passenger seat, the driver, and another passenger in the back seat. An officer recognized the back-seat passenger as an individual with several outstanding felony warrants and subsequently arrested him.

After the arrest, Officer Hager noticed an open beer bottle in the vehicle and asked Defendant to step out. When Defendant exited the vehicle, Officer Hager "smell[ed] an odor of marijuana coming from his person." Officer Hager performed a pat down on Defendant to ensure he was not armed. During this pat down, Officer Hager felt a small metal container used as a keychain in Defendant's pocket. Relying on his prior experience in law enforcement, Officer Hager suspected that the keychain hid controlled substances. Officer Hager opened the container and found inside what was later identified as Oxycodone and methamphetamine. Cocaine was also found in the glove compartment of the vehicle.

Defendant was charged with possession of cocaine and possession of methamphetamine. For the entirety of his trial, Denzil Forrester ("Forrester") was Defendant's court-appointed counsel. Forrester filed a motion to suppress evidence of the drugs found on Defendant during Officer Hager's pat down. However, Forrester omitted the required affidavit for the motion to be treated as a motion to suppress, thus making it a motion *in limine*, which the trial court denied.

After his motion *in limine* was denied—and immediately prior to jury selection—Defendant requested new counsel, explaining to the trial court that he believed Forrester was not competent to represent

him because they could not agree on which witnesses to call and could not properly communicate. Defendant also said he wanted to hire a private attorney and could acquire the money to pay for one. In response, Forrester moved to withdraw from his representation of Defendant. The trial court denied Defendant's request as well as Forrester's, stating, "The Court deems there not to be an absolute impasse in regards to this case so far."

Forrester continued as Defendant's counsel, and, at the trial's conclusion, the jury found Defendant guilty of possession of methamphetamine and not guilty of possession of cocaine. Defendant was sentenced to an active sentence of 37-57 months imprisonment. He timely appeals.

ANALYSIS

Defendant presents two arguments on appeal: (1) that the trial court committed plain error when it admitted evidence obtained during the search subsequent to the pat down and (2) that the trial court committed a structural error when it denied his request for new, chosen counsel. We first address the choice of counsel issue, and conclude the trial court committed structural error by applying the incorrect standard in resolving Defendant's request to hire private counsel.

Defendant contends that the trial court committed a structural error when it used the ineffective assistance of counsel standard established in *State v. Ali*, 329 N.C. 394, 402, 407 S.E.2d 183, 188 (1991), to deny his request for chosen counsel. Defendant asserts the standard from *State v. McFadden*, 292 N.C. 609, 613-14, 234 S.E.2d 742, 746 (1977), was instead appropriate. The State argues Defendant tried to replace Forrester on ineffective-assistance-of-counsel grounds and, therefore, the trial court used the correct standard. After a thorough review, we agree with Defendant.

A structural error is one that "should not be deemed harmless beyond a reasonable doubt" because "it 'affect[s] the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.' " *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420, 431-32 (2017) (citing *Arizona v. Fulminate*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 331 (1991)) (alteration in original). "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* "Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.' " *Id.* at 1910, 198 L. Ed. 2d. at 434.

The Supreme Court of the United States has repeatedly held that "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.' " *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 165 L. Ed. 2d 409, 420 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 124 L. Ed. 2d 182, 191 (1993)). Therefore, if we determine that the trial court erred in any manner that deprived Defendant of his right to choice of counsel, we must order a new trial.

The most frequently cited of our Supreme Court's cases regarding a defendant's constitutional right to chosen counsel is *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). In *McFadden*, the defendant argued the trial court infringed on his right to be represented by the counsel of his choice when it denied a continuance for his case and thereby forced an attorney unfamiliar with the case to become his primary counsel on short notice. *Id.* at 612, 234 S.E.2d at 744-45. Holding this to be a violation of the defendant's constitutional rights, our Supreme Court reasoned:

> [T]he state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.

Id. at 613-14, 234 S.E.2d at 746 (quoting *People v. Crovedi*, 417 P.2d 868, 874, 65 Cal. 2d 199, 208, 53 Cal. Rptr. 284, 290 (1966)) (alteration in original).

Under our reading of *McFadden*, when a trial court is faced with a Defendant's request to substitute his court-appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice. The most common example of a situation where a defendant's request is properly denied is where he seeks to weaponize his right to chosen counsel "for the purpose of obstructing and delaying his trial." *Id.* at 616, 234 S.E.2d at 747; *see also State v. Chavis*, 141 N.C. App. 553, 562, 540 S.E.2d 404, 411 (2000). In *Chavis*, for example, the trial court denied an indigent defendant's request for a private attorney, which he made on the morning of his trial. *Id.* We upheld the trial court's ruling, citing the timing of the request as the primary reason for our decision. *Id.*

A somewhat related standard is that described in *State v. Ali*, where our Supreme Court held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to . . . tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 329 N.C. at 404, 407 S.E.2d at 189. Because the defendant in *Ali* had not reached an absolute impasse with his attorney regarding the direction of his trial, our Supreme Court held that he was "not denied effective assistance of counsel." *Id*. at 404, 407 S.E.2d at 189-90. That decision remains binding, but is inapplicable where, as here, the defendant is seeking the counsel of his choice rather than arguing that he has received ineffective assistance. *See Gonzalez-Lopez*, 548 U.S. at 146-48, 165 L. Ed. 2d at 418-19 (explaining the difference between the right to be assisted by the counsel of one's choice and the right to receive effective assistance of counsel).

Reviewing the transcript from Defendant's trial, the trial court mistakenly relied upon the absolute impasse standard in ruling on his request for new counsel, stating, "The Court deems there not to be an absolute impasse in regards to this case so far." Again, this standard was incorrect because Defendant's request was an assertion of his right to be represented by the counsel of his choice; not an argument regarding the effectiveness of Forrester's representation. Defendant wanted to hire a new, private attorney to replace Forrester and asked the trial court for permission to do so. Although Defendant expressed doubts about Forrester's competency to the trial court, that alone is insufficient to transform his request into an argument regarding effective assistance of counsel, as the trial court concluded; instead, it supports Defendant's assertion that he was entitled to hire counsel of his choice, which was not Forrester.

It is within the trial court's discretion to decide whether allowing a defendant's request for continuance to hire the counsel of his choice would result in "significant prejudice . . . or in a disruption of the orderly processes of justice [that is] unreasonable under the circumstances of the particular case." *McFadden*, 292 N.C. at 613-14, 234 S.E.2d at 746. The trial court did not make such a determination in this case. It made no findings of fact indicating that the timing or content of Defendant's request may have been improper or insufficient. Instead, by misapprehending the law and employing the incorrect standard in resolving Defendant's request, the trial court failed to properly exercise discretion. Affirming the trial court's denial of Defendant's request would implicitly endorse the use of an incorrect standard for the right

to counsel of choice and a structural error that violated Defendant's Sixth Amendment rights. We must vacate the judgment and remand for a new trial.

Because we hold the trial court committed a structural error when it applied the incorrect standard in analyzing Defendant's request for new counsel, we need not reach Defendant's other argument on appeal, which may not recur in his new trial.[1] *See, e.g.*, *State v. Long*, 196 N.C. App. 22, 41, 674 S.E.2d 696, 707 (2009) ("As we are granting defendant's request for a new trial, and the other issues he has may not be repeated in a new trial, we will not address his other [arguments on appeal].").

CONCLUSION

The record reflects Defendant asserted his right to hire chosen counsel and the trial court treated that request as an ineffective assistance of counsel claim, evaluating Defendant's request accordingly. We vacate the entry of judgment of conviction against Defendant and remand the case for a new trial.

VACATED AND REMANDED.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
TAMMY MARIE NEAL

No. COA18-1113

Filed 17 September 2019

1. Search and Seizure—traffic stop—motion to suppress—finding of fact—conflicting evidence

In an order denying a motion to suppress in an impaired driving case, a finding of fact resolving conflicting evidence in favor of the State—regarding whether an officer pulled in front of or behind defendant's car and therefore had the ability to confirm that the car's license plate number matched the tag given by an anonymous

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1. Additionally, even if we are presented with Defendant's remaining argument in a subsequent appeal, it is likely we would not be reviewing it solely for plain error as we would in the instant appeal.

tipster—was supported by competent evidence. Inconsistencies in the evidence were within the trial court's authority to resolve.

2. Search and Seizure—traffic stop—reasonable suspicion—anonymous tip—sufficient indicia of reliability

In a prosecution for impaired driving, the trial court properly denied defendant's motion to suppress where an anonymous tip exhibited sufficient indicia of reliability to support reasonable suspicion for a traffic stop. The tip described multiple instances of erratic driving and a potential hit-and-run accident on a specific road, stated that the car was still in the area, and gave the color of the car and license plate number. When the responding officer arrived in that area and immediately saw a car matching the description attempting to leave, sufficient reasonable suspicion existed for him to execute a stop.

3. Evidence—impaired driving—expert testimony—drug recognition expert—impairing effects of drugs

In a prosecution for impaired driving, the trial court did not abuse its discretion by allowing testimony from an expert witness regarding the effects of drugs on defendant. A certified drug recognition expert's testimony comparing the signs and symptoms exhibited by defendant on the night of her traffic stop with the drug categories identified from defendant's blood sample was admissible pursuant to Evidence Rule 702(a1)(2), and the expert's testimony evaluating the results of a trooper's standardized field sobriety tests was not prejudicial, even if allowed in error, where the trooper's similar testimony about the test results was properly admitted under Rule 702(a1)(1).

4. Evidence—impaired driving—expert testimony—forensic toxicology—impairing effect of drugs

In a prosecution for impaired driving, the trial court did not abuse its discretion by allowing testimony from an expert on forensic toxicology that a substance found in defendant's blood was "active" and "having an effect on [defendant's] body." The expert explained that "active" means a substance that has an effect on the body and clarified that she could not affirmatively state whether the substance had an impairing effect on defendant.

Appeal by Defendant from Judgment entered 8 September 2017 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Irons & Irons, PA., by Ben G. Irons II, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tammy Marie Neal (Defendant) appeals from her conviction for Impaired Driving. The Record tends to show the following:

On 11 April 2016, Deputy Reggie Ray of the Buncombe County Sheriff's Department (Deputy Ray) was dispatched to investigate an anonymous report concerning a possibly impaired driver. According to Deputy Ray, he received a call from dispatch that an anonymous individual had observed a "small green vehicle in color with a tag number of [042-RCW] on [Interstate] 40 that had almost run a few vehicles off the road . . . [and] that it had ended up in an area known as Sleepy Hollow[.]" The anonymous tipster also reported that the driver of the green vehicle had hit a car in the Sleepy Hollow area and was attempting to leave the scene.

Upon arriving in the Sleepy Hollow area, Deputy Ray observed a car matching this description and immediately pulled behind the vehicle, while another Deputy approached the front of the vehicle with his patrol car, to block its path. Deputy Ray testified that he did not observe the car violate any traffic laws and stopped it based solely on the report from dispatch. After stopping the car, Deputy Ray observed Defendant was driving the car.

When Deputy Ray had Defendant step out of her car, Defendant "was very unstable on her feet[,]" could not stand or walk well, had to grab her car once for support, and also had to hold onto Deputy Ray's vehicle once to avoid falling. Deputy Ray then placed Defendant in the back of his patrol car with the windows down "for her safety, because [he] didn't want her to fall[.]" While another Deputy stayed with Defendant, Deputy Ray began looking for and eventually found the vehicle that Defendant allegedly hit. The owner of the vehicle, who was a friend of Defendant, was standing outside and informed Deputy Ray that she did not want to press charges.

Subsequently, Andrew Depoyster (Trooper Depoyster), a State Trooper with the North Carolina Highway Patrol, arrived, took over the investigation, and conducted three standardized field sobriety tests

(SFST) on Defendant: the walk-and-turn test, the one-leg stand test, and the horizontal gaze nystagmus test (HGN test). Trooper Depoyster testified Defendant "was very uneasy on her feet[; h]ad a hard time standing still[; u]sed her arms for balance[; h]ad a blank stare[; and w]as using [his] vehicle for balance after [he] brought her back to [his car] for the standardized field sobriety testing." He also stated Defendant's "pupils were pinpoint, very small." Trooper Depoyster testified he had to stop all three SFSTs early because Defendant could not follow instructions and showed signs of severe impairment. Defendant admitted she was prescribed and had taken numerous medications, including Ambien, Oxycodone, Restrio, an unnamed restless leg syndrome medication, and Clonazepam. When asked if she had smoked marijuana recently, Defendant replied, "yes." Based on Defendant's responses and her performance on these tests, Trooper Depoyster arrested and charged Defendant with Impaired Driving. Thereafter, Defendant consented to having her blood drawn for a blood report (Blood Report). Trooper Depoyster also created a Driving While Impaired Report (DWIR form), which contained his findings regarding his investigation into Defendant's Impaired-Driving arrest.

On 18 August 2017, Defendant was tried in Buncombe County District Court and found guilty of Impaired Driving. The trial court sentenced Defendant to a 60-day suspended sentence and placed her on unsupervised probation for 12 months. Thereafter, Defendant appealed her conviction in District Court to Buncombe County Superior Court. Prior to trial in Superior Court, Defendant filed, *inter alia*, a Motion to Suppress alleging the stop and seizure violated Defendant's constitutional rights and seeking to suppress all evidence obtained as a result of the stop. Specifically, Defendant contended Deputy Ray did not have reasonable suspicion to stop her car. After a hearing in which Deputy Ray testified, the trial court deferred its ruling on Defendant's Motion to Suppress, and the matter proceeded to trial.

At trial, the State tendered Dawn Sherwood (Sherwood) as an expert witness in toxicology and forensic analysis. Sherwood testified she works as a certifying scientist for NMS Labs, which specializes in toxicology, criminalistics, and DNA analysis, and that she primarily handles blood tests. She also testified that she has a bachelor's degree in biology, approximately 19 years of experience in analyzing blood work, and completed a graduate course in forensic toxicology that discussed various drug classifications. Sherwood stated the Blood Report, which she prepared in her capacity at NMS Labs, showed Defendant's blood contained measurable amounts of the following—Oxazepam,

which is a benzodiazepine drug used to treat conditions such as anxiety; Temazepam, another benzodiazepine; Clonazepam, another benzodiazepine; 7-Amino Clonazepam, which is an active metabolite[1] of Clonazepam; Oxycodone Free, an opiate drug commonly used for pain or sedation; 11-Hydroxy Delta-9 THC, an intermediate metabolite of marijuana; Delta-9 Carboxy THC, an inactive metabolite of marijuana; and Delta-9 THC, the principle drug in marijuana.

The State also tendered Sergeant Ann Fowler (Sgt. Fowler), a drug recognition expert with the Asheville Police Department, as a drug recognition expert (DRE). Sgt. Fowler testified that based on her review of the Blood Report and Trooper Depoyster's DWIR form, her conversation with Trooper Depoyster, and her training and experience, she believed Defendant "was impaired on a central nervous system depressant and also on a narcotic analgesic."

At the close of the State's evidence, Defendant made a Motion to Dismiss based on insufficient evidence of impairment and her previous Motion to Suppress. The trial court denied the Motion to Dismiss. On 8 September 2017, the jury found Defendant guilty of Impaired Driving. The same day, the trial court sentenced Defendant to a 60-day suspended sentence and placed her on supervised probation for 12 months. The trial court also entered an Order on Defendant's Motion to Suppress (Suppression Order). In its Suppression Order, the trial court made the following Findings of Fact:

> 1. [Deputy Ray], who was employed by the Buncombe County Sheriff's Office at the time of the arrest, was on duty when he heard over his dispatch radio that an anonymous person had reported by making a cell phone call that a small green Toyota automobile, with a tag # of 042-RCW, was being driven erratically, and was involved in an accident in the area of the Sleepy Hollow Road, and that the driver of the Toyota was leaving the scene of the accident.
>
> 2. [Deputy] Ray quickly came upon a small green Toyota automobile, with a tag # of 042-RCW, which was leaving a parking lot of a townhouse development of off [sic] Sleepy Hollow Road.

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1. Sherwood testified that "when a drug is taken into the body, it will be broken down into different components" called metabolites. According to Sherwood, an "active metabolite" is a substance that "has an effect on the body."

3. [Deputy] Ray used his car to block the Toyota from leaving, and began his encounter with the Defendant.

Based on these Findings of Fact, the trial court denied Defendant's Motion to Suppress.[2]

On 8 September 2017, Defendant timely filed a written Notice of Appeal from this Judgment. Defendant's Notice of Appeal, however, contains two technical errors. First, although the caption properly lists Defendant's name, the body erroneously identifies a different person as the party appealing. Second, Defendant's Notice of Appeal specifies that Defendant is appealing the "*Judgments* entered on September 8, 2017," even though Defendant appeals from a single Judgment. Out of an abundance of caution, Defendant filed a Petition for Writ of Certiorari with this Court in order to preserve her right of appellate review. Although we do not believe these technical errors render her Notice of Appeal defective, "[t]o the extent that [these] error[s] cast[] any doubt on our jurisdiction, we exercise our discretion and grant *certiorari* to review [Defendant's] claims on their merits[.]" *Cox v. Steffes*, 161 N.C. App. 237, 241, 587 S.E.2d 908, 911 (2003) (citation omitted).

Issues

The dispositive issues on appeal are: (I) whether (A) Finding of Fact 2 of the Suppression Order is supported by competent evidence and (B) the trial court properly concluded Deputy Ray had reasonable suspicion to stop Defendant and (II) whether (A) the trial court erred by permitting Sgt. Fowler to testify concerning the impairing effects of certain drugs found in Defendant's blood and (B) the trial court erred by finding that Sherwood was an expert in "forensic toxicology" and by allowing Sherwood to testify that Delta-9 THC was "active" and "having an effect on [Defendant's] body."

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2. The Citation charging Defendant with Impaired Driving also referenced a violation of N.C. Gen. Stat. § 20-154. Specifically, the Citation alleged Defendant "unlawfully and willfully operat[ed] a (motor) vehicle . . . by failing to see before turning from a direct line that such movement could be made in safety." Although a traffic violation can supply the necessary reasonable suspicion to initiate a traffic stop, *see*, *e.g.*, *State v. Johnson*, 370 N.C. 32, 38, 803 S.E.2d 137, 141 (2017) (citation omitted), the State did not make this argument at any point during trial or on appeal. In addition, the Citation was written by Trooper Depoyster who arrived on the scene *after* Defendant's vehicle had been stopped. Further, Deputy Ray testified at trial he did not observe Defendant violate any traffic laws. For these reasons, we do not address this alleged traffic violation in our reasonable-suspicion analysis.

Analysis

I. Motion to Suppress

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed *de novo*. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

A. Finding of Fact 2

[1] Finding of Fact 2 reads: "[Deputy] Ray quickly came upon a small green Toyota automobile, with a tag # of 042-RCW, which was leaving a parking lot of a townhouse development of off [sic] Sleepy Hollow Road." Specifically, Defendant "objects to that portion of this finding which indicates that Deputy Ray saw the tag #042-RCW on the car he stopped before he stopped it[.]" Defendant contends Deputy Ray's testimony, both at the suppression hearing and trial, establishes that he did not see Defendant's license plate number until *after* stopping Defendant.

During the suppression hearing, when first asked to describe his initial contact with Defendant's vehicle, Deputy Ray stated:

> When we got there, we noticed -- one of us came in from James Branch -- Jim's Branch Road. The other one came in from -- I think it was the access road. So we came in two different directions. We saw the vehicle in question. *I pulled in front*, and an officer pulled in the back, and we blocked her in, because they were -- the vehicle was trying to leave. Once I got out of the vehicle and got to the front of the suspect vehicle to the driver's side, I noticed [Defendant]. (emphasis added).

At another point during the hearing, Deputy Ray testified, "When I first got there, I noticed the vehicle in question, the tag number matched, the description matched." Later in the hearing, the following exchange occurred:

> [Defense Counsel]: Did you personally view her tag as she was driving out?
>
> [Deputy Ray]: I viewed it as I got into the neighborhood to stop her, yes, sir.
>
> [Defense Counsel]: Were you coming from the front of her or behind her?
>
> [Deputy Ray]: Behind her, sir.

During Defendant's trial, Deputy Ray described his initial encounter with Defendant's vehicle as follows:

> [State]: And what did you do [after you received the call from dispatch]?
>
> [Deputy Ray]: Started en route toward the Sleepy Hollow area. When I was coming down -- it's called Buckeye Access Road. You can come down Buckeye Access or a road called Jim's Branch and come in both ways. My partner came in Jim's Branch. I came in the access. When I hit into -- when I came into Sleepy Hollow, I noticed a small green vehicle backing out. Hit my blue lights to get him to back up, because my partner came in the front, and we stopped it.
>
> [State]: And what did you notice as soon as you were able to make that stop?
>
> [Deputy Ray]: The tag number that we were given from Communications matched the vehicle that we had just found on Sleepy Hollow.

Thus, during both the suppression hearing and trial, Deputy Ray's testimony was inconsistent on whether he pulled in front or behind of Defendant's vehicle, which would determine whether he could have viewed Defendant's license plate on the back of her vehicle prior to the stop. Nevertheless, "[w]here the evidence is conflicting . . . , the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971). "Furthermore, a trial court's resolution of a conflict in the evidence will not be disturbed on appeal[.]" *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000) (citation omitted). Therefore, we conclude Finding of Fact 2 is supported by competent evidence and thus binding on appeal. *See id.* (citation omitted).

B. Investigatory Stop

[2] Defendant next argues Deputy Ray did not have reasonable suspicion to stop Defendant and therefore the trial court erred by failing to grant Defendant's Motion to Suppress. After a thorough review of the relevant case law and the evidence in this case, we disagree.

The Fourth Amendment of the United States Constitution ensures the right of the people to be secure in their persons and protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV.; *see also* N.C. Const. art. I, § 20; *State v. Garner*, 331 N.C. 491, 506-07, 417 S.E.2d 502, 510 (1992) (citations omitted). These protections apply to "seizures of the person, including brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994) (citation omitted).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *Id.* at 441, 446 S.E.2d at 70 (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). "[R]easonable suspicion" requires "[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." *Id.* (citations omitted). All that is required is a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Id.* at 442, 446 S.E.2d at 70 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). In assessing whether reasonable suspicion exists, the reasonableness "must be measured by what the officers knew *before* they conducted their search." *Florida v. J.L.*, 529 U.S. 266, 271, 146 L. Ed. 2d 254, 260 (2000) (emphasis added). A court must consider the totality of the circumstances in determining whether reasonable suspicion to make an investigatory stop existed. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citation omitted).

The United States Supreme Court has explained the following regarding anonymous tipsters:

> Of course, an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity. That is because ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations, and an anonymous tipster's veracity is by hypothesis largely unknown, and unknowable. But under appropriate circumstances, an anonymous tip can demonstrate

> sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop.

Navarette v. California, 572 U.S. 393, 397, 188 L. Ed. 2d 680, 686 (2014) (alteration, citations, and quotation marks omitted). In North Carolina, it is well established that "[a]n anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630 (2000) (citations omitted). Further, our Supreme Court has also recognized "[an anonymous] tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.* (citation omitted). "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. Peele*, 196 N.C. App. 668, 672, 675 S.E.2d 682, 685 (2009) (citation and quotation marks omitted).

Here, the tip provided to Deputy Ray through dispatch constituted an anonymous tip. During the suppression hearing, Deputy Ray testified he did not know who placed the call to communications and that the anonymous tipster was not present at the scene of the stop when he arrived. Further, the State in its brief assumes the caller was anonymous. Therefore, in order to justify an investigatory stop, the tip must have possessed sufficient indicia of reliability or been corroborated by Deputy Ray. *Id.* (citation omitted). Specifically, our case law requires the officer to corroborate the illegal activity in order to corroborate the anonymous tip. *See State v. Blankenship*, 230 N.C. App. 113, 116, 748 S.E.2d 616, 618-19 (2013) (holding that officers—who immediately stopped the defendant's vehicle based on it matching an anonymous tip's description and without observing the defendant violate any traffic laws or otherwise drive erratically—had not corroborated the tip's assertion of illegality); *see also Peele*, 196 N.C. App. at 673, 675 S.E.2d at 686 (concluding on similar facts that officers "did not corroborate the caller's assertion of careless or reckless driving").

In this case, the State argues Deputy Ray was able to "corroborate significant portions" of the tip prior to the stop because he observed a car matching the tipster's description leaving the same location the tipster alleged it would be leaving. Deputy Ray, however, testified he did not observe Defendant violate any traffic laws or drive erratically and that he stopped Defendant based solely on the anonymous tip. Therefore, Deputy Ray did not corroborate the tip, and "the only issue to determine is whether [the anonymous caller's] tip exhibited sufficient 'indicia of

reliability' to provide [Deputy Ray] with reasonable suspicion to stop [D]efendant." *Blankenship*, 230 N.C. App. at 116, 748 S.E.2d at 619.

The State contends the anonymous tip had sufficient indicia of reliability to support the stop because the caller described Defendant's vehicle, her erratic driving, and the location where Defendant was allegedly involved in an accident. In support of its position, the State puts forth the United States Supreme Court's decision in *Navarette*. We ultimately conclude the anonymous tip in this case had sufficient indicia of reliability to provide reasonable suspicion supporting the stop of Defendant. However, in light of the State's argument, we must acknowledge the apparent tension between our prior case law addressing similar factual scenarios and *Navarette*.

For instance, in *Blankenship*, officers received a "be-on-the-lookout" message from dispatch. *Id.* at 114, 748 S.E.2d at 617. A taxicab driver anonymously[3] called 911 on his cell phone and reported observing "a red Mustang convertible with a black soft top . . . driving erratically, running over traffic cones and continuing west on Patton Avenue." *Id.* at 114, 748 S.E.2d at 617. The caller followed the Mustang and provided the license plate, "XXT-9756." *Id.* Less than two minutes after dispatch broadcast this call, officers spotted a red Mustang with a black soft top and an "X" in the license plate heading west on Patton Avenue. *Id.* When the officers caught up to the car, it had turned and was approaching a security gate. *Id.* As the driver attempted to open the gate, the officers activated their blue lights and stopped the defendant. *Id.* At the time of the stop, the officers had not observed the defendant "violating any traffic laws or see[n] any evidence of improper driving that would suggest impairment[.]" *Id.* Thereafter, the officers detected a strong odor of alcohol and eventually arrested the defendant on suspicion of impaired driving. *Id.* The defendant filed a motion to suppress claiming the officers did not have reasonable suspicion to stop his car, which motion the trial court denied. Thereafter, the defendant pleaded guilty to impaired driving, reserving his right to seek appellate review of the denial of his motion to suppress. *Id.* at 115, 748 S.E.2d at 618.

On appeal, this Court reversed the trial court's denial of his motion to suppress. The *Blankenship* Court first noted the officers did not

3. Using the 911 system, the 911 operator was later able to identify the taxicab driver's identity; however, this Court analyzed this case under our anonymous-tip framework because the officers did not know the taxicab driver's identity at the time of the stop. *Id.* at 116, 748 S.E.2d at 618.

corroborate the tip, as "they did not observe [the defendant] violating any traffic laws[.]" *Id.* at 116, 748 S.E.2d at 619. Our Court next indicated that the tip itself did not provide enough indicia of reliability to give the officers reasonable suspicion to stop the defendant because the caller "was unable to describe the defendant . . . or indicate whether the driver was a male or a female" and because "a tipster's confirmation that a defendant was heading in a general direction is simply not enough detail in an anonymous tip situation." *Id.* at 117, 748 S.E.2d at 619 (citations and quotation marks omitted). Without more detail or any corroboration, our Court held on these facts the officers lacked reasonable suspicion to stop the defendant. *Id.* at 118, 748 S.E.2d at 620 (citation omitted).

Our Court's analysis in *Blankenship* comports with a number of decisions from this Court reaching the same conclusion on similar facts—where an anonymous tip reports, without more, the location and description of a vehicle alleged to be involved in criminal activity and officers stop the vehicle based solely on the tip, the officers lacked the requisite reasonable suspicion to effectuate a stop. *See State v. Coleman*, 228 N.C. App. 76, 82, 743 S.E.2d 62, 67 (2013) (holding a tip from an individual who was unknown to officers at the time of the stop to the effect that a cup of beer was located in a specific vehicle bearing a specific license plate parked at a specific location did not establish the necessary reasonable suspicion to support an investigative detention); *State v. Johnson*, 204 N.C. App. 259, 264-65, 693 S.E.2d 711, 715-16 (2010) (holding an anonymous tip that "a black male suspect wearing a white shirt in a blue Mitsubishi with a certain license plate number" was "selling drugs and guns at the intersection of Pitt and Birch Streets" did not establish the necessary reasonable suspicion to justify an investigative detention); *Peele*, 196 N.C. App. at 674-75, 675 S.E.2d at 687 (holding an anonymous tip describing a specific make and color of a car, the erratic driving of the car, and a description of the direction the car was traveling, without further corroboration, did not rise to the level of reasonable suspicion to lawfully stop the vehicle); *State v. McArn*, 159 N.C. App. 209, 214, 582 S.E.2d 371, 375 (2003) (holding an anonymous tip reporting that a white Nissan on a specific street corner was involved in a drug deal did not provide reasonable suspicion for the stop because, *inter alia*, the tipster "in no way predicted [the] defendant's actions . . . [and] police were thus unable to test the tipster's knowledge or credibility").

However, in 2014, the United States Supreme Court decided *Navarette*, which arguably reaches a different result despite similar

facts. In *Navarette*, an anonymous tipster[4] called into the 911 system to report a possible drunk driver, which the police department's 911 system recorded as follows: "Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David-94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago." *Id.* at 395, 188 L. Ed. 2d at 685 (alteration in original) (citation and quotation marks omitted). Exactly 13 minutes after this report, an officer heading northbound on Highway 1 passed the truck near mile marker 69. After making a U-turn, the officer followed the defendant for a 5-minute period but did not observe any signs of impaired driving. Thereafter, the officer stopped the defendant, smelled marijuana emanating from the vehicle, and eventually arrested the defendant. *Id.* at 395-96, 188 L. Ed. 2d at 685.

The United States Supreme Court held the anonymous call "bore adequate indicia of reliability for the officer to credit the caller's account" and that this "indicia of reliability . . . [was] sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road[, which] made it reasonable under the circumstances for the officer to execute a traffic stop." *Id.* at 398, 404, 188 L. Ed. 2d at 687, 691. Although it acknowledged this was a "close case[,]" a divided Supreme Court nonetheless upheld the stop primarily based on what it observed to be three indicia of reliability. *Id.* at 404, 188 L. Ed. 2d at 691 (citation omitted).

First, the Court concluded that because the caller reported being run off the road by a specific vehicle, "the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving." *Id.* at 399, 188 L. Ed. 2d at 687. Second, the Court asserted the caller was credible based on the specific timeline of events. As the Court explained:

> Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported

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4. The Supreme Court treated the tipster as an anonymous tipster; however, in footnote one, the majority acknowledged:

> the reporting party identified herself by name in the 911 call recording. Because neither the caller nor the . . . dispatcher who received the call was present at the hearing, however, the prosecution did not introduce the recording into evidence. The prosecution proceeded to treat the tip as anonymous, and the lower courts followed suit.

Navarette, 572 U.S. at 396 n.1, 188 L. Ed. 2d at 685 n.1 (citation omitted). Although the Court claims to treat this caller as anonymous, it appears the fact that the caller identified herself to the 911 operator influenced the Court's analysis, as the majority references footnote one twice in its opinion. *See id.* at 398, 400, 188 L. Ed. 2d at 687, 688.

> in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable.

Id. at 399, 188 L. Ed. 2d at 688. Lastly, the Supreme Court found it significant that the caller used the 911 emergency system because this prevents the likelihood of someone making false reports, as the call can be traced and the caller subject to prosecution. *Id.* at 400-01, 188 L. Ed. 2d at 688-89 (citations omitted). Relying on these three indicia, the Supreme Court held the officers had reasonable suspicion to stop the defendant.[5] *Id.* at 404, 188 L. Ed. 2d at 691.

Here, though, we need not resolve the apparent tension between our previous case law and *Navarette* because the present case presents additional indicia of reliability not present in those cases. In the case *sub judice*, the anonymous caller reported a small green vehicle with a tag number of 042-RCW being driven erratically on Interstate 40. The caller then indicated the car was now in the Sleepy Hollow area, where it was involved in an accident near Sleepy Hollow Road, and that the driver of the car was leaving the scene of the accident. Whereas the anonymous

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5. Justice Scalia authored a dissenting opinion, joined by Justices Ginsburg, Sotomayor, and Kagan, raising concerns about the majority opinion and characterizing it as a deviation from past precedent. Regarding the first indicia of the caller having eyewitness knowledge of the alleged dangerous driving, the dissent argued: "So what? The issue is not how [the tipster] claimed to know, but whether what [the tipster] claimed to know was true." *Id.* at 407, 188 L. Ed. 2d at 692 (Scalia, J., dissenting). To that question, "[t]he claim to 'eyewitness knowledge' . . . supports *not at all* its veracity[.]" *Id.* The dissent further disregards the second indicia because the time it would take for the caller to observe the vehicle, write down the license plate number, and call 911 suggests there was "no such immediacy" in that case but rather "[p]lenty of time [for the caller] to dissemble or embellish." *Id.* at 408, 188 L. Ed. 2d at 693. As for the 911 system, the dissent posited that the tipster's use of the 911 system proved "absolutely nothing . . . unless the anonymous caller was *aware* of [the] fact" that 911 callers can be identified. *Id.* at 409, 188 L. Ed. 2d at 694. For the dissent, the majority's opinion

> serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness.

Id. at 413, 188 L. Ed. 2d at 696. From this, the dissent concludes the majority has created a new rule: "So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop." *Id.* at 405, 188 L. Ed. 2d at 691.

caller in *Navarette* claimed a single instance of being run off the road, which was indicative of impaired driving, the anonymous caller here not only alleged several instances of erratic driving on Interstate 40 but also reported observing Defendant hit another vehicle in a specific, different location and attempting to flee the scene.

Further, Deputy Ray arrived in the Sleepy Hollow area and immediately noticed a vehicle matching the exact description attempting to leave, which suggests the anonymous caller reported the accident soon after it occurred. When coupled with the fact that the anonymous caller alleged not only several instances of erratic driving but also a potential hit-and-run accident, the anonymous tip "bore adequate indicia of reliability for [Deputy Ray] to credit the caller's account"; therefore, this "indicia of reliability . . . [was] sufficient to provide [Deputy Ray] with reasonable suspicion that [Defendant had driven erratically, hit another vehicle, and was attempting to flee, which] made it reasonable under the circumstances for [Deputy Ray] to execute a traffic stop." *Id.* at 398, 404, 188 L. Ed. 2d at 687, 691; *see generally Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 ("An anonymous tip can provide reasonable suspicion as long as it exhibits sufficient indicia of reliability." (citations omitted)). Accordingly, the trial court did not err in denying Defendant's Motion to Suppress.

II. Expert Testimony

A trial court's ruling regarding the admissibility of expert testimony "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (citation and quotation marks omitted). A trial court may only be reversed for abuse of discretion "upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (citation and quotation marks omitted).

A. Sgt. Fowler's Testimony

[3] Defendant asserts the trial court erred by allowing Sgt. Fowler to testify "about the impairing effects of the drugs found in [Defendant's] blood sample and her reconstruction and validation of the SFST performed by [Trooper Depoyster]."

Rule 702 of the North Carolina Rules of Evidence governs testimony by experts and provides in relevant part:

> (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.

(a1) Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances, if the witness holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services.

N.C. Gen. Stat. § 8C-1, Rule 702(a)-(a1) (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).

We initially note Defendant does not challenge the trial court's determination that Sgt. Fowler qualifies as a DRE. As to the impairing effects of the substances found in Defendant's blood, Sgt. Fowler categorized the various drugs identified in the Blood Report into three categories: central nervous system depressants, narcotic analgesics, and cannabis. Based on her training and experience as a DRE, Sgt. Fowler then described how there are certain effects or symptoms associated with each category. After talking with Trooper Depoyster and reviewing his DWIR form, Sgt. Fowler testified that, in her opinion, Defendant "was impaired on a central nervous system depressant and also on a narcotic analgesic." Importantly, Sgt. Fowler testified that she could not determine whether Defendant was impaired based on the levels of the various

drugs in the Blood Report; rather, she stated that she compares the signs and symptoms of impairment described in the DWIR form to corroborate drug categories identified in the Blood Report. Therefore, the trial court did not abuse its discretion by allowing Sgt. Fowler's testimony on this point. *See id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 702(a1)(2) (allowing a qualified DRE to give an opinion as to whether "a person was under the influence of one or more impairing substances").

As for her "reconstruction and validation" of the SFSTs performed by Trooper Depoyster, Defendant claims Sgt. Fowler's "evaluation of [Trooper Depoyster's SFSTs] was not reliable." However, we note Rule 702 explicitly allows Trooper Depoyster to testify to the results of a HGN test because he had "successfully completed training in HGN." *Id.* § 8C-1, Rule 702(a1)(1); *see also State v. Fincher*, ___ N.C. App. ___, ___, 814 S.E.2d 606, 609-10 (2018). Therefore, Sgt. Fowler's testimony on this point, even assuming *arguendo* it was error, was not prejudicial because Trooper Depoyster's testimony was essentially the same and constituted competent evidence. *See State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) ("[E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial." (citations omitted)).

B. Sherwood's Testimony

[4] Defendant contends the trial court erred by finding that Sherwood was an expert in "forensic toxicology" and by allowing Sherwood to testify that Delta-9 THC was "active" and "having an effect on [Defendant's] body."

However, the trial court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376. Here, Sherwood testified that she has a bachelor's degree in biology, approximately 19 years of experience in analyzing blood work, and completed a graduate course in forensic toxicology that discussed various drug classifications. Based on this testimony, the trial court did not abuse its discretion by finding Sherwood was an expert in toxicology and forensic analysis. *See id.*; *see also State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985) ("Ordinarily whether a witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a *complete lack of evidence* to support his ruling." (emphasis added) (citation omitted)).

As for Defendant's argument that the trial court erred by allowing Sherwood to testify that Delta-9 THC was "active" and "having an effect on [Defendant's] body[,]" we note Sherwood simply clarified that the

term "active" means a substance "has an effect on the body." Sherwood, however, did not testify that any of the substances identified in the Blood Report were, in fact, having an *impairing* effect on Defendant's body. Specifically, Sherwood testified she could not say affirmatively whether any of the substances in Defendant's blood were having an impairing effect on Defendant or when Defendant had last taken any of these drugs. Therefore, the trial court did not abuse its discretion by allowing Sherwood's testimony. *See Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

C. Prejudice

Even assuming the trial court erred by allowing Sgt. Fowler's and Sherwood's challenged testimony, we conclude Defendant has failed to meet her burden that the admission of the evidence was prejudicial in this case. *See Wilkerson*, 363 N.C. at 415, 683 S.E.2d at 194 (citations omitted); *see also State v. Cotton*, 329 N.C. 764, 767, 407 S.E.2d 514, 517 (1991) (recognizing the burden of establishing prejudicial error is on the defendant). To show prejudicial error, a defendant must show that "there is a *reasonable possibility* that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2017) (emphasis added). "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. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citations omitted); *see also State v. Taylor*, 165 N.C. App. 750, 758, 600 S.E.2d 483, 489 (2004) (holding the erroneous admission of the State's expert witness's testimony regarding a retrograde extrapolation analysis was not prejudicial where there was other strong evidence of the defendant's impairment).

Here, even excluding testimony of the State's experts, ample evidence existed that Defendant was impaired at the time of her arrest. Specifically, the evidence tended to show as follows: Defendant was reportedly driving erratically on Interstate 40 and subsequently hit a parked car. After being stopped, Defendant "was very unstable on her feet[,]" could not stand or walk well, and had to support herself multiple times on multiple vehicles to avoid falling. Both Deputy Ray and Trooper Depoyster testified that they believed Defendant was impaired. Further, Defendant could not complete the three SFSTs administered by Trooper Depoyster and showed multiple indicators suggestive of impairment on all three tests. Defendant also admitted to taking multiple drugs and smoking marijuana recently, and a blood test revealed

five different types of drugs in her system. As in *Taylor*, we hold that "even if the admission of [the State's experts'] testimony was error, the error was not prejudicial." *Id.* at 758, 600 S.E.2d at 489.

Conclusion

Accordingly, for the foregoing reasons, we find no error in Defendant's trial for Impaired Driving.

NO ERROR.

Judges STROUD and BROOK concur.

STATE OF NORTH CAROLINA
v.
ANTE NEDLKO PAVKOVIC, Defendant

No. COA19-126

Filed 17 September 2019

1. Appeal and Error—nonjurisdictional appellate rules—violations—substantial or gross—sanctions under Rules 25 and 34

On appeal from a conviction for resisting a police officer, because the appellant's brief contained numerous "substantial and gross" violations of Appellate Rules 26 and 28 (the brief was single-spaced, lacked a proper table of authorities, lacked any citations to the record, and failed to meet many other briefing requirements), the Court of Appeals sanctioned appellant's counsel under Appellate Rules 25(b) and 34(b) by ordering her to pay double the court-imposed costs of the appeal. Nevertheless, counsel's noncompliance with the Appellate Rules did not warrant dismissal of the appeal.

2. Appeal and Error—preservation of issues—constitutional challenge—failure to raise at trial

Where defendant was convicted of resisting a police officer, who arrested him for violating a city noise ordinance by yelling into a microphone at an anti-abortion event held outside an abortion clinic, defendant failed to preserve three constitutional arguments for appellate review (that his arrest was illegal because law enforcement lacked reasonable suspicion to stop him under the Fourth Amendment, that the noise ordinance was facially unconstitutional,

and that a condition of his probation banning him from coming within 1,500 feet of the abortion clinic violated the First Amendment) because he failed to raise them at trial.

3. Probation and Parole—condition of probation—banning defendant from abortion clinic—reasonable relationship to offense during anti-abortion protest

Where defendant was convicted of resisting a police officer, who arrested him for violating a city noise ordinance by yelling into a microphone at an anti-abortion event held outside an abortion clinic, the trial court did not abuse its discretion by imposing a condition of probation banning defendant from coming within 1,500 feet of the abortion clinic. Not only did defendant's argument that the court could only ban him from the clinic to protect an identified victim lack any legal basis, but also the condition bore a reasonable relationship to defendant's offense because he violated the noise ordinance at that clinic.

4. Evidence—admissibility—testimony regarding noise meter reading—proper foundation laid

At defendant's trial for resisting a police officer, who arrested him for violating a city noise ordinance by yelling into a microphone at an anti-abortion event held outside an abortion clinic, the trial court did not abuse its discretion by admitting the officer's testimony about readings from the noise meter used to measure defendant's volume at the event. Where the prosecutor asked the officer whether the noise meter had been approved by the American National Standards Institute (ANSI)—a requirement under the ordinance—and where the officer replied that a "national organization" had approved the meter, the trial court could have rationally inferred that the officer was referring to ANSI.

5. Cities and Towns—noise ordinance—interpretation—plain meaning—"operate" sound amplification equipment

At defendant's trial for resisting a police officer, who arrested him for violating a city noise ordinance at an anti-abortion event held outside an abortion clinic, the trial court properly concluded that defendant was "operating or allowing the operation of any sound amplification equipment" under the ordinance (based on a plain reading of the word "operate") by yelling into a microphone at the event.

6. Police Officers—resisting a police officer—refusal to provide identification at anti-abortion event

Where defendant violated a city noise ordinance by yelling into a microphone at an anti-abortion event held outside an abortion clinic, defendant was properly convicted of resisting a police officer by repeatedly refusing to provide his identification information to police during a lawful stop. Defendant hindered the police from issuing him a citation and therefore hindered the police from discharging their duty to enforce the noise ordinance at the event.

Judge BERGER concurring by separate opinion.

Appeal by defendant from final judgment entered 9 May 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Bell Law Firm, by Hannah R. Bell, for defendant-appellant.

ARROWOOD, Judge.

In this appeal, defendant raises multiple issues relating to: (1) the constitutionality of a Charlotte noise ordinance, of his arrest, and of his probation sentence; and (2) alleged errors by the trial court in interpreting the noise ordinance, admitting certain evidence, and finding he resisted an officer. For the reasons set forth below, we affirm.

I. Background

On 27 May 2017, Ante Nedlko Pavkovic ("defendant") was speaking at an anti-abortion event held outside an abortion clinic located at 3220 Latrobe Drive, Charlotte, North Carolina ("the abortion clinic"). Charlotte-Mecklenburg Police Department ("CMPD") officers testified that they observed defendant standing at a table yelling into a microphone. CMPD Officer James Gilliland, testified that on the table was the amplifier or controls for the speaker to which the microphone transmitted, and defendant "was the only one on the microphone." Using a department-issued 3M™ sound meter ("the noise meter"), CMPD officers observed "sustained readings" over eighty decibels, with occasional "spikes" up to eighty-four decibels. The officers alerted CMPD Sergeant B.K. Smith, who was also there to help monitor the event, of

the violation. They then wrote a citation to the permit holder for the event, David Jordan.

Officers then approached defendant, informed him of the violation, and asked for his identification so that they could issue a citation to him as well. Officer Gilliland twice asked defendant for his identification, but defendant refused both requests. Sergeant Smith then asked defendant three times to present his identification, with defendant refusing each time. After defendant's fifth refusal to present his identification, he attempted to argue that the officers could only cite the permit holder for any noise violations. After approximately one minute of argument, Sergeant Smith told Officer Graham to arrest defendant. As Officer Graham began handcuffing defendant, he stated that his identification was in his car, not on his person. CMPD charged defendant with violating Charlotte Ordinance § 15-64 ("the noise ordinance"), and resisting an officer by refusing to provide his identifying information to the CMPD officers.

On 5 September 2018, sitting without a jury, the Honorable Judge Hugh B. Lewis concluded that defendant was guilty of both charges, but dismissed the charge of violating the noise ordinance. The court noted that the City of Charlotte ("the City") had discretion to decide which enforcement penalties it would levy against a violator of the noise ordinance, but that the City failed to do so. The trial court thus found the magistrate's order for defendant's noise ordinance violation "defective," because the State failed to clearly express which enforcement penalty it would levy against the defendant. Due to the defective order, the trial court dismissed the noise ordinance violation and concluded it would "not take any further action, *other than saying the defendant violated the ordinance*[.]" (emphasis added).

The court convicted defendant of resisting an officer, and sentenced him to forty-five days imprisonment, and imposed a fine of $200.00. The sentence was suspended, and defendant was placed on supervised probation for twenty-four months. As a condition of probation, defendant was restrained from being within 1500 feet of the abortion clinic at which he had been protesting.

Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant argues (1) that CMPD had no reasonable suspicion to arrest him; (2) that the noise ordinance is facially unconstitutional; (3) that the Superior Court erred in allowing the meter used to

measure defendant's volume to be admitted as evidence; (4) that the Superior Court erred in restraining defendant from being within 1500 feet of the abortion clinic for the term of his probation; and (5) that the Superior Court erred in concluding that defendant was "operating or allowing the operation of any sound amplification equipment" under the noise ordinance. To the extent that the first three arguments raise constitutional issues, we address them together.

A. Standard of Review

"When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citing *State v. Lazaro*, 190 N.C. App. 670, 670-71, 660 S.E.2d 618, 619 (2008)). "The well-established rule is that findings of fact made by the court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them, although the evidence might have supported findings to the contrary." *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979) (citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' " *State v. Evans*, 251 N.C. App. 610, 613, 795 S.E.2d 444, 448 (2017) (quoting *Hoover v. Hoover*, 248 N.C. App. 173, 175, 788 S.E.2d 615, 616 (2016)).

B. Rules of Appellate Procedure Violations

[1] Defendant's brief contains numerous violations of our Rules of Appellate Procedure, including violations of Rule 26(g), Rule 28(b)(6), Rule 28(e), and Rule 28(g)(2).

Defendant's brief is single spaced. Rule 26(g) requires appellate briefs to be double spaced. N.C.R. App. P. Rule 26(g) (2019). Rule 26(g), requiring parties double-space their briefs, "facilitates the reading and comprehension of large numbers of legal documents by members of the Court and staff." *State v. Riley*, 167 N.C. App. 346, 347-48, 605 S.E.2d 212, 214 (2004). Rule 26(g) is plain on its face and a cursory reading of the Appellate Rules by counsel would have avoided such a blatant violation.

Additionally, the brief fails to contain a proper table of authorities, fails to support its factual assertions with any reference to the Record or Transcript, and fails to properly arrange the argument consistent with the briefing requirements, all in violation of the provisions of Rule 28 of the Rules of Appellate Procedure. N.C.R. App. P. Rule 28 (2019).

Finally, while the brief complies with the word limits set forth in the Rules, the declaration contained in the brief is deficient in that, while it attests compliance, the Court was required to conduct its own analysis of the documents to ascertain that the number of words was within the limits of Rule 28(j).

1. Noncompliance

North Carolina Rules of Appellate Procedure 25(b) provides that an appellate court "may, on its own initiative . . . impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these rules." N.C.R. App. P. 25(b) (2019). Sanctions allowable under Rule 25(b) are "of the type and in the manner prescribed by Rule 34 for frivolous appeals," *id.*, which include dismissal, single or double costs, "damages occasioned by delay," or "any other sanction deemed just and proper." N.C.R. App. P. 34(b) (2019).

"The Rules [of Appellate Procedure] are mandatory, and serve particular purposes[.]" *Riley*, 167 N.C. App. at 347, 605 S.E.2d at 214. If a court determines that "a party fails to comply with one or more nonjurisdictional appellate rules," and that "noncompliance is substantial or gross under Rules 25 and 34 . . . [the court] should then determine which, if any, sanction under Rule 34(b) should be imposed." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008).

While defendant's violations of Rules 26, 28(b), and 28(e) are substantial and gross and impaired this Court's ability to discern the merits of defendant's arguments, the noncompliance is not enough to warrant dismissal of his appeal. *See Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366 ("[O]nly in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate."). Nevertheless, considering both the extent to which "the noncompliance impair[ed] the court's task of review" and "the number of rules violated," defendant's noncompliance with the rules is "substantial or gross under Rules 25 and 34." *Id.* at 200-201, 657 S.E.2d at 366-67. As such, this Court will determine which sanctions under Rule 34(b) should be imposed.

2. Sanctions

Given defendant's numerous violations of the Rules—some, if not most, of which could have been avoided by an even cursory reading of the Rules—we hereby sanction counsel for defendant. Counsel is ordered to personally pay double the court-imposed costs of this appeal,

including all costs of printing the briefs and records in this matter within 30 days of the date this Opinion is certified.

C. Constitutional Challenges

[2] Having determined that the rule violations do not merit dismissal, we now consider the merits of defendant's arguments.

Defendant asserts three arguments consisting of constitutional challenges. Defendant argues (1) that CMPD had no reasonable suspicion to stop him, and by extension, no authority to arrest him; (2) that the noise ordinance is facially unconstitutional; and (3) that the probation requirement banning defendant from coming within 1500 feet of the abortion clinic violates the First Amendment. We address each of these arguments in turn.

1. Reasonable Suspicion to Stop Defendant

Defendant first argues CMPD did not have reasonable suspicion to stop him, thereby rendering his subsequent arrest for resisting an officer illegal. Though defendant does not expressly refer to the constitutionality of the stop, the argument that CMPD lacked reasonable suspicion to effect a stop is the standard for Fourth Amendment challenges. *See, e.g.*, *State v. Barnard*, 184 N.C. App. 25, 29, 645 S.E.2d 780, 783 (2007) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 20 L.Ed.2d 889, 906 (1968)). Defendant did not raise this argument at trial, thus failing to preserve the issue for appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). Accordingly, this Court will not address it.

Alternatively, defendant argues there was "no reason to stop" defendant because the trial court dismissed defendant's noise-ordinance-violation charge. In support of his argument, defendant contends because "the record is silent as to the reason for dismissal, this Court cannot assume why the case was dismissed." Rather, defendant asserts this Court "must find that there was no noise ordinance violation," which would in turn negate any reason to stop defendant in the first place.

In addition to defendant failing to cite any statute or precedent to support this claim, defendant also misstates the facts of the dismissal. The trial court expressly stated it found "[defendant] is in violation of the ordinance." However, pursuant to the ordinance, the particular punishment for violating the ordinance was left to the City's discretion. Charlotte, N.C., Municipal Code § 15-64 (2018). Unable to ascertain in

what way the City had exercised its discretion, the trial court decided it "[would] not take any further action, other than saying the defendant violated the ordinance[.]" Thus, the charge was dismissed because it was unclear which penalty the City chose to levy against defendant, not because defendant had not violated the ordinance. We therefore reject defendant's argument that dismissing the charge meant "that there was no noise ordinance violation."

2. Facial Unconstitutionality

Defendant next argues that the noise ordinance is facially unconstitutional because it vests CMPD with "unbridled discretion" to grant or deny permits. Once again defendant did not raise this argument at trial, so this Court will not address it. *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607.

3. First Amendment Challenge to Ban from Clinic

Finally, defendant argues banning him from being within 1500 feet of the abortion clinic as a condition of his probation violates his First Amendment right to free speech. As with his other constitutional arguments, defendant failed to raise this issue at trial. Failure to challenge a sentence at trial is not always fatal, however, because our legislature has preserved for "appellate review even though no objection, exception or motion has been made in the trial division," allegations that "[t]he 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." N.C. Gen. Stat. § 15A-1446(d)(18) (2017). However, our State's Supreme Court has held that a defendant cannot preserve a constitutional argument using paragraph (d)(18), "even when a sentencing issue is intertwined with a constitutional issue." *State v. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018). Therefore, to the extent that defendant grounds this argument in a First Amendment challenge, defendant failed to properly preserve this argument, and we will not address it.

D. Court's Discretion to Impose Conditions of Probation

[3] In addition to the constitutional argument, defendant also argues that a court may not, as a condition of probation, "ban[a defendant] from a premises" unless it is "protecting an identified victim." Accordingly, he argues because the State did not identify a victim at sentencing, the trial court could not ban defendant from the abortion clinic. In support of his argument, defendant cites statutory provisions regarding domestic protection orders, N.C. Gen. Stat. § 50B-3 (2017); trespass relief, N.C. Gen.

Stat. §§ 14-159.11-13 (2017); and larceny relief, N.C. Gen. Stat. § 14-72 (2017). None of these statues are relevant to the facts of this case.

This Court reviews a challenge to a trial court's decision to impose a condition of probation for abuse of discretion. *State v. Allah*, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013).

Defendant offered three statutory authorities which provide examples of restraining orders involving a "victim," but has presented no precedent, regulation, statute, or any other reason to interpret these statutes to restrict trial courts' statutorily granted authority to impose probation conditions in situations such as this. In fact, there is precedent contradicting defendant's assertion a court may not "ban[a defendant] from a premises" unless it is "protecting an identified victim." In *Harrington*, this Court upheld a trial court order banning the defendant, during the hours of 8:00 p.m. to 6:00 a.m., from premises selling or serving alcohol. *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). The ban was a condition of the defendant's probationary sentence imposed as punishment for a DWI. *Id.* Similar to the present case, there was no "identifiable victim" in *Harrington*; no one was harmed by the defendant's violation of the law. Yet, we upheld the condition. *Id.*

More importantly, "[u]nder N.C. Gen. Stat. § 15A-1343(b1), the trial court may impose any conditions on probation that it determines 'to be reasonably related to [defendant's] rehabilitation.' " *State v. Johnston*, 123 N.C. App. 292, 304, 473 S.E.2d 25, 33 (1996). "The trial court is accorded 'substantial discretion' in imposing conditions under this section." *Id.* at 305, 473 S.E.2d at 33 (quoting *State v. Harrington*, 78 N.C. App. at 48, 336 S.E.2d at 857 (1985)). Its discretion is not boundless, however, but is limited to "whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant's exposure to crime, and whether the condition assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911 (citing *State v. Cooper*, 304 N.C. 180, 183, 282 S.E.2d 436, 438 (1981)).

Here, the condition that defendant not come within 1500 feet of the abortion clinic is reasonably related to the offense because defendant violated the noise ordinance while speaking in protest outside the clinic. The condition also tends to reduce defendant's opportunity to violate the ordinance again, especially given that defendant regularly speaks at abortion protests that take place at or near that particular clinic. Lastly, the condition assists in defendant's rehabilitation by discouraging future misconduct. We therefore reject this argument.

E. Admissibility of the Noise-Meter Reading

[4] Defendant next argues the trial court erred in admitting, over defendant's objection, Officer Gilliland's testimony that defendant exceeded the volume allowed by the ordinance. Defendant contends it should not have been admitted because Officer Gilliland based his testimony on readings from a noise meter that defendant argues "did not have the characteristics established by the American National Standards Institute."

Regarding sound measurements, the noise ordinance provides "the noise shall be measured on the A-weighting scale on a sound level meter of standard design and quality having characteristics established by the American National Standards Institute." Charlotte, N.C., Code § 15-62 (2018).

At trial, defendant objected that the State had not laid proper foundation establishing the noise meter's characteristics conformed with those established by the American National Standards Institute (ANSI). Where a defendant objects to the introduction of evidence because "the State had not laid a proper foundation that they [sic] complied with the statutory procedures" for obtaining that evidence, "defendant open[s] the door for testimony" that the State *did* comply with those statutory procedures. *State v. Berry*, 143 N.C. App. 187, 193-94, 546 S.E.2d 145, 151 (2001).

Here, following defendant's objection, the trial court instructed counsel for the State to "ask a few additional foundation questions[.]" Counsel then asked whether the noise meter "has the characteristics established by the [ANSI]." In response, Officer Gilliland testified that the noise meter is "approved by the department" and is "a department-owned device," but did not explicitly say it met the characteristics established by the ANSI. When pressed again about whether the noise meter "meet[s] the standards set by any national organizations though," Officer Gilliland testified it has "a certificate of approval that it is accepted approved [sic]." Defendant objected after this testimony, arguing the State still had not laid proper foundation on the meter. The trial court overruled this second objection.

"On appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006) (citing *Williams v. Bell*, 167 N.C. App. 674, 678, 606 S.E.2d

436, 439 (2005)) (internal quotation marks omitted). Here, the trial court decided to admit the evidence over defendant's second objection after it had already required the prosecution to lay additional foundation. In the course of laying foundation, the prosecution elicited testimony that CMPD's noise meter was both approved by the police department and had a certificate of approval from a national organization. Although unclear whether the national organization that issued approval was the ANSI, the trial court's decision was not "so arbitrary that it could not have been the result of a reasoned decision." The trial court could rationally infer, from the context of the prosecution's questions, that Officer Graham's response was addressing both whether the noise meter was approved by any national organization and the ANSI specifically. Thus, we hold the trial court did not err in admitting evidence of the noise meter readings.

Defendant further argues that "if the alleged violation was based on a faulty decibel reading, then police never had reasonable suspicion to stop" him, essentially asserting the very basis for his convictions was invalid. Defendant's argument rests on the assumption the noise meter was faulty, without providing any evidence of such an assertion. Although defendant objected at trial to whether the State laid a proper foundation, he made no challenge to the sufficiency of the evidence presented by the State, nor offered any evidence of his own. A defendant may only challenge the sufficiency of the evidence on appeal if he had moved to dismiss at the close of the State's evidence, the close of all evidence, or both. N.C.R. App. P. 10(a)(3) (2019). Defendant made no such motions at trial, and thus failed to preserve this issue for appeal. This Court will therefore not address it.

We note that intertwined in defendant's evidentiary challenge is also a constitutional argument regarding whether the police had reasonable suspicion to stop defendant. However, defendant failed to preserve this argument because he did not raise any objection at trial "referenc[ing] . . . the Fourth Amendment, . . . privacy, or reasonableness, [and therefore] it is 'not apparent from the context,' N.C.R. App. P. 10(a)(1), that defense counsel intended to raise a constitutional issue." *State v. Bursell*, 372 N.C. 196, 200, 827 S.E.2d 302, 305 (2019) (citation in original). Defendant "thereby waiv[ed] the ability to raise th[is] issue on appeal." *Id.*

F. "Operating or Allowing Operation"

[5] Defendant's sole remaining argument is that the trial court erred in concluding that speaking into a microphone constitutes "operating . . .

sound amplification equipment" under the noise ordinance. Interpreting statutes is a question of law, reviewed *de novo*. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012). The noise ordinance states, in pertinent part:

> (a) It shall be unlawful to:
>
> . . . .
>
> (3) Operate or allow the operation of any sound amplification equipment in the public right-of-way, including streets or sidewalks . . . (ii) so as to produce sounds registering more than 75 db(A) ten feet or more from any electromechanical speaker . . . . In addition to the person operating or allowing the operation of sound amplification equipment in violation of this subsection, the person to whom the permit was issued must be present at the location and during the times permitted and shall be liable for any and all violations.

Charlotte, N.C., Code § 15-64. The Superior Court concluded that "[t]he defendant in this case is shown in a video speaking into a microphone which exhibits loud sound which, as testified by an officer, spiked at 84 decibels. *In the plain English*, the individual was operating that sound equipment, therefore he is in violation of the ordinance." (emphasis added). Though defendant did not specifically allege that the ordinance is ambiguous, he notes the ordinance is silent as to what defines an "operator." While the noise ordinance likely does not define the term "operator" because it does not *use* the term "operator"—instead referring to a "person operating or allowing the operation of sound amplification equipment"—we note that the ordinance does not define "operating or allowing the operation," either.

Defendant argues he was not "operating" because (1) there was no evidence that he had volume control on his wireless microphone; (2) there was no evidence he "had actual physical control over any sound equipment that could control the volume;" and (3) there was no evidence that he owned the equipment.[1] Defendant thus restricts "operating or allowing the operation of sound equipment" to either controlling the volume or holding title to the equipment.

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1. To the extent this is also an insufficiency of the evidence issue, we note that defendant failed to challenge the sufficiency of the evidence at trial. Accordingly, any such argument is waived. N.C.R. App. P. 10(a)(3).

We find defendant's interpretations unduly narrow and instead will use the plain meaning of "operate" to determine the noise ordinance's breadth. Definitions for "operate"—as a transitive verb, how it is used in the statute—include "to cause to function." "Operate." Merriam-Webster Online Dictionary. 2019. https://www.merriam-webster.com/dictionary/operate (26 Aug. 2019). The "function" of a microphone connected to a speaker is to receive sound from the person or thing inputting sound, and output amplified sound via the speaker. An electromechanical speaker will not produce any sound without such an input, regardless of how high that speaker's volume setting is. Hence, volume control is not, per se, necessary to "operate . . . sound amplification equipment," but an "input" is "necessarily implied" for sound amplification equipment to ever violate the noise ordinance. Therefore "operating or allowing the operation of sound amplification equipment" necessarily includes inputting the sound which the equipment amplifies. *See Iredell Cty. Bd. of Educ. v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952) (Statutes' "meanings are to be found in what they necessarily imply as much as in what they specifically express.").

Here, defendant input sound by "speaking into the microphone," which the connected speaker output at a volume over the limit prescribed by the noise ordinance. As the trial court concluded, this act was "[i]n the plain English, . . . operating that sound equipment." We therefore affirm the trial court's conclusion that the defendant was operating the sound equipment in violation of the noise ordinance.

Furthermore, even if we were to accept that "operating or allowing the operation of sound amplification equipment" requires control over the amplifier's volume, the trial court had sufficient evidence to determine that defendant was operating the equipment. At trial, CMPD officers testified that while the volume was exceeding the limit of the ordinance, defendant was standing at a table on which sat the controls for the amplifier. This testimony was uncontradicted at trial, and therefore is competent evidence upon which the trial court could find that defendant had control over the sound amplification equipment's volume. This finding could in turn support the trial court's conclusion that defendant was operating the sound amplification equipment, even under defendant's narrow interpretation.

Defendant further requests that this Court "find that [the noise] ordinance does not even apply to a guest speaker." We reject this argument for two reasons. First, defendant argues that applying the ordinance to guest speakers erodes the First Amendment. To the extent that this raises a Constitutional argument "not raised and passed upon at trial[,]"

defendant may not now argue it on appeal. *Lloyd*, 354 N.C. at 86-87, 552 S.E.2d at 607. Second, to accept this argument would be to "add to or subtract [an exception] from the language of the" ordinance, which our State's Supreme Court has held courts may not do. *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950). Defendant's narrow reading requires us to pretend that there are no circumstances in which one who is—or claims to be—a "guest speaker" could not also be an operator. If Charlotte's City Council had intended to carve out a specific exception for "guest speakers," it would have done so.

[6] Given that defendant was "operating" the amplified sound equipment above the 75 db(A) permitted under the ordinance, we also agree with the trial court's conclusion that defendant resisted an officer by refusing CMPD officers' requests to provide his identification. Specifically, defendant was found guilty of violating N.C. Gen. Stat. § 14-223, which provides "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2017). In *State v. Friend*, we interpreted "resistance, delay, or obstruction" under N.C. Gen. Stat. § 14-223 to include "the failure to provide information about one's identity during a lawful stop" when such failure hinders the police from discharging their duties. 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014). There, we held the defendant guilty of resisting an officer because his refusal to provide identification hindered the police officer from completing a traffic citation. *Id.* at 493, 768 S.E.2d at 148.

Here, CMPD officers were present on the scene to "keep the peace," which included "enforc[ing] any ordinances or state laws that may be violated." Upon registering defendant was violating the noise ordinance, they requested defendant provide identification in order to issue him a citation. Defendant's subsequent refusal to provide identification hindered the police from issuing defendant a citation, and thereby amounted to resisting an officer. *See id.* Thus, we hold the trial court did not err in finding defendant guilty of resisting an officer.

III. Conclusion

For the foregoing reasons, we affirm the trial court's judgment and sentence. For violation of the Rules of Appellate Procedure, we sanction counsel for defendant personally by directing counsel for defendant to pay double the court-imposed costs of this appeal, including, but not limited to, the costs for printing of the records and briefs within 30 days of the date this Opinion is certified.

AFFIRMED.

Judge COLLINS concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur in the result reached by the majority.

That we may agree with the cause does not grant us license to ignore the law. That we may disagree with the cause does not provide us a privilege to punish arbitrarily. Justice resides in the consistent enforcement and application of the law. While Defendant may argue that he has been treated unjustly given the peaceful nature of his actions when compared to violent and destructive riots which have not resulted in criminal convictions, we are not at liberty to put social justice above the letter of the law.

This case is not about abortion, a pro-life demonstration, or the First Amendment. This case is about a defendant who hindered or delayed an officer in the performance of that officer's duties. No matter the importance an individual assigns to his or her cause, there is an obligation to comply with a law enforcement officer's lawful request. *See State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014) ("failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of N.C. Gen. Stat. § 14–223.").

Here, Defendant was lawfully stopped for a noise ordinance violation. When officers requested identifying information from Defendant to issue a citation, he refused at least five times. Even though Defendant did not have his identification on him, he was not prevented from providing his identifying information. Further, it is irrelevant that Defendant provided the requested information after being arrested. By his refusal, Defendant resisted and delayed an officer in the performance of his duties. While Defendant has a constitutionally protected right to argue the justness of his cause in the public forum, he is not exempt from his obligation to abide by the law.

STATE OF NORTH CAROLINA
v.
JEFFREY LYNN STEPHENSON, DEFENDANT

No. COA19-98

Filed 17 September 2019

1. Larceny—of motor vehicle parts—cost to repair—aggregation—indictment—sufficiency

In a prosecution for larceny of motor vehicle parts, the indictment was facially invalid and therefore insufficient to confer subject matter jurisdiction on the trial court where it alleged that defendant stole sixty fuel injectors with an "aggregate value of $10,500" from an automotive parts business. Based on the plain language of N.C.G.S. § 14-72.8—which criminalizes larceny of motor vehicle parts as a felony if the cost of repairing the vehicle is at least $1,000—the repair costs requirement refers to the cost of repairing a single vehicle, not the cost of repairing multiple vehicles in the aggregate or the value of stolen car parts where no actual vehicle was involved.

2. Evidence—hearsay—testimony regarding investigation—not offered to prove the truth of the matter—no plain error

In a prosecution for larceny of motor vehicle parts and felony possession of stolen goods, where defendant stole sixty fuel injectors from an automotive parts business, the trial court did not commit plain error by admitting testimony from the detective on the case, who stated that an employee of another automotive parts company told him that defendant had sold several fuel injectors to the company. This testimony was not hearsay because it was offered to describe the detective's investigation rather than to prove the matter asserted (that defendant stole the fuel injectors). Moreover, based on other evidence of defendant's guilt, it was unlikely that the jury would have reached a different verdict had the testimony been excluded.

3. Possession of Stolen Property—jury instructions—value of goods stolen—no plain error

In a prosecution for felony possession of stolen goods, where defendant stole a total of sixty fuel injectors from an automotive parts business on two separate occasions, the trial court did not commit plain error by declining to instruct the jury that defendant needed to possess more than $1,000 worth of stolen goods at a

single moment in time to be found guilty. Based on evidence that defendant could carry seven injectors totaling more than $1,000 at one time, the jury would have likely reached the same result with or without the omitted instruction.

4. Possession of Stolen Property—simultaneous larceny conviction—based on same stolen goods—moot

Where defendant stole sixty fuel injectors from an automotive parts business, his argument challenging his simultaneous convictions for larceny of motor vehicle parts and possession of stolen goods based on the same property was rendered moot because the larceny conviction was vacated on appeal.

5. Damages and Remedies—restitution—notice—amount ordered—miscalculation

Where the trial court ordered defendant to pay restitution for stealing sixty fuel injectors from an automotive parts business, the State was not required to give defendant notice of a document containing repair estimates—which the trial court used to calculate the restitution amount—where the State was not required to provide the document in the first place. Moreover, the evidence supported the restitution amount, and therefore defendant's argument that he was ordered to pay for more than what he stole was meritless. However, the restitution order was still remanded to correct a clerical error in the court's calculation.

Appeal by defendant from judgments entered 22 February 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Shawn Maier, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock for defendant-appellant.

YOUNG, Judge.

The trial court lacked jurisdiction to try Stephenson for larceny of motor vehicle parts because the indictment failed to allege the cost of repairing a single motor vehicle. Therefore, we vacate the judgment and we need not address appellant's other arguments as to larceny of motor vehicle parts. The trial court did not err in admitting Detective

Pierce's testimony, nor did it err in instructing the jury. The trial court also did not err in admitting a document to support the restitution order. Furthermore, the trial court did not err in what it ordered Stephenson to pay in the restitution order, but did have a clerical error which should be corrected on remand. Therefore, we affirm in part, dismiss in part, vacate in part, and remand.

I. Factual and Procedural History

In the Spring of 2016, employees at Green's Auto Salvage ("Green's") noticed that fuel injectors and other parts were disappearing from working engines and that engines were being damaged. Green's is a family owned business started by Debbie Green Lassiter's ("Mrs. Lassiter") father. Mrs. Lassiter works at Green's, along with her husband Jeffrey Lin Lassiter ("Mr. Lassiter") and other employees. Mrs. Lassiter estimated that the fuel injectors had been removed from five to ten engines, possibly more. Each engine had six fuel injectors, and Green's sold the individual injectors for $175 each.

Mrs. Lassiter testified that there was a hole cut in the fence and tools appeared that did not belong to any of the salvage yard employees. Green's installed five motion-activated cameras. One camera's footage showed a man entering the salvage yard through the hole in the fence on two occasions. Jeffrey Lynn Stephenson ("Stephenson") admitted that it was him. On both occasions, Stephenson was seen with a backpack and a bucket. Green's installed another camera in an attempt to get the license plate number from a vehicle that had been parking near the salvage yard. However, the camera went missing and there was no further surveillance.

Green's provided the footage to the Wayne County Sheriff's Office and on 18 April 2016 reported to the office that approximately 60 fuel injectors had been seized and six engines had been damaged. After several months, the Wayne County Sheriff's Office received information from the Wilson County Sheriff's Office about a crime involving stolen fuel injectors.

The Wayne County Sheriff's Office contacted Stephenson, who admitted to being present at the salvage yard on the two nights when he was captured on surveillance. Stephenson admitted to the Wayne County Sheriff's Office that he stole twenty to thirty Caterpillar-brand fuel injectors in total from the salvage yard, eight to ten of which he stole on 12 April 2016. Stephenson sold the injectors to an individual in Virginia. To prevent his arrest, Stephenson contacted Mrs. Lassiter and offered between $1,500.00 and $2,000.00 if she would not press charges, and she declined.

On 3 July 2017, a Wayne County grand jury indicted Stephenson for larceny of motor vehicle parts, felony possession of stolen goods, injury to personal property, and first-degree trespass. On 20 February 2018, Stephenson pled guilty to the misdemeanors of injury to personal property and first-degree trespass.

After a jury trial on the two felonies, the jury found Stephenson guilty of larceny of motor vehicle parts and felony possession of stolen goods. The trial court imposed a sentence of six to seventeen months imprisonment for each of the two felonies, 45 days imprisonment for the injury to personal property charge, and thirty days imprisonment for the first-degree trespass charge. These sentences were suspended for thirty-six months of supervised probation. Stephenson was also ordered to pay restitution in the amount of $26,315. Stephenson filed notice of appeal on 22 January 2019.

II. Larceny of Motor Vehicle Parts

A. Standard of Review

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, 'and to give authority to the court to render a valid judgment.' " *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

[1] In his first argument, Stephenson contends that the trial court lacked subject-matter jurisdiction to try him for larceny of motor vehicle parts because the indictment failed to allege the cost of repairing any motor vehicle required by statute. We agree.

Stephenson was indicted for larceny of motor vehicle parts under N.C. Gen. Stat. § 14-72.8, which provides:

> Unless the conduct is covered under some other provision of law providing greater punishment, larceny of a motor vehicle part is a Class I felony if the cost of repairing the motor vehicle is one thousand dollars ($1,000) or more.

> For purposes of this section, the cost of repairing a motor vehicle means the cost of any replacement part and any additional costs necessary to install the replacement part in the motor vehicle.

N.C. Gen. Stat. § 14-72.8 (2017). Stephenson's indictment read:

> Jeffrey Lynn Stephenson unlawfully and willfully did feloniously steal, take and carry away approximately sixty (60) diesel injectors, a motor vehicle part and the personal property of Green's Auto Salvage, Inc., for which the cost of repairing the motor vehicle is $175.00 each or an aggregate value of $10,500 for all parts.

When this Court interprets a criminal statute, the statute "must be strictly construed with regard to the evil which it is intended to suppress . . . and interpreted to give effect to the legislative intent." *State v. Ferebee*, 137 N.C. App. 710, 715, 529 S.E.2d 686, 689 (2000) (internal quote omitted). In determining legislative intent, this Court first looks to the language of the statute, and if the language is "clear and unambiguous," it will apply the "plain meaning of the words." *State v. Lail*, 251 N.C. App. 463, 469, 795 S.E.2d 401, 407 (2016). If the statute is in any way ambiguous, this Court must apply the rule of lenity and "strictly construe the statute in favor of the defendant." *State v. Conway*, 194 N.C. App. 73, 79, 669 S.E.2d 40, 44 (2008).

Here, the plain language of N.C. Gen. Stat. § 14-72.8 demonstrates the General Assembly's express intent for the larceny described in the statute to constitute a felony "if the cost of repairing *the motor vehicle*" — including the "costs necessary to install the replacement part *in the motor vehicle*" — is $1000 or more. N.C. Gen. Stat. § 14-72.8 (emphasis added). Therefore, the statute's requirement of $1,000 in repair costs refers to the cost to repair a *single* vehicle, not the cost to repair multiple vehicles in the aggregate, nor the value of car parts stolen where *no* vehicle is involved. N.C. Gen. Stat. § 14-72.8 (2017).

The State contends that Stephenson was properly indicted on the charge at issue because the aggregate value for all parts Stephenson seized exceeded the statutory requirement of $1,000. Furthermore, the State concedes it could have proceeded solely on the value of the goods stolen sufficient to support a conviction for theft of property, as Stephenson admitted to seizing twenty to thirty fuel injectors, which the State established as having a value of $175 each.

Since a valid indictment would not support aggregation, nor the mere theft of car parts where no actual vehicle is damaged, this indictment

is invalid on its face. "Invalid indictments deprive the trial court of its jurisdiction." *State v. Culbertson*, __ N.C. App. __, __, 805 S.E.2d 511, 516 (2017). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). Upon review, in substituting our judgment for that of the trial court's, we conclude the indictment was facially invalid and therefore insufficient to confer subject-matter jurisdiction on the court. We vacate the judgment and conviction and remand to the trial court with instructions to arrest the judgment on this charge.

III. Testimonial Evidence

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial. . . may be made the basis of an issue on appeal when [it] . . . amount[s] to plain error." N.C. R. App. P. 10(a)(4). Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "Under the plain error rule, a defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

[2] In his second argument, Stephenson contends that the trial court plainly erred by admitting testimony regarding an unauthenticated document, the contents of which included inadmissible hearsay and violated Stephenson's confrontation rights. We disagree.

The trial court admitted testimony from Detective Scott Pierce ("Detective Pierce") regarding his conversations with an employee of Goldfarb and Associates ("Goldfarb"), an auto parts company in Maryland. Detective Pierce testified that the employee told him Stephenson sold auto parts to Goldfarb, and that the employee sent Detective Pierce purchase orders related to Stephenson's transactions. The log identified 147 fuel injectors among other parts purchased from Stephenson for $9,835.00. Detective Pierce took handwritten notes about the information he received as a part of his investigative file.

Despite Stephenson's contention, the testimony of Detective Pierce was not offered to prove that Stephenson stole anything; rather, it was offered to describe Detective Pierce's investigation pertaining to the

matter at issue. "[W]henever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997). Because the testimony offered by Detective Pierce was not offered to prove the truth of the matter asserted, it fell outside the definition of hearsay and we find no error in its admission. Furthermore, based on a totality of the evidence, it is unlikely that the jury would have reached a different verdict had the evidence not been admitted.

IV. Jury Instructions

A. Standard of Review

As provided above, an issue on appeal that was not preserved by objection at trial is reviewed for plain error. N.C.R. App. P. 10(a)(4). "Under the plain error rule, the 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." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

B. Analysis

[3] In his third argument, Stephenson contends the trial court plainly erred by failing to instruct the jury that for Stephenson to be guilty of felonious possession of stolen goods, he had to possess more than $1,000 worth of stolen goods at a single moment in time. We disagree.

Stephenson essentially argues that the trial court should have, *sua sponte*, instructed the jury as to the possession of $1,000 worth of stolen goods at a single moment in time. However, even if it was error to fail to instruct the jury in this case regarding possession of $1,000 worth of stolen goods at a single moment in time, such error was harmless. Stephenson testified to having removed up to thirty injectors from Green's on two occasions, with each weighing from seven to nine pounds. Stephenson admitted to having a bucket and a backpack with him at Green's. However, Stephenson also acknowledges that with the weight of the injectors it could not all have been stolen at once. Each injector was valued at $175. Since up to thirty injectors were removed in only two trips, and carrying only seven injectors at one time would total more than $1,000, it would not be unreasonable to believe that Stephenson was in possession of at least $1,000 worth of stolen goods at a single moment in time. Therefore, even if the trial court had instructed the jury accordingly, it is likely that the jury would have reached the same result. Therefore, the trial court did not err in its jury instructions.

V. Multiple Judgments

A. Standard of Review

"Whether multiple punishments were imposed contrary to legislative intent presents a question of law, reviewed *de novo* by this Court." *State v. Hendricksen*, 809 S.E.2d 391, 393, 2018 N.C App. LEXIS 34 (2018).

B. Analysis

[4] In his fourth argument, Stephenson contends that the trial court erred by entering judgment against Stephenson for both larceny and possession of stolen goods because the two convictions involved the same property. Because we have vacated the conviction for larceny of motor vehicle parts, we dismiss this argument.

"Our Supreme Court has held that the legislature did not intend to punish a defendant for possession of the same goods that he stole." *State v. Szucs*, 207 N.C. App. 694, 702-03, 701 S.E.2d 362, 368 (2010). "A trial court's judgment must be arrested in one of the two cases where a defendant has been convicted of both larceny and possession of the same stolen property." *State v. Spencer*, 187 N.C. App. 605, 612, 654 S.E.2d 69, 73 (2007). Here, we have vacated the conviction for larceny of motor vehicle parts and are only reviewing the conviction for felonious possession of stolen property. Therefore, we dismiss this argument for mootness.

VI. Restitution

A. Standard of Review

A trial court's award of restitution "must be supported by evidence adduced at trial or at sentencing . . . Nonetheless, the quantum of evidence needed to support a restitution award is not high." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). In cases where "there is specific testimony or documentation to support the award, the award will not be disturbed." *Id.* On appeal, this Court reviews *de novo* whether a restitution award is supported by evidence. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011).

"[We review alleged sentencing errors for] 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)).

B. Analysis

[5] In his last argument, Stephenson contends that the trial court erred by basing its restitution order on a document Stephenson had never seen. We disagree.

a. Notice

The document at issue is an estimate from Edward Truck Service, the company that Mrs. Lassiter contacted for an estimate of how much it would cost to repair an engine from which the injectors had been removed. The relevant portion of the restitution statute provides:

> The court may require that the victim or the victim's estate provide admissible evidence that documents the costs claimed by the victim or the victim's estate under this section. Any such documentation shall be shared with the defendant before the sentencing hearing.

N.C. Gen. Stat. § 15A-1340.35(b). The phrase "any such documentation" refers to evidence that the trial court "may require." Here, the trial court did not require Green's to provide documentation, but the State provided it anyway. As a result, the State was not required by statute to provide notice of the document to Stephenson.

Even if notice of the document had been required, Stephenson was not prejudiced because there was ample evidence to support the restitution amount before the trial court. "[T]he quantum of evidence needed to support a restitution award is not high." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). Mrs. Lassiter, who has thirty years of experience in valuing, buying, and selling trucks, truck parts, and engines, testified as to the value of the stolen parts. Although the State entered the Edward Truck Service estimate as an exhibit, it could have relied solely on Mrs. Lassiter's testimony to support the restitution amount. She testified that the cost to repair an engine was $2,963.16.

Since the State was not required to provide notice of the document to Stephenson, and since Stephenson was not prejudiced by not receiving notice, the trial court did not err in admitting the document that Stephenson had not seen.

b. Amount of Restitution

Stephenson further contends that the trial court erred by ordering him to pay for more items than he was convicted of stealing. We disagree.

The trial court entered restitution based on two separate charges: possession of stolen goods and injury to personal property. Stephenson stipulated to stealing 60 injectors. The trial court valued the injectors at $175 apiece, for a total of $10,500.

Stephenson also entered a guilty plea on count III of the indictment which stated that Stephenson "unlawfully and willfully did wantonly injure personal property, to wit: six (6) Cummins and Detroit Diesel Engines, the property of Green's Auto Salvage, Inc." The court, based on an invoice from Edward Truck Service, valued the cost of repair to one engine at $2,963.16. Since the State only sought restitution for five of the engines, the total value to repair the engines was $14,815.80. This is a grand total of $25,315.80 in restitution.

Stephenson's argument that he is being required to pay for more than he stole is without merit. He contends that he is being charged for 90 injectors, which is untrue. The supporting invoice shows restitution for the damage to the engines and for the replacement of the injectors in those engines, and Stephenson stipulates that he stole 60 injectors. The restitution order is supported by evidence and does not charge Stephenson with more than he should be charged. Therefore, the trial court did not err in the restitution order.

c. Miscalculation

The trial court erred in adding the amounts for the stolen injectors ($10,500) and the damaged engines ($14,815.80). The correct total is $25,315.80, not $26,315.80. The difference in the restitution amounts was a scrivener's error that should be corrected on remand. *See State v. Brooks*, 148 N.C. App. 191, 195, 557 S.E.2d 195, 197-98 (2001) (remand to trial court for correction of clerical error in sentencing proper) *disc. rev. denied*, 355 N.C. 287,560 S.E.2d 808 (2002).

AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and ZACHARY concur.

STATE v. WILLIAMS

[267 N.C. App. 485 (2019)]

STATE OF NORTH CAROLINA
v.
ASHLEIGH CORRIN WILLIAMS

No. COA18-1136

Filed 17 September 2019

Search and Seizure—search warrant—supporting affidavit—controlled drug purchase—personal knowledge of confidential informant

The trial court erred in a prosecution for drug-related offenses by denying defendant's motion to suppress evidence obtained pursuant to a search warrant, where the affidavit supporting the warrant application did not address the reliability of the confidential information's middleman, who actually made the controlled drug purchase from defendant. The allegations based upon the personal knowledge of the confidential informant—that she had purchased drugs from defendant in the past and that she believed defendant would only sell to the middleman at that time—were insufficient to establish probable cause for issuance of the search warrant.

Judge BRYANT dissenting.

Appeal by defendant from judgments entered 27 April 2018 by Judge James F. Ammons Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State.

Richard Croutharmel, for defendant-appellant.

STROUD, Judge.

Defendant appeals the denial of her motion to suppress and judgments for her drug-related convictions. We reverse the denial of defendant's motion to suppress and judgment and remand for a new trial.

I. Procedural Background

We briefly summarize the procedural background. On 20 April 2017, based upon a warrant application and affidavit by Agent Charles Melvin, the magistrate issued a search warrant for defendant's home, vehicles,

and person. Based upon the warrant, law enforcement searched defendant's home and found heroin. Defendant was then indicted for several drug-related offenses.

In March of 2018, defendant made a motion "to suppress all evidence collected pursuant to the search warrant[.]" Defendant raised arguments regarding the reliability of the informants, the lack of specificity of the property searched and seized, and a lack of probable cause; she also requested a *Franks* hearing[1] because she believed the affiant "made material misrepresentations to the judicial officer reviewing the search warrant application."

In her "Motion to Suppress and Request for *Franks* Hearing[,]" (original in all caps), defendant contended that Agent Melvin had "intentionally exaggerated" the past cooperation and reliability of the confidential informant, Ms. Smith. Defendant alleged Ms. Smith had done only one controlled drug buy for the Brunswick County Vice Narcotics Unit ("BCVN") prior to offering to buy heroin from a man known as Vaughn who would buy it from defendant because defendant would only sell to Vaughn.[2] Ms. Smith then participated in a controlled buy on 20 April 2017 equipped with a recording device, which showed that she picked up "an unknown black male, alleged to be Vaughn, and travel[ed] to an unknown destination" where Vaughn left the vehicle and returned "when the deal was complete." But the video did not show defendant or defendant's home, and Vaughn did not tell Ms. Smith he had gotten the heroin from defendant. Thus, defendant alleged the video does not corroborate Ms. Smith's allegations that she went to defendant's home

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1. "It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute probable cause anticipates a truthful showing of facts. *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 678 (1978). Truthful, as intended here, does not mean 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. Rather, truthful in this context means that the information put forth is believed or appropriately accepted by the affiant as true. Resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Franks* held that where a search warrant is issued on the basis of an affidavit containing false facts which are necessary to a finding of probable cause, the warrant is rendered void, and evidence obtained thereby is inadmissible if the defendant proves, by a preponderance of the evidence, that the facts were asserted either with knowledge of their falsity or with a reckless disregard for their truth." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citations, quotation marks, ellipses, and brackets omitted).

2. The warrant affidavit notes Vaughn is a nickname and does not provide his real name.

or that Vaughn received heroin from defendant. The motion included as exhibits the warrant affidavit, Ms. Smith's informant contract signed in January of 2017, and the search warrant.

At the beginning of the trial, the trial court heard the motion to suppress. The State noted that defendant had requested a *Franks* hearing, so "it's his burden to produce substantial evidence of a violation, at which point the State would need to respond." Defendant then called Agent Charles Melvin of the Brunswick County Sheriff's Office to testify in support of her motion to suppress. The warrant affidavit stated, "*In the past year* CS1 has worked with Agents and has provided correct and accurate information leading to the *arrests* of narcotics dealers." (Emphasis added). As to the "[i]n the past year" language, during his testimony, Agent Melvin acknowledged that he had "first dealt" with Ms. Smith in January of 2017, only a few months prior to the search of defendant, and she had done *one* controlled buy prior to the one from which defendant's arrest arose. As to the plural "*arrests* of narcotics dealers" language, Agent Melvin also admitted he knew the seller from the first controlled buy was "charged" but he did not know when that occurred or if she had been "arrested before April 20th[.]" (Emphasis added.)

After Agent Melvin's testimony, defendant's counsel and the State made arguments regarding the *Franks* issue, and the trial court denied the motion:

> All right. This matter coming on to be heard on defendant's motion to suppress a search warrant, a request for a *Franks* hearing, the Court has pretty much given a hearing on this. But after reviewing the motion to suppress, after reviewing the search warrant and the affidavit, after reviewing applicable case law, the statute law, and hearing testimony from the witness and hearing arguments of counsel, the Court denies the motion to suppress.

Defendant's counsel then requested "to be heard on the other issue, which is the reliability of the unknown informant." The trial court stated, "The information is not unknown; right? The informant is [Ms. Smith]." Defense counsel then noted the information about defendant

> came from 'Vaughn' through [Ms. Smith], that's a separate issue. On that issue – that's where the law is very clear, that they have to prove reliability of the middleman. The middleman was unknown and known after all this and arrested eight months later. But at the time the warrant

> was issued, they took information – they say it's from [Ms. Smith]. It's not from [Ms. Smith]. [Ms. Smith] didn't see anything. [Ms. Smith] didn't know anything. [Ms. Smith] never dealt with anybody . . . .

The trial court then denied defendant's motion to suppress again, stating:

> All right. That's my ruling. Motion to suppress is denied.
>
> . . . .
>
> . . . Court reserves the right to make further findings of fact and conclusions of law with regard to this ruling at a later time, should it become necessary.

The trial court made no later findings of fact or conclusions of law and did not enter a written order regarding the motion to suppress. Defendant's trial then began and she was found guilty of all six charges against her and sentenced accordingly. Defendant appeals.

II. Motion to Suppress

The motion to suppress raised four arguments for suppression; we will note the first two as relevant to the issues on appeal. First, defendant argued the information in the search warrant application "was derived from an unknown informant [Vaughn] and was insufficient to support a search warrant." Although Ms. Smith was known to Agent Melvin, nearly all of the material information came from the unknown man identified as Vaughn, and there was no indication of Vaughn's reliability. Second, defendant argued that "Agent Melvin's exaggeration of [Ms. Smith's] past cooperation, as set forth in the affidavit of probable cause" was a material misrepresentation." The alleged misrepresentations were the time period of prior assistance and the number of prior arrests and prosecutions based upon Ms. Smith's cooperation.

> A reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed. Our Supreme Court has stated, the applicable test is whether, given all the circumstances set forth in the affidavit before the magistrate, there is a fair probability that contraband will be found in a particular place.

State v. Frederick, ___ N.C. App. ___, ___, 814 S.E.2d 855, 858, *aff'd per curiam*, ___ N.C. ___, ___, 819 S.E.2d 346 (2018) (citations, quotation marks, and brackets omitted).

A. Failure to Make Findings of Fact and Conclusions of Law

Defendant contends the trial court violated North Carolina General Statute § 15A-977(f) when it failed to make written findings of fact and conclusions of law in ruling on her motion to suppress, particularly as to the *Franks* issue. North Carolina General Statute § 15A-977(f) requires the trial court to "set forth in the record his findings of fact and conclusions of law" in ruling on a motion to suppress; N.C. Gen. Stat. § 15A-977(f) (2017), although where there is no material conflict in the evidence and the trial court's legal conclusion is clear from the record, we may be able to review the denial of a motion to suppress on appeal without written findings of fact and conclusions of law:

> After a motion to suppress evidence is presented at the trial court, the judge must set forth in the record his findings of fact and conclusions of law. Our Supreme Court has held, the absence of factual findings alone is not error because only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. Even so, it is still the trial court's responsibility to make the conclusions of law.
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> The State argues no material conflicts in the evidence exist, and the trial court's conclusion was clear from its ruling. The record of the suppression hearing reveals no material conflicts existed. . . .
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> . . . .
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> *While no material conflicts exist in the evidence presented at the suppression hearing, the judge failed to provide any rationale from the bench to explain or support his denial of Defendant's motion.* The only statement from the trial court concerning Defendant's motion was, "I'm going to allow the case to go forward with some reluctance, but—I'm going to deny the Motion to Suppress." This lack of rationale from the bench precludes meaningful appellate review.
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> The trial court's failure to articulate or record its rationale from the bench supports a remand.

State v. Howard, ___ N.C. App. ___, ___, 817 S.E.2d 232, 237–38 (2018) (emphasis added) (citations and quotation marks omitted); *see also State v. Faulk*, ___ N.C. App. ___, ____, 807 S.E.2d 623, 630 (2017) ("Even

though findings of fact are not required, the trial court's failure to provide its rationale from the bench, coupled with the omission of any mention of the motion challenging the search warrant, precludes meaningful appellate review of that ruling. It is the trial court's duty to apply legal principles to the facts, even when they are undisputed. We therefore hold that the trial court erred by failing to either provide its rationale from the bench or make the necessary conclusions of law in its written order addressing both of Defendant's motions to suppress.").

The State attempts to distinguish *Howard and Faulk* because

> the Trial Court's explanation of what it had reviewed in arriving at its finding of probable cause, [which the State notes is implicit,] is unlike the conclusion of law at issue in *State v. Faulk*, ___ N.C. App. ___, 807 S.E.2d 623, 630 (2017), in which the trial court's order failed to even mention one of the two motions to suppress at issue. Similar, the Trial Court's conclusion of law in this case is more detailed than the rote conclusion in *State v. Howard*, ___ N.C. App. ___, 817 S.E.2d 232, 238 (2018), in which the trial court merely stated: "I'm going to allow the case to go forward with some reluctance, but – I'm going to deny the Motion to Suppress." In sum, the Trial Court's conclusion of law denying defendant's motion to suppress is sufficient to satisfy N.C. Gen. Stat. § 15A-977(f).

But we decline the State's invitation to find the trial court's "conclusion" in this case sufficient. First, we note that defendant's motion to suppress raised several issues, and at best, the trial court's ruling from the bench addressed only two portions of the motion, the *Franks* motion and the reliability of Ms. Smith as an informant. But under the motion and facts here, to call the trial court's statement a "conclusion of law" is too generous; it is a merely a denial of the motion. Were we to adopt the State's argument that a conclusion of probable cause is "implicit" in the ruling there would be no need for findings of fact or conclusions of law for any denial of a motion to suppress of this nature, since the mere denial of the motion would "implicitly" contain a conclusion of probable cause or a ruling on whatever issue the defendant raised in the motion to suppress.

Also, the motion to suppress here included an issue not raised in *Faulk* and *Howard* since defendant requested a *Franks* hearing. *Contrast Howard* ___ N.C. App. ___, 817 S.E.2d 232, *Faulk*, ___ N.C. App. ___, 807 S.E.2d 623. The affidavit could support a conclusion of probable cause only if there was no *Franks* violation in the allegations

about Ms. Smith and Vaughn was also a reliable informant. On this initial issue regarding the allegations of the affidavit, the trial court stated it had "pretty much" given a *Franks* hearing, but defendant is only entitled to a *Franks* hearing upon "a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (1997). Based upon this statement, the trial court apparently agreed that defendant had made the preliminary showing required for a *Franks* hearing, but never made findings addressing the issues of credibility and good faith raised by the motion.

B. Reliability of Middleman

But even if we assume the trial court did find that Agent Melvin's statements regarding the length of time Ms. Smith had worked as an informant and the number of arrests made with her assistance were not intentional misrepresentations and were made in good faith, most of the substantive allegations of the affidavit are based upon *Vaughn's* interactions with defendant, so his reliability as an informant was also essential. The information provided by Ms. Smith can only be as reliable as Vaughn, since she drove him to the general area of defendant's home but did not observe Vaughn going to defendant's home or purchasing drugs. Only the allegations that she had purchased drugs from defendant in the past and that she believed that defendant would at that time sell only to Vaughn were based on Ms. Smith's own personal knowledge. Ms. Smith did not say that Vaughn never purchased drugs from anyone but defendant or that there was no other potential source of drugs in the area where she took Vaughn to buy drugs. In fact, Agent Melvin testified that the area was known as an area of high drug activity. Even if Agent Melvin was acting in good faith and his representations about Ms. Smith's reliability were correct, very little of the affidavit was based upon Ms. Smith's own information.

Remand for additional findings regarding the *Franks* hearing and Ms. Smith's reliability would be necessary only if the affidavit demonstrates Vaughn's reliability as well:

> If a defendant establishes by a preponderance of the evidence that a false statement knowingly and intentionally, or with reckless disregard for the truth" was made by an affiant in an affidavit in order to obtain a search warrant, that false information must be then set aside. *If 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 322-23, 502 S.E.2d at 884 (emphasis added) (citations and quotation marks omitted).

The "remaining content" of affidavit was based mostly upon information provided by the unknown informant, Vaughn, to Ms. Smith, since she did not personally participate in or observe the actual purchase of drugs by Vaughn. Unlike the ruling upon the *Franks* motion, the basis for the trial court's denial of this portion of the motion is in our record:

> THE COURT: The informant is not unknown; right? The informant is Ashleigh.
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> MR. THOMAS: No. Ashleigh Williams is the defendant. The informant is CS- --
>
> THE COURT: I'm sorry. The informant is [Ms. Smith]?
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> MR. THOMAS: Yes.
>
> MR. WRIGHT: Correct.
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> THE COURT: You previously said that -- is it "Vaughn" or Ryan that's going to testify?
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> MR. THOMAS: Yes, sir. "Vaughn" is going to testify.
>
> THE COURT: "Vaughn," the runner, is going to testify. All right.

The trial court then denied the motion indicating that the fact that Vaughn was now known cured the fact that he was not known at the time of the affidavit, but in fact it does not. It is undisputed that at the time of the warrant affidavit, April 2017, Vaughn was not known to law enforcement, and there is no mention of any effort to identify him or determine his reliability. Vaughn is merely identified as "a middle man nicknamed 'Vaughn' " though Vaughn is the only individual who allegedly interacted with defendant or even saw her.

In the substantive factual allegations of the warrant affidavit,[3] the only statements based upon Ms. Smith's own knowledge are:

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3. We are referring to the factual allegations regarding Ms. Smith, Vaughn, and defendant. There is no issue on appeal regarding the factual allegations of Agent Melvin's training and experience.

> CS1 advised that CS1 has purchased fifty bags of heroin five times from the residence in the past six months. CS1 advised that [defendant] used to sell to CS1 directly but has been scared lately. CS1 advised that [defendant] makes everyone use Vaughn as a middle man to come to the residence.

Even if we assume Ms. Smith was properly considered as a reliable informant, these factual allegations are the only statements for which only her reliability is relevant. Standing alone, these allegations are not sufficient to form the basis for probable cause to issue the search warrant. The affidavit included no information regarding Vaughn's reliability as an informant or even his identity, other than as a man Ms. Smith believed defendant trusted as a drug buyer. This situation is quite different from *Frederick*, because in *Frederick*, the reliability of the known confidential reliable source was not questioned; the issue was regarding the reliability of the middleman who purchased drugs. *See Frederick*, ___ N.C. App. at ___, 814 S.E.2d at 858-60. The warrant affidavit did not address the reliability of the middleman, but the affidavit stated that

> Detective Ladd personally observed his confidential source meet the middleman and travel to Defendant's residence, where the middleman entered and exited shortly thereafter. The confidential source, who had been searched and supplied with money to purchase controlled substances, provided Detective Ladd with MDMA and heroin after his interaction with the middleman. Detective Ladd also observed other traffic in and out of Defendant's residence. Detective Ladd's experience and personal observations set forth in the affidavit were sufficient to establish probable cause to believe that controlled substances would probably be found in Defendant's residence.

Id. at ___, 814 S.E.2d at 860. In *Frederick*, the detective personally observed the confidential source and the middleman go into the defendant's residence and purchase drugs. *See id.* There was no need to establish the reliability of the middleman where the detective personally observed him going into the defendant's home to buy drugs. *See generally id.*

Here, neither Agent Melvin nor Ms. Smith observed Vaughn going to defendant's home to buy drugs. Instead, the affidavit states that Ms. Smith took Vaughn to Victory Drive and saw him "run into the yard of the residence leading to the house" but "could not see the residence[;]"

Vaughn completed "the deal[;]" Vaughn left and then Ms. Smith returned to Agent Melvin with "the heroin purchased from 'Vaughn' and [defendant]." The only information in the affidavit regarding where Vaughn purchased the drugs is based upon what Vaughn told Ms. Smith and not upon her observations, as she did not witness the purchase of the drugs or even Vaughn entering defendant's home. Although Ms. Smith was searched to ensure that she had no drugs prior to the controlled buy, Vaughn was not searched prior to going with Ms. Smith, so there was no way of knowing if he already had the drugs he claimed to have purchased. Since the affidavit does not address Vaughn's reliability at all and the allegations based upon Ms. Smith's knowledge are not sufficient to establish probable cause, the motion to suppress should have been allowed.

III. Conclusion

Because the affidavit was insufficient to form the basis of probable cause for issuance of the search warrant, we reverse the denial of defendant's motion to suppress and judgment and remand for a new trial.

REVERSED and REMANDED.

Judge COLLINS concurs in the result.

Judge BRYANT dissents.

BRYANT, Judge, dissenting.

Because I do not believe defendant's challenge to the affidavit, which sets forth probable cause for the search warrant, is sufficient to overcome the presumption of validity accorded a search warrant granted by a neutral and detached magistrate, I respectively dissent.

> The Fourth Amendment to the United States Constitution protects the people from "unreasonable searches and seizures." U.S. Const. amend. IV. Absent exigent circumstances, the police need a warrant to conduct a search of or seizure in a home, *see Payton v. New York*, 445 U.S. 573, 586 (1980), and a warrant may be issued only on a showing of probable cause, U.S. Const. amend. IV.

State v. Allman, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016). "Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the

premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Howard*, ___ N.C. App. ___, ___, 817 S.E.2d 232, 235 (2018) (citation omitted); *see also State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) ("[P]robable cause requires only a *probability or substantial chance* of criminal activity, not an actual showing of such activity." (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n. 13, 76 L. Ed. 2d 527, 552 n. 13 (1983) (emphasis added))).

Per statute, each application for a search warrant must contain a statement asserting there is probable cause to believe that an item subject to seizure will be found in the place to be searched and an affidavit setting forth the facts and circumstances establishing the probable cause. *See* N.C. Gen. Stat. § 15A-244 (2), (3) (2017).

> An "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citing *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976)). The applicable test is
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> > whether, given all the circumstances set forth in the affidavit before [the magistrate], including "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.
>
> *Id.* 311 N.C. at 638, 319 S.E.2d at 257–58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983)).

State v. Riggs, 328 N.C. at 218, 400 S.E.2d at 432; *see also State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) ("A magistrate must 'make a practical, common-sense decision,' based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched. *Gates*, 462 U.S. at 238, 103 S.Ct. at 2332, 76 L. Ed. 2d at 548; *e.g.*, *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 598 (2014).").

> Courts interpreting the Fourth Amendment have expressed a "strong preference for searches conducted pursuant to a warrant." *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331, 76 L. Ed. 2d 527, 547 (1983); *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (quoting *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991)). . . . Recognizing that affidavits attached to search warrants "are normally drafted by nonlawyers in the . . . haste of a criminal investigation," [*United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684, 689 (1965)], courts are reluctant to scrutinize them "in a hypertechnical, rather than a commonsense, manner," *id.* at 109, 85 S. Ct. at 746, 13 L. Ed. 2d at 689.
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> . . . .
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> . . . The magistrate's determination of probable cause is given "great deference" and "after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331, 76 L. Ed. 2d at 547).

McKinney, 368 N.C. at 164–65, 775 S.E.2d at 824–25.

The majority appears to express sympathy toward defendant's contentions: that information in the search warrant affidavit "was derived from an unknown informant[—a middle man—]" whose reliability was unknown; and that the affiant Agent Melvin's "exaggeration" of the confidential informant's (Ms. Smith's) past cooperation was a material misrepresentation. The majority then discusses a lack of written findings of fact and conclusions of law regarding defendant's motion to suppress, and cites to cases finding error in a trial court's failure to either provide its rationale from the bench or enter a written order with findings. Notwithstanding an extensive discussion, the majority does not hold the trial court's failure to make findings of fact was reversible error. Instead, the majority seems to hold that "since the affidavit does not address [the middle man]'s reliability at all and the allegations based upon Ms. Smith's knowledge are not sufficient to establish probable cause, the motion to suppress should have been allowed." Then, finding "the affidavit . . . insufficient to form the basis of probable cause for issuance of the search warrant, [the majority] reverse[s] the denial of defendant's motion to suppress and judgment and remand[s] for a new trial."

In *State v. Frederick*, ___ N.C. App. ___, 814 S.E.2d 855, *aff'd per curiam*, ___ N.C. ___, 819 S.E.2d 346 (2018), a divided panel of this

Court affirmed the issuance of a search warrant predicated on the sworn affidavit of a law enforcement officer describing his observations of a confidential source conducting controlled buys of "Molly" (MDMA) and heroin from a Raleigh residence through a middleman. The informant provided law enforcement officers with the identity of "a mid-level MDMA, heroin[,] and crystal methamphetamine dealer in Raleigh." *Id.* at ___, 814 S.E.2d at 857. The informant arranged and conducted the purchase through a middleman who traveled with the informant to the Raleigh residence. *Id.* Law enforcement officers observed the informant meet the middleman and watched the middleman enter the suspect Raleigh residence, emerge two minutes later, and return to the informant, after which, the informant provided law enforcement officers with a quantity of MDMA. *Id.* The informant conducted a second controlled buy from the same residence also via a middleman shortly before the submission of the search warrant application. The affiant wrote, "[b]ased on my training and experience, this was indicative of drug trafficking activity." *Id.* at ___, 814 S.E.2d at 858. A majority of this Court held that "[b]ased on the totality of the circumstances, the magistrate had a substantial basis for concluding probable cause existed to believe controlled substances were located on the premises of [the Raleigh residence]." *Id.* at ___, 814 S.E.2d at 860; *see also State v. Jackson*, ___ N.C. App. ___, ___, 791 S.E.2d 505, 511 (2016) ("In order for a reviewing court to weigh an informant's tip as confidential and reliable, 'evidence is needed to show indicia of reliability[.]' [*State v. Hughes*, 353 N.C. 200, 204, 539 S.E.2d 625, 628 (2000)]. Indicia of reliability may include statements against the informant's penal interests and statements from an informant with a history of providing reliable information. *Benters*, 367 N.C. at 665, 766 S.E.2d at 598. Even if an informant does not provide a statement against his/her penal interest and does not have a history of providing reliable information to law enforcement officers, the Supreme Court has suggested that 'other indication[s] of reliability' may suffice. *Hughes*, 353 N.C. at 204, 539 S.E.2d at 628.").

In *McKinney*, 368 N.C. 161, 775 S.E.2d 821, our Supreme Court held that a search warrant application affidavit provided sufficient facts to support a finding of probable cause on the following facts: "a citizen" met with a law enforcement officer in the Greensboro Police Department and "reported observing heavy traffic in and out of [an apartment] . . . . Pointing out that the visitors made abbreviated stays" and that the citizen had seen the apartment resident dealing narcotics in the parking lot of the apartment complex. *Id.* at 162, 775 S.E.2d at 823. In response to the report, law enforcement officers began surveillance of the apartment

and observed a vehicle driver arrive in the afternoon, enter the apartment, and exit six minutes later. Id. An officer conducted a traffic stop of the vehicle and discovered $4,258.00 in cash on the person of the driver, as well as a gallon-size bag containing marijuana remnants. *Id*. Incident to the driver's arrest, law enforcement officers searched the driver's cell phone and discovered a series of text messages exchanged minutes before the driver entered the apartment: "Bra, when you come to get the money, can you bring a fat 25. I got the bread." *Id*. The next stating, "Can you bring me one more, Bra?" In response, "About 45," "ight." *Id*. The person to whom the driver sent the texts was never linked to the residence under surveillance. *Id*.

In a pretrial motion and hearing, the *McKinney* defendant moved to suppress the evidence seized during the search of the apartment arguing there was a lack of probable cause to support the search. *Id*. at 163, 775 S.E.2d at 823. The trial court denied the motion, and defendant pled guilty preserving his right to appeal the denial of his motion to suppress. On appeal, the Court of Appeals reversed the trial court's order holding that the warrant was unsupported by probable cause. *Id*. at 163, 775 S.E.2d at 824 (citing *State v. McKinney*, ___ N.C. App. ___, 752 S.E.2d 726 (2014)). Reversing the Court of Appeals, our Supreme Court noted the following:

> [The defendant] maintains that the citizen complaint underlying the officer's application for the search warrant was unreliable because the complaint gave no indication when the citizen observed either the short stays or drugs purportedly changing hands, that the complaint was only a "naked assertion" that the observed activities were narcotics-related, and that the State failed to establish a nexus between [the driver]'s vehicle and [the] defendant's apartment.

Id. at 165, 775 S.E.2d at 825. The Court found "[n]one of these arguments . . . persuasive, either individually or collectively." *Id*. The Court noted that information contained in the citizen complaint was consistent with the officer's observations of activity around the apartment and the contents of the vehicle in conjunction with the text messages indicated preparation for a drug transaction involving the vehicle driver and someone he was about to meet. *Id*. at 166, 775 S.E.2d at 825.

> We conclude that, under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants

> recovered from [the driver]'s vehicle and [the] defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search [the] defendant's apartment. Considering this evidence in its entirety, the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling.

Id. at 166, 775 S.E.2d at 826 (citation omitted); *cf. Benters*, 367 N.C. 660, 766 S.E.2d 593 (holding that the search warrant application failed to provide a substantial basis to believe probable cause existed to find a marijuana grow operation at the suspect residence where the affidavit mainly provided that the residence windows were covered with thick mil black plastic; potting soil, fertilizer, seed starting trays, plastic cups, metal storage rack, and portable pump sprayers were observed on the curtilage of the residence; and the energy usage records for the residence indicated "extreme high and low kilowatt usage"); *State v. Campbell*, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (holding the search warrant application affidavit did not support a finding of probable cause where "purely conclusory" statements indicated substantively that persons named in the warrant application all lived in the residence to be searched and "reliable confidential informants" had provided that the named persons had sold narcotics to college students).

Here, in the case before us, the affidavit submitted by Agent Melvin contained his work history as a law enforcement officer, including his experience investigating narcotics cases since 2012, and the following factual basis for the search warrant application:

> In April 2017 Affiant received information from a confidential source of information, hereafter referred to as [Ms. Smith] that a black female with the first name Ashley lives on Victory Drive off of Freedom Star Drive. [Ms. Smith] advised that Ashely [sic] lives on the left of Victory Drive . . . and sells heroin from the residence. [Ms. Smith] advised that Ashley's residence to [sic] a cream colored double wide residence with a swing set in the front yard. [Ms. Smith] advised that Ashley drives a burgundy Jeep Liberty with a tire cover on the back that has animal paws on it. [Ms. Smith] advised that Ashley only sells fifty bags of heroin at a time and will not sell any less. . . . [Ms. Smith] advised that [Ms. Smith] has purchased fifty bags of heroin five times in the past six months from the residence on Victory Drive . . . . [Ms. Smith] advised that Ashley has

been scared recently and is making all her customers use a middle man named "Vaughn" to conduct the controlled purchase from the residence. [Ms. Smith] advised that another black male with the name "Ryan" lives at the residence and is known to conduct heroin deals.

In the past 48 hours [Ms. Smith] advised Affiant that [Ms. Smith] could purchase heroin from "Vaughn" and Ashley on Victory Drive . . . . Affiant met with [Ms. Smith] at a secured location. [A law enforcement officer] searched [Ms. Smith] for any illegal contraband or narcotics. [The law enforcement officer] found no illegal contraband or narcotics on [Ms. Smith]. [The law enforcement officer] searched [Ms. Smith's] vehicle for any illegal contraband or narcotics. [The law enforcement officer] advised that no illegal contraband or narcotics were located. Affiant provided [Ms. Smith] with an amount of U.S. Currency . . . . Affiant provided [Ms. Smith] with a recording device. [Ms. Smith] traveled . . . and picked up "Vaughn" at his residence while Agents followed. [Ms. Smith] and Vaughn" traveled to Freedom Star Drive. [Ms. Smith] and "Vaughn" traveled down Freedom Star Drive and took a left onto Victory Drive. Agents were not able to follow due to counter surveillance and high narcotic area. [Ms. Smith] stayed on Victory Drive for approximately five minutes and [Ms. Smith] advised the deal was complete. [Ms. Smith] and "Vaughn" traveled back to "Vaughn's" residence . . . . "Vaughn" departed [Ms. Smith's] conveyance and [Ms. Smith] departed. Agents followed [Ms. Smith] back to the staging area. Once back at the secured location Affiant searched [Ms. Smith] for any illegal contraband and narcotics. Affiant located no illegal contraband or narcotics except the heroin purchased from "Vaughn" and [defendant]. [A law enforcement officer] searched [Ms. Smith's] vehicle for any illegal contraband or narcotics. [The law enforcement officer] found no illegal contraband or narcotics in the vehicle. . . . [Ms. Smith] advised that [after picking up "Vaughn," she and "Vaughn"] went to the first house on the left on Victory Drive. [Ms. Smith] advised she parked beside the wood line on Victory Drive. [Ms. Smith] advised [Ms. Smith] gave the issued U.S. Currency to "Vaughn" and he departed. [Ms. Smith] advised that "Vaughn" departed the vehicle and ran to

> [defendant's] residence. . . . [Ms. Smith] advised that [Ms. Smith] could not see the residence but observed "Vaughn" run into the yard of the residence leading to the house. [Ms. Smith] advised that "Vaughn" stayed an estimated five minutes at the residence and came back to [Ms. Smith's] vehicle. [Ms. Smith] advised that [Ms. Smith] has purchased fifty bags of heroin five times from the residence in the past six months. [Ms. Smith] advised that [defendant] used to sell to [Ms. Smith] directly but has been scared lately. [Ms. Smith] advised that [defendant] makes everyone use Vaughn as a middle man to come to the residence [Ms. Smith] advised that [Ms. Smith] transported "Vaughn" back to his residence . . . [Ms. Smith] advised [Ms. Smith] departed. [Ms. Smith] advised that [defendant's] residence is the only residence on the left side of Victory Drive. Affiant conducted a google maps search of Victory Drive and observed one residence on the left side of Victory Drive . . . [Ms. Smith] identified [defendant's] residence on the left of Victory Drive . . . to be the same residence on Google Maps. Affiant conducted a search using Brunswick County GIS on Victory Drive . . . . Affiant observed only one residence on the left side of Victory Drive . . . . Brunswick County GIS showed the address to be 7655 Victory Drive . . . . Affiant conducted a search on the address 7655 Victory Drive . . . using the law enforcement database CJLEADS. Affiant located an Ashleigh Corrin Williams and a Richard Ryan Stallings with the listed address of 7655 Victory Drive . . . . [Ms. Smith] identified [defendant] from the heroin purchases to be Ashleigh Corrin Williams by photo identification and advised that [defendant] lives at 7655 Victory Drive . . . .

The majority's analysis of challenges to the sufficiency of the affidavit to support a finding of probable cause hinges in large part on the reliability of Ms. Smith and Vaughn. Absent the trial court's findings of fact and conclusions as to Vaughn's reliability, the majority holds that the affidavit fails to provide sufficient probable cause to find illegal narcotics: "Ms. Smith did not say that Vaughn never purchased drugs from anyone but defendant or that there was no other potential source of drugs in the area where she took Vaughn to buy drugs." However, "[p]robable cause does not mean . . . absolute certainty. *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972)). . . . A determination of probable cause is grounded in practical considerations. *Jaben v. United*

States, 381 U.S. 214 (1965)." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256–57 (1984).

The majority seems to predicate its disposition to reverse the trial court's ruling to deny the motion to suppress on the premise that the affidavit, standing alone, does not support a finding of probable cause, especially when averments potentially made in violation of *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667 (1978), are excluded. However, the challenged averments of the affidavit (the length of time Agent Melvin worked with Ms. Smith as a confidential informant and the number of arrests made and convictions entered in direct relation to Ms. Smith's information) do not appear to be essential to a finding of probable cause.

Per the unchallenged averments in the affidavit, Ms. Smith—a confidential informant known to law enforcement officers and whom the trial court was aware was available to testify, along with Vaughn, at defendant's trial—made a statement against penal interest regarding her multiple purchases of heroin directly from defendant at the defendant's residence, *see Jackson*, ___ N.C. App. ___, 791 S.E.2d 505; Ms. Smith's description of the protocol to purchase heroin from defendant's residence matched the conduct law enforcement officers could practically observe, *see McKinney*, 368 N.C. 161, 775 S.E.2d 821; and the use of a middle-man to deliver narcotics from the location of defendant's residence—the same residence from which Ms. Smith had previously purchased heroin five times within the previous six months—along with the short delivery time (five minutes), did not make the likelihood of finding narcotics at the suspect residence less probable, *see Frederick*, ___ N.C. App. ___, 814 S.E.2d 855.

Given the totality of the circumstances set forth in the affidavit, including the basis of knowledge provided by Ms. Smith, the affidavit describes circumstances establishing a probability that contraband or evidence of heroin trafficking would be found at defendant's residence. *See McKinney*, 368 N.C. at 166, 775 S.E.2d at 825–26. In accordance with our duty as a reviewing court, I would hold the magistrate had a substantial basis for concluding there existed probable cause to search defendant's residence for narcotics, *see id.*; the trial court's denial of defendant's motion to suppress was supported by the affidavit establishing probable cause; and the record showed no proof of a violation of *Franks*. As with many cases, this Court would prefer detailed findings of fact and conclusions of law regarding the trial court's rationale for its ruling. However, where, as here, the record provides sufficient basis to support the trial court's ruling, and given that a neutral and detached magistrate's grant of a warrant to search defendant's residence was valid

and any potential defects in the warrant application were not substantial, I would affirm the trial court's denial of defendant's motion to suppress.

JOHN BAKER WARREN, PETITIONER
v.
N.C. DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY/NORTH CAROLINA HIGHWAY PATROL, RESPONDENT

No. COA18-532

Filed 17 September 2019

Police Officers—dismissal from employment—unacceptable personal conduct—just cause

The trial court properly conducted a three-step inquiry regarding just cause before reversing the State Highway Patrol's (SHP) decision to terminate petitioner sergeant's employment. Petitioner's conduct in driving a state-owned patrol car to a party after drinking and with alcohol in the car constituted unbecoming conduct under SHP policy, though not a violation of conformance to laws under that policy, and the conduct fell within the category of unacceptable personal conduct under the N.C. Administrative Code. However, no just cause for dismissal existed where similar conduct resulted in disciplinary actions less severe than dismissal, the evidence did not substantiate allegations that petitioner drove while impaired, and other factors regarding petitioner's work history and lack of harm mitigated a finding of just cause.

Appeal by respondent from order entered 30 October 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 March 2019.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill, for respondent-appellant.

Essex Richards, P. A., by Norris A. Adams, II, for Amicus Curiae North Carolina Fraternal Order of Police.

BRYANT, Judge.

Where the superior court properly determined respondent did not have just cause to terminate petitioner, we affirm the superior court's ruling.

The full background of this case is set forth by this Court in *Warren v. N.C. Dep't of Crime Control & Pub. Safety; N.C. Highway Patrol* (*Warren I*), 221 N.C. App. 376, 726 S.E.2d 920 (2012). The facts and procedural history relevant to this appeal are as follows:

> On 7 October 2007, the North Carolina State Highway Patrol (the "Patrol"), a division of the North Carolina Department of Crime Control and Public Safety ("respondent"), dismissed Sergeant John Baker Warren ("petitioner"). The dismissal was based on the Patrol's determination that petitioner had engaged in unacceptable personal conduct in an alcohol-related incident.
>
> Shortly after midnight on 9 September 2007, petitioner stowed an open bottle of vodka in the trunk of his Patrol-issued vehicle and drove to a party. He could have used his personal vehicle, but he elected not to because he was concerned that he would wake his aunt (with whom he was residing at the time) in an effort to get the keys to his personal vehicle. After petitioner arrived at the party, deputies of the Nash County Sheriff's Office were called because of an altercation between two women. The deputies arrested petitioner, who had consumed a significant amount of alcohol at some point that evening, because they believed he was already impaired before driving to the party.
>
> After an investigation by Internal Affairs, the Patrol dismissed Petitioner for violating the Patrol's written policies on "conformance to laws" and "unbecoming conduct." Petitioner filed a contested case petition challenging his termination. The administrative law judge ("ALJ") found that the Patrol failed to prove just cause for termination but acknowledged that some discipline was appropriate. The State Personnel Commission ("SPC") adopted the ALJ's findings of fact but rejected the ALJ's conclusion of law that termination was inappropriate. Petitioner appealed to Wake County Superior Court.

> The [superior] court reversed the SPC, concluding Petitioner's conduct did not justify termination. The [superior] court concluded that petitioner violated the Patrol's written [policy for] conduct unbecoming [] by operating a state-owned vehicle after consuming "some quantity of alcohol." The [superior] court also concluded that petitioner did not violate the Patrol's written conformance to laws policy because there was insufficient evidence to establish that he was appreciably impaired at the time he operated a motor vehicle upon the highways of this state. The [superior] court held as a matter of law that petitioner's conduct did not justify dismissal. The case was remanded to the SPC for imposition of discipline "consistent with the lesser misconduct proven."
>
> Respondent [noted its first appeal to this Court].

Id. at 377–78, 726 S.E.2d at 922.

Respondent's first appeal was heard before a panel of this Court and a written opinion issued on 19 June 2012. Noting that respondent's specific disciplinary sanction must constitute just cause based on petitioner's specific misconduct, this Court in *Warren I* required the superior court on remand to resolve the conflict between the ALJ's finding of fact (that respondent failed to prove petitioner drove his Patrol vehicle with *any* alcohol in his system) and the superior court's finding (that petitioner consumed *some* amount of alcohol prior to driving).[1] This Court vacated and remanded the case back to the superior court to make the necessary findings of fact and conclusions of law in accordance with a three-pronged analytical framework set forth in that opinion.

Pursuant to the *Warren I* mandate, the superior court on remand issued a judgment dated 16 February 2015, concluding that respondent did not have just cause to terminate petitioner because "the allegation of driving while impaired [was] not substantiated" and termination based on that allegation "would constitute disparate treatment." Petitioner filed a motion for reconsideration and to set aside the 16 February 2015 judgment. On 30 October 2017, the superior court amended the

1. In its decision, the ALJ had stated: "[t]he credible evidence presented does not support a conclusion that [petitioner] had alcohol in his system when he arrived at the [private] residence. Thereafter, the superior court had stated: "the evidence and fact findings are sufficient to show that [p]etitioner had consumed some quantity of alcohol before or during the driving in question. However, such evidence and findings are insufficient to establish that [p]etitioner drove with an alcohol concentration in excess of the legal limit[.]"

16 February 2015 judgment to clarify the award of back pay, including pay increases, and retirement benefits. On 29 November 2018, respondent noted the instant appeal to this Court.

Respondent's sole argument is that the superior court erred in its determination that respondent lacked just cause to terminate petitioner's employment. We disagree.

We review the superior court's order for errors of law under "a two-fold task: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N.C.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation and quotation marks omitted).

The superior court mandate on remand was to apply a three-step inquiry to analyze whether just cause existed to terminate petitioner's employment. *See Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 ("The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. . . . If the employee's act qualifies as a type of unacceptable [personal] conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken.").

Whether petitioner engaged in the conduct alleged

The parties primarily dispute whether the allegations—that petitioner violated Highway Patrol policies on conformance to laws[2] and unbecoming conduct[3] by operating a motor vehicle while subject to an impairing substance—were substantiated by evidence of petitioner's conduct.

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2. Highway Patrol Directive H.1, § III, Conformance to Laws, states:

   Each member shall obey the laws of the United States, the State of North Carolina and of local jurisdiction. If facts revealed by a thorough investigation indicate there is substantial evidence that a member has committed acts which constitute a violation of a civil or criminal law, ordinance, or infraction other than a parking ordinance, then the member may be deemed to have violated this subsection, even if the member is not prosecuted or is found not guilty in court.

3. Highway Patrol Directive H.1, § V, Unbecoming Conduct, states:

   Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably upon the Highway Patrol

The superior court, as directed on remand, made a comprehensive finding that: "based upon all the evidence of record, the [c]ourt finds that the [p]etitioner consumed some quantity of alcohol prior to his arrival at the party and that such alcohol was in his body at the time of the driving but he was not impaired by alcohol." Additionally, the superior court reviewed the record, considered the unchallenged findings as to defendant's alcohol level, and determined the following:

> [b]ased on the totality of the evidence presented at the contested case hearing, having weighed the credibility of the witnesses who testified, [r]espondent did not have sufficient evidence to terminate [p]etitioner for violation of Highway Patrol Directive H.1, § III, Conformance to Laws.
>
> In this case, the retrograde extrapolation theory was not proven as being sufficiently reliable to establish that [p]etitioner Warren was in violation of the Patrol Policy requiring conformance to laws. However, the retrograde extrapolation provided by Mr. [Paul] Glover [admitted as an expert in retrograde extrapolation] was sufficient to prove that [p]etitioner drove his state-issued patrol vehicle with some amount of alcohol in his system prior to arriving at the party, which would violate the Highway Patrol's Directive on Unbecoming Conduct.

There was substantial evidence to support the superior court's ultimate finding—that petitioner had been drinking prior to driving but was not impaired while driving—as the ALJ had found that Mr. Glover's testimony regarding petitioner's impairment was unreliable and failed to establish a violation of the Highway Patrol policy requiring conformance to laws. Yet, the evidence shows that petitioner did engage in conduct that established a violation of the Highway Patrol policy relating to unbecoming conduct. Petitioner placed an open bottle of vodka in his patrol vehicle and—through his own admission and without prior authorization—drove the vehicle to a private residence to engage in "drinking and hanging out" while off duty.

Thus, the superior court found that petitioner's conduct, while not sufficient to support a violation for conformance to laws, was sufficient

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> and in keeping with the high standards of professional law enforcement. *Unbecoming conduct shall include any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol, or which tends to impair the operation and efficiency of the Patrol or of a member, or which violates Patrol policy.*

to support a violation for unbecoming conduct and, in doing so, properly conducted the first step in the just cause inquiry.

Whether petitioner's conduct falls within a category of unacceptable personal conduct per the Administrative Code

Under the North Carolina Administrative Code, just cause for a disciplinary action, including termination, can be established by a showing of: 1) unsatisfactory job performance, including grossly inefficient job performance, or 2) unacceptable personal conduct, which includes, *inter alia*, "the willful violation of known or written work rules" and "conduct unbecoming a state employee that is detrimental to state service." 25 N.C. Admin. Code 01J .0604(b)(2), .0614(8)(d)–(e) (2019). A disciplinary action is without just cause if evidence of disparate treatment is present in the discipline. *Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 125, 131–32, 741 S.E.2d 315, 319–20 (2012).

Here, the superior court concluded the following:

> 12. Petitioner's violation of Highway Patrol Directive H.1, § V for driving [a] Highway Patrol vehicle with alcohol in his body, operating a Highway Patrol vehicle off duty and driving it to a party for the purposes of "drinking and hanging out" and transporting liquor in the vehicle is unacceptable [personal] conduct under the North Carolina Administrative Code.

We agree that petitioner's conduct of driving his patrol vehicle to a party and consuming alcohol was unacceptable personal conduct as he acted in willful violation of the Highway Patrol's policies.[4] In its order, the superior court concluded that petitioner's conduct fell within a category of unacceptable personal conduct and thus, properly conducted the second step in the just cause inquiry.

Whether petitioner's conduct amounted to just cause for the disciplinary action taken

Career state employees, like petitioner, may only be discharged, suspended, or demoted for disciplinary reasons if just cause exists. N.C. Gen. Stat. § 126-35(a) (2019). " 'Just cause,' like justice itself, is not susceptible of precise definition." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004).

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4. *See supra* note 2 and 3.

The superior court concluded the unbecoming conduct did not amount to just cause for the specific disciplinary action taken against petitioner:

> 13. To terminate [p]etitioner based on findings that he drove a state owned vehicle while impaired would not have been treating him disparately from other members of the Highway Patrol. In that the allegation of driving while impaired is not substantiated, this Court finds and concludes as a matter of law that to terminate [] [p]etitioner based on the allegations that are sustained would constitute disparate treatment.

Upon consideration of respondent's past treatment of similar violations, we agree that petitioner's unacceptable personal conduct does not rise to the level to constitute just cause for termination as a matter of law because his termination was based on disparate treatment. *See Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 ("Just cause must be determined based upon an examination of the facts and circumstances of each individual case." (citation and quotation marks omitted)).

We acknowledge the factors outlined by our Supreme Court in *Wetherington v. N.C. Dep't of Pub. Safety*, as necessary to review whether petitioner's unacceptable personal conduct established just cause for his termination. 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015). Such factors include "the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or *discipline imposed in other cases involving similar violations*." *Id.* (emphasis added); *see also id.* ("We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.").

Respondent contends that petitioner's conduct was especially egregious so as to warrant termination. However, our review of the disciplinary actions respondent has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, where the conduct was equally or *more egregious* than that of petitioner (i.e., threats to kill another person, sexual harassment, assault), the employee was generally subjected to disciplinary measures other than termination.

While petitioner certainly engaged in unacceptable personal conduct, termination is inconsistent with respondent's treatment of similar conduct and, other factors mitigate just cause for the punishment. Petitioner had an excellent work history and tenure of service, and there

was no evidence that petitioner's actions resulted in harm. Thus, taking into consideration all of the factors and circumstances in this case as suggested by *Wetherington*, we conclude the superior court properly determined there is no just cause for petitioner's termination based on his conduct.

Accordingly, for these reasons, we conclude that the superior court on remand properly applied the approach requested by *Warren I*, and did not err in reversing the SPC's decision.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 SEPTEMBER 2019)

BRIDGES v. BRIDGES No. 19-207	Cumberland (91CVD6088)	Affirmed
COLTON v. BANK OF AM. CORP. No. 19-166	Durham (17CVS4268)	Affirmed
DANIELE v. DANIELE No. 18-749	Cumberland (06CVD6628)	Affirmed
HOLMBERG v. HOLMBERG No. 19-52	Gaston (15CVD2395)	Vacated and Remanded
IN RE A.M.C. No. 18-1260	Wake (16JT160-165)	Affirmed
IN RE C.T.D. No. 18-1209	Alleghany (17JT12-16)	Affirmed
LINDBERG v. LINDBERG No. 19-78	Chatham (18CVS345)	Affirmed
OKO v. NORTHLAND INV. CORP. No. 19-165	Wake (18CVD4646)	Affirmed
PERRY v. JACKSON No. 18-862	Durham (16CVD3884)	Affirmed
STATE FARM MUT. AUTO. INS. CO. v. DON'S TRASH CO., INC. No. 18-735	Wake (17CV10688)	Reversed and Remanded
STATE v. AMMONS No. 18-1293	Sampson (16CRS50753) (16CRS51753)	No Error
STATE v. CODY No. 18-931	Forsyth (15CRS52023) (15CRS5802)	Dismissed in Part; Vacated in Part and Remanded.
STATE v. DUFF No. 18-874-2	Guilford (14CRS92098-99)	REMANDED FOR FURTHER PROCEEDINGS AND TO CORRECT A CLERICAL ERROR
STATE v. HENDERSON No. 18-760	Wake (16CRS223566)	No Error

STATE v. HERRING No. 19-143	Wake (15CRS209413) (15CRS214761)	Reversed and Remanded
STATE v. KING No. 19-15	Brunswick (12CRS56233)	No Error
STATE v. LUTZ No. 18-1291	New Hanover (15CRS55121) (15CRS55186) (15CRS55187)	No Error
STATE v. PHELPS No. 19-28	Iredell (16CRS54786) (16CRS54787) (17CRS2321) (17CRS53128)	No Error
STATE v. TRICE No. 18-1292	Durham (15CRS60540-42) (15CRS60544) (16CRS84)	No Error
STATE v. YOUNG No. 18-1232	Forsyth (17CRS52872) (17CRS52874)	Affirmed
TALLENT v. POSTLEWAITE No. 19-49	Buncombe (17CVD2643)	Affirmed in Part, Dismissed in Part and Remanded in Part
VANDIVER v. HOUSTON No. 19-196	Mecklenburg (17CVS6057)	Affirmed

JUDITH M. AYERS, PETITIONER
v.
CURRITUCK COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA18-1007

Filed 1 October 2019

1. Public Officers and Employees—career employees—dismissal—racial epithet—findings of fact

Where a career state employee (petitioner) was dismissed from her employment for using a racial epithet during a private conversation with her supervisor about what "NR" might mean in the "race" category of handwritten reports about families with whom the child protective services unit had worked (for the purpose of compiling statistics), the administrative law judge's (ALJ) finding regarding the racial term petitioner believed she used was not supported by the record evidence. Petitioner testified that she had said "nigra rican" (which she spelled out in her testimony), while the ALJ found that petitioner believed she had said "Negra-Rican." Because the ALJ carried out the remainder of its analysis regarding petitioner's termination under the misapprehension of the exact phrase petitioner uttered, the decision was vacated and remanded for new findings and conclusions.

2. Public Officers and Employees—career employees—dismissal—racial epithet—conduct alleged

Where a career state employee (petitioner) was dismissed from her employment for using a racial epithet, the administrative law judge (ALJ) erred by concluding that respondent-employer failed to prove that petitioner had engaged in the conduct alleged. Whether petitioner used the actual phrase alleged or a dialectic variant of the phrase, respondent met its initial burden of proving the conduct alleged.

Judge TYSON concurring in result with separate opinion.

Appeal by Respondent from Final Decision entered 13 June 2018 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 26 March 2019.

Hornthal, Riley, Ellis & Maland, L.L.P., by John D. Leidy, for petitioner-appellee.

The Twiford Law Firm, by John S. Morrison, for respondent-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Currituck County Department of Social Services (DSS) appeals from a Final Decision of the Administrative Law Judge (ALJ) reversing a Final Agency Decision by DSS to terminate the employment of Judith M. Ayers (Petitioner) and further requiring Petitioner be retroactively reinstated to her same or similar position with DSS with full back pay and payment of reasonable attorneys' fees. The Record before us reflects the following:

Late in the afternoon on Friday, 3 November 2017, at approximately 4:45 p.m., Samantha Hurd (Hurd), Director of DSS, was working to compile statistics related to DSS's Child Protective Services Unit, including demographic information such as race and gender of individuals and families with which DSS was engaged. In the process of going though handwritten reports, Hurd identified several reports that required some additional information or about which she had questions. As was the customary practice, Hurd found Petitioner, the Supervisor of the Child Protective Services Unit, to go through the reports about which Hurd had questions. On this particular afternoon, Petitioner was working in a vacant office.

One report Hurd had questions about involved the "F family."[1] On the intake form for the F family, the assigned social worker had listed the letters "NR" under the race category. Hurd did not recognize the abbreviation and knew Petitioner, as the supervisor of the unit, would be able to obtain the information. Hurd asked Petitioner what NR meant, and Petitioner replied she was unsure.[2] Petitioner then volunteered a suggestion as to a possible meaning. Hurd believed Petitioner said NR could

1. The family name is redacted from the Record to protect their privacy.

2. Although the evidence tends to show NR was not a customary abbreviation used by DSS, it, nevertheless, apparently did not occur to either of the two senior DSS employees that NR likely stood for "None Reported," "Not Recorded," "No Response," "No Reply," or something similar, particularly in the context of the overall form, which also included NR under the column for School/Child Care. Hurd later determined the abbreviation did indeed stand for "None Reported." Had either of the two made this connection, all that follows may well have been avoided.

mean "nigger rican."[3] The two left the vacant office to locate the actual file to obtain the information. Embarrassed, Petitioner asked Hurd not to tell anyone what had been said. Both Petitioner and Hurd are white females. Hurd later testified Petitioner's statement made "a significant impact" on her because it was vulgar, crude, demeaning, and discriminatory, as it disparaged both African Americans and Puerto Ricans.

Over the ensuing weekend, Hurd conferred with an attorney for DSS and a personnel consultant about the incident, as well as consulting an excerpt from a guide on the imposition of discipline of North Carolina public employees. On Monday, 6 November 2017, Petitioner was summoned to a pre-dismissal conference with Hurd. Petitioner was provided a written summary of the allegations, including the specific allegation that Petitioner had used the phrase "n---- rican." The written notice asserted Petitioner's alleged actions constituted "unacceptable personal conduct, in that it was conduct for which no reasonable person should be expected to be warned of in advance, the willful violation of known or written work rules, and conduct unbecoming of an employee of [DSS]."

In correspondence presented to Hurd either prior to or at the 6 November 2017 pre-dismissal conference, Petitioner wrote:

> You stated that our meeting will be about the comment that I made on Friday afternoon. I made the comment directly to you while we were alone in the unoccupied social work office. You asked what a race 'code' meant that was hand written . . . [, and] we each paused attempting to decipher as it was not clear and it was said as a random guess. I immediately commented that I couldn't believe I had just said that. I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional.

After receiving Hurd's written notice of the allegations at the pre-dismissal conference, Petitioner prepared a further written response

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3. It is important at this stage to note (as discussed below) Petitioner ultimately disputes that she used this phrase, instead claiming she used a different iteration of the phrase. The ALJ, in the Final Decision, found Petitioner used yet a third (and later a fourth) version of the phrase. Because of these discrepancies and the underlying evidentiary disagreement between the parties, we set out the offensive phrase here for context but will redact it for the remainder of the opinion.

disputing the events as recounted by Hurd and the grounds for her potential dismissal, stating in part:

> Your synopsis is not exactly how I recall the exchange on November 3, 2017. I do not recall saying the words as they are spelled out in your letter, though I do not deny that I did say two unrelated words in the tone of answering a nonsensical word problem.

Petitioner went on to state: "Your assumption of my negative effect on the morale of subordinates and service delivery are baseless. The syllables spoken were not used to describe anyone. Separately or together they do not describe a race."

On 8 November 2017, Hurd issued a letter with her decision to terminate Petitioner. This correspondence stated that during the pre-dismissal conference, Petitioner "acknowledged using the words 'n----- rican' during your conversation with me and described this as 'totally inappropriate and unacceptable'." The letter concluded: "After consideration of all of this information I have decided to terminate your employment with [DSS] for unacceptable personal conduct."

On 14 November 2017, Petitioner gave a written appeal to DSS, challenging the grounds and procedure used in her termination. In this appeal, Petitioner wrote: "You spell out in quotation marks what you claim I said. I did not say those remarks as they are recounted by you." Petitioner further stated: "You state that I acknowledged using the words spelled out by you. I did not. I apologized for making an illogical comment or 'random guess' that was unacceptable." Petitioner then asserted: "You state 'at no time (in the pre dismissal conference) did you (I) deny using the words' that were spelled out. I did not deny nor did I agree with those words spelled out by you." On 21 November 2017, DSS, through Hurd, issued a Final Agency Decision affirming the decision to terminate Petitioner's employment.

On or about 15 December 2017, Petitioner filed a Petition for Contested Case Hearing alleging she had been dismissed from her employment by DSS "without just cause or due process." The matter was heard before the ALJ on 19 April 2018. During this evidentiary hearing, Petitioner disputed that she had said: "n----- rican." Rather, she maintained she had used the phrase: "nigra rican." For clarification, Petitioner's counsel asked her to spell the words Petitioner thought she used, to which Petitioner spelled out: "n-i-g-r-a" and "r-i-c-a-n." Petitioner explained:

> I guess I used neither of those words often or ever, and those words are in my word bank because of people in my family.
>
> My grandmother was from Norfolk, an old southern lady, and she would refer to negroes as nigra. And as kids we didn't know if that was a good word or a bad word, but by our generation, it was close enough that we just didn't say it unless we were imitating my grandmother.
>
> And rican, my brother-in-law is from Ecuador, and he lived in New York, so he would often tell stories or different situations about stereotyping the different Latin American community up in New York. And he would refer to people as rican.
>
> That's the only -- I can't say I intended to say any of this, but those are the words that would be in my personal word bank.

On cross-examination, Petitioner conceded this was the first time she had expressly articulated what she believed she had said on 3 November 2017, despite prior opportunities to straighten the record. "I felt like the situation -- the incident -- I said something improper whether it was nigra or n-i-g-g-e-r. What she heard was improper, what I said was improper, and I still accept that." Petitioner went on to state, "I wouldn't allow my social workers to say that."

On 13 June 2018, the ALJ entered its Final Decision containing numerous Findings of Fact and Conclusions of Law. In particular, as to the 3 November 2017 incident, the ALJ found:

> 23. During the conversation between Petitioner and Ms. Hurd, Ms. Hurd asked more than once "what does this ['NR'] mean?" Finally, Petitioner responded, "I think it means "Negra-Rican." Petitioner believes she used the word "Negra" as her grandmother used that word to refer to African-Americans. Ms. Hurd believes Petitioner said the word "n-----"[.]

The ALJ, having inserted a third iteration of the phrase into the record, further found:

> 47. Petitioner felt that she had used the word "Negra," and conceded that at the time of the November 3, 2017 incident, and in all subsequent discussions about it. She

> also consistently conceded that using the word "Negra" was improper and unacceptable in a work setting. Ms. Hurd misunderstood Petitioner's apology as an acknowledgement that she had used the "n" word which Ms. Hurd believed Petitioner said. However, Petitioner's apology for saying "Negra" was not an acknowledgement by Petitioner that she had used the "n" word as Ms. Hurd alleged. Nonetheless, Ms. Hurd's confusion was not material to the November 3, 2017 incident and did not cause Ms. Hurd to decide to dismiss or to discipline Petitioner.

The ALJ then made Conclusions of Law, including analyzing the facts of the case in light of *Warren v. North Carolina Department of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), and *Granger v. University of North Carolina*, 197 N.C. App. 699, 678 S.E.2d 715 (2009). The ALJ concluded:

> 12. The undersigned agrees with the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass* that the use of the "n" word is far more than just a mere offensive utterance, and is a "pure anathema to African-Americans" that creates an abusive working and personal environment. . . . In this case, unlike Pamela Granger in *Granger*, *supra.*, Petitioner did not use the "n" word in referring to another coworker in [DSS], but blurted out "Negra-Rican" while trying to interpret the "NR" abbreviation on a form during a private conversation with her supervisor. Unlike Pamela Granger, Petitioner did not say she "would not hire another black person," was not overheard by one of her subordinate employees or any other employee at work, and did not expose [DSS] to embarrassment and potential legal liability. . . . Petitioner surprised herself by saying what she said, immediately regretted her statement, immediately told Ms. Hurd that she could not believe she had said that, and apologized to Ms. Hurd.
>
> 13. While Ms. Hurd believed Petitioner spoke the "n" word during their private conversation on November 3, 2017, the greater weight of evidence demonstrated that Petitioner involuntarily blurted out the phrase "Negro-Rican" during a momentary lapse in judgment. Petitioner's statement was not committed maliciously, was not meant or said for any racially-motivated reason, or with any racially motivated intent. Petitioner's explanation for making that statement

> was credible and believable. Therefore, [DSS] failed to prove the first prong of *Warren* by failing to prove by a preponderance of the evidence that Petitioner engaged in the conduct alleged by [DSS].

Based on Conclusion of Law 13,[4] the ALJ concluded no further analysis was required because DSS failed to even prove Petitioner engaged in the specific conduct alleged by DSS. The ALJ, nevertheless, went on to conclude DSS also erred in the Final Agency Decision by failing to give proper weight to the fact no one other than Hurd overheard the comment on 3 November 2017 and by failing to give proper weight to Petitioner's lack of disciplinary history during her almost 11 years of service.

Based on the totality of the Findings of Fact and Conclusions of Law, the ALJ determined:

> 15. The relevant facts and mitigating factors, including, but not limited to, Petitioner's disciplinary history, her years of service, prior job performance, and the lack of any harm sustained by Respondent, further supports a determination that Petitioner's conduct does not rise to the level of conduct that would justify the severest sanction of dismissal under the totality of facts and circumstances of this contested case.

The ALJ then ultimately concluded: "Based on the foregoing analysis, [DSS] lacked just cause to dismiss Petitioner from employment . . . ." Consequently, the ALJ reversed the Final Agency Decision and ordered Petitioner to be reinstated with full back pay and reimbursement of attorneys' fees. DSS timely filed Notice of Appeal from the ALJ's Final Decision.

Appellate Jurisdiction

The parties agree this case is subject to Article 8 of Chapter 126 of the North Carolina General Statutes, titled "Employee Appeals of Grievances and Disciplinary Action." The parties also agree Petitioner qualifies as a "career State employee" and thus is afforded the benefit of N.C. Gen. Stat. § 126-35(a), which provides in part: "No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2017). Under this Statute, an

4. Which now inserted a fourth iteration of the alleged comment as "Negro-Rican."

employee has the right to appeal first to the agency head to obtain a final agency decision and then, in turn, seek review of the final agency decision in the Office of Administrative Hearings (OAH). *Id.* Under Section 126-34.02, an employee aggrieved by the final agency decision appeals to OAH by filing a contested case. *Id.* § 126-34.02(a) (2017). Specifically, as was the case here, "[a] career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." *Id.* § 126-34.02(b)(3). Following the ALJ's final decision, an aggrieved party, here DSS, is entitled to judicial review by appeal to this Court, as further provided under N.C. Gen. Stat. § 7A-29(a). *Id.* § 126-34.02(a).

Thus, this matter is before this Court on appeal from the ALJ's Final Decision under N.C. Gen. Stat. §§ 126-34.02(a) and 7A-29(a). Further, we note that while the ALJ left open the issue of the amount of attorneys' fees to be awarded to Petitioner, this does not alter the final nature of the ALJ's Final Decision for purposes of its appealability under N.C. Gen. Stat. § 7A-29(a). *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) ("An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." (citation omitted)).

Standard of Review

" 'It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test.' " *Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 798 S.E.2d 127, 132 (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142-43 (2017).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (2016) (citation and quotation marks omitted). As such, "[u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *Id.* (alteration in original) (citation and quotation marks omitted).

On the other hand, "[u]nder the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and

conclusions." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "When the trial court applies the whole record test, however, it 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*." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation and quotation marks omitted).

Issues

The relevant issues are (I) whether the ALJ's Finding of Fact 23, regarding the alleged conduct of Petitioner, is supported by substantial evidence in the Record; and (II) whether the ALJ properly concluded that DSS failed to prove the first prong of the *Warren* analysis—that Petitioner engaged in the conduct alleged by DSS.

Analysis

Before beginning our analysis of the ALJ's Final Decision, it is helpful to review the basic legal foundation for the Final Agency Decision, the ALJ's Final Decision, and thus our decision. As noted above, "[c]areer state employees, like petitioner, may not be discharged, suspended, or demoted for disciplinary reasons without 'just cause.' " *Warren*, 221 N.C. App. at 379, 726 S.E.2d at 923 (quoting N.C. Gen. Stat. § 126-35(a)). By statute, "the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d).

The Administrative Code provides two bases for the statutory "just cause" standard: "(1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance[; and] (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0604(b)(1)-(2) (2018). Here, Petitioner's dismissal was based on allegations of unacceptable personal conduct. The Administrative Code further defines unacceptable personal conduct as:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> (b) job-related conduct which constitutes a violation of state or federal law;
>
> (c) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the State;

> (d) the willful violation of known or written work rules;
>
> (e) conduct unbecoming a state employee that is detrimental to state service;
>
> (f) the abuse of client(s), patient(s), student(s) or a person(s) over whom the employee has charge or to whom the employee has a responsibility or an animal owned by the State;
>
> (g) absence from work after all authorized leave credits and benefits have been exhausted; or
>
> (h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8)(a)-(h) (2018). Here, DSS asserted Petitioner's alleged unacceptable personal conduct included: (a) conduct for which no reasonable person should expect to receive prior warning; (d) the willful violation of known or written work rules; and (e) conduct unbecoming a state employee that is detrimental to state service.

This Court has articulated a three-part analytical approach to determine whether just cause exists to support a disciplinary action against a career State employee for alleged unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based upon an examination of the facts and circumstances of each individual case.

Warren, 221 N.C. App. at 383, 726 S.E.2d at 925 (citation and quotation marks omitted). The North Carolina Supreme Court has further emphasized that an "appropriate and necessary component" of a decision to impose discipline on a career State employee is the consideration of certain factors, including: "the severity of the violation, the subject matter involved, the resulting harm, the [career State employee's] work history, or discipline imposed in other cases involving similar violations."

Wetherington v. N.C. Dep't of Pub. Safety, 368 N.C. 583, 592, 780 S.E.2d 543, 548 (2015).

In this case, the ALJ concluded DSS failed to meet its burden under the first prong of the *Warren* analysis because the ALJ found Petitioner uttered the phrase "Negra-Rican" or "Negro-Rican" rather than "N----- Rican" as alleged by DSS; thus, according to the ALJ, DSS failed to prove that Petitioner engaged in the conduct alleged. The ALJ went on, however, to further conclude DSS committed errors in its analysis of whether dismissal was the appropriate disciplinary measure by failing to take into account whether anyone else overheard the comment and by failing to consider Petitioner's lack of any prior disciplinary history. Therefore, the ALJ concluded in light of Petitioner's disciplinary history, years of service, prior job performance, and the lack of harm to DSS, under the totality of the circumstances, dismissal was not warranted. As a result, the ALJ determined DSS lacked just cause to dismiss Petitioner and reversed the Final Agency Decision.

I. Finding of Fact 23

[1] DSS challenges a number of the ALJ's Findings of Fact as unsupported by the evidence. We, however, for purposes of this appeal need only address one of the challenged Findings of Fact:

> 23. During the conversation between Petitioner and Ms. Hurd, Ms. Hurd asked more than once "what does this ['NR'] mean?" Finally, Petitioner responded, "I think it means "Negra-Rican." Petitioner believes she used the word "Negra" as her grandmother used that word to refer to African-Americans. Ms. Hurd believes Petitioner said the word "n-----"[.]

It is apparent from the ALJ's Final Decision that this was the critical finding driving the ALJ's analysis both in terms of applying the *Warren* factors and in its consideration of the totality of the circumstances surrounding the imposition of discipline on Petitioner.

DSS argues the ALJ should have accepted Hurd's testimony as more credible because Petitioner only provided her version of the alleged comment for the first time at the hearing before the ALJ. However, "[t]he credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness." *N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 287, 786 S.E.2d 50, 64 (2016) (alterations in original) (citation and quotation marks omitted).

Nevertheless, we are compelled to conclude the ALJ's Finding is still not supported by the evidence in the Record, even relying solely upon Petitioner's testimony. Petitioner's testimony was clear and unequivocal that the phrase she used was "nigra rican" and not "Negra-Rican," as found by the ALJ. Petitioner even spelled out the phrase in response to her own attorney's questioning. In addition, Petitioner went on to explain:

> I guess I used neither of those words often or ever, and those words are in my word bank because of people in my family.
>
> My grandmother was from Norfolk, an old southern lady, and she would refer to negroes as nigra. And as kids we didn't know if that was a good word or a bad word, but by our generation, it was close enough that we just didn't say it unless we were imitating my grandmother.
>
> And rican, my brother-in-law is from Ecuador, and he lived in New York, so he would often tell stories or different situations about stereotyping the different Latin American community up in New York. And he would refer to people as rican.
>
> That's the only -- I can't say I intended to say any of this, but those are the words that would be in my personal word bank.

Thus, the ALJ's Finding is not supported by the evidence in the Record. It is then apparent the ALJ carried out the remainder of its analysis under the misapprehension of the exact phrase used and that the ALJ's understanding of the exact phrase used was central to both the rest of the ALJ's Findings and its Conclusions of Law. Therefore, we vacate the ALJ's Final Decision in its entirety and remand this matter for the ALJ to reconsider its factual findings in light of the evidence of record and to make new conclusions based upon those factual findings.

II. Failure to Prove First Prong of Warren

[2] In particular, the ALJ's erroneous Finding directly impacted its Conclusions of Law 12 and 13:

> 12. The undersigned agrees with the Fourth Circuit's analysis in *Spriggs v. Diamond Auto Glass* that use of the "n" word is far more than just a mere offensive utterance, and is a "pure anathema to African-Americans" that creates an abusive working and personal environment. . . .

> In this case, unlike Pamela Granger in *Granger*, *supra.*, Petitioner did not use the "n" word in referring to another coworker in [DSS], but blurted out "Negra-Rican" while trying to interpret the "NR" abbreviation on a form during a private conversation with her supervisor. Unlike Pamela Granger, Petitioner did not say she "would not hire another black person," was not overheard by one of her subordinate employees or any other employee at work, and did not expose [DSS] to embarrassment and potential legal liability. . . . Petitioner surprised herself by saying what she said, immediately regretted her statement, immediately told Ms. Hurd that she could not believe she had said that, and apologized to Ms. Hurd.
>
> 13. While Ms. Hurd believed Petitioner spoke the "n" word during their private conversation on November 3, 2017, the greater weight of the evidence demonstrated that Petitioner involuntarily blurted out the phrase "Negro-Rican" during a momentary lapse in judgment. Petitioner's statement was not committed maliciously, was not meant or said for any racially-motivated reason, or with any racially motivated intent. Petitioner's explanation for making that statement was credible and believable. Therefore, [DSS] failed to prove the first prong of *Warren* by failing to prove by a preponderance of the evidence that Petitioner engaged in the conduct alleged by [DSS].

It is clear that based on its erroneous finding that Petitioner used the phrase "Negra-Rican" or "Negro-Rican," the ALJ concluded Petitioner had not used a racial epithet intentionally or with racial animus but rather suffered only a momentary lapse in judgment by offering an inappropriate response to her supervisor to the question of the meaning of "NR." Irrespective of whether the ALJ's analysis on this point stands on firm footing, the evidence in this case simply does not support these conclusions.

The evidence reflects Petitioner either used the word "n----- rican" or the variant "nigra rican." In any event, the phrase employed by Petitioner constitutes a racial epithet. *See Friend v. Leidinger*, 588 F.2d 61, 68 (4th Cir. 1978) (Butzner, J., concurring in part and dissenting in part) (describing "nigras" as an epithet); *see also Gwin v. BFI Waste Services, LLC*, 718 F. Supp. 2d 1326, 1332 (N.D. Ala. 2010) (including "nigra" in a long string of racial epithets and referring to it as "a somewhat pervasive mispronunciation of the word 'negro' "); *Webster's Third*

New International Dictionary 1528 (1971) (defining "nigra" as a version of negro "often taken to be offensive"). We fail to see how using a variant of an epithet that is commonly understood to be a complete anathema is any less of an anathema. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (noting "n-----" is "pure anathema to African–Americans"); *Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African–Americans.").

Indeed, Petitioner conceded: "I felt like the situation -- the incident -- I said something improper whether it was nigra or n-i-g-g-e-r. What she heard was improper, what I said was improper, and I still accept that." Prior to her dismissal, Petitioner wrote to Hurd: "I apologize for making that comment. I know the comment was unacceptable. It would be unacceptable in any setting, personal or professional." As such, Petitioner, herself, effectively conceded whichever variant she used was improper and unacceptable. She also conceded in her testimony that she would not permit her own subordinates to use such language.

More to the point, this renders unsound the ALJ's Conclusion that DSS failed to meet the first prong of the *Warren* analysis. The purpose of requiring a specific allegation of the conduct alleged to support disciplinary action is to provide the employee with "a sufficiently particular description of the incidents [supporting disciplinary action] . . . so that the discharged employee will know precisely what acts or omissions were the basis of [her] discharge." *Blackburn*, 246 N.C. App. at 209, 784 S.E.2d at 519 (alterations in original) (citations and quotation marks omitted). Here, DSS's allegations sufficiently informed Petitioner that the basis of her termination was her use of a racial epithet in her conversation with Hurd. The fact Petitioner only admitted to using a dialectic variant of the phrase alleged does not mean DSS failed to prove Petitioner did not engage in the conduct alleged. We therefore conclude under either version of the evidence, DSS met its initial burden of proving Petitioner engaged in the conduct alleged under *Warren*. Consequently, we reverse the ALJ's conclusion that DSS "failed to prove the first prong of *Warren*[.]"

It is further clear the ALJ's conclusions and consideration of the "totality of the circumstances" were also grounded in its misapprehension of the evidentiary record. As such, on remand, the ALJ should make new findings of fact supported by the evidence in the record and continue its analysis under *Warren* of whether Petitioner engaged in

unacceptable conduct constituting just cause for her dismissal or for the imposition of other discipline.[5] *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 926; *Harris*, ___ N.C. App. at ___, 798 S.E.2d at 138. "The [ALJ] may, in its discretion, hold additional hearings in this matter." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 926.

Conclusion

Accordingly, for the foregoing reasons, we vacate the Final Decision and remand this matter for new findings of fact and conclusions of law.

VACATED AND REMANDED.

Judge DIETZ concurs.

Judge TYSON concurs in result with separate opinion.

TYSON, Judge, concurring.

The majority's opinion concludes the decision of the ALJ should be remanded for further findings of fact.

I. Background

Petitioner Judith M. Ayers is a longtime employee of Currituck County DSS and a career state employee. At the time of her hearing and termination, she was Supervisor of the Child Protective Services Unit. She had never been previously disciplined by DSS and had been consistently awarded exemplary performance reviews.

Ayers was considered "first choice" for the DSS director's job but had turned it down, which allowed Hurd to be promoted. Hurd worked as a subordinate to Ayers. There is a history of "friction" between these two individuals. The factual inquiry before the ALJ was and is solely the credibility of Ayers and Hurd, and DSS carries the burden of proof.

The evidence shows and the ALJ found Hurd approached Ayers late on a Friday afternoon when no other employees were present to question the meaning of a notation on a report Ayers did not prepare.

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5. Based on our decision vacating the ALJ's Final Decision as unsupported by the evidence in the whole record and remanding for additional proceedings, we express no opinion as to whether the ALJ erred by ruling DSS lacked just cause to terminate Petitioner for the conduct alleged.

After Ayers stated she did not know the answer to Hurd's question and declined to speculate, Hurd persisted and made the allegation at issue.

The ALJ weighed the credibility of the two witnesses and the evidence, factually found and concluded DSS had failed to prove the first prong of the *Warren* test to support Ayers' termination. *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012). The ALJ further found and stated the relevant facts, including Ayers' lack of disciplinary history, her years of exemplary service, job performance and reviews, and the lack of any harm sustained by either DSS or Hurd, in support of her conclusion DSS failed to carry its burden to show Ayers' conduct rose to the level of conduct to justify the sanction of dismissal.

II. Standard of Review

The majority opinion correctly states the standard of review from *Harris*. *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132, *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017) ("It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test.").

"It also is appropriate to note that the 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *Brewington v. N.C. Dep't of Pub. Safety*, 254 N.C. App. 1, 19, 802 S.E.2d 115, 128 (2017), *cert. denied*, 371 N.C. 343, 813 S.E.2d 857 (2018) (citation and quotation marks omitted).

Like the jury, the ALJ is the sole judge of the credibility of the witnesses and the weight given to the evidence as the finder of fact. She is the only "lie detector" in the hearing. *State v. Looney*, 294 N.C. 1, 26, 240 S.E.2d 612, 626 (1978) (quoting *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973)) (describing the role of the jury as finders of fact in a jury trial). Her resolutions of credibility, weight, and factual findings, like the jury's "verdict" or truth, are not open to appellate review. DSS carries the burden to show prejudicial and reversible error on appeal.

III. Issues

The sole issues before the ALJ are the credibility of the two witnesses: one who asserts the allegation and the other who denies it, and whether DSS carries and sustains its burden of proof. The issues before

this Court are not credibility, but: (1) whether the ALJ's findings of fact are supported by evidence presented to the ALJ; and, (2) whether the ALJ erred by concluding just cause did not exist and reversing DSS' decision to terminate Ayers' employment.

IV. Analysis

Career and non-exempt state employees may not be discharged, suspended, or demoted for disciplinary reasons without "just cause." *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 379, 726 S.E.2d 920, 923 (2012).

This requires the reviewing tribunal to examine two things: (1) "whether the employee engaged in the conduct the employer alleges"; and, (2) "whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (citation omitted). There are two categories of just cause for discipline: "unsatisfactory job performance" and "unacceptable personal conduct." *Id.*

The ALJ weighed the credibility of the witnesses, considered all the evidence in the "whole record," and concluded DSS had failed to prove that the first prong of the *Warren* test was met. The ALJ further stated the accuser-director had erred in applying her own *Warren* test, and also noted Ayers' exemplary reviews and past job performance. DSS complains about these additional conclusions. These conclusions and evidence are clearly part of the "whole record," but DSS wholly fails to show these statements or findings are error or explain its own failure to offer credible testimony and carry its burden of proof.

Our standard of review constricts appellate review to the legal conclusions of the ALJ. We are not the "lie detector" judging the witnesses' credibility, and may not re-weigh the evidence. Nor may we consider or assert arguments never made before the ALJ. The ALJ heard the evidence, weighed the credibility of the witnesses, entered findings supported by the evidence, made a decision, and issued her conclusions and ruling. Accepting, rejecting, or resolving any conflicts in the witnesses' testimony or the evidence is solely within the province of the ALJ as finder of fact.

On remand, based upon the whole record, the ALJ is entirely free to accept or reject the testimony and judge the credibility of any witness, and weigh and resolve all factual disputes in the evidence before her as the sole judge and finder of facts. Ayers carries no burden at the hearing.

It is for the ALJ and not within this Court's prerogative or authority to determine factually who said what. As noted in the majority's opinion, nothing in this Court's opinion and mandate suggests, compels, directs, or orders a contrary result from the ALJ previously ordered upon remand.

SHAUNNA L. CARLTON, PETITIONER
v.
UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT

No. COA19-140

Filed 1 October 2019

1. Public Officers and Employees—state employee—fired then reinstated with back pay—contested case—subject matter jurisdiction

Where a state university fired an employee and then reinstated her with back pay, the Office of Administrative Hearings (OAH) lacked jurisdiction under N.C.G.S. § 126-34.02 to review the employee's contested case, which challenged how the university implemented its final decision following an informal grievance process. Although the employee's initial grievance arose out of alleged discrimination and dismissal without just cause, which section 126-34.02(b) lists as one of six grounds for which a state employee may bring a contested case, the issue she raised before the OAH did not arise from any of those six grounds. Moreover, because the employee obtained a favorable result through the informal grievance process, review from the OAH was unnecessary.

2. Attorney Fees—state employee—fired then reinstated with back pay—contested case

Where a state university fired an employee and then reinstated her with back pay, the Office of Administrative Hearings (OAH) properly denied the employee's request for attorney fees after dismissing her contested case. Under N.C.G.S. § 126-34.02, attorney fees would have been appropriate only if the OAH itself had ordered the employee's reinstatement and back pay.

Appeal by Petitioner from final decision entered 28 August 2018 by Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 18 September 2019.

Law Office of Shiloh Daum, by Shiloh Daum, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, for Respondent-Appellee.

DILLON, Judge.

Petitioner Shaunna L. Carlton is an employee of Respondent University of North Carolina at Chapel Hill ("UNC"). She was terminated, but then reinstated with back pay. Notwithstanding her reinstatement, she commenced a contested case in the Office of Administrative Hearings ("OAH"). The OAH dismissed her case, and she appeals this dismissal to our Court.

I. Background

Ms. Carlton was employed by UNC as a Human Resources Consultant for approximately fifteen (15) years with no history of discipline. In January 2017, Ms. Carlton sought and was approved for medical leave due to a temporary disability.

In June 2017, shortly after Ms. Carlton's return, she was dismissed from her position as a Human Resources Consultant. Ms. Carlton timely filed a grievance.

On 23 May 2018, UNC reinstated Ms. Carlton. Specifically, at the conclusion of an internal grievance process, UNC issued a Final University Decision, finding "that there was not just cause to support the disciplinary decision of dismissal," but "that there was not sufficient evidence to support [Ms. Carlton's] claim that [her] dismissal was based on [her] disability." In so finding, UNC "reverse[d] the dismissal and reinstate[d Ms. Carlton] to employment[.]"

Despite her reinstatement, Ms. Carlton filed a Petition for Contested Case Hearing with the OAH, citing to a lack of progress "in the reinstatement process[.]" UNC motioned to dismiss her Petition for lack of subject matter jurisdiction, lack of personal jurisdiction, and for failure to state a claim.

The OAH issued a Final Decision Order of Dismissal ("Final Decision"), dismissing Ms. Carlton's contested case with prejudice for lack of both subject matter jurisdiction and personal jurisdiction. Ms. Carlton timely appealed the Final Decision.

II. Analysis

[1] On appeal, Ms. Carlton argues that the OAH erred in concluding that it lacked jurisdiction over the matter. We disagree.

We review the Final Decision using two different standards: questions of law are reviewed *de novo* and questions of fact are reviewed under the whole record test. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2005).

Section 126-34.01 governs the process by which "[a]ny State employee having a grievance arising out of or due to the employee's employment" should follow. N.C. Gen. Stat. § 126-34.01 (2018). Essentially, a State employee must seek informal resolution through internal channels before seeking review from the OAH. *Id.*; *see also* N.C. Gen. Stat. § 126-34.02.

Section 126-34.02 identifies six grounds for which an employee may bring a "contested case[] after completion of the agency grievance procedure and the Office of State Human Resources review[.]" N.C. Gen. Stat. § 126-34.02(b) (listing discrimination or harassment, retaliation, just cause, veteran's preference, failure to post or give priority consideration, and whistleblower as grounds to "be heard as contested cases").

Here, we note that Ms. Carlton's initial grievance arose out of alleged discrimination and dismissal without just cause as contemplated in Section 126-34.02(b)(1). But we also note that Ms. Carlton obtained a result in her favor on this issue at the conclusion of the informal grievance process. Ms. Carlton, though, seeks review of the "implement[ation]" of the Final University Decision. This issue is not one set out in our General Statutes for the OAH to resolve. N.C. Gen. Stat. § 126-34.02(b); N.C. Gen. Stat. § 126-34.02(c) ("Any issue for which an appeal to the Office of Administrative Hearings has not been specifically authorized by this section shall not be grounds for a contested case hearing.").[1]

[2] Further, in dismissing Ms. Carlton's contested case, the OAH also denied Ms. Carlton's request for attorneys' fees. Such a denial was proper.

Subsection (e) of Section 126-34.02 allows the OAH to "award attorneys' fees to an employee where reinstatement or back pay is ordered[.]"

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1. Ms. Carlton's proper avenue for implementation and performance of the Final University Decision is to file a claim for specific performance with the trial court. *See McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952) ("Ordinarily, a court of equity will decree specific performance of a valid contract[.]").

N.C. Gen. Stat. § 126-34.02(e). However, as the OAH did not order any remedy, but rather dismissed Ms. Carlton's contested case, this statute does not permit the OAH to award attorneys' fees. *Id.* Moreover, prior to filing a contested case hearing with the OAH, Ms. Carlton had already been reinstated and awarded back pay through UNC's internal grievance procedure.

III. Conclusion

We conclude that the OAH did not err in dismissing Ms. Carlton's contested case. Likewise, we conclude that the OAH properly denied Ms. Carlton's request for attorney's fees.

AFFIRMED.

Judges TYSON and BROOK concur.

IN THE MATTER OF S.P. AND J.P.

No. COA18-1190

Filed 1 October 2019

Child Abuse, Dependency, and Neglect—permanency planning hearing—lack of oral testimony

An order appointing guardianship of neglected juveniles to relatives was vacated and remanded because the trial court heard no oral testimony at the permanency planning hearing. The reports offered by the county department of social services and the guardian ad litem were insufficient to support the trial court's findings and conclusions without oral testimony.

Appeal by Respondent-Father from order entered 21 August 2018 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 5 September 2019.

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

Peter Wood for respondent-appellant father.

James N. Freeman, Jr. for guardian ad litem.

MURPHY, Judge.

Respondent-Father ("Edouard"[1]) appeals from an order appointing the Johnsons as guardians of his minor children, Arthur and Cesar. Because no oral testimony was received at the hearing, we vacate the trial court's order and remand for further proceedings.

BACKGROUND

On 11 July 2017, the Surry County Department of Social Services ("DSS") filed petitions alleging that Arthur and Cesar were neglected juveniles. DSS alleged the children did not receive proper care, supervision, or discipline from their parents and lived in an environment injurious to their welfare due to their parents' significant substance abuse. DSS obtained nonsecure custody of the children and placed them with the Johnsons, a couple related to the children's mother.

After a hearing on 17 August 2017, the trial court entered an order on 12 September 2017 adjudicating the children to be neglected juveniles. In its disposition order, entered the same day, the trial court continued custody of the children with DSS, ordered the parents to comply with the Family Services Case Plans they had entered into with DSS, and granted the parents bi-weekly supervised visitation with the children.

The trial court entered review hearing orders on 31 January 2018 and 22 March 2018. It found the children were doing well in their placement with the Johnsons and that the parents were making only limited progress on the requirements of their case plans. The trial court continued custody of the children with DSS and directed they remain in placement with the Johnsons. The parents were ordered to comply with DSS requests and the provisions of their case plans and to submit to immediate drug screening. The trial court modified visitation to two visits per month to be supervised by the Johnsons.

On 27 June 2018, the trial court conducted a permanency planning hearing. The trial court entered its order from that hearing on 23 July 2018 and entered an amended order on 21 August 2018. In that order, the trial court found the parents had not made satisfactory progress on their case plans. The trial court set the primary plan for the children as guardianship and the secondary plan as reunification and appointed the Johnsons as guardians of the children. The trial court relieved DSS from

1. Pseudonyms are used for all relevant persons throughout this opinion to protect the juveniles' identities and for ease of reading.

further responsibility in the case, discharged the guardian ad litem for the children, released the parents' appointed counsel, and held no further hearings were required in the case. The parents were granted a minimum of one two-hour visit with the children each month, to be supervised by the Johnsons, and the Johnsons were authorized to expand visitation in their discretion. Edouard filed timely notice of appeal.

ANALYSIS

Edouard argues the trial court erred by (1) delegating "its judicial responsibility by granting the [Johnsons] excessive discretion over [his] visitation rather than setting specific terms[,]" (2) "awarding guardianship to nonparents without verifying that the guardians understood the legal significance and had adequate resources[,]" and (3) terminating "juvenile court custody without [following] the mandates of [N.C.G.S.] § 7B-911 or opening a case under . . . Chapter 50."

We first address Edouard's argument challenging the trial court's decision to award guardianship to the Johnsons. Our review of a permanency planning hearing is well established:

> This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions are reviewable de novo on appeal.

In re P.O., 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal citations and quotation marks omitted).

N.C.G.S. § 7B-906.1(j) states:

> (j) If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C.G.S. § 7B-906.1(j) (2017).

We have previously addressed the requirement of testimony at the permanency planning hearing to support a permanency planning

order. *In re J.T.*, 252 N.C. App. 19, 796 S.E.2d 534 (2017); *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010); *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004). In *In re J.T.*, at the permanency planning hearing, the trial court heard statements from attorneys and "accepted into evidence court reports submitted by the guardian ad litem and a DSS social worker and incorporated those reports by reference in its orders." *In re J.T.*, 796 S.E.2d at 536. We stated that "reports incorporated by reference in the absence of testimony are insufficient to support the trial court's findings of fact." *Id.* Accordingly, we held that "[b]ecause the trial court did not hear evidence at either of the permanency planning hearings, the findings in the court's orders were unsupported by competent evidence, and its conclusions of law were in error." *Id.*

In so holding, we found support in *In re D.Y.* and *In re D.L.*:

> The determinative facts of the present case are indistinguishable from those in this Court's prior decisions in *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010), and *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004), in which court reports were the only admissible evidence offered by DSS at the permanency planning hearings. The trial court's findings of fact thus were based only on the court reports, prior orders, and the arguments of counsel. In both cases, this Court held that the trial court's conclusions of law were in error without additional evidence offered to support the trial court's findings of fact, and this Court reversed the permanency planning orders.

Id. at 21, 796 S.E.2d at 536 (citations omitted).

This case is indistinguishable from the aforementioned cases. Here, the only evidence before the trial court consisted of the reports offered by DSS and the guardian ad litem. The trial court heard no testimony at the permanency planning hearing. The entirety of the evidentiary portion of the permanency planning hearing consists of the following:

> THE COURT: If we can have the preparers of the report sworn?
>
> (The preparers of the report were sworn.)

The trial court then asked if DSS had anything further, whereupon counsel presented their arguments to the court. While the trial court could consider the reports as evidence, these reports and arguments made by counsel alone, without testimony, are insufficient to support the trial court's findings of fact. *See In re J.T.*, 796 S.E.2d at 536. Thus,

the trial court's conclusions of law were erroneous. We vacate the order and remand for further proceedings. Because we must vacate the trial court's order, we need not address Edouard's remaining arguments.

CONCLUSION

For the reasons stated herein, the trial court's order is vacated and remanded.

VACATED AND REMANDED.

Chief Judge McGEE and Judge COLLINS concur.

DOUGLASS HOYT McMILLAN, PLAINTIFF
v.
SHELLY DIANE McMILLAN, DEFENDANT

No. COA18-1279

Filed 1 October 2019

1. Child Custody and Support—jurisdiction—prior neglect proceeding—termination of juvenile court jurisdiction

The trial court properly exercised jurisdiction over a child custody action even though that action was filed during the pendency of a juvenile neglect proceeding. While the juvenile order's reference to a civil child custody order being entered the same day was not supported by the record (which did not reflect the entry of such an order), the juvenile order expressly terminated the neglect proceeding and returned custody of the child to the parents, thereby terminating jurisdiction in accordance with N.C.G.S. § 7B-201.

2. Child Custody and Support—jurisdiction—prior neglect proceeding—modification of custody

The trial court properly exercised jurisdiction in a child custody action where a father filed a motion in the cause after a prior juvenile neglect proceeding was terminated and custody of the child was returned to the parents, because the court had authority to make an initial child custody determination pursuant to sections 50-13.1 and 50-13.2. Even taking as true the father's argument that the juvenile order constituted a permanent child custody order which could only be modified by an allegation of a substantial change in

circumstances as required by section 50-13.7, allegations in the parties' filings were sufficient to meet that requirement.

Appeal by Plaintiff from an Order entered 28 March 2018 by Judge George A. Bedsworth in Forsyth County District Court. Heard in the Court of Appeals 5 June 2019.

Morrow Porter Vermitsky & Taylor, PLLC, by John C. Vermitsky, for Plaintiff-Appellant.

Metcalf & Beal, LLP, by Christopher L. Beal, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Douglass Hoyt McMillan (Plaintiff) appeals from an Order awarding Shelly Diane McMillan (Defendant) legal custody and primary physical custody of the parties' minor child and granting Plaintiff secondary legal custody. The Record before us tends to show the following:

Even prior to the minor child's birth, the parties in this case had a tumultuous relationship fueled by alcohol and substance abuse. As the trial court would later summarize: "Their courtship was marked by relapses, hospitalizations, domestic violence and extremely careless behavior." On 6 October 2010, two days after the parties' minor child was born, the parties engaged in a domestic violence incident resulting in the two-day old minor child being dropped on the floor and hitting her head.

As a result, on 8 October 2010, the Forsyth County Department of Social Services (DSS) initiated a Juvenile Abuse/Neglect/Dependency action in Forsyth County District Court (the Neglect Proceeding) due to reports from hospital staff of the parties arguing and concerns about releasing the child to a hostile environment.[1] The parties separated on 10 October 2010. On 2 March 2011, the minor child was adjudicated to be a neglected juvenile and placed in the custody of her maternal grandparents.

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1. The Record before us does not contain the Juvenile Petition, the subsequent Neglect Adjudication, or other contemporaneous documents. Thus, we draw our factual and procedural background here from findings and undisputed allegations in this subsequent child custody litigation setting out this earlier history.

On 15 December 2010, before the Neglect Adjudication and while the Neglect Proceeding was still pending, Plaintiff initiated this action by filing a Complaint in Forsyth County District Court seeking exclusive legal and physical custody of the parties' minor child (the Child Custody Action). Following the Neglect Adjudication, on 9 November 2011, the Child Custody Action was administratively removed from the active court calendar and ordered closed by the Forsyth County District Court on the basis "it appears that the case is no longer an active lawsuit and that trial will not likely be necessary."

On 18 April 2012, in the Neglect Proceeding, the Forsyth County District Court entered a Juvenile Order[2] following a statutory periodic review hearing under then N.C. Gen. Stat. § 7B-906[3] on the status of the minor child. The Juvenile Order found DSS now recommended legal custody of the minor child be returned to the parties, with the parties having joint custody of the child, and that the case be converted to a civil child custody proceeding. The Guardian *ad Litem* for the minor child recommended the same thing. The Juvenile Order contains findings reciting the efforts of DSS to eliminate the need for foster placement of the minor child and reunify her with her parents, and a finding those efforts were reasonable.

The Juvenile Order found "that return of [the minor child] to the joint custody of her parents would be in the best interest of the child." In addition, the Juvenile Order found: "On this date, the Court has entered an order pursuant to N.C.G.S. 50-13.1, 50-13, 50-13.5 and 50-13.7, as provided in G.S. 7B-911, awarding joint custody of the child" to Plaintiff and Defendant.

The Juvenile Order further found:

> 22. The parties understand that any Motion to enforce or modify the terms of the civil custody order will be in Civil, not Juvenile Court and may be referred to mediation; that no party is entitled to court-appointed counsel in that action; that the Guardian ad Litem and Attorney Advocate have no responsibilities in that action; that the Juvenile Court will have jurisdiction to consider matters relating to the child only if a new Petition is filed; and that the [DSS] has no custodial

2. This Juvenile Order is included in the Record.

3. Since repealed and now replaced with N.C. Gen. Stat. § 7B-906.1. *See* 2013 N.C. Sess. Law 129, § 29 (N.C. 2013).

> or other rights or responsibilities with respect to the child, although Plaintiff may contact DSS for assistance that may be available on a voluntary basis.
>
> 23. The Court finds pursuant to N.C.G.S. 7B-911 that [Plaintiff and Defendant] are fit and proper to have sole custody of [the minor child] and such custody would be in the best interest of the [minor child].

Consequently, the Juvenile Order decreed the parties were to have joint legal custody of the minor child, including authorization of necessary medical care for the child, and "the Court terminates juvenile court jurisdiction and there shall be no further scheduled Court reviews." Despite the Juvenile Order's recitation that a civil child custody order was being entered the same day, the Record does not reflect that any such order was entered in the Child Custody Action or in any newly initiated civil child custody action. Indeed, the parties appear to agree that no such written order was actually entered.[4] In any event, no further proceedings took place in the Neglect Proceeding.

Almost two years later, on 16 April 2014, Plaintiff filed a Motion in the Cause in the Child Custody Action seeking permanent, exclusive legal and physical custody of the parties' minor child, as well as ex parte emergency and temporary custody of the child and child support. The Motion in the Cause alleged following the termination of the Neglect Proceeding, the parties had operated on an alternating 4-3-4-3 custody schedule from June 2012 until April 2014. The Motion in the Cause further alleged that earlier in April 2014, Plaintiff observed Defendant to be highly intoxicated during child custody exchanges and determined Defendant had relapsed; on 10 April 2014, Defendant had checked herself into an alcohol treatment program; and Plaintiff refused to return the child to her for the child's protection.

The same day, 16 April 2014, Plaintiff obtained an ex parte order granting him temporary legal and exclusive physical custody of the child. On 20 June 2014, Defendant filed a Response to Plaintiff's Motion in the Cause countering, *inter alia*, that while she "may have an occasional problem with alcohol," Plaintiff was a "recovering crack addict" "diagnosed with several personality disorders," including Narcissism and Anti-Social disorders, and who was "obsessively jealous of the

4. Nothing in the Record reflects that any party moved or requested entry of an order in the Child Custody Action or sought a writ of mandamus requiring the trial court to enter such an order.

Defendant's parents being involved" with the child. Between 2014 and 2016, the parties operated under a series of Memoranda of Judgment/Orders providing temporary custody, which, generally speaking, provided Defendant greater custodial time with the minor child. The last of these Memoranda, entered on 29 November 2016 with the consent of the parties, granted temporary primary physical custody to Defendant.

The case finally came on for trial over several dates in July and August 2017 on the parties' respective claims for child custody. On 28 March 2018, the trial court entered its Order in the Child Custody Action, awarding Defendant legal and primary physical custody and granting Plaintiff secondary custody every other weekend and one weeknight, with a birthday, holiday, and summer visitation schedule. The trial court left open the remaining issues of child support and attorneys' fees in hopes the parties might reach some agreement. Plaintiff filed his Notice of Appeal on 9 April 2018.

Appellate Jurisdiction

The trial court's 28 March 2018 Order constitutes a final resolution of the parties' child custody claims and this appeal is properly before us notwithstanding the remaining child support claim or request for attorneys' fees. *See* N.C. Gen. Stat. § 50-19.1 (2017) ("Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating . . . child custody . . . 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."); *see also Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) ("An order that completely decides the merits of an action therefore constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs.").

Issues

On appeal to this Court, Plaintiff elects not to directly challenge the trial court's 28 March 2018 Order but, instead, presents two narrow jurisdictional issues: (I) whether exclusive jurisdiction in the Neglect Proceeding was properly terminated in 2012, such that the trial court obtained jurisdiction to enter orders in the Child Custody Action; and if so, (II) whether the fact Plaintiff's own 2014 Motion in the Cause in the Child Custody Action, along with Defendant's own subsequent filings, failed to recite the existence of a substantial change of circumstances affecting the welfare of the minor child, deprived the trial court of jurisdiction to modify a prior custody decree.

Standard of Review

In both of his arguments, Plaintiff contends the trial court in the Child Custody Action lacked subject-matter jurisdiction to enter its 28 March 2018 Order granting both legal and primary physical custody to Defendant. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

We acknowledge, at least on the Record before us, Plaintiff failed to raise either of his arguments on appeal before the trial court. Nevertheless, "[s]ubject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *Id.* "Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings." *Id.* Therefore, we conclude the two issues raised are properly before us for review.

Analysis

I. Termination of Jurisdiction over the Neglect Proceeding

[1] Plaintiff first argues the trial court did not have jurisdiction over the Child Custody Action because jurisdiction over the Neglect Proceeding was not properly terminated under N.C. Gen. Stat. § 7B-911.

Jurisdiction in the Neglect Proceeding initiated in 2010 was exercised under N.C. Gen. Stat. § 7B-200(a) (2010), under which "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2010).[5] "When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a) (2010). When a petition alleging abuse, neglect, and/or dependency under Chapter 7B is filed, any then-pending civil action that includes child custody is automatically stayed as to the issue of child custody. N.C. Gen. Stat. § 7B-200(c)(1); § 50-13.1(i) (2010).

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5. During the lengthy pendency of this action, a number of amendments have been made to statutes within Chapter 7B relevant to this case, including Section 7B-200. As noted above, Section 7B-906 was repealed entirely and replaced with a new Section 7B-906.1. Indeed, in that same Session Law, Section 7B-911 underwent a number of revisions effective well after the Juvenile Order in this case. 2013 N.C. Sess. Law 129, § 29 (N.C. 2013). In our analysis, however, we endeavor to apply the statutory language in effect at the time of the Neglect Proceeding in 2010–2011. Much of the substantive discussion, including as to the jurisdictional provisions, however, remains generally applicable.

In this case, the Child Custody Action filed under Chapter 50-13.1 was not pending when the Neglect Proceeding was initiated; rather, "as the juvenile court obtained jurisdiction over the children, *see* N.C. Gen. Stat. 7B-200(a), the juvenile court had continuing exclusive jurisdiction unless jurisdiction was 'terminated by order of the court[.]' N.C. Gen. Stat. §§ 7B-200(a), -201(a)." *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011). In other words, at the time Plaintiff filed the Civil Custody Action, the trial court had no jurisdiction over the Child Custody Action because of the already-pending Neglect Proceeding.

The question then becomes whether the Juvenile Order entered on 18 April 2012 in the Neglect Proceeding was sufficient to terminate continuing exclusive jurisdiction in that proceeding, such that when Plaintiff filed his Motion in the Cause in the Child Custody Action two years later, the trial court could invoke jurisdiction over the Child Custody Action. Plaintiff contends that under this Court's prior decision in *Sherrick v. Sherrick*, 209 N.C. App. 166, 704 S.E.2d 314 (2011), the trial court in the Neglect Proceeding was required to comply with N.C. Gen. Stat. § 7B-911 in order to terminate its jurisdiction and transfer the matter to the Child Custody Action.

"N.C. Gen. Stat. § 7B-911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action." *Id.* at 169, 704 S.E.2d at 317. "N.C. Gen. Stat. § 7B-911 sets forth a detailed procedure for transfer of such cases which will ensure that the juvenile is protected and that the juvenile's custodial situation is stable throughout this transition. For this reason, N.C. Gen. Stat. § 7B-911(b) requires that the juvenile court enter a permanent order prior to termination of its jurisdiction." *Id.*

At the time[6] of the Neglect Proceeding, Section 7B-911 provided in full:

> (a) After making proper findings at a dispositional hearing or any subsequent hearing, the court on its own motion or the motion of a party may award custody of the juvenile to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in this section, and terminate the court's jurisdiction in the juvenile proceeding.

6. Again, see 2013 N.C. Sess. Law 129, § 29 for a comparison of the language both then and now.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

If the order is filed in an existing civil action and the person to whom the court is awarding custody is not a party to that action, the court shall order that the person be joined as a party and that the caption of the case be changed accordingly. The order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.

If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.

(c) The court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceeding only if:

(1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7; and

(2) In a separate order terminating the juvenile court's jurisdiction in the juvenile proceeding, the court finds:

a. That there is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding; and

b. That at least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911 (2010).

In *Sherrick*, this Court held a trial court had no jurisdiction to enter child custody orders in a Chapter 50 child custody action where jurisdiction in a neglect proceeding had not been properly terminated and the matter had not been properly transferred to the civil child custody action. 209 N.C. App. at 170-71, 704 S.E.2d at 318-19. There, the court in the juvenile neglect proceeding made no finding it was terminating jurisdiction, made no finding there was no need for continued State intervention, could not have made a finding at least six months had passed since the court made a determination as to the permanent plan, and awarded "temporary custody" over the child to both the grandparents and parents. *Id*. Consequently, our Court held "the juvenile court never terminated its jurisdiction and the case was therefore never properly transferred from juvenile court to civil court; thus the trial court, acting under its Chapter 50 jurisdiction, had no subject matter jurisdiction to enter these orders." *Id*. at 172, 704 S.E.2d at 319.

In this case, Plaintiff specifically argues the Neglect Proceeding was never properly terminated because the Juvenile Order failed to include specific findings required by Section 7B-911(c) and no custody order was entered in the Child Custody Action under Section 7B-911(b). Here, it appears, at a minimum, the trial court in the Neglect Proceeding, despite its finding otherwise, failed to actually enter an appropriate permanent custody order in either the Child Custody Action or in a newly initiated action. Thus, the Juvenile Order, by itself, was insufficient to *transfer* jurisdiction to the Child Custody Action.

However, a court presiding over a Chapter 7B abuse, neglect, and/or dependency proceeding may *terminate* jurisdiction under Section 7B-201 without having to comply with the *transfer* requirements of Section 7B-911. *See*, *e.g.*, *In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) ("[I]f the trial court determines that termination of the juvenile court's jurisdiction is proper or that the case should be transferred to civil court, the trial court should make the appropriate findings as required by N.C. Gen. Stat. § 7B-201 and/or N.C. Gen. Stat. § 7B-911."). In *Rodriguez*, this Court held a trial court properly terminated its jurisdiction over a juvenile abuse/neglect/dependency proceeding under N.C. Gen. Stat. § 7B-201 and thus the trial court had jurisdiction over a subsequent Chapter 50 custody action initiated by the child's grandparents. 211 N.C. App. at 273, 710 S.E.2d at 240. This Court further held:

> Because the juvenile review order herein placed the children in both the physical and legal custody of [the parent], ended involvement of both DSS and the Guardian ad Litem program, and included no provisions requiring ongoing supervision or court involvement, we conclude that the order terminated the jurisdiction of the juvenile court over the children as contemplated by N.C. Gen. Stat. § 7B-201(a).

Id.

In the present case, the Juvenile Order expressly states it is terminating jurisdiction in the Neglect Proceeding, expressly ends the involvement of both DSS and Guardian *ad Litem*, and expressly returns custody—including legal custody—of the child to the parents. As in *Rodriguez*, we conclude the Juvenile Order "terminated the jurisdiction of the juvenile court over the [child] as contemplated by N.C. Gen. Stat. § 7B-201(a)." *Id.* As such, upon the termination of jurisdiction in the Neglect Proceeding, the legal status of the juvenile and the custodial rights of the parties reverted to the status they were before the juvenile petition was filed. N.C. Gen. Stat. § 7B-201(b) (2010). Therefore, the trial court in this Child Custody Action had subject-matter jurisdiction to consider Plaintiff's custody claim once Plaintiff invoked that jurisdiction by filing his Motion in the Cause.[7] *Rodriguez*, 211 N.C. App. at 273, 710 S.E.2d at 240. Thus, the trial court did not err in asserting jurisdiction over the Child Custody Action after the Juvenile Proceeding was terminated.

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7. We leave aside a separate question not raised or briefed as to whether Plaintiff should have instead filed a new action in light of the fact the Child Custody Action was administratively dismissed prior to the trial court ever obtaining jurisdiction in the case.

II. Allegations of a Substantial Change in Circumstances

[2] Plaintiff next contends, to the extent the Juvenile Order constituted a permanent custody order under Section 7B-911, no party in the Child Custody Action alleged a substantial change of circumstances affecting the welfare of the child. Thus, Defendant submits, the trial court lacked jurisdiction to modify any permanent custody order arising out of the Neglect Proceeding.

Under N.C. Gen. Stat. § 50-13.7(a) an existing permanent child custody order may only be modified "upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C. Gen. Stat. § 50-13.7(a). However, as we note above, the trial court in the Neglect Proceeding did not enter any permanent custody order in compliance with Section 7B-911. Rather, the court in the Neglect Proceeding merely terminated its jurisdiction and returned custody of the minor child to the parties; thus, the parties simply reverted to their pre-petition status under which there was no prior court order for the custody of the minor child. *See* N.C. Gen. Stat. § 7B-201. In the absence of an existing permanent child custody order, the parties were not required to allege, and the trial court was not required to find or conclude, that there existed a substantial change of circumstances affecting the welfare of the child for purposes of modifying an existing custody order under N.C. Gen. Stat. § 50-13.7. Rather, the trial court in the Child Custody Action was permitted to make an initial child custody determination based on the best interests of the minor child under N.C. Gen. Stat. § 50-13.1 and § 50-13.2.

Therefore, we do not reach the question of whether an express allegation of a "substantial change of circumstances" is a jurisdictional requisite of a motion in the cause seeking to modify custody. Moreover, even assuming it is, and further assuming the Juvenile Order in this case did result in a permanent custody order subject only to modification under Section 50-13.7, Plaintiff's own Motion in the Cause adequately alleged a substantial change of circumstances affecting the welfare of the child. Specifically, the Motion in the Cause filed in April 2014 alleged subsequent to the termination of the Neglect Proceeding in April 2012, the parties had maintained an alternating custody schedule, but that in 2014, Defendant had allegedly relapsed and had allegedly been observed to be highly intoxicated around the child during custody exchanges and that this presented a risk of harm to the child. Defendant filed a Response to this Motion containing her own rebuttal and allegations to Plaintiff's Motion. The parties' allegations in these filings would be sufficient to allege a substantial change in circumstances affecting the welfare of the child to permit the trial court to consider a modification of child custody.

Thus, we conclude the trial court did not err in asserting jurisdiction over the Child Custody Action. Therefore, the trial court did not err in entering its 28 March 2018 Order granting Defendant legal and primary physical custody of the parties' minor child.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 28 March 2018 Order.

AFFIRMED.

Judges DIETZ and BERGER concur.

MOUNT AIRY-SURRY COUNTY AIRPORT AUTHORITY, Plaintiff
v.
DENNIS DWAIN ANGEL and WYATT DWAIN ANGEL, Defendants

No. COA18-1019

Filed 1 October 2019

1. Landlord and Tenant—commercial lease—holdover provision—continued payment at previous rate—month-to-month

By the express terms of a commercial lease, the continued payment of rent by lessees of an airport hangar after the original lease term expired—at the same rate and not a renegotiated higher rate—converted the lease to a month-to-month schedule. Therefore, even though the landlord county airport authority gave only twelve days' notice of termination of the lease, summary judgment for the landlord in this summary ejectment action was appropriate.

2. Landlord and Tenant—commercial lease—holdover tenancy—landlord's failure to act—waiver of terms

In a summary ejectment action in which lessees of an airport hangar were given twelve days' notice of termination of the lease, no evidence was presented that the landlord county airport authority waived the renewal provisions of the lease, either expressly or impliedly, through its continued acceptance of rent after the expiration of the original lease term. Where the terms of the lease provided for continued operation on a month-to-month basis under these circumstances, summary judgment for the airport authority was appropriate.

3. Landlord and Tenant—commercial lease—holdover tenancy—novation—lack of evidentiary support

In a summary ejectment action in which lessees of an airport hangar were given twelve days' notice of termination of the lease, the Court of Appeals rejected the lessees' argument that their continued payment of rent after the original lease term expired, especially after they began paying at an increased rate, constituted a novation—i.e., the substitution of a new lease agreement with a one-year term. There was no evidence of mutual assent between the parties to adopt a one-year term, and since the terms of the original lease provided for continued operation on a month-to-month basis under these circumstances, summary judgment for the airport authority was appropriate.

Appeal by defendants from order entered 15 May 2018 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 26 March 2019.

C. Daniel Barrett for plaintiff-appellee.

Randolph M. James, P.C., by Randolph M. James, for defendants-appellants.

DIETZ, Judge.

Dennis Dwain Angel and his son Wyatt Dwain Angel leased a hangar at the Mount Airy-Surry County Airport for more than ten years. In late 2017, with little more than a week's notice, the airport told the Angels that the lease was terminated and they must vacate the hangar.

We acknowledge that the Angels presented evidence indicating that they were treated differently from other airport tenants, and that a lawsuit whose pleadings became a part of the record in this case allege there is much more to the parties' dispute than a mere disagreement over a hangar lease.

But this appeal concerns only the application of settled contract law principles to a proceeding for summary ejectment. Applying those principles here, the Angels have not forecasted sufficient evidence to create any genuine issues of material fact. By 2017, the parties' lease arrangement was on a month-to-month basis. Thus, the trial court properly entered summary judgment in this case.

Facts and Procedural History

On 31 May 2011, Dennis Dwain Angel and his son Wyatt Dwain Angel entered into a three-year lease agreement with Mount Airy-Surry County Airport for Hangar #5. The rent was $2,400 per year due in monthly $200 payments. The lease term was from 1 June 2011 to 31 May 2014.

The lease agreement contained a "Renewal Option" and a provision for "Holdovers":

> (19) Renewal Option: In the event Tenant is not in default of the terms, covenants and conditions of this agreement, Tenant and Landlord may agree to renew this lease at the expiration of the original term for one (1) year on the same terms and conditions contained herein, except for the fixed minimum monthly rent which shall be at a negotiated amount. Such renewal agreement shall be made in writing on or before the termination of the original term. Notwithstanding the provisions contained herein, under no circumstances may this agreement be renewed or extended to a date more than 5 years beyond the original beginning date set forth herein.
>
> (20) Holdovers: Except as provided above, continued occupancy of the premises beyond the initial lease period, or beyond any renewal period, shall be on a month-to-month basis.

The lease was not renewed in writing before the contract's expiration on 31 May 2014. But the Angels did not vacate the hangar at the end of the original lease term. Instead, they continued to pay the airport $200 per month to use the hangar. This went on for more than three years, including a period in 2017 in which, according to the Angels, the airport increased the monthly rent to $215 per month.

On 19 October 2017, the airport gave the Angels written notice that, in the airport's view, they were operating under a month-to-month lease and that the airport was terminating that lease effective 31 October 2017. The Angels refused to leave, prompting the airport to commence a summary ejectment action.

At the initial summary ejectment proceeding, the magistrate found in favor of the airport. On 15 December 2017, the Angels appealed the judgment to district court. The court granted summary judgment in favor of the airport. The Angels timely appealed.

Analysis

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). We review the trial court's grant of summary judgment *de novo*. *Murillo v. Daly*, 169 N.C. App. 223, 225, 609 S.E.2d 478, 480 (2005).

I. Lease renewal for one-year term

[1] The Angels first argue that there are genuine issues of material fact because they have evidence that they continued to pay rent long after the initial expiration of the lease term. They contend that the airport's acceptance of those monthly rental payments constituted a series of one-year renewals under the terms of the renewal provision in the agreement.

To support this argument, the Angels cite case law stating that "if the lease provides for an additional term at an increased rental, and after the expiration of the lease the tenant holds over and pays the increased rental, this is affirmative evidence on his part that he has exercised the option to take the lease for an additional term." *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 218, 146 S.E.2d 97, 101 (1966). This rule applies even if the contract requires any renewal to be in writing, or has other preconditions. In *Coulter*, for example, the contract required the tenant to notify the landlord of the intent to renew by registered mail at least 30 days before the end of the original lease term. *Id.* at 217, 146 S.E.2d at 100. Our Supreme Court held that the lease was renewed when the tenant held over and paid the increased rent. *Id.* at 218–19, 146 S.E.2d at 101.

On the surface, this case appears quite similar to *Coulter*. But there is a key distinction. In *Coulter*, the rent increase already was negotiated and built into the original lease agreement, which stated that the rent for the additional two-year term would increase from $175 to $225 per month. Here, by contrast, the contract provides that any one-year extension would be accompanied by a new rental payment "at a negotiated amount."

There is no evidence that the Angels and the airport negotiated a new rental payment amount after the original contract term expired. Instead, the record indicates that the Angels simply held over and paid the same rent as before. The lease agreement has an express provision governing this situation. It provides that "continued occupancy of the

premises beyond the initial lease period, or beyond any renewal period, shall be on a month-to-month basis."

To be sure, the Angels contend that they paid increased rent beginning in 2017. But by then, it was too late. The original lease agreement expressly provides that it can be renewed only for two additional one-year terms. In other words, the contract cannot be extended beyond mid-2016 under any circumstances. Occupancy that continues beyond that time period necessarily must be month-to-month under the agreement. By 2017, when the Angels allegedly paid increased rent, they had held over well past that two-year mark and thus could not renew the contract—either expressly or impliedly—for further one-year terms.

In sum, as *Coulter* explained, although our courts have created common law rules to help address recurring tenant holdover issues, "[t]he parties to the lease may, of course, agree upon a different relationship." *Id.* at 217, 146 S.E.2d at 100. That is what occurred here. The parties agreed that, if the tenant held over and the parties did not negotiate a new rental payment, then the tenant's occupancy was on a month-to-month basis. Accordingly, we reject the Angels' argument that their payment of rent after holding over constituted a renewal of the original lease agreement for successive one-year terms.

II. Waiver of the renewal terms in the lease

[2] The Angels next argue that the airport, through its failure to act on the holdover, waived several portions of the lease agreement: the requirement that renewals be in writing; the requirement that renewals occur before the expiration of the existing lease term; and the provision limiting renewals to no more than two additional one-year terms beyond the original three-year term.

In contract law, waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Bombardier Capital, Inc. v. Lake Hickory Watercraft, Inc.*, 178 N.C. App. 535, 540, 632 S.E.2d 192, 196 (2006). Waiver can be express or implied. "A waiver is implied when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Id.*

Here, there is no express evidence of waiver. Dennis Dwain Angel's affidavit states that "[a]fter May of 2014, I was informed and believed that our lease would be renewed." But this statement is missing a critical fact: informed *by whom*? To create a material issue of fact, the Angels must have evidence that *airport officials* told them the lease would be renewed. That evidence is not in the record before us.

Similarly, Dennis Dwain Angel's affidavit states that the airport "had a practice or policy of renewing everyone's leases as long as they were making rental payments." But, again, this assertion is missing key pieces of evidence necessary to overcome summary judgment. For example, we do not know if "everyone"—which presumably means similarly situated tenants—had discussions or negotiations about the renewals that did not occur here. And, more importantly, we do not know that those tenants had lease agreements with terms similar to the agreement here. Indeed, the airport might have different contracts with different tenants, with different renewal terms.

In sum, the record does not contain evidence of conduct by the airport that might naturally have led the Angels to believe there was an express or implied waiver. The lease agreement contains a holdover provision that permits the Angels to continue to occupy the hangar on a "month-to-month basis." The airport's conduct is consistent with that term of the contract, and there is no evidence that the airport expressly or implicitly took steps indicating it would waive those contract terms. Accordingly, the trial court properly rejected the Angels' waiver arguments.

III. Novation and a new, unwritten lease agreement

[3] Finally, the Angels argue that there was a novation—that, when the Angels began paying increased rent of $215 per month, that increase was "intended to extinguish the obligations of the written lease agreement" and to replace the written agreement with a new, unwritten one that included a one-year lease term.

Again, this argument has a fatal flaw. A novation is "a substitution of a new contract or obligation for an old one which is thereby extinguished. The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract." *Bank of Am., N.A. v. Rice*, 230 N.C. App. 450, 458, 750 S.E.2d 205, 210 (2013) (ellipses and emphasis omitted). "The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Southeast Caissons, LLC v. Choate Const. Co.*, 247 N.C. App. 104, 110, 784 S.E.2d 650, 654 (2016).

Here, the time frame of the alleged unwritten lease agreement—which the Angels contend is one year—is an essential term. Thus, there must be evidence of the parties' mutual assent to that term. There is none. Dennis Dwain Angel's affidavit states that "in April or May 2017, Plaintiff increased the rent to $215.00 per month. I made all monthly rental payments of $215.00." That is the only evidence to indicate the

parties negotiated a different contractual relationship at that time. Because there is no evidence that the parties mutually assented to abandon their existing month-to-month lease term and form a new lease agreement with a one-year term, the trial court properly rejected the Angels' novation argument.

Conclusion

We affirm the trial court's order granting summary judgment in favor of the Mount Airy-Surry County Airport Authority.

AFFIRMED.

Judges TYSON and HAMPSON concur.

RICHARD OWEN SHIREY, PLAINTIFF
v.
STACIE B. SHIREY, DEFENDANT

No. COA18-1011

Filed 1 October 2019

1. Divorce—alimony—child support—substantial change in circumstances—income increase

The trial court erred by concluding that a substantial change in circumstances warranted a modification of child support and alimony where plaintiff-ex-husband had income from new business ventures and also sold his interests in several businesses. An increase in the supporting ex-spouse's income cannot alone support a conclusion of a substantial change in circumstances; further, defendant-ex-wife had expressly relinquished any interest in the businesses that plaintiff sold, and there was no evidence that the sale of the businesses resulted in actual income to defendant.

2. Child Custody and Support—modification—by misinterpretation of prior order

The trial court erroneously modified a prior consent order's child custody provisions by misinterpreting a disjunctive provision ("the minor child will visit . . . and/or as the minor child desires") to mean that all visitation would be determined by the child's wishes, where the provision actually meant that the minor child could request additional visitation above the required visitation.

3. Divorce—equitable distribution—satisfaction of amounts owed—not modification

The trial court erred by concluding that plaintiff-ex-husband's $202,000 payment for defendant-ex-wife's share of a beach property was not in satisfaction of amounts he owed under the equitable distribution portion of their consent order, based on a provision in the consent order requiring the written consent of both parties for any modification of said order. Plaintiff's $202,000 payment was an effectuation of the consent order's terms rather than a modification, so no written consent was required. A portion of the trial court's order requiring plaintiff to pay a sum from the proceeds of the sale of another property was vacated and remanded based on this holding.

4. Divorce—equitable distribution—modification by written agreement—arguments on appeal moot

Plaintiff-ex-husband's arguments regarding real property subject to the equitable distribution provisions of a consent order were moot where plaintiff and defendant-ex-wife modified the consent order by written agreement and transferred ownership of the property to an out-of-state LLC.

5. Divorce—equitable distribution—loan payoff—obligations of parties

The trial court did not err by ordering plaintiff-ex-husband to pay off the debt on a truck that defendant-ex-wife drove, pursuant to a prior equitable distribution consent order, even though defendant had failed to provide the loan payoff information at the appropriate time. Defendant's failure did not absolve plaintiff of his obligation under the consent order.

6. Divorce—attorney fees—other issues reversed and remanded

The trial court's award of attorney fees to defendant-ex-wife in an alimony, child custody and support, and equitable distribution case was vacated and remanded where much of rest of the trial court's order had been reversed and remanded.

Appeal by plaintiff from order entered 14 March 2018 by Judge Tracy H. Hewett in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2019.

Thomas Godley & Grimes, PLLC, by Maren Tallent Werts and Seth A. Glazer, for plaintiff-appellant.

Hamilton Stephens Steele + Martin, LLC, by Amy E. Simpson, and Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick, for defendant-appellee.

TYSON, Judge.

Richard Owen Shirey ("Husband") appeals from the trial court's 6 March 2018 order on Stacie B. Shirey's ("Wife") motions: (1) for contempt; (2) to enforce/attach; (3) to modify alimony and child support; (4) for suspension of custody/visitation; and, (5) for attorney's fees, and on Husband's motions: (1) for contempt; and, (2) to modify. We affirm in part, reverse in part, vacate in part, and remand.

I. Background

The Shireys were married on 12 October 2002, separated on 1 February 2014, and were divorced on 13 May 2016. They are the natural parents of two children, one deceased minor son and one minor daughter with special needs ("T.S."), who is also a subject of this litigation.

While represented by counsel, the Shireys voluntarily bargained for and agreed upon a settlement on all issues of alimony, child custody and support, and equitable distribution, which was reduced to writing, signed by all parties and was jointly presented to the court and entered as a Consent Order in the Mecklenburg County Clerk of Superior Court on 24 May 2016.

Husband agreed to: (1). pay $2,800 per month for T.S.'s child support until terminated pursuant to North Carolina Law; (2). pay T.S.'s health insurance premium and 50% of T.S.'s uninsured medical expenses; (3). maintain a life insurance policy securing his life with a net death benefit of $1,000,000.00 to T.S. as named beneficiary; (4). pay Wife a total of sixty (60) payments of $1,500.00 per month in alimony; (5). pay Wife's health insurance premium for the same five years duration; and, (6). maintain a life insurance policy on his life with a net benefit of $1,500,000.00 with Wife as named beneficiary.

The Consent Order also required the Shireys to list the former marital residence located at 17301 Huntersville Concord Road, Huntersville, N.C. ("Huntersville Property") for sale and to split the net sale proceeds; list a marital Condominium property located at 18829 Vineyard Point Lane, Cornelius, N.C. ("Cornelius Property") for sale and split the net sale proceeds; and for Husband to pay debt owed by the Shireys to the Internal Revenue Service ("IRS") in the amount of $159,163.83. The

Consent Order also addressed the disposition and sale of a resort property located in Big Pine Key, Florida, which was owned by the Shireys with two other couples.

After their separation and divorce, the Shireys remained amicable and were staying at a hotel in Indian River County, Florida with T.S. for her to attend and participate in an equestrian event on 27 January 2017. An altercation arose between them. Wife threw a soft drink in Husband's face, and then Husband threw a soft drink in Wife's face, then purportedly hit her. Husband called police officers, who observed injuries to Wife and arrested Husband. Wife then obtained a Domestic Violence Order of Protection ("DVPO").

This DVPO restricted Husband from contacting Wife directly. Husband attempted to send the alimony and child support payments to Wife's counsel. Wife refused to accept these payments and filed motions for contempt, to enforce/attach, to modify alimony and child support, for suspension of custody/visitation, and for attorney's fees. Husband later filed motions for contempt and to modify alimony and child support on 27 April 2017.

Wife's motion to modify the Consent Order's alimony and child support provisions alleges a substantial change in circumstances based upon the following facts: (1) Husband selling the business interests distributed to him as separate property in the Consent Order; (2) Husband allegedly having acquired additional employment and income post-divorce; (3) Husband having voluntarily provided additional funds beyond his agreed-upon obligations for the benefit of T.S. and Wife after entry of the Consent Order; (4) the Shireys not selling and agreeing to maintain ownership of the property in Big Pine Key under a limited liability company, and to operate it as a rental property; and, (5) the Shireys' alleged diversion of rental income from the Big Pine Key property.

While legally separated and divorce was contemplated and after the Consent Order had been entered, Husband and Wife purchased a residence as listed tenants by the entirety located at 25 Park Avenue, Vero Beach, Florida ("Vero Beach Property"). The parties stipulated Husband contributed $300,000.00 to pay for his one-half interest, and also contributed an additional $202,000.00 towards the purchase price of Wife's share.

Wife contributed $98,000.00 toward her one-half interest in the Vero Beach Property. Wife testified she had agreed to the Husband's request for the Vero Beach Property to be purchased to provide T.S. "a nice place to live."

Wife further testified that no portion of the purchase price contributed by Husband for her share of the Vero Beach Property was to compensate for amounts Husband owed pursuant to the Consent Order. Wife asserted Husband wished to reconcile with her at the Vero Beach Property and wanted them to raise his minor son, who was born from an extramarital affair.

Husband testified and denied Wife's assertions. Husband testified the additional $202,000.00 he paid to purchase Wife's share of the Vero Beach Property was to satisfy amounts owed and payable to Wife under the equitable distribution terms of the Consent Order. Husband also testified to an agreement providing Husband would advance Wife a portion of her share of the net proceeds from the sale of the Cornelius Property, and reimburse her for money garnished from her account by the IRS by bringing those cash amounts to closing for the parties' purchase of the Vero Beach Property.

The trial court concluded Husband remained obligated to Wife for $58,700.70 from the sale proceeds of the Cornelius Property and to pay $129,873.10 to reimburse her for the IRS garnishment. The trial court denied Wife's Motion for Contempt, but found "Husband has failed to comply with the terms of the Permanent Order. However, he has either purged the contempt[s] or found not to be willful."

The trial court also allowed Wife's Motion for Modification of Child Support and Alimony. The court found a "substantial change in circumstances impacting the welfare of the minor child that justifies an indefinite suspension of the child custody provisions in the permanent order" had occurred since entry of the Consent Judgment. Sometimes referring to the Consent Order or Judgment as a "Permanent Order," the court also concluded the best interests of the child required the custodial terms of the Consent Order that placed T.S. in the primary physical custody with Wife were to remain intact, but amended the agreed-upon terms to allow the minor child to dictate the terms of any visitation with Husband.

Husband was also ordered to pay $58,700.70, representing Wife's remaining share of the net proceeds from the sale of the Cornelius Property, $155,632.68 representing Wife's share of the proceeds from the sale of the Huntersville Property, $129,873.10 as reimbursement for money garnished from Wife's account by the IRS, and pay the debt on the 2014 Ford F-250 pick-up truck in full and to transfer and deliver title to the vehicle to Wife.

The trial court also found: "Wife is an interested party acting in good faith with insufficient means to defray costs and expenses of suit and is entitled to an award of attorney's fees." The trial court granted Wife's Motion for Attorney's Fees, holding "Wife had no choice but to initiate legal action to force Husband's compliance with the Permanent Order." Husband was ordered to pay Wife's attorney's fees of $69,962.90. Husband timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Husband argues the trial court erred by: (1) finding a substantial change in circumstances had occurred to warrant a modification of child support and alimony; (2) concluding both that there had been a substantial change in circumstances warranting an indefinite suspension of the child visitation provisions in the Permanent Order and that it is in the best interests that the custodial terms in the consent order remain intact, yet denying Wife's motion to suspend child custody; (3) ordering Husband to pay Wife $58,700.70 from the net proceeds of the Cornelius Property; (4) requiring Husband to pay Wife $129,873.10 to reimburse Wife for the IRS garnishment; (5) finding the parties did not deviate from the terms of the Consent Order without the written consent of both parties; (6) ordering Husband to pay off the debt on the F-250 Ford pick-up; and, (7) awarding Wife attorney's fees.

IV. Modification of Child Support and Alimony

[1] Husband asserts the trial court erred when it found a substantial change in circumstances had occurred, warranting a modification of the parties' agreed-upon terms for child support and alimony in the Consent Order.

A. Standard of Review

Generally, the trial court's decision regarding alimony and child support is:

> left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's

> findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (citations and quotation marks omitted).

A trial court abuses its discretion when it renders a decision that is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 60 S.E.2d 222, 224 (2004).

B. Analysis

The Order states, in relevant parts:

> 63. Since the entry of the Permanent Order there has been a substantial change in circumstances affecting both the welfare of the minor child and her mother which justifies the modification of child support and alimony in order to maintain their accustomed standard of living. Specifically the court finds as follows:
>
> a) Husband sold his interests in the businesses he previously owed with his brother for more than $4 million which is paid over a 10-year period in monthly installments of $30,000 [twice monthly payments of $15,000.00] as well as an additional $100,000.00 lump sum payment made annually= $460,000.00/year. This does not include the initial buyout payment of $275,000.00 made to Husband in April, 2016.
>
> b) Husband is receiving rental income from one or more properties in Florida.
>
> c) Husband is enjoying income from the new businesses he formed after the Permanent Order was signed. In fact, he generates additional earnings anywhere from $5,000 to $30,000 more per month than what he receives from the sale of his business interests.
>
> d) Husband voluntarily provided thousands per month (every month until the month Husband was arrested for domestic violence) to Wife in excess of the base child support and alimony amounts to cover

reasonable and necessary expenses for the minor child including her equestrian activities[6] (including ownership of a horse and all that it entails) and her attendance at Sun Grove Montessori School, a private school which is well suited to help ameliorate [T.S]'s longstanding and documented special needs and learning disabilities. After the entry of the DVPO, Husband stopped paying the tuition and expenses related thereto thereby severely affecting the welfare of the minor child.

e) Husband convinced Wife to buy an expensive home in Vero Beach with him and then defaulted on the remaining indebtedness which sent the home into foreclosure.

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[6]After Wife and the minor child moved to Florida, Husband continued paying for the minor child to participate in equestrian related activity. The minor child has been riding since she was four [4] years old and is now an equestrian competition rider. All her life she has been encouraged in this endeavor by both parents, as she is talented in it and it is beneficial to the minor child because of her special needs. It was only on Husband's guarantee that he would maintain the costs associated with the care, boarding, and other expenses of the horse, as well as the costs associated with the minor child's continued participation in the sport that the minor child would be able to continue riding.

Defendant argues the trial court committed an error of law by concluding a substantial change in circumstances had occurred to warrant a modification of child support and alimony. "When the parties have entered into a consent order providing for the custody and support of their children, any modification of that order must be based upon a showing of a *substantial change in circumstances affecting the welfare of the child*." *Woncik v. Woncik*, 82 N.C. App 244, 247, 346 S.E.2d 277, 279 (1986) (emphasis supplied) (citing *Harris v. Harris*, 56 N.C. App. 122, 286 S.E.2d 859 (1982)).

A trial court may modify alimony and post-separation support only upon a "showing of changed circumstances." N.C. Gen. Stat. § 50-16.9(a) (2017). This Court has held "[i]t is well established that an increase in child support is improper if based solely upon the ground that the

support payor's income has *increased*." *Thomas v. Thomas*, 134 N.C. App. 591, 594, 518 S.E.2d 513, 525 (1999) (emphasis in original).

In *Britt v. Britt*, this Court held a trial court's conclusion of a substantial change in circumstances related to alimony, that was based solely on a supporting spouse's increase in income, was erroneous as a matter of law. *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980). To properly consider a change in income by a supporting spouse, the Court is limited to review and determine how that change in income affects the supporting spouse's ability to pay. *Rowe v. Rowe*, 52 N.C. App. 646, 655, 280 S.E.2d 182, 187 (1981), *rev'd on other grounds*, 305 N.C. 177, 287 S.E.2d 840 (1982).

1. Sale of Business Assets

As enumerated and detailed in the Consent Order, Husband held interests in the following related landscaping companies: 1) Southeast Spreading Company, LLC; 2) Southeast Spreading Asset Management, LLC; 3) Southeast Spreading Logistics, LLC; 4) Southeast Spreading Properties, LLC; 5) Southeast Spreading Transport, LLC; and 6) Southeast Pinestraw, LLC. In the Consent Order, Wife expressly agreed she "hereby and forever releases, waives, and relinquishes any right title and interest she may have in and to these businesses."

Following the divorce and entry of the Consent Order, the court found Husband had:

> sold his interests in the businesses he previously owned with his brother for more than $4 million which is paid over a 10-year period in monthly installments of $30,000.00 [twice monthly payments of $15,000.00] as well as an additional $100,000.00 lump sum payment made annually = $460,000.00. This does not include the initial buyout payment of $275,000.00 made to Husband in April, 2016.

The classification of proceeds from the sale of business assets as income is a conclusion of law, reviewable *de novo* by this Court. *Lee*, 167 N.C. App at 253, 60 S.E.2d at 224. The separate assets Husband sold had been released, awarded, and distributed solely to him by agreement in the Consent Order. Wife had expressly "relinquish[ed] any right title and interest she may have in and to these businesses."

Under the holdings in *Greer* and *Britt*, an increase of income alone cannot be the sole basis to support a conclusion of a substantial change in circumstances. *Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926. In the absence of fraud or non-disclosure, modification of the Consent Order

regarding alimony or child support cannot be based upon the change in form of separate assets from tangible to liquid, after they were released by Wife and distributed solely to Husband.

This Court, in *McKyer v. McKyer*, examined a similar issue in the context of non-recurring payments, the sale of a marital residence distributed solely to a spouse with an order that it be sold. *McKyer v. McKyer*, 179 N.C. App. 132, 143, 662 S.E.2d 828, 834-35 (2006). When wife sold the residence, the conversion of the asset into cash did not render the cash proceeds received from the sale as income. *Id.*

While the analysis in *McKyer* is pertinent and persuasive, in this case we must address whether the installment payments from a purchase-money financing sale of an asset previously released and distributed solely as separate property is considered as income to the supporting spouse for modification of previously agreed upon alimony and child support.

When this Court reviews an issue of first impression, it is appropriate to look to decisions from other 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 Appellate Court of Connecticut reviewed an analogous issue in *Denley v. Denley*, 661 A.2d 628 (Conn. App. Ct. 1995). In *Denley*, the husband was solely awarded stock options in a dissolution decree. *Id.* at 630. The Connecticut court found the gain husband had received from the redemption of these stock options could not be considered income to evaluate whether a change in circumstances had occurred. The court held "[t]he mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income." *Id.* at 631 (citing *Simms v. Simms*, 593 A.2d 161 (Conn. App. Ct. 1991)).

Two other jurisdictions agree with the Connecticut court's holding. *See Rimpf v. Campbell*, 853 So. 2d 957, 961 (Ala. Civ. App. 2002) ("the change in the character of an asset . . . awarded in a divorce judgment does not transform the asset into income"); *Geiger v. Geiger*, 645 N.E.2d 818, 821 (Ohio Ct. App. 1994) ("The sale of assets was merely a conversion of assets into cash, not income realized by the defendant.").

The reasoning of these decisions and this Court's holding in *McKyer* regarding a similar issue of sale of an asset into liquid proceeds is

instructive. The fact that the purchase price was paid to Husband, either as a lump sum or in an installment sale, does not convert the payment and receipt of proceeds from sale of a distributed sole asset into income. In *McKyer*, the wife sold the former marital residence for more than the value listed in the equitable distribution order. *McKyer*, 179 N.C. App. at 143, 662 S.E.2d at 834-35. This Court did not address whether this additional money was income as apparently neither party raised the issue. *Id.* However, in this case, and unlike *McKyer*, the trial court did not assign values to assets being distributed according to an equitable distribution order. The record does not show whether Husband realized profit or whether he received full payment in installments from the purchase money sale. Additionally, as in *McKyer*, the only arguments before this Court assert the installment payments were not income and do not address any profit realized from the sale of the businesses. *See id.* at 144, 632 S.E.2d at 835. *Cf.* N.C. Child Support Guidelines at p. 3; N.C.R. Annot. at 53 (2019) (defining "Income" as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment . . . , ownership or operation of a business, partnership or corporation, . . . capital gains").

The trial court here erred by including proceeds from the mere sale of Husband's released and separate business assets as increased income and a purported substantial change of circumstances to support a modification to agreed-upon alimony and child support without any evidence and finding the sale of the business assets resulted in actual income to Defendant. Also, an increase of income alone cannot be the sole basis to support a substantial change in circumstances. *Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926.

The incorrect attribution of the installment proceeds from the sale as income and Husband's purported increase in income permeates the trial court's entire analysis to modify child support and alimony. Moreover, one spouse's cessation of voluntary payments in excess of support amounts established by a court order should not be classified as a substantial change of circumstances, absent a showing of a change in the reasonable needs of the child or dependent spouse. *See, e.g.*, *Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975) (holding that an increase in support was properly justified by a showing of increased support costs and substantially increased spendable income of the payor).

Here, no finding by the trial court supports any change in the costs of child support since the parties' agreed upon amounts of child support in the Consent Order. The trial court's findings and conclusions are

unsupported as a matter of law. This portion of the trial court's order is reversed.

V. Child Custody Provisions

[2] Husband argues the trial court erred when it found a substantial change in circumstances had occurred warranting an indefinite suspension of his child custody and visitation provisions in the Consent Order, while keeping the custody provisions intact, after denying Wife's motion to suspend Husband's child custody. Husband asserts the trial court's Conclusions of Law 12 and 13 directly contradict one another.

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). The trial court's conclusions of law are reviewed *de novo*. *Lee*, 167 N.C. App at 253, 60 S.E.2d at 224.

B. Analysis

The trial court's Conclusions of Law 12 and 13 state:

> 12. Pursuant to N.C. Gen. Stat. §50-13.7, [t]here has been a substantial change of circumstances impacting the welfare of the minor child that justifies an indefinite suspension of the child custody provisions in the Permanent Order.
>
> 13. It is in the best interests of the minor child that the custodial terms provided in the Permanent Order remain intact with [T.S.] dictating visitation.

Contrary to Husband's argument, these conclusions of law are not in conflict. Rather, these conclusions of law reflect the trial court's two-part analysis in determining whether to modify the custody provisions of the parties' earlier Consent Order. *Shipman* 357 N.C. at 474, 586 S.E.2d at 253 ("If . . . the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests."). Here, while the trial court incorrectly determined there was a substantial change of

circumstances affecting the welfare of the child, the trial court then determined it was nevertheless not in the best interests of the minor child to modify the Consent Order. Thus, the trial court purported to decline to modify the prior Consent Order.

However, in so doing, the trial court erred in its interpretation of the Consent Order. In Finding of Fact 79, the trial court "notes that paragraph 2 of the decretal [in the Consent Order] sets out visitation 'as the minor child desires.' " In addition, the trial court ordered: "Defendant/Wife's Motion to Modify Custody/Suspend Visitation is **DENIED**. However, as a result of the custodial provisions as provided in the [Consent Order], visitation is to be as the minor child desires."

This conclusion in the order constitutes an erroneous modification of the prior Consent Order. The Consent Order does not vest decisions regarding Husband's visitation solely within the discretion of the minor child. Rather, the Consent Order incorporates the parties' then-existing arrangement and actually provides: "the minor child *will* visit upon reasonable advance request to Defendant /Mother, as the parties agree, and/or as the minor child desires." (emphasis supplied).

This provision of the parties' Consent Order is stated disjunctively and does not provide the minor child with automatic consent or veto power over Husband's visitation; rather, it provides the minor child with the ability to request additional visitation with her father if she desires in addition to and above the "will visit" provision. By re-casting this provision as one providing the minor child with sole discretion over visitation, the trial court erroneously modified child custody. We vacate this provision of the trial court's order and remand for entry of an order simply denying Defendant's Motion to Modify Custody/Suspend Visitation.

VI. $202,000.00 Payment

A. Standard of Review

[3] When interpreting consent orders, it is appropriate to consider normal rules of interpreting or construing *contracts*." *Fucito v. Francis*, 175 N.C. App. 144, 150, 622 S.E.2d 660, 664 (2005) (emphasis in original). What constitutes a "modification" by "written consent of both parties" is an interpretation of a contract and is a conclusion of law, reviewable *de novo* by this Court. *See Id.*

B. Argument

Husband argues the trial court erred by concluding his cash payments of $202,000.00 to purchase Wife's share of the Vero Beach

Property were not in satisfaction of amounts he owed under the equitable distribution of the Consent Order. The trial court's order did not find or classify the basis for these payments to ex-Wife, but simply denied Husband any credit for these payments toward his obligations under the Consent Order.

The trial court based this conclusion on a provision in the parties' agreement, entered as a Consent Order, that states "this consent order, is not subject to modification absent the written consent of both parties." The trial court disallowed modification of the express provisions in the Consent Order by finding and concluding no "deal was possible without the written consent of both parties." (emphasis in original). The trial court found no evidence the parties had agreed in writing that the additional $202,000.00 payment towards the Vero Beach property modified Husband's obligations under the Consent Order as it related to (1) repayment of IRS tax debt Husband was obligated to pay and (2) the proceeds from the parties' Cornelius property.

1. IRS Lien

The Consent Order was entered on 24 March 2016, before the divorce decree was finalized and entered on 13 May 2016. Husband and Wife purchased the Vero Beach property as tenants by the entirety on 6 May 2016, after the Consent Order and a week before the divorce decree was entered. As such, the Vero Beach property is not addressed in the Consent Order. Husband contributed his share to purchase a one-half interest of $300,000.00, and an additional $202,000.00 towards Wife's share of the purchase price. Wife contributed $98,000.00.

The Shireys purchased the Vero Beach Property as purported tenants by the entirety on 6 May 2016. Less than a week later on 13 May 2016, the tenancy by the entirety was terminated by entry of the divorce decree in North Carolina. The Shireys became tenants in common in the Vero Beach Property, and their equal ownership percentages in the property remained the same.

Husband testified the additional $202,000.00 he paid for Wife's share was to advance and satisfy amounts he owed under the equitable distribution provisions of the Consent Order. Specifically, after the parties had entered into their Consent Order, the IRS garnished $129,873.10 from Wife's funds. The Consent Order provided this IRS debt was to be Husband's obligation. The Consent Order states: "Plaintiff/Husband agrees to be solely and separately responsible for this indebtedness and shall indemnify and hold Defendant/Wife harmless from any liability she

may have thereon (including any attorneys' fees spent to enforce this indemnification provision)." Wife's own testimony in this case, agreeing that she "had to put in less money to purchase the Vero house because of the IRS withdrawal," shows that as a result of this garnishment and other expenses, Wife lacked the funds to pay her portion of the Vero Beach Property purchase price. Instead, Husband paid an additional $202,000.00 on her behalf in order to make up in part for the garnishment.

The trial court found that in the absence of a written modification to the Consent Order agreement that Husband's additional $202,000.00 payment toward the Vero Beach property did not absolve him of having to reimburse Wife an additional $129,873.10. Contrary to the trial court's characterization, Husband's additional payment towards the Vero Beach house was not a modification of the parties' Consent Order, but rather was the effectuation of the terms of the Consent Order. We reverse the provisions of the trial court's Order requiring Husband to make an additional $129,873.10 payment to Wife as reimbursement for the amounts garnished from her to satisfy the IRS tax debt.

2. Cornelius Property

Husband further contends he should be entitled to a credit from the proceeds from the sale of the Cornelius property resulting from his additional $202,000.00 payment towards Wife's interest in the Vero Beach property. As noted, the Shireys closed the purchase of the Vero Beach property on 6 May 2016. The Cornelius Property was under contract and closed on 18 August 2016. In the Consent Order, Husband and Wife had agreed to sell and divide the net sale proceeds from the Cornelius Property. The net proceeds from the sale of the Cornelius Property were $157,401.39, with Husband's and Wife's one-half share each representing $78,700.70. A copy of the closing statement signed by both parties is included in the record on appeal. It is also undisputed Wife received $20,000.00 cash from the sale of the Cornelius Property after closing.

The trial court disallowed modification of the express provisions in the Consent Order again by finding no "deal was possible without the written consent of both parties." (emphasis original). In light of our decision that Husband's $202,000.00 payment was, at least in part, reimbursement to Wife for the IRS tax debt under the Consent Order, we also find it necessary to vacate the provisions of the trial court's Order requiring Husband to pay Wife $58,700.00 from the proceeds of the Cornelius property sale. We remand the matter for the trial court to determine whether Husband is entitled to any credit toward the

additional $58,700.70 he owes (after the $20,000 actually paid to Wife) resulting from the additional $202,000 he paid toward Wife's interest in the Vero Beach Property.

VII. Big Pine Key Property

[4] Husband argues the trial court erred in finding that the parties agreed to modify the Consent Order by co-owning the Big Pine Key property, while simultaneously finding that no agreement to deviate from the order was possible without written consent of both parties.

A. Analysis

In light of our holding that Wife's signed agreements to sell the Cornelius and Huntersville properties serve as a modification of the Consent Order with the written consent of both parties, we address the status of the Big Pine Key property as it also relates to the modification of the Consent Order. The Consent Order provides:

> 4) Big Pine Key Property. The parties are the part owners of real property located in the Florida Keys, more specifically: 225 West Cahill Court, Big Pine Key, Florida [hereinafter the "Big Pine Key Property"]. This property is owned with 2 other couples. Neither party resides in the Big Pine Key Property and it is currently listed for sale at the listing price of Four Hundred Seventy-Five Thousand Dollars ($475,000). Until the sale of the property, Plaintiff/Husband shall be responsible for maintaining payments for the taxes, insurance and any other expenses related to the parties' ownership share in the Big Pine Key Property.
>
> After the Big Pine Key Property has been sold and the expenses of sale are paid, which shall include the mortgage (principal and interest), appraisals, inspections, sales commissions, prorated and *ad valorem* taxes, revenue stamps, and other routine closing costs Plaintiff/Husband shall pay Defendant/Wife a one-time cash distribution of Fifty Thousand Dollars ($50,000) for her share of this property, within thirty (30) days of closing.
>
> However, notwithstanding the foregoing, in the event that the debt payments to be paid by Plaintiff/Husband as part of equitable distribution and pursuant to this Consent Order have not been satisfied in full, the parties agree that Plaintiff/Husband's share of the net proceeds shall be used to pay down any and all outstanding debts which have not

> been timely paid pursuant to the express terms of this Consent Order.

The trial court's Finding of Fact 10 provides:

> 10. In May 2016, Husband decided to take the house he owned with Wife and four other family members in Big Pine Key (i.e. 255 Cahill Court W. Big Pine Key, Florida) ("Big Pine Key House") off the market. He asked Wife to remain as co-owner of the home and to operate it with him as a rental property. She agreed. Husband secured transfers of ownership from his other family members and now Husband and Wife are the only two persons remaining on the deed.

After the parties reached agreement on equitable distribution and the Consent Order was entered, the parties mutually agreed in writing to modify its terms, formed a Florida Limited Liability Company ("LLC") on 16 April 2016, bought out the other couples' ownership and transferred ownership of the property into the LLC.

The trial court received into evidence the Operating Agreement for the LLC and bank information concerning the management and operation of the property. At the time of the hearing, the Shireys owned and operated this property under a Florida LLC, Shirey Properties, LLC. In addition, their acts of forming of the LLC, transfer of ownership, and co-owning and operating the Big Pine Key House in an LLC, that is owned by both parties was not in dispute.

The Consent Order states the property was listed for sale and was owned by the Shireys and two other couples. It is clear the parties had mutually agreed in writing to modify the terms of the Consent Order requiring sale of this property, and implemented that modification. The trial court acknowledged the post-divorce change of ownership of the Big Pine Key Property from the terms of equitable distribution in the Consent Order was not a part of this action.

The Big Pine Key Property provisions of the Consent Order were modified and satisfied and are no longer subject to the sale or distribution provisions of that order or to North Carolina's jurisdiction. Husband's and Wife's ownership, rights and liabilities to the property now owned by the Shirey Properties, LLC, are subject to Florida laws and jurisdiction. Any claims concerning use of funds purportedly belonging to this entity by either party are also subject to Florida law. As we have held the parties modified the terms of the Consent Order by written agreement on

other assets, this provision of the Consent Order is satisfied. Husband's arguments on this issue are moot and dismissed.

VIII. Ford F-250 Pick-Up Truck

[5] Husband argues the trial court erred in concluding he had failed to pay off the debt on the Ford pick-up, after wife failed to provide the required payoff information to the closing attorney.

The Consent Order provides:

> 1) 2014 Ford F250 Super Duty Truck. Defendant/Wife currently drives a 2014 Ford F250 Super Duty Truck which is titled in Plaintiff/Husband's name [hereinafter "Ford F250"]. The Ford F250 is encumbered by a loan in favor of Ford Motor Company. Plaintiff/Husband agrees to pay off the current indebtedness securing the 2014 Ford F250 Super Duty Truck in full and, until said payoff occurs, Defendant/Husband shall be responsible for making the monthly loan payments. Defendant/Wife shall be responsible for all expenses of ownership of said, including vehicle, insurance, taxes, registration, maintenance, repairs and the like, and shall indemnify and hold Plaintiff/Husband harmless from any liability he may have thereon. If the loan is not paid in full and any of the real properties provided in Paragraph 16 (a)(1)-(4) above sell, then Plaintiff/Husband will pay off this loan in full using his share of the net proceeds from said sale. Defendant/Wife shall provide the payoff information to the closing attorney who shall cause the loan to be paid off directly from Plaintiff/Husband's closing proceeds.
>
> Once the loan has been paid in full Plaintiff/Husband shall sign the title over into Defendant/Wife's sole name. The Ford F250 shall thereafter be the sole and separate property of Defendant/Wife, free of all claims of Plaintiff/Husband, marital or otherwise. Defendant/Wife shall be solely responsible for all expenses of ownership of said vehicle, including liens, insurance, taxes, registration, maintenance, repairs and the like, and shall indemnify and hold Defendant/Husband harmless from any liability he may have thereon.

It is undisputed that Wife failed to provide the payoff information to the closing attorney when the Huntersville and Cornelius properties

were sold as she had agreed and was ordered by the Consent Order. Her failure to comply was considered by the trial court when it found Husband was not in willful violation of the Consent Order. Wife's failure did not absolve or release Husband from his agreed-upon obligations to pay off this debt in the Consent Order. Husband has not provided any argument or authority to relieve him from this obligation. In the absence of any authority, he remains bound by the terms of the Consent Order. *See* N.C. R. App. P. 28. Husband's argument is dismissed.

IX. Proceeds from Huntersville Property

The parties agreed in the Consent Order:

> 1) 17301 Huntersville Concord Road, Huntersville, NC 28078. The parties are the owners of real property located at 17301 Huntersville Concord Road, Huntersville, NC 28078 which is the former marital residence [hereinafter the "Residence"]. Neither party currently resides in the Residence and it is currently listed for sale at the listing price of One Million Eight Hundred Thousand Dollars ($1,800,000.00). Plaintiff/Husband shall bring all mortgage payments secured by the Residence current within thirty (30) days of the entry of this Consent Order. Neither party shall cause any further indebtedness to be secured by the property.
>
> The Residence shall remain on the market to be sold until such time as it is sold. Plaintiff/Husband shall be solely and separately responsible for maintaining the mortgage payments, *ad valorem* taxes, homeowner's insurance and all other expenses related to the property. He will not allow these expenses to go in arrears thereby resulting in a reduction in net sales proceeds (as defined below) upon sale. In addition, Plaintiff/Husband agrees to assume the cost of an ensure the repairs and upgrades that have been started on the property are completed in a timely manner so as not to hinder any potential sale of the property and he shall pay all of the cost to complete any such projects.
>
> The parties agree to cooperate in all respects to sell the Residence including lowering the price in reasonable increments and making sure the Residence in saleable condition at all showings (sic). The parties shall be obligated to take any offer within 10% of the initial listing price. In the event that the Residence is not sold in ninety (90) days

> from the entry of this Order, the initial listing price shall be reduced by the amount suggested by the realtor.
>
> At closing on the sale of the Residence and the expenses of sale are paid, which shall include the mortgage (principal and interest), appraisals, inspections, sales commissions, prorated and *ad valorem* taxes, revenue stamps, and other routine closing costs the net balance, constituting the "net sales proceeds," shall be divided equally between the parties.
>
> There are some large items of furniture located in the residence in which the parties hope to sell with the Residence. In the event that a potential buyer does not wish to purchase this furniture, the parties agree to divide the remainder between them.

The trial court found:

> That the real property located at 17301 Huntersville Concord Road, Huntersville, NC 28078 be sold. Pending the sale of this property, Husband is required to pay ALL (1) mortgage payments; (2) ad valorem taxes (sic); (3) homeowner's insurance and (4) all other expenses related to the property, [including maintenance and repairs related to the listing for sale. Husband was forbidden from allowing the house mortgage to fall into arrears or to allow the house to fall into disrepair. Per the Order, upon the sale of the property, the proceeds were to be divided equally between the parties. However, notwithstanding the foregoing, in the event that debt payments to be paid by Husband pursuant to this Order have not been satisfied in full, Husband's share of the net proceeds will be used to pay same.

The net sale proceeds of the Huntersville Property totaled $295,321.68. To this amount, the trial court found and added: Husband had retained the buyer's deposit of $500.00, should have paid the July 2016 mortgage of $7,809.27, and the *ad valorem taxes* of $7,634.41 to equal $311,265.36. Husband does not challenge these calculations and adjustments to his obligations under the Consent Order.

From these adjusted net proceeds of $311,265.36, Wife is due $155,632.38. Husband is due the balance of the net sale proceeds, $139,689.30. It is undisputed the parties signed the settlement and closing statement for this property to be sold. The net sale proceeds, if still

held in trust by the closing attorney from the sale of the Huntersville property, are to be distributed to both Husband and Wife, consistently with the Consent Order with the amounts as adjusted above by the trial court and unchallenged by the parties.

X. Award of Attorney's Fees

[6] Husband asserts the trial court abused its discretion when it awarded Wife attorney's fees related to contempt, while not finding Husband in contempt. In light of this Court's holdings to reverse and remand for further proceedings, the trial court's award of attorney's fees is vacated and remanded.

XI. Conclusion

We affirm the trial court's conclusion ordering Husband to pay off the Ford pick-up. The trial court's refusal to address the Big Pine Key Property's change of ownership and any disputes over the funds belonging to that ownership entity is moot.

We reverse the trial court's finding a substantial change in circumstances had occurred to warrant a modification of child support and alimony by calculating income derived from the sale of Husband's separate property in the Consent Order and increased income earned post-divorce. We also reverse the trial court's modification of the child custody provisions in the Consent Order leaving Wife's custodial terms in the Consent Order intact, while only allowing Husband's parental visitation as his minor daughter "desires." On remand, the trial court shall deny Wife's Motion to Modify Custody.

We vacate the trial court's order for Husband to further pay Wife $58,700.70 from the proceeds of the Cornelius property and remand for further consideration. We reverse the trial court's requirement Husband pay $129,873.10 to reimburse Wife for the IRS garnishment. We also vacate the award of Wife's attorney's fees.

These portions of the trial court's order are reversed or vacated as noted and remanded for entry of order consistent herewith. The net sale proceeds from the sale of the Huntersville Property, as adjusted by the trial court's 6 March 2018 order and unchallenged by Husband, are to be distributed by the closing attorney to Husband and Wife per the terms of the Consent Order. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges INMAN and HAMPSON concur.

STATE v. BRYANT

[267 N.C. App. 575 (2019)]

STATE OF NORTH CAROLINA
v.
BRITTANY SUE OPAL BRYANT, DEFENDANT

No. COA19-175

Filed 1 October 2019

Criminal Law—pleadings—citation—amended to charge different crime

Where the State originally cited defendant with larceny for stealing items from a retail store but later amended the citation to charge her with shoplifting by concealing merchandise, the trial court erred in entering judgment against defendant on the shoplifting charge. Since larceny and shoplifting are separate statutory offenses requiring proof of different elements, the amendment was improper under N.C.G.S. § 15A-922(f) and, therefore, deprived the court of its subject matter jurisdiction in the case.

Appeal by Defendant from an order entered on 18 September 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 3 September 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

BROOK, Judge.

Brittany S. O. Bryant ("Defendant") appeals from the superior court's order entered on 18 September 2018. Defendant argues the superior court erred in denying her petition for writ of certiorari, which sought review of a district court order denying her motion for appropriate relief. We agree. We therefore reverse the superior court's order and vacate Defendant's conviction.

I. Background

On 6 September 2014, Defendant was cited with larceny for $14.94 worth of merchandise ("acne toner and towelettes") from a Wal-Mart store located in Wake County. Specifically, the citation stated:

> The officer named below has probable cause to believe that on or about Saturday, the 06 day of September, 2014, at 03:08 PM in the county named above you did unlawfully and willfully STEAL, TAKE, AND CARRY AWAY (ACNE TONER AND TOWELETTES), THE PERSONAL PROPERTY OF (WAL-MART STORES INC. STORE#1372, 4500 FAYETTEVILLE RD, RALEIGH, NC 27603), SUCH PROPERTY HAVE A VALUE OF ($14.94). (G.S. 14-72(A)).

Pursuant to a plea agreement with the State, Defendant pleaded guilty to the purportedly amended charge of shoplifting on 3 March 2015. The prosecutor reduced the charge by drawing a line through the capitalized text, handwrote "Shoplifting," and beside the word initialed her name with the date. The trial court entered judgment against Defendant for shoplifting by concealing merchandise—defined under N.C. Gen. Stat. § 14-72.1(a). Defendant was sentenced to a suspended sentence of 15 days imprisonment and placed on nine months of supervised probation.[1]

On 13 August 2018, Defendant filed a motion for appropriate relief in Wake County District Court challenging her conviction. The Honorable Louis B. Meyer denied her motion in an order dated 12 September 2018.

On 13 September 2018, Defendant filed a petition for writ of certiorari in Wake County Superior Court seeking reversal of the order denying her motion for appropriate relief. The Honorable Paul C. Ridgeway entered an order denying her petition on 18 September 2018.

Defendant sought review of that decision and filed a petition for writ of certiorari in this Court, which allowed the petition on 1 October 2018.

II. Standard of Review

A writ of certiorari is granted or denied at the discretion of the superior court judge, *see State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (1993), and ordinarily is reviewed for abuse of discretion, *see N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997). However, Defendant's certiorari petition alleged that the district court lacked

1. We note that this sentence violated N.C. Gen. Stat. § 15A-1340.23(d), which states, "the judgment for a person convicted of a Class 3 misdemeanor who has no more than three prior convictions shall only consist of a fine." N.C. Gen. Stat. § 15A-1340.23(d) (2017). Defendant was convicted of shoplifting as a Class 3 misdemeanor, and the judgment notes the Defendant had only one prior conviction. N.C. Gen. Stat. § 14-72.1(e) (2017). Thus, the sentence should have been court costs and a fine only, and her sentence as imposed is unlawful. Defendant did not raise this issue on appeal, however, and thus it is not before us.

subject matter jurisdiction to enter judgment against her. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016) (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)). Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *See State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citations omitted).

III. Analysis

On appeal, Defendant argues that the district court lacked jurisdiction to enter judgment against her because the amended citation was insufficient to charge her with shoplifting by concealing merchandise. Specifically, Defendant argues that the citation was improperly amended to charge a different offense in violation of N.C. Gen. Stat. § 15A-922(f). We agree.[2]

We note at the outset that a defendant who pleads guilty generally waives all non-jurisdictional errors in the proceeding. *See State v. Warren*, 113 N.C. 499, 500, 18 S.E.2d 498 (1893). However, there is "abundant authority that a plea of guilty standing alone does not waive a jurisdictional defect," *see State v. Stokes*, 274 N.C. 409, 412, 163 S.E.2d 770, 772 (1968), and our Court has long recognized that subject matter jurisdiction can be raised for the first time on appeal, *see State v. Peele*, 246 N.C. App. 159, 165, 783 S.E.2d 28, 33 (2016) (internal marks and citations omitted). Thus, we can and do turn to the merits of Defendant's argument.

A citation is one of the seven types of pleadings that may be used to initiate a criminal prosecution in North Carolina. N.C. Gen. Stat. § 15A-921 (2017). A properly drafted criminal pleading provides the court with jurisdiction to enter judgment on the offense charged, while certain pleading defects deprive the court of jurisdiction. *See State v. Wallace*, 351 N.C. 481, 503-04, 528 S.E.2d 326, 340-41 (2000).

"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." N.C. Gen. Stat. § 15A-922(f) (2017). "It is well

2. Because we decide the amendment itself was unlawful under N.C. Gen. Stat. § 15A-922(f), we do not reach the issue of whether the citation as amended meets the requirements of N.C. Gen. Stat. § 15A-302(c) as articulated in *State v. Jones*, 371 N.C. 548, 819 S.E.2d 340 (2018).

established that misdemeanor charging documents may not be amended so as to charge the defendant with committing a different crime." *State v. Carlton*, 232 N.C. App. 62, 66, 753 S.E.2d 203, 206 (2014). In *Carlton*, the defendant was initially cited for a violation of N.C. Gen. Stat. § 14-291, but ultimately was convicted of violating N.C. Gen. Stat. § 14-290. *See id.* at 63, 753 S.E.2d at 204. "Instead of requiring the State to establish that Defendant was acting as a representative in the State for an illegal lottery," that amendment would have "merely require[d] proof that Defendant knowingly possessed lottery tickets in order to make out a *prima facie* violation of the statute." *Id.* at 66, 753 S.E.2d at 206.

As in *Carlton*, the defendant here was charged via a North Carolina Uniform Citation. When the prosecutor amended the citation in question from larceny to shoplifting, she changed the nature of the offense charged. Larceny and shoplifting are separate statutory offenses requiring proof of different elements. *Compare State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968) (holding a larceny requires the defendant to have had the intent to steal at the time of the taking), *with State v. Hales*, 256 N.C. 27, 32, 122 S.E.2d 768, 772 (1961) ("Our shoplifting statute . . . does not require any felonious intent or any criminal intent on the part of the person who, without authority, willfully conceals the goods and merchandise of a store."). Further bearing out this point is the fact that larceny is punishable as a Class 1 misdemeanor while shoplifting is a less serious Class 3 misdemeanor. *Compare* N.C. Gen. Stat. § 14-72(a) (2017) (making the misdemeanor offense of larceny punishable as a Class 1 misdemeanor), *with id.* § 14-72.1(e) (punishing a first conviction of shoplifting as a Class 3 misdemeanor and allowing for deviation by the sentencing judge in specified circumstances). Thus, the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant. *See Carlton*, 232 N.C. App. at 66-67, 753 S.E.2d at 206-07.[3]

We therefore reverse the superior court's order denying Defendant's certiorari petition and vacate the judgment entered against her. *See State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E.2d 398, 400 (2003) (holding that when a trial court lacks jurisdiction to allow a conviction, the appropriate remedy is to vacate the judgment of the trial court).

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3. The citation here was more detailed in its description of the alleged offense than was the case in *Carlton*. This, however, is not determinative. *See Carlton*, 232 N.C. App. at 67, 753 S.E.2d at 207 (vacating judgment where court did not have jurisdiction because amended offense separate and distinct from offense originally charged).

IV. Conclusion

For the reasons stated above, we reverse the order denying Defendant's petition for writ of certiorari and vacate her conviction.

VACATED.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
THOMAS ALLEN CHEEKS

No. COA18-884

Filed 1 October 2019

1. Appeal and Error—preservation of issues—general motion to dismiss—sufficiency of evidence of one charge

At a trial for multiple charges, where defendant timely made a general motion to dismiss for insufficiency of the evidence, he preserved for appellate review his specific challenge to the sufficiency of the evidence supporting a murder by starvation charge.

2. Homicide—murder by starvation—sufficiency of evidence—definition of "starving"—duty to feed—malice

In a case of first impression addressing murder by starvation (N.C.G.S. § 14-17(a)), the Court of Appeals defined "starving" as the willful deprivation of sufficient food or hydration necessary to sustain life, which need not be absolute or continuous for a particular time period but must be severe enough to cause death. Thus, the evidence was sufficient to convict defendant of murdering his four-year-old stepson by starvation where an autopsy showed the boy died of malnutrition and acute dehydration, and where defendant had been his primary caregiver for two months, had kept him "cloistered" at home, rarely fed him more than once daily, and never sought medical help for him despite his visible emaciation. Further, the State was not required to make separate showings of malice or a "legal duty to feed," as neither constituted elements of the offense.

3. Homicide—murder by starvation—sufficiency of evidence—proximate cause

In a bench trial for murder by starvation (N.C.G.S. § 14-17(a)), there was sufficient evidence that starvation proximately caused the death of defendant's four-year-old stepson—despite some evidence of possible contributing factors, including the stepson's genetic abnormalities, regular seizures, and abuse by defendant—where an initial autopsy showed the boy died from malnutrition and acute dehydration while under defendant's care. Although the medical examiner who performed the autopsy cited strangulation as a contributing cause, he based that opinion on defendant's statements to police that he choked his stepson (which defendant later recanted and which the trial court found to be false) and clarified that he found no physical signs of strangulation on the boy's body.

4. Indictment and Information—negligent child abuse—no fatal variance between indictment and evidence—surplusage

There was no fatal variance between an indictment alleging negligent child abuse and the evidence presented at trial, which showed defendant allowed his four-year-old stepson to remain in soiled diapers until an acute diaper rash caused numerous open wounds, and that defendant kept him in a playpen for such long periods of time that pressure sores formed on his legs. The indictment alleged all essential elements of the crime, and its additional statements regarding defendant's failure to provide the child with medical care for over a year (despite the child having a seizure disorder) and with proper food and hydration (resulting in the child's death) were surplusage.

Appeal by defendant from judgment entered 1 November 2017 by Judge Hugh B. Lewis in Superior Court, Gaston County. Heard in the Court of Appeals 24 April 2019.

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

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his conviction following a bench trial for first degree murder by starvation under North Carolina General Statute

§ 14-17(a) and negligent child abuse under North Carolina General Statute § 14-318.4(a4), both arising from the mistreatment and death of his four-year-old stepson, Malachi Golden. There was sufficient competent evidence to support the trial court's conclusion that defendant intentionally starved his four-year-old stepson Malachi and that starvation was the proximate cause of his death. As to his conviction for negligent child abuse, there was no fatal variance between the evidence presented at trial and the indictment. After careful review of Defendant's arguments and all of the evidence, we find no error in the trial court's judgment.

I. Procedural and Factual Background

Defendant Thomas Allen Cheeks was charged with first degree murder, negligent child abuse resulting in serious injury, and intentional child abuse resulting in serious injury, all arising from the death of Malachi Golden. He waived jury trial, and a five-day bench trial was conducted starting on 23 October 2017 before the Superior Court, Gaston County. On 1 November 2017, the trial court entered verdicts finding defendant not guilty of intentional child abuse, guilty of negligent child abuse, and guilty of first degree murder by starving but not guilty of murder "with premeditation and deliberation where a deadly weapon is used," felony murder, or murder by torture.[1] Defendant was sentenced to life imprisonment without parole. Defendant gave notice of appeal in open court.

The evidence showed that Malachi Golden was born on 15 November 2010. At the time of his death, Malachi lived with his mother, Tiffany Cheeks, his stepfather, Defendant, and his two younger half-sisters, both the biological children of Mrs. Cheeks and Defendant. Malachi's biological father was never involved in his life. His mother began living with Defendant in 2012, and they were married on 1 November 2013.

Malachi began having "infantile spasms" when he was about 4 months old, and Mrs. Cheeks took him to see his pediatrician, who referred Malachi to a pediatric neurologist, Dr. Robinett. Dr. Robinett determined he was suffering from seizures and prescribed an anti-epileptic medication, Zonisamide. Upon further testing, physicians determined Malachi had a chromosomal abnormality, a microdeletion in chromosome 22. They recommended additional testing to determine whether the abnormality was inherited and likely insignificant, or a new mutation that may be clinically significant, but Mrs. Cheeks never returned to

1. Based upon its verdict of first degree murder by starving, the trial court noted that second degree murder was moot.

have additional testing done. Mrs. Cheeks stopped taking Malachi to the pediatric neurologist in June 2013, one month after her first child with Defendant was born. Sometime in 2014, without consulting a physician, Mrs. Cheeks stopped giving Malachi his medication.

Malachi had trouble walking and was referred to the Child Development Services Agency (CDSA), which began therapy services. With therapy, his fine motor skills improved, his walking improved, and he was learning to feed himself. At age 3, on 15 November 2013, he aged out of the CDSA therapy services in the home and began to receive therapy at a local elementary school, but Mrs. Cheeks often failed to take him to his therapy appointments because she "just didn't feel like going" and stopped completely in December 2014, one month after the birth of her second child with Defendant.

The therapists mentioned in the trial court's findings of fact below had come to the home to provide services to Malachi's younger sisters, not Malachi, since Mrs. Cheeks had stopped taking him to therapy appointments. 5 February 2015, was the last day a therapist saw Malachi in the home, although she was there to provide therapy for his sister. The therapist commented about how thin Malachi was becoming. The therapist returned to the home for appointments in April but did not see Malachi. After the April appointments, Mrs. Cheeks cancelled therapy for her daughter.

At about 10:00 p.m. on 11 May 2015, Ms. Cheeks called 911 regarding Malachi. When EMS arrived, they found Malachi lying dead in an undecorated room. Malachi was extraordinarily emaciated. Although he was nearly five years old, he was wearing clothing sized for 24 months and 3T, and the clothes were hanging off of him. His bones protruded, his stomach and face were gaunt, and his head disproportionately large for his body. The doctor that performed the autopsy estimated that Malachi had been lying on his back after death from a few hours to one or two days.

Besides his obvious emaciation, Malachi had other injuries and signs of severe and protracted neglect. He had head injuries and pressure ulcers where his bones had laid against one another; injuries to his groin and genital area, including sores in various stages of healing, some beyond the point of septic infection. Specialist Justin Kirkland, crime scene investigator for the Gaston County Police Department, had investigated crime scenes for almost 10 years. He was one of the first investigators on the scene and took many of the photographs. Upon examining Malachi, he noted that Malachi had

> a large sore on his right groin area. When we turned him over there was -- I would call it large sores, but it was severe diaper rash as well on his bottom. He had large sores on his bottom, something I have never seen before on a child in a death investigation.

The medical examiner also testified he had never seen anything like Malachi's pressure sores and extreme diaper rash in a child.[2] Neither of the other children were visibly malnourished, and police found plenty of food in the home, in both the kitchen cabinets and refrigerator.

After Malachi's death, officers from the Gaston County Police Department interviewed both Defendant and Mrs. Cheeks several times regarding Malachi and the events surrounding his death. Defendant made several conflicting statements to police regarding Malachi's death and his condition leading up to his death. Defendant was not working and was the primary caregiver for Malachi for at least two months before his death. On 11 May 2015, he initially told police he had fed Malachi Spaghettios but he had thrown up, and he had checked on him several times during the day he died. In the second interview, on 14 May 2015, he gave a different timeline of events and said he had fed Malachi a "Kid Cuisine," a "grape-apple pouch[] squeeze food," and water. His third and final interview was on 30 October 2015 by Detective Brienza. Detective Brienza received the original, unamended autopsy report on 15 October 2015.[3] He then met with Defendant and Mrs. Cheeks again because the "inconsistencies were too great at this point based on the autopsy report." He found inconsistencies in the medication Malachi should have been receiving for his seizure disorder (since Mrs. Cheeks and Defendant claimed his doctors had taken him off medication, but the medical records showed his physician had actually increased the dosage), in the percentages of caretaking responsibilities between Defendant and Mrs. Cheeks, the "huge discrepancy" as to the food Defendant had claimed to have given Malachi and what was found on the autopsy, and evidence of head injuries.

At the third interview, Defendant "had a couple different versions of killing Malachi." His first version was that "Malachi drowned because

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2. These photographs are in our record, and, as the trial court put it, the "photographs of Malachi Golden speak more volumes than any words ever could."

3. As discussed in detail below, the original autopsy report concluded Malachi had died from starvation and dehydration. The autopsy report was amended after the medical examiner reviewed Defendant's third interview with Detective Brienza.

he gave him too much fluid while in the bath tub" and Malachi had been dead for two days before the 911 call. Detective Brienza noted that the autopsy did not indicate Malachi had drowned. Defendant then said he had put his hands around Malachi's neck to keep him quiet. He said Malachi's moaning "frustrated him greatly." His "method of operation" was to

> put his hands around Malachi's throat and pick him up by his neck and choke him enough to quiet him. . . . Once Malachi would become limp, he would physically throw him in the Pack N Play from a distance, walk to the doorway, turn around to see if he was okay, if he was going to make any sound or movement. Once he saw that movement he then left.

Defendant claimed he did this to Malachi "five times a week for the last two months" and had been "throwing him around, smacking him, whooping him almost on a daily basis[.]" Defendant said he was frustrated over Malachi's moaning again on 11 May 2015, so after using his regular "method of operation" to quiet him, he also hit him several times on the head with a hard object. He said he watched Malachi "take his last few gasps of breath." He claimed "he bathed Malachi after he was dead for a long period of time," washing his hair and body as if he were alive, and then he put clothing and a new diaper on him and placed him in his bed with a blanket over him.

Defendant testified at trial and gave yet another entirely different story of what happened prior to Malachi's death. He testified that after Mrs. Cheeks left for work around noon, he changed Malachi's diaper, applied diaper rash cream, and fed him lunch. He could not recall exactly what Malachi ate, but it was "normal food" such as "Kid Cuisine, Hungry-Man, hot dogs, chicken nuggets, french fries." He also gave him juice and put him back in his playpen. He then went to take care of the other two children. Around 4:30 p.m., Malachi woke up and Defendant heard his normal moaning sounds. His diaper was dry, so he did not need to be changed, and he then fed Malachi some fruit snacks. He testified that Malachi "grabs as much as he can and stuffs them in the mouth" but most of them he would end up missing his mouth, so he would then give him more. He also fed him a Kid Cuisine, string cheese, and yogurt bites at about 4:30 p.m. After Malachi ate, Defendant testified he gave him a bath, changed his diaper, and put him back in his playpen. Defendant fed the two girls as well, and by 5:30 p.m. all three children were sleeping, and he went outside to smoke a cigarette. Defendant then came back inside and took a nap until about 7:30 p.m. He then checked on Malachi,

changed his diaper, and fed him again, not a "whole meal" but string cheese and a Juicy Juice box. He then put Malachi back in his playpen and tended to the other children. Sometime around 8:00 p.m. he checked on Malachi again, and he appeared to be sleeping. He was not moaning, but Defendant could hear him breathing. He went outside to smoke again, and Mrs. Cheeks got home around 10:00 p.m. She went to check on Malachi and then called for Defendant, saying, "There is something wrong with Malachi. I think he is dead." Defendant told her, "There is no way because I just checked on him hours before." Defendant said he took Malachi out of the playpen and laid him on the floor while Mrs. Cheeks called 911. The 911 operator told them to administer CPR, so he tried to administer CPR but did not want to use too much pressure, since he had only been trained to do CPR on adults when he was in the military.

Defendant testified at trial his statements to Detective Brienza were lies and he had said what he did because "he told me we have this autopsy" but did not tell him what the autopsy said. He said he drowned Malachi but Detective Brienza said that was a lie based on the autopsy so Defendant "gave him another option saying I hit him in the head." Defendant denied that he had ever choked Malachi or thrown him into the playpen to make him be quiet. Defendant claimed he told Detective Brienza the things he did because "I was going to take the blame" to protect Mrs. Cheeks. In response to the photographs of Malachi, Defendant testified, "I can't explain that. I know I fed my son." He testified that his ribs did not look like they did in the photographs, and his diaper rash was just regular diaper rash.

Mrs. Cheeks also gave several different versions of events. In her initial statement, she claimed she did not know what had happened to Malachi and neither she nor Defendant realized he was dead until she found him and called 911. She then gave a statement implicating Defendant on 2 November 2015, regarding his abuse of Malachi and stating that she knew Defendant had killed Malachi. She said she already knew Malachi was dead before she called 911, and she did not perform CPR because she did not know how. Based upon her statement implicating Defendant, she entered into a plea arrangement with the State and plead guilty to a reduced charge of accessory after the fact of first degree murder and negligent child abuse resulting in serious injury. But at trial, she recanted her prior statements against Defendant and agreed that she "pretty much would do anything" for Defendant "to be found not guilty."[4]

4. Mrs. Cheeks had made statements regarding Malachi's death to many people since his death, but stated for the first time in her trial testimony that all of her prior statements

The trial court entered an order with findings of fact, and Defendant does not challenge the findings of fact as unsupported by the record, so we will quote the trial court's order as to the facts[5] of this case:

1. The deceased victim was Malachi Golden, a four year old boy.

2. Malachi Golden's caregivers were his mother, Tiffany Cheeks, and Defendant.

3. Tiffany Cheeks and Defendant married in November of 2013.

4. Defendant, Tiffany Cheeks, Malachi Golden and the two younger female half-siblings lived in an apartment in High Shoals.

5. Malachi Golden's younger half-siblings were the children of Defendant and Tiffany Cheeks.

6. Malachi Golden died on May 11, 2015.

7. Malachi was discovered laying on the floor in a room that appeared more like a storage room than a child's bedroom with materials piled in the comers and along the walls.

8. Inside the room was a "Pack and Play" a portable playpen for infants.

9. Malachi Golden spent the majority of the time during the last five months of his life in the "Pack and Play."

10. At the time of death, Malachi Golden had a plastic appearance with sunken eyes, collarbones, protruding spine, protruding joints and protruding ribs.

11. At the time of death, Malachi Golden had very little body fat or muscle tissue.

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were false: "Q. At what point between the last time we talked and today did you decide you were going to come in here and say that what you told in the past to me, people in the DA's office, Detective Brienza, DSS workers, that you were going to come in here and say that was all just a lie. A. Today."

5. Because several of the trial court's conclusions of law are actually findings of fact, we have quoted those as well. *See State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

12. At the time of death, Malachi Golden's internal organs were about half the average size for a four-year-old boy.

13. Dehydration caused the abnormal size of the internal organs.

14. The dehydration occurred over several weeks.

I5. The autopsy revealed that Malachi Golden was malnourished and dehydrated.

16. At the time of death, Malachi Golden weighed 19 pounds compared to the average weight of a [sic] 38-40 pounds for a four-year-old boy.

17. At the time of death, Malachi Golden's skin exhibited "tenting" a sign of acute dehydration.[6]

18. At the time of death, Malachi Golden had a very wasted appearance.

19. At the time of death, Malachi Golden's skin also exhibited acute wrinkling in the armpit and hip joint areas which is a sign of severe malnutrition.

20. Malachi Golden suffered acute diaper rash with extensive inflammation on his buttocks and groin.

21. Some of the ulcers, or wounds, caused by the diaper rash were healing while others were open sores that exhibited bleeding.

22. Malachi Golden suffered from the acute diaper rash for an extended period without proper treatment.

23. Staying in soiled diapers for long periods of time caused the diaper rash.

24. Malachi Golden also suffered from bed sores on his legs and knees from his lying in the "Pack and Play"

6. We note that the word "acute" has an ordinary meaning which is different from its medical definition. In the ordinary sense, acute means "very serious; critical; crucial." Webster's New World College Dictionary (5th ed. 2014). In the medical sense, acute means "severe but of short duration; not chronic: said of some diseases." *Id*. In the findings, the trial court was clearly using "acute" in the ordinary sense and not in the medical sense. The evidence showed the conditions described as "acute" in the findings were serious, but all of the medical evidence characterized them as both serious (in the ordinary sense) and chronic (in the medical sense).

for extensive periods of time without being moved or given proper attention.

25. Doctors diagnosed Malachi Golden with a genetic disorder and seizure disorder shortly after birth.

26. The seizures consisted of Malachi Golden losing control of his body and dropping to the ground.

27. Seizures would only last for a few seconds to a few minutes.

28. There was no danger that the seizures would cause death in and of themselves.

29. For Malachi Golden's safety, he wore a helmet to protect his head when he dropped to the ground during a seizure.

30. Malachi Golden did not wear the helmet when he was in his "Pack and Play."

31. Malachi Golden took the prescribed medication called Zonegram Zonisamide for his seizures.

32. Malachi Golden did well on medication and responded positively to therapy.

33. With medication and therapy, Malachi Golden began walking some and was feeding himself with supervision.

34. Malachi Golden's walking improved from a few feet to the length of the courtroom by the time the caregivers stopped allowing the child to have therapy in December of 2014.

35. The caregivers ceased Malachi Golden's medication, medical care and therapy sessions at, or near, December of 2014.

36. The caregivers ceased all medication, medical care, and therapy sessions without consulting Malachi Golden's physicians.

37. For the last few months of his life, Malachi Golden was cloistered from all adults except Tiffany Cheeks and Defendant.

38. During this period, Defendant became the primary caregiver for Malachi Golden and provided up to 80 percent of the child's care.

39. Defendant spent most of his time sleeping, watching movies or playing video games.

40. Defendant rarely fed Malachi Golden more than one time a day.

41. Neither Defendant nor Ms. Tiffany Cheeks ever took Malachi Golden to the doctor because of the weight loss.

42. Ms. Tiffany Cheeks was afraid that one day Defendant would hurt her.

43. Malachi Golden was a "chubby" child before October 2013.

44. In December of 2014, Malachi Golden was hungry when he met with the therapist at the school.

45. In January of 2015, the home therapist working with Malachi Golden's sibling commented to Ms. Tiffany Cheeks that the [sic] Malachi Golden appeared thin.

46. Ms. Tiffany Cheeks told the therapist that the doctor was taking care of it, when in fact Malachi had not seen a doctor for a long time.

47. Ms. Tiffany Cheeks canceled the sibling's appointments with the therapist shortly after the above conversation during the January 2015 visit.

48. The caregivers had transportation to get Malachi Golden to a doctor's office.

49. Both Defendant and Ms. Tiffany Cheeks recanted their interviews with the police where they admitted wrongdoing regarding the care of Malachi Golden.

50. Defendant contradicted himself several times on the stand during his testimony during the trial.

Based upon the above FINDINGS OF FACT, the Court concludes as a MATTER OF LAW that:

1. Dehydration causes the reduced size of internal organs.

2. "Tenting" demonstrates acute dehydration.

3. Acute wrinkling in the armpit and hip joint areas demonstrates severe malnutrition.

4. Staying in soiled diapers for long periods of time causes the diaper rash.

5. Acute diaper rash without proper treatment over an extended period will cause ulcers or wounds.

6. Defendant was a person providing care and supervision for Malachi Golden.

7. Defendant committed a grossly wanton negligent omission with reckless disregard for the safety of Malachi Golden by:

    a. Allowing the child to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and

    b. Keeping the child in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees;

8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

9. To starve someone is to "kill with hunger."

10. A reasonably careful and prudent person could foresee that failing to provide for a child's nutritional needs would cause death.

11. By feeding Malachi Golden typically only once a day and watching the child waste away to skin and bones, the Defendant intentionally starved the four-year old boy.

12. Malachi Golden perished from the lack of food and life-sustaining liquids.

13. Defendant's starving Malachi Golden was the proximate cause of the child's death.

14. Defendant's failure to take any action to seek medical help, through any means possible, for Malachi

> Golden as the child wasted away from lack of nutrients needed for the maintenance of life was the commission of a homicide.

The trial court then entered a verdict based upon the findings of fact and conclusions of law as follows:

> 1. Negligent Child Abuse - Resulting in Serious Bodily Injury
>
> GUILTY
>
> 2. Child Abuse - Inflicting Serious Bodily Injury
>
> NOT GUILTY
>
> 3. First Degree Murder with Premeditation and Deliberation Where a Deadly Weapon is Used
>
> NOT GUILTY
>
> 4. First Degree Murder Committed in Perpetration of a Felony
>
> NOT GUILTY
>
> 5. First Degree Murder by Torture
>
> NOT GUILTY
>
> 6. First Degree Murder by Starving
>
> GUILTY
>
> SECOND DEGREE MURDER IS MOOT

The trial court sentenced defendant to life imprisonment without parole for first degree murder and consolidated the negligent child abuse conviction into this sentence. Defendant gave notice of appeal in open court.

II. Trial Procedure

We begin by addressing the trial court's procedure in the case since no prior appellate case addresses the hybrid procedure used by the trial court. Because of this unusual procedure, the state makes various arguments regarding waiver of some issues and both parties make arguments based upon different standards of review for various issues, based upon either a bench trial or jury trial.

Defendant waived trial by jury and elected to have a bench trial under North Carolina General Statute § 15A-1201(b). In a criminal bench

trial, the trial court is not required to set forth the law it will follow in the form of jury instructions or to make detailed findings of fact and conclusions of law. The trial court may enter a general verdict, just as a jury would in a jury trial.

> Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise. We follow this presumption in many contexts. For example, in a jury trial, if the trial court allows the jury to hear inadmissible evidence, this may be reason for reversal and a new trial, if such errors were material and prejudicial. But in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise. We presume the trial court has followed "basic rules of procedure" in bench trials.

State v. Jones, ___ N.C. App. ___, ___, 816 S.E.2d 921, 924-25 (2018) (citations omitted).

In a *civil* bench trial, the trial court must make findings of fact and conclusions of law to support its ruling, as required by North Carolina General Statute § 1A-A, Rule 52. On appeal, the appellant must challenge specific findings of fact as unsupported by the evidence. N.C. R. App. P. 28(b)(6). Where a trial court makes findings of fact after a bench trial, appellate review is based upon those findings, and not upon potential findings the trial court could have made based upon the evidence but did not. But in a criminal jury trial, there is no requirement for findings of fact, just a general jury verdict, so a defendant who appeals may challenge the sufficiency of the evidence to support the jury's verdict; there are no findings of fact to consider on appeal. On appeal in a criminal jury trial, we view the evidence in the light most favorable to the State and may draw any reasonable inferences based upon that evidence to determine if the evidence is sufficient to support the verdict. *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007).

Here, the trial court elected to follow a hybrid procedure by adopting "jury instructions" setting forth the law it would apply to the case, as required in a jury trial, but also made detailed findings of fact and conclusions of law supporting the verdict, as is typical in a *civil* bench trial. The trial court explained why it requested the parties to request jury instructions as they would in a jury trial:

> The reason I am asking for those patterned jury instructions. All I need is the substantive ones for the charges because, and please understand that having presided over bench trials for higher felonies before as well as discussing how to handle a bench trial with other superior court judges across the state that have also held them, it is our feeling that basically we operate the same as if there were 12 people in that box. Therefore, when it comes time for me to deliberate, we will actually have a conference over those three substantive charges. I will not go through the preliminary ones, the function of the jury and all that, but I do need the substantive charges, and that way we can all have a discussion so we know what the State has met on and what has not, and also, you all will know what I am deliberating with myself about.
>
> Also, throughout the trial, if we are moving from finder of fact to judge of law, I will place that on the record so the appellate courts will have the opportunity to know which role I was standing in when I was making certain comments.
>
> . . . .
>
> . . .We will actually have a conference just like we would if there was a jury here as to what the wording would be, and basically, it will be read or presented into the record as a document.[7]

During the conference regarding the jury instructions, the trial court also informed counsel it would not enter a general verdict as would be done by a jury, but instead the trial court would enter a detailed order with findings of fact, conclusions of law, and a verdict:

> THE COURT: . . .What you will find in the bench trial, the fact finder will produce a set of findings of fact and conclusions, and finally, its decision so that the appellate courts will know what facts it took. . . .
>
> MR. RATCHFORD: Your Honor, if I may, if I can go back to your statement. Is that going to be delineated on the verdict sheet?

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7. Instead of reading the instructions into the record, the trial court included in the record Court's Exhibit 1, which is a copy of the jury instructions as modified by the trial court during the charge conference. Both parties agreed there was no need for the trial court to read the instructions aloud to itself in open court.

THE COURT: Well, there is not really a verdict sheet as such. There will be a judgment. In other words, each of the charges will be found to be either guilty or not guilty at the end of the judgment. It will have the equivalence of the verdict sheets, but it is going to be all in one document. You will have the findings of fact that I used and conclusions of law that I made and then my verdict.

MR. RATCHFORD: So I am trying to think through this. As findings of fact as a trier of the fact, would that be delineated out such as the medicine or the lack of nutrition?

THE COURT: Or strangulation or hitting on the head.

MR. RATCHFORD: Thank you.

THE COURT: The judgment part of it, instead of having like, for instance, you would normally have a verdict sheet for first degree murder and then it would have guilty not guilty. It will have first degree murder based on whatever the elements are and so forth that are found. That would also cover whether it is a B1 or B2 when I am finding in that. It will be stated out so that Court of Appeals knows which one I was considering based on the findings of fact.

After further discussion of the process and order, which would take the place of a verdict sheet, counsel for defendant stated:

MR. RATCHFORD: I think what Ms. Hamlin and I are thinking, we are trying to still make this a jury trial. I think what your Honor is looking at doing basically negate[s] the necessity of a verdict sheet.

THE COURT: I will be quite honest with you, having the record overloaded gives the Court of Appeals much more of an understanding of what we were doing here.

MS. HAMLIN: I guess the one question -- and I am fine with whatever Mr. Ratchford -- if he wants to have these verdict sheets. Sometimes in other cases I have had we have submitted on say two, P & D, specific intent, and then felony murder say. When we submit those, there is situations where they find them guilty on both. Does that

> make sense? That's what I was wondering. When you go down you are going to do each?
>
> THE COURT: Anything I find the individual guilty of will be completely.

We appreciate the trial court's attention to detail and effort to provide this Court with a full understanding of the law applied and the facts it determined to be true. Charges of murder by starvation are rare; this is an unusual case, and the trial court handled it carefully. The additional procedural steps used by the trial court are fully within the trial court's discretion, but we note they are not required by the North Carolina Rules of Criminal Procedure or Chapter 15A, Article 73 of North Carolina's General Statutes.

III. Standard of Review

Here, because the trial court made detailed findings of fact, our manner of review of Defendant's challenge to sufficiency of the evidence differs somewhat from most criminal cases. We will review the trial court's order based upon the standards of review as set forth for findings of fact in criminal cases regarding motions to suppress and motions for a new trial, since we have been unable to find any cases addressing review of an order with findings of fact in a criminal bench trial.

> Findings of fact are binding and are conclusive on appeal when they are supported by competent evidence. The findings of fact must support and justify the conclusion of law.

State v. Saults, 299 N.C. 319, 322, 261 S.E.2d 839, 840-41 (1980) (citations omitted).

Although there may be evidence which would support different findings of fact, if the trial court's findings are supported by competent evidence, they are binding on appeal. *See State v. Williams*, 308 N.C. 47, 60, 301 S.E.2d 335, 344 (1983) ("[T]he trial court's ruling will not be disturbed on appeal, notwithstanding the fact that there was evidence from which a different conclusion could have been reached." (citing *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966))). "The trial court's conclusions of law, however, are reviewable *de novo*." *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002)).

Defendant also challenges the sufficiency of the evidence to support the verdict, as is typical in a criminal jury trial. We review the trial court's ruling on the motion to dismiss for insufficiency of the evidence *de novo*:

> A trial court, on a motion to dismiss for insufficient evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." "Whether evidence presented constitutes substantial evidence is a question of law for the court" and is reviewed *de novo*. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." In reviewing the denial of a motion to dismiss for insufficiency of the evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal."

State v. Glisson, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127-28 (2017) (citations omitted).

IV. Sufficiency of the Evidence to Support Verdict of Murder by Starvation

A. Murder by Starving

1. Preservation of Issue

[1] Defendant first argues the trial court erred by not granting his motion to dismiss based upon insufficient evidence he murdered Malachi by starvation. The State contends that Defendant failed to preserve this issue for review by his general motion to dismiss, noting that Defendant's motion to dismiss failed to identify the charge of murder by starvation.

Defendant made a general motion to dismiss at the close of the State's evidence, and the trial court denied the motion:

> MR. RATCHFORD: Your Honor, we would make a motion to dismiss, the standard of the State's evidence motion. We do not wish to be heard or argue further.
>
> THE COURT: When all of the evidence is taken in the light most favorable to the nonmoving party, the Court believes there is sufficient evidence to go forward and will deny the motion at this time.

Defendant renewed this motion at the close of all of the evidence, again with no additional argument.

The State is correct that if a Defendant makes a specific argument regarding the basis for dismissal of a particular charge before the trial court and then attempts to make a different argument for that particular charge on appeal, the Defendant has waived the new argument by his failure to present it to the trial court, based upon the theory that the defendant may not "swap horses" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996). But prior cases have held that where the Defendant makes a general motion to dismiss, he has preserved his challenge to the sufficiency of the evidence to support all of the crimes charged.

> To preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure provides further that
>
> > in a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
> >
> > A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on

> appeal the sufficiency of the evidence to prove the crime charged.
>
> Our courts have long held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." This "swapping horses" argument historically has applied to circumstances in which the arguments on appeal were grounded on separate and distinct legal theories than those relied upon at the trial court, or when a sufficiency of the evidence challenge on appeal concerns a conviction different from a charge challenged before the trial court.

State v. Walker, ___ N.C. App. ___, ___, 798 S.E.2d 529, 530 (citations and brackets omitted), *review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017).

Here, Defendant did not swap horses on appeal; the horse he rode in the trial court was insufficiency of the evidence in general to support all of the charges, and he rides the same horse on appeal in his argument regarding the first degree murder conviction. This case is more akin to *State v. Glisson*:

> Defendant's motion to dismiss required the trial court to consider whether the evidence was sufficient to support each element of each charged offense. The trial court acknowledged Defendant's contention that the State "simply failed to offer sufficient evidence on each and every count as to justify these cases to survive a motion to dismiss." The trial court referred to the motion as "global" and "prophylactic," acknowledging on the record that Defendant's motion was broader than the single oral argument presented. In ruling on the motion to dismiss, the trial court stated that "the State has offered sufficient evidence on each and every element of all the surviving charges to justify these cases being advanced to the jury." Counsel's oral argument challenging a single aspect of the evidence does not preclude Defendant from arguing other insufficiencies in the evidence on appeal. So we will address the merits of Defendant's argument challenging the sufficiency of the evidence to support the conspiracy charge.

___ N.C. App. at ___, 796 S.E.2d at 127 (citation omitted). We will therefore consider Defendant's challenge to sufficiency of the evidence.

2. Definition of "Starving" Under North Carolina General Statute § 14-17(a)

[2] Defendant's specific argument on appeal regarding insufficiency of the evidence is that the evidence cannot support a conviction of first degree murder by starvation. Defendant notes correctly that in North Carolina "there are no cases upholding convictions for first-degree murder by starving under [North Carolina General Statute § 14-17(a)]." But there is also no case in North Carolina *reversing* a conviction for first degree murder by starvation; this is a case of first impression. Indeed, there are very few cases of first degree murder by starvation reported in the United States.

Defendant was charged and convicted of murder by starving under North Carolina General Statute § 14-17(a):

> A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, *starving*, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished in accordance with Part 2A of Article 81B of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 14-17(a) (2017) (emphasis added).

At trial, at the end of the day on 30 October 2017, the trial court discussed the definition of starvation with counsel during its charge conference and invited counsel to research the issue overnight to propose guidance on the proper definition. The next morning, the trial court noted the results of its research on the issue, which was included in the record as part of Court's Exhibit 1 as the definitions of starvation from a variety of sources, as follows:

> Starvation is the result of a severe or total lack of nutrients needed for the maintenance of life. https://medicaldictionary.thefreedictionary.com/starvation
>
> To starve someone is to "kill with hunger;" to be starved is to "perish from lack of food." Starving: Medical Definition, Merriam-Webster Dictionary, http://www.merriam-webster.com/medical/starving (last visited Apr. 16, 2012).
>
> COMMENT: KinderLARDen Cop: Why States Must Stop Policing Parents of Obese Children. 42 Seton Hall L. Rev. 1783. 1801
>
> To starve someone is the act of withholding of food, fluid, nutrition, Rodriguez v. State, 454 S.W.3d 503, 505 (Tex. Crim. App. 2014)
>
> Starving can result from not only the deprivation of food, but also liquids. Deprivation of life-sustaining liquids amounts to starvation under the statute. A specific intent to kill is . . . irrelevant when the homicide is perpetrated by means starving, or torture. State v. Evangelista, 319 N.C. 152 (1987)
>
> When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself.
>
> State v. Dunheen, 224 N.C. 738,739, 32 S.E.2d 322, 323 (1944)

(Alteration in original). After the trial court provided the definitions above, counsel for defendant noted that his research "found almost the exact same thing." The trial court then stated it would rely upon *State v. Evangelista* and the definitions listed above as the definition of starvation in its deliberations. Defendant had no objection or proposed modification to this definition to include a *complete* deprivation of food and liquids.

As the trial court noted, the statute does not define "starving," but in *State v. Evangelista*, our Supreme Court in dicta noted that the evidence in that case would have supported a theory of murder by starvation. 319 N.C. 152, 158, 353 S.E.2d 375, 380 (1987). In *Evangelista*, the trial court "[f]rom an abundance of caution" submitted the charge of first

degree murder of an 8 month old baby to the jury based on the "theory of 'murder perpetrated by any other kind of willful, deliberate and premeditated killing' " instead of the theory of starving. *Id.* In *Evangelista*, the baggage master on an Amtrak train saw bullet holes in the door of a compartment and heard loud voices inside. *Id.* at 155, 353 S.E.2d at 378. Others on the train heard sounds of a crying baby, breaking glass, screaming, and gunshots in the compartment. *Id.* They called the police, who determined that the occupants of the compartment were the defendant, his sister, and her two children, ages 8 months and 3 years. *Id.* at 155, 353 S.E.2d at 378-79. The car was separated from the rest of the train and thus was cut off from access to a water supply. *Id.* at 155, 353 S.E.2d at 379. For three days, defendant remained barricaded in the car while police tried to negotiate with him. *Id.* The negotiators repeatedly asked the defendant to come out or at least to release the children. *Id.* at 156, 353 S.E.2d at 379. They offered food and liquids for him and the children, but he refused. *Id.* They also warned him regarding the safety of the children and that they could not survive without food and water. *Id.* Ultimately, when police entered the train car, they found the woman deceased from a gunshot wound and the 8 month old baby deceased from dehydration. *Id.*

The Supreme Court upheld the defendant's conviction for murder of the baby based upon "willful, deliberate and premeditated killing, but noted that the evidence would have supported murder by starvation as well":

> We note that the evidence in the present case would have supported conviction of the defendant for the first degree murder of the infant on the theory of murder perpetrated by means of starvation, specifically declared to be first degree murder by the statute. The evidence tended to show that the defendant deprived the infant male of liquids and thereby caused his death. Liquids are necessary in the nourishment of the human body, especially as here in the case of an infant. Therefore, deprivation of life-sustaining liquids amounts to starvation under the statute. If the trial court had submitted the case to the jury on the theory of starvation, it would not have been necessary that the State prove a specific intent to kill. As we said in *State v. Johnson*, "a specific intent to kill is . . . irrelevant when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving, or torture. . . ."

Id. at 158, 353 S.E.2d at 380 (alterations in original).

Although the statute does not define murder by starving, *Evangelista* provides a definition of starving: death from the deprivation of liquids or food "necessary in the nourishment of the human body" may amount to starvation under North Carolina General Statute § 14-17(a). *See id.*

Defendant argues that "a homicide resulting from the failure to provide sufficient food, as opposed to the *complete denial* of food, will not *ipso facto* constitute murder by 'starving' as the term is used in N.C.G.S. 14-17." (First emphasis added.) Defendant derives this argument from two cases upholding convictions of involuntary manslaughter of children who died from malnutrition or starvation, *State v. Fritsch*, 351 N.C. 373, 526 S.E.2d 451 (2000), and *State v. Mason*, 18 N.C. App. 433, 197 S.E.2d 79 (1973). Defendant notes that "unlike *Evangelista*, there is no suggestion in *Mason* or *Fritsch* that the evidence in those cases would have supported a conviction for first-degree murder by starvation." This is correct, but the absence of dicta regarding first degree murder by starvation in *Mason* and *Fritsch* is not helpful to our analysis. In *Evangelista*, the defendant was charged with first degree murder under several theories, including starving, but the trial court elected not to submit that theory to the jury, so our Supreme Court noted that the evidence would have supported this theory in addition to those considered by the jury. 319 N.C. at 158, 353 S.E.2d at 380. In *Fritsch*, the defendant was not charged with murder. 351 N.C. at 374, 526 S.E.2d at 452. The defendant in *Fritsch* was charged with felonious child abuse and involuntary manslaughter and convicted of non-felonious child abuse and involuntary manslaughter. *Id.* The defendants in *Mason* were charged with murder but the trial court reduced the charge to involuntary manslaughter at the close of the State's evidence, and the defendants were convicted of involuntary manslaughter. 18 N.C. App. 433, 197 S.E.2d 79. In each case, there was evidence of other abuse or neglect of the child beyond deprivation of food and water, but the situations are all different. The defendants in each case were charged with the crimes the prosecutor in his or her discretion elected to pursue and the juries considered the theories the trial court determined were supported by the evidence in that particular case. As the State argues,

> By defendant's absurd logic, anyone who claims—or can definitely prove—they fed their child some amount of food or water cannot be guilty of murder. If that were so, short deaths (with arguably less suffering) would be murder. Protracted deaths—a child intentionally, cruelly, but slowly, starved to death—only manslaughter. A defendant who fed his victim one tablespoon of food a day, or three

> teaspoons thrice a day—three square meals—could not be guilty of murder.

We have been unable to find any support in the law for Defendant's argument that murder by starvation requires the complete denial of all food or water (or both) for a certain period of time. We also note that Defendant did not present this proposed definition of starvation to the trial court and had no objection to the definition of starvation announced by the trial court. Murder by starving requires the willful deprivation of sufficient food or hydration to sustain life. The deprivation need not be absolute and continuous for a particular time period. As the *Evangelista* court noted, a baby or small child would likely not be able to survive as long as a healthy adult, so the duration of starvation needed to cause death will vary, but if the deprivation is so severe as to cause death, it may be the basis for murder by starving. *See Evangelista*, 319 N.C. at 158-59, 353 S.E.2d 375, 380-81.

We again note the unusual posture of this appeal, as a criminal bench trial where the trial court made specific findings of fact instead of simply giving its verdict. Since the trial court made findings of fact, Defendant must challenge the sufficiency of the evidence to support those findings on appeal. *See State v. Durham*, 74 N.C. App. 121, 123, 327 S.E.2d 312, 314 (1985) ("Failure to except to individual findings waives any challenge to the sufficiency of the evidence to support them." (citing *State v. Ford*, 70 N.C. App. 244, 318 S.E.2d 914 (1984))). Defendant did not challenge on appeal the sufficiency of the evidence to support any of the trial court's specific findings of fact regarding Malachi's physical condition as quoted above. We therefore consider those findings conclusive on appeal.[8] *Id.* Based upon the evidence and the trial court's findings, the State met its burden of proving that for an extended period, two months or more, Defendant denied Malachi of sufficient food and hydration to survive. According to the findings, Malachi was "chubby" before October 2013. In December of 2014, a therapist noticed he was hungry, and by January 2015, a therapist noticed he was very thin. Shortly thereafter, Defendant and Ms. Golden stopped allowing therapists in the home, and Malachi was "cloistered" in the home until his death. That fact that Malachi was wasting away would have been obvious to Defendant, and Defendant was by his own testimony Malachi's primary caretaker for the last months of his life. But he took no action to seek medical assistance or to provide more sustenance to him. As the trial court accurately

8. Even if Defendant's argument could be construed as a challenge to specific findings of fact, we have reviewed the record, and the trial court's findings are fully supported by the evidence.

stated to Defendant at the close of the trial, "the photographs of Malachi Golden speak more volumes than any words ever could. There is no way that you did not starve that child to death." This argument is overruled.

3. Legal Duty to Feed

Defendant argues that "[t]here was no evidence, and the trial court did not find, that [Defendant] was under a legal duty to feed Malachi." Defendant again seeks to rely upon *Fritsch* and *Mason* to support this argument as to a "legal duty," noting that the defendants in those cases "were natural parents of the decedents, so this element was not in question and those cases do not elaborate further on the requirement." Beyond this, Defendant cites various cases from other states. We also note that the Defendant did not request that the trial court consider a legal duty to feed as part of the jury instructions. The State cites cases from other states holding otherwise, but none of these cases address first degree murder under a statute comparable to North Carolina General Statute § 14-17.

We first note that the trial court made several findings and conclusions which would support a legal duty to feed Malachi, including Defendant's position as a "caregiver" for Malachi providing about 80% of his care in the months immediately preceding his death.[9] But based upon North Carolina General Statute § 14-17 and *Evangelista*, we can find no support for the necessity of a separate element of a "legal duty to feed" for murder by starving. In *Evangelista*, the defendant was an uncle of the deceased child, but his familial relationship was irrelevant. 319 N.C. at 155, 353 S.E.2d at 379. There is no indication in *Evangelista* he was ever a "caregiver" for his sister's child. *See id*. The relevant fact was that he barricaded himself into a train car with the child and would not accept offers of food and water from the police. *Id*. The *Evangelista* defendant had no "legal duty" to feed his sister's child before he barricaded them into the train car, but then he placed the child in circumstances where he was entirely dependent upon defendant for food and water and the defendant intentionally failed to provide food and water to the child. If Defendant's argument there must be a "legal duty" to feed to support a conviction of murder by starvation were correct, then a defendant who shuts his victim into a locked room with no food or water and no means to escape must first have an independent "legal duty" to provide food to the victim before he could be convicted of murder by

9. In fact, being a caregiver for the child is one of the elements of negligent child abuse under North Carolina General Statute § 14-318.4(a4), and the trial court found defendant guilty of this charge as well.

starving. This is not the law. As a four-year old child with developmental delays, Malachi depended entirely upon Defendant and his mother for all of his needs, including food and water, and, by their own testimony, both were fully aware of his dependency upon them. No further "legal duty" is necessary. This argument is overruled.

4. Malice

Defendant next argues that "the trial court's findings are insufficient to support the verdict because malice is an essential element of murder by starving, but the trial court did not determine that defendant acted with malice." The State argues that no separate finding of malice is required for first degree murder under North Carolina General Statute § 14-17.

Defendant seeks to derive from *Mason*, *Fritsch*, and 61 A.L.R.3d 1207 the proposition that "[a]bsent a showing of malice, the failure of a parent to meet the legal obligation to provide a child sufficient food would have been manslaughter, not murder, at common law." But our Supreme Court has clearly held that no separate showing of malice is required for first degree murder by the means set forth under North Carolina General Statute § 14-17:

> This Court has previously concluded that N.C.G.S. § 14-17 "separates first-degree murder into four distinct classes as determined by the proof: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; (2) murder perpetuated by any other kind of willful, deliberate, and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon." "Any murder committed by means of poison is automatically first-degree murder." As this Court has previously stated, "premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving, or torture; and an intent to kill is not an element of first-degree murder where the homicide is carried out by one of these methods."
>
> "Malice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another

> intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life." This Court has already stated that murder by torture, which is in the same class as murder by poison, "is a dangerous activity of such reckless disregard for human life that, like felony murder, malice is implied by the law. The commission of torture implies the requisite malice, and a separate showing of malice is not necessary." We hold that the same reasoning applies for the crime of first-degree murder by poison and conclude that a separate showing of malice is not necessary. Thus, this assignment of error is overruled.

State v. Smith, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000) (citations, brackets, and ellipsis omitted).

Just as with poisoning or torture, murder by starving "implies the requisite malice, and a separate showing of malice is not necessary." *Id*. Malice is not a separate element of murder by starving under North Carolina General Statute § 14-17, so the trial court did not err by not making a finding or conclusion as to malice. This argument is overruled.[10]

B. Causation of Death

[3] Defendant argues there was "no evidence that Malachi's death was caused by starvation." Defendant bases this argument upon evidence he argues could indicate that other factors contributed to Malachi's death, including his genetic abnormalities, seizures, and abuse by Defendant. Defendant also argues that Dr. Jonathan Privette, medical examiner and forensic pathologist with the Mecklenburg County Examiner's Office, "*unequivocally testified* that the cause of Malachi's death was asphyxia due to strangulation," not starvation. (Emphasis added.) But Defendant's argument ignores much of Dr. Privette's testimony and particularly the fact that Dr. Privette's opinion regarding strangulation was based *solely* upon Defendant's statement to Detective Brienza he had strangled Malachi. Dr. Privette first determined that starvation and dehydration caused Malachi's death and considered strangulation as

10. Defendant also argues that "the trial court committed plain error by failing to instruct itself that malice is an element of murder by starvation." Since we have determined that malice is not an element of murder by starvation, we need not address this argument.

a potential cause based only upon Defendant's statement to Detective Brienza, months after Malachi's death, that he had choked Malachi.

Dr. Privette testified at length regarding the autopsy and his determination that Malachi had died from malnutrition and dehydration. He described Malachi's autopsy and the physical findings including his weight, the unusually small size of his internal organs, his wasted appearance, his loose skin, and the severe dermatitis in his diaper area. He also testified regarding various laboratory findings, such as isonatremic dehydration. He explained that isonatremic dehydration means that the sodium level in Malachi's body was essentially normal but he was severely dehydrated. With a sudden, acute dehydration, the sodium level would go up, but with chronic dehydration, over an extended period of time, the kidneys try to adapt to the reduced intake of liquid and adjust the sodium level so it does not get too high. Thus, Malachi was chronically dehydrated, over a period of time of "more than a few days" and "probably weeks."[11] Dr. Privette could not determine exactly when Malachi had died, but based upon his condition, he believed "he died one to two days" before 12 May 2015, when he performed the autopsy.

Besides his findings regarding dehydration and malnourishment, Dr. Privette found a bruise on the top of Malachi's head; a fresh subgaleal hemorrhage on his left forehead,[12] and pressure ulcers on his knees. Dr. Privette also examined Malachi's prior medical records up to 2013 and spoke to some physicians who had treated him and learned that he had a chromosomal disorder which may have caused the seizure disorder.[13] Dr. Privette's initial impression after the autopsy and review of medical records was that Malachi died from malnutrition and dehydration. He had concerns regarding the genetic abnormality but determined that the particular abnormality Malachi had did not account for his presentation.

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11. Defendant argues that "chronic" malnutrition and dehydration, as opposed to an "acute" condition, does not support death by starvation. This interpretation of the evidence is not supported by Dr. Privette's testimony. He explained the difference: "When a person gets acutely dehydrated we can see acute dehydration if only dehydrated for a few days. If someone has a GI infection and vomiting and diarrhea and this is going on for a couple days and gets dehydrated, you can see affects [sic] of acute dehydration or presentation of acute dehydration. Chronic dehydration is you are talking more than a few days, this is probably weeks."

12. The subgaleal hemorrhage was through the full thickness of the scalp, and this would take more force to generate bleeding to this level than the bruise on the top of his head. Dr. Privette testified this hemorrhage was consistent with being struck on the head.

13. Dr. Privette was unable to review more recent medical records because Mrs. Cheeks stopped taking Malachi to his physicians.

Although his autopsy report noted the genetic abnormality, the defect did not directly contribute to his death.[14] He noted that if the genetic defect "prevented him from being able to get up and feed himself and go get water, which you would expect a normal four-year old to be able to do," then the underlying genetic abnormality could have contributed to his death because he had to rely solely upon his caregivers to provide food and water.

Dr. Privette testified that the contents of Malachi's stomach was approximately 100 milliliters of "clear fluid" with ""fragments of semi-solid white material consistent with dairy product." Defendant testified that he fed Malachi repeatedly on the day of his death, but Dr. Privette's autopsy did not find indications of the food Defendant testified he had given Malachi on the day of his death.

After the autopsy, as part of his investigation as to the cause of death, Dr. Privette later reviewed statements from defendant and Ms. Cheeks regarding Malachi's death. Portions of their statements were generally consistent with the physical findings. Defendant had stated that he had hit Malachi on the head at least twice, which was consistent with the two head injuries found during the autopsy. Defendant had also told police he would put his hands around Malachi's neck to make him be quiet, and that he had done this repeatedly. Defendant also said that he had put pressure on Malachi's neck and watched him take his last breath. Dr. Privette noted that it would take very little pressure to cut off the blood flow to Malachi's brain, given his extremely weak state, so he would not expect necessarily to see any signs of bruising or injury to Malachi's neck. Even pressure by two fingers on his neck, for a very brief time, could result in death due to his debilitated state, while a healthy person, if the pressure is released, the person should "come around and be okay." Ultimately, Dr. Privette testified that the causes of Malachi's death were "inflicted pressure on the carotid arteries or basically asphyxia"—based only upon Defendant's claims in his third interview—and that "the malnourished state would have contributed to his death."

Although Dr. Privette's initial autopsy report identified "malnutrition/dehydration" as the immediate cause of Malachi's death, he amended his report to include "strangulation" as the cause of death after reading the interview transcripts from Ms. Cheeks and Defendant. If Dr. Privette had any reason to suspect strangulation at the time of the autopsy, such as

14. Dr. Robinett, Malachi's pediatric neurologist, testified that it would be "unusual, highly unusual" for seizures of the type Malachi suffered to cause death.

bruising, he would have done an "in situ neck dissection" to try to find additional evidence of strangulation. But he saw no signs of strangulation during the autopsy and had no reason to do further investigation.[15] He testified the amendment to the autopsy report was based "solely" upon defendant's and Mrs. Cheeks's statements that defendant had strangled Malachi. He also agreed that "[i]f those statements were deemed to be faulty or not the truth," there was "no objective scientific evidence to suggest strangulation." Thus, his opinion of strangulation as a contributing factor to Malachi's death was based solely on the later statements of Defendant and Mrs. Cheeks and he found "no positive physical findings" of strangulation.

As the trier of fact, the trial court did not have to believe Defendant's statement to Detective Brienza he strangled Malachi, and this was the *only* basis for Dr. Privette's testimony that Malachi may have been strangled. Both Defendant and Mrs. Cheek gave several different versions of what happened to Malachi. Some of these statements, such as Defendant's claim of drowning Malachi, were refuted by the autopsy. Defendant's trial testimony of repeatedly feeding Malachi, changing his diaper, and bathing him on the day of his death is patently incredible, given the condition of Malachi's body when EMS arrived and the autopsy results. The trial court found it did not find either Defendant or Mrs. Cheeks credible, noting that both had "recanted their interviews with the police where they admitted wrongdoing regarding the care of Malachi Golden" and that "Defendant contradicted himself several times on the stand during his testimony during the trial." In fact, the trial court's finding that Defendant "contradicted himself several times" minimizes the extreme variations in Defendant's several conflicting statements to police and his entirely different trial testimony.

Given the abundant evidence that Malachi died from starvation, Dr. Privette's testimony that Malachi could have died from strangulation as described by Defendant in his interview with police—which Defendant and Mrs. Cheeks both recanted at trial—does not negate his initial opinion that Malachi died from starvation. The trial court specifically found that Defendant's statements to police about choking Malachi were not true, and Defendant himself testified at trial they were not true[16] The

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15. Although Defendant and Mrs. Cheeks both gave statements to the police immediately after Malachi's death, neither mentioned any abuse or possible strangulation until their later interviews, months after Malachi's death.

16. If the trial court had deemed Defendant's claim of strangulation to be true, Defendant could have been convicted of child abuse inflicting serious injury (which was based upon inflicting "serious bodily injury, by placing his hands around Malachi Golden's

trial court determined, quite correctly, that all of the credible evidence supported starvation as the cause of Malachi's death. This argument is without merit.

V. Fatal Variance as to Negligent Child Abuse

[4] Defendant last argues that the trial court erred by returning a verdict finding Defendant guilty of negligent child abuse based on a theory not alleged in the indictment. The indictment alleged that from 1 January 2014 to 11 May 2015, in violation of North Carolina General Statute § 14-318.4(a4), Defendant

> unlawfully, willfully and feloniously did show reckless disregard for human life by committing a grossly negligent omission, allowing the child, Malachi Golden, age 4 years old, and thus, under 16 years of age, by not providing the child with medical treatment in over 1 year, despite the child having a disability, and further, not providing the child with proper nutrition and medicine resulting in weight loss and failure to thrive. The defendant's omission resulted in serious bodily injury, to wit, extreme malnutrition and severe dehydration. At the time the defendant committed the offense, he was a person providing care or supervision of the child.

Defendant argues

> that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." *State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984). If it is error for the judge to allow the jury to convict on a theory not charged in the indictment, it necessarily follows that it must be error for the judge to do so himself in a bench trial.

The State argues that Defendant failed to preserve his argument regarding fatal variance between the indictment and evidence presented at trial by raising it before the trial court. *See State v. Nickens*, ___ N.C. App. ___, ___, 821 S.E.2d 864, 874 (2018) ("This Court repeatedly has held a defendant must preserve the right to appeal a fatal variance. If

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throat restricting air and blood flow resulting in Malachi Golden's death"), and first degree murder based upon premeditation and deliberation where a deadly weapon (hands) is used and/or first degree murder in perpetration of a felony. But based upon its determination that Defendant's statement regarding strangulation was false, the trial court found Defendant not guilty of these charges.

the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue." (citations and brackets omitted)). The State also argues that "the trial court's numerous detailed findings and conclusions—what defendant essentially challenges as a special verdict—are immaterial. [Defendant] points to nothing to suggest that they were necessary in the first place let alone that review would be so constricted."

We also agree with the State that the "detailed findings and conclusions" were unnecessary, but since the trial court made the findings, we cannot ignore them and they are not "immaterial." Again, this is a case of first impression as a criminal bench trial which utilized "jury instructions" and includes an order with detailed findings. Typically, in a bench trial, we can rely upon the assumption that the trial court has properly applied the law unless the record demonstrates otherwise. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court."). But here, the trial court entered an order and made a conclusion regarding negligent child abuse:

> 7. Defendant committed a grossly wanton negligent omission with reckless disregard for the safety of Malachi Golden by:
>
> a. Allowing the child to remain in soiled diapers until acute diaper rash formed on the groin and bottom of Malachi Golden which included open sores and ulcers; and
>
> b. Keeping the child in a playpen for so long of period that bed sores formed on Malachi Golden's legs and knees;
>
> 8. The above sub-paragraphs caused the child extreme pain and with reckless disregard for human life.

Defendant argues we should view this conclusion of law in isolation, but we must review the entire order and must consider all of the findings of fact which support this conclusion in context. The trial court also made these findings of fact relevant to this issue:

> 20. Malachi Golden suffered acute diaper rash with extensive inflammation on his buttocks and groin.
>
> 21. Some of the ulcers, or wounds, caused by the diaper rash were healing while others were open sores that exhibited bleeding.

22. Malachi Golden suffered from the acute diaper rash for an extended period without proper treatment.

23. Staying in soiled diapers for long periods of time caused the diaper rash.

24. Malachi Golden also suffered from bed sores on his legs and knees from his lying in the "Pack and Play" for extensive periods of time without being moved or given proper attention.

. . . .

35. The caregivers ceased Malachi Golden's medication, medical care and therapy sessions at, or near, December of 2014.

36. The caregivers ceased all medication, medical care, and therapy sessions without consulting Malachi Golden's physicians.

Again, the parties' arguments regarding this issue and our review are complicated by the unusual procedure in this case, as bench trials normally do not include "jury instructions" or findings of fact. But we review the issue of a fatal variance *de novo*, so we will turn to the law first to determine if there was a fatal variance. *See State v. Martinez*, 230 N.C. App. 361, 364, 749 S.E.2d 512, 514 (2013). A fatal variance arises when the allegations of the indictment do not conform to material aspects of the jury instructions, or, in this case, the law as the trial court stated it would apply through its "jury instructions" to itself. *See State v. Glidewell*, ___ N.C. App. ___, ___, 804 S.E.2d 228, 232 (2017). The variance must involve an essential element of the crime charged, and the defendant must demonstrate prejudice as a result of the variance:

> When allegations asserted in an indictment fail to "conform to the equivalent material aspects of the jury charge," our Supreme Court has held that a fatal variance is created, and "the indictment is insufficient to support that resulting conviction." Furthermore, for "a variance to warrant reversal, the variance must be material," meaning it must "involve an essential element of the crime charged." The determination of whether a fatal variance exists turns upon two policy concerns, namely, (1) insuring "that the defendant is able to prepare his defense against the crime with which he is charged and (2) protecting the defendant from another prosecution for the same incident."

> However, "a variance does not require reversal unless the defendant is prejudiced as a result."

Id. at ___, 804 S.E.2d at 232 (citations, brackets, and ellipsis omitted).

We have found no cases addressing whether the allegations of the particular acts or exact harm caused by the negligent child abuse under North Carolina General Statute § 14-318.4(a4) are "essential elements" which must be included in the indictment or surplusage. But this Court has addressed this issue under North Carolina General Statute § 14-318.4(a3), and we see no reason for these two subsections of this statute to be treated differently. In *State v. Qualls*, this Court held that the allegation of the particular injury in the indictment for felonious child abuse under North Carolina General Statute § 14-318.4(a3) was surplusage and not grounds for a fatal variance. 130 N.C. App. 1, 502 S.E.2d 31 (1998) (citation omitted), *aff'd*, 350 N.C. 56, 510 S.E.2d 376 (1999). In *Qualls*, the indictment alleged defendant had inflicted serious physical injury on 15 March 1993 by: "blunt trauma to the head resulting in a subdural hematoma to the brain," but the evidence at trial showed that the "victim suffered an epidural hematoma on 15 March 1993 and a subdural hematoma on or about 26 March 1993." *Id.* at 7, 502 S.E.2d at 36 (brackets and emphasis omitted). This Court held there was no fatal variance:

> All that is required to indict a defendant for felonious child abuse is an allegation that the defendant was the parent or guardian of the victim, a child under the age of 16, and that the defendant intentionally inflicted any serious injury upon the child. Here, the indictment appropriately charged the elements of that crime; therefore, the reference to the victim suffering a subdural hematoma rather than an epidural hematoma was surplusage and was properly disregarded by the trial court. As such, the trial court did not err by denying defendant's motion to dismiss on that basis.

Id. at 8, 502 S.E.2d at 36 (citation and emphasis omitted).

North Carolina General Statute § 14-318.4(a4) provides as follows:

> A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

N.C. Gen. Stat. § 14-318.4(a4) (2017). Thus, the essential elements of an indictment for negligent child abuse inflicting serious bodily injury are: (1) the defendant was "a parent or any other person providing care to or supervision"; (2) "of a child less than 16 years of age"; (3) the defendant commits a "willful act or grossly negligent omission in the care of the child"; (4) showing "a reckless disregard for human life;" and, (5) "the act or omission results in serious bodily injury to the child[.]" *Id.*

The indictment here includes each of these elements, and the additional statements regarding failure to provide medical care, failure to provide nutrition and hydration, extreme malnutrition, and severe dehydration are surplusage. The allegations are "beyond the essential elements of the crime sought to be charged[, and they] are irrelevant and may be treated as surplusage." *State v. Lark*, 198 N.C. App. 82, 90, 678 S.E.2d 693, 699-700 (2009) (quoting *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996)).

We also note that a defendant must show prejudice arising from an alleged fatal variance. Defendant here failed to make any argument he was unable to prepare his defense or of any prejudice whatsoever from this alleged fatal variance. Further, the evidence showed that Malachi needed medical care for many reasons, but the trial court's findings and conclusions regarding Malachi's acute diaper rash and bed sores are consistent with the scope of the evidence as discussed in the charge conference regarding the jury instruction on negligent child abuse. The State noted that it was "talking about a variety of things. It includes not providing the child with medical treatment in over one year despite having a disability, not providing the child with proper nutrition, medicine resulting in weight loss and failure to thrive. So basically, includes nutrition aspect of it, the medicine, and the medical treatment." Defendant had no objection to the "jury instruction" as to negligent child abuse as encompassing "a variety of things" including failure to provide medical treatment.

As found by the trial court and as supported by the testimony of several witnesses, this was not a case of garden variety diaper rash. The extreme diaper rash and pressure sores were serious and painful conditions requiring medical treatment, but Defendant and Mrs. Cheeks failed to obtain any medical treatment for these conditions. Mrs. Cheeks testified that they failed to provide Malachi with any medical treatment whatsoever after 31 October, 2013, the day before she and Defendant got married. She testified that he never again saw his pediatric neurologist, got a wellness check, got an immunization, or went to

a pediatrician after this date, although she did regularly take her other two children to the doctor. This argument is overruled.

VI. Conclusion

The evidence was sufficient to support first degree murder by starving and negligent child abuse, so the trial court properly denied Defendant's motion to dismiss. There was no fatal variance between the evidence presented and the indictment for negligent child abuse because the additional allegations of the indictment were surplusage, not necessary for the indictment, and Defendant failed to argue any prejudice from the alleged variance. The trial court's findings of fact support its conclusions of law regarding both first degree murder by starving and negligent child abuse. Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges BRYANT and COLLINS concur.

STATE OF NORTH CAROLINA
v.
QUINTON ANDREW JONES, DEFENDANT

No. COA18-229

Filed 1 October 2019

Probation and Parole—warrantless search—probationer's residence—directly related to probation supervision

In a prosecution for various drug-related offenses, the trial court properly denied defendant probationer's motion to suppress evidence found at his home during a warrantless search because the search was "directly related" to his probation supervision under N.C.G.S. § 15A-1413(b)(13). Although the search was part of a separate initiative with other law enforcement agencies, competent evidence—including a risk level assessment conducted by his probation officer—showed that defendant's probation officer specifically selected his home to be searched because defendant had a high risk for reoffending, was suspected of being involved in a gang, and had recently violated his probation by testing positive for illegal drugs.

Judge MURPHY dissenting.

Appeal by defendant from order entered 9 November 2017 by Judge W. Robert Bell and judgment entered on or about 29 November 2017 by Judge Joseph N. Crosswhite in Superior Court, Cabarrus County. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton, for the State.

Everson Law Firm, PLLC, by Cynthia Everson, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying his motion to suppress and his judgment for drug-related offenses. Defendant moved to suppress evidence found during a search of his residence conducted by a probation officer and other law enforcement officers, alleging that the search was not "directly related" to his probation supervision under North Carolina General Statute § 15A-1343(b)(13). Because the trial court's findings of fact support its conclusion that the search was "directly related" to his supervision, we affirm the order and conclude there was no error in the judgment.

I. Background

Defendant was placed on probation after he was convicted of possession of a firearm by a felon on 19 January 2017. Cabarrus County Probation and Parole Officer Michelle Welch began supervising defendant's probation on 1 February 2017. Defendant met with Officer Welch and discussed the regular conditions of his probation, which included warrantless searches of his residence by a probation officer for purposes directly related to his probation supervision. Officer Welch also conducted a risk level assessment of defendant, using his criminal history along with an "Offender Traits Inventory instrument" ("OTI") used by probation officers. Officer Welch determined defendant was at "Level 1" for supervision purposes, which meant that he was at "extreme high risk for supervision which indicates he needs close supervision in the community."

In May 2017, the Kannapolis Police Department, Concord Police Department, and U.S. Marshals undertook an initiative to perform warrantless searches of certain probationers in Cabarrus County. Personnel from the Cabarrus County probation office participated in the initiative. Officer Waylan Graham, a Cabarrus County Probation and Parole Officer,

was involved in the search of defendant's residence. The purpose of the initiative was for "high-risk and gang offenders[.]" Officer Graham testified that defendant was identified as one of the high risk probationers because "the type of felony that he had, which is a possession of a gun charge, high risk, positive drug screen." Prior to conducting the search, Officer Graham read defendant's probation file so he would be familiar with defendant's case.

At about 7:46 a.m. on 18 May 2017, officers began the search of defendant's residence, where he lived with his cousin and his cousin's girlfriend. Officer Welch was aware that defendant's residence was to be searched but she did not participate in it. For the searches done by the joint initiative, including the search of defendant's residence, the probation department was the lead agency for the search, so probation officers were the first officers in the residence, and they performed the first sweep of the residence. Only after the probation officers had entered the residence and secured the probationer would officers from other law enforcement agencies assist in the search.

At defendant's residence, Officer Graham knocked on the door and defendant answered. Officer Graham told defendant he was there "to conduct a warrantless search[,]" and defendant was handcuffed. Officer Graham and three other probation officers then did the initial sweep of the residence and found marijuana in several places, including in a cup and a mason jar on the kitchen counter, and marijuana plants growing in the backyard and "hanging from a clothesline in the laundry room." The officers searched the common areas and defendant's bedroom initially, and then obtained consent to search defendant's cousin's and his cousin's girlfriend's bedroom. The officers also searched the garage and found an EBT card with defendant's name along with ecstasy, heroin, burnt marijuana, a mason jar with marijuana residue, and digital scales. The girlfriend told one of the officers that defendant used the garage as a recording studio.

Defendant was charged with several drug-related felonies as a result of the drugs and paraphernalia found during the search. On 16 June 2017, Defendant filed a "MOTION TO SUPPRESS ILLEGAL SEARCH AND SEIZURE[,]" requesting suppression of the drugs and paraphernalia, and the trial court heard the motion on 26 October 2017. On 9 November 2017, the trial court entered an order denying defendant's motion to suppress. On or about 29 November 2017, defendant entered an *Alford* plea to all charges and reserved his right to appeal the denial of the motion to suppress. Defendant appeals both the order of the denial of his motion to suppress and the judgment of his drug convictions.

II. Findings of Fact and Conclusions of Law

Defendant's only issue on appeal is whether the trial court erred in denying his motion to suppress because the search of his residence and garage were reasonable, arguing specifically that the search was not "directly related" to his probation supervision. Defendant challenges 6 of the trial court's 19 findings of fact as unsupported by competent evidence:[1]

> 6. Based upon an offender traits inventory evaluation conducted at the time he was placed on probation, his criminal history and performance on previous probations the Defendant was assessed as an "extreme high risk" probationer requiring close supervision in the community.
>
> 7. Between February 1, 2017 and May 17, 2017 the Defendant moved twice and tested positive for drug use. Defendant's use of illegal drugs violated the conditions of his probation that he not use or possess any controlled or illegal drugs and that he commit no criminal offense. His probation officer used her discretionary delegated authority to place an electronic monitor on the Defendant for a period of 30 days as a sanction.
>
> . . . .
>
> 10. The purpose of the searches was to provide closer supervision and oversight to the selected probationers because of their high risk status.
>
> 11. A number of teams were assigned to the task. A team consisted of probation officers and law enforcement officers. The teams were led by the probation officers and the law enforcement officers were there to provide security and assistance.
>
> 12. The probationers to be searched were selected by the probation officers because of the high risk status and need for closer supervision. They were not selected at

1. Defendant's brief mentions findings of fact 7, 11, and 14 in the issues presented in the record on appeal but makes no specific argument regarding these findings, and thus these issues are abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reasons or argument is stated, will be taken as abandoned.").

random or by the law enforcement officers nor for the purpose of conducting any police investigation.

13. Graham and several other probation officers went to the Defendant's residence. They were accompanied by Kannapolis Police Department (KPD) Officers and U.S. Marshals. Graham selected the Defendant based upon his risk assessment, suspected gang affiliation, and positive drug screen. The purpose of the search was to give the added scrutiny and closer supervision required of "high risk" probationers such as the Defendant.

14. Prior to going to the Defendant's house he notified the Defendant's assigned probation officer and read Defendant's case file.

15. At the residence, . . . PO Graham initiated the search by knocking on the residence door. The KPD and Marshals remained in the yard. Graham explained to the Defendant why they were there and what they intended to do. Defendant consented to the search.

16. Because the Defendant was living at the residence with his cousin, his cousin's girlfriend and a minor child only the common areas of the house and Defendant's bedroom were searched initially. That search revealed marijuana in plain sight in the kitchen and laundry room. It was also found growing in a grill in the backyard.

17. The female gave consent to search her bedroom and the garage. Digital scales, heroin and ecstasy were found in the garage.

The trial court made the following conclusions of law:

1. N.C.G.S. § 15A-1413(b)(l3) provides that a probation officer may, at reasonable times, conduct warrantless searches of a probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision.

2. The issue presented is whether the search of Defendant's residence conducted by probation officer

Graham was directly related to the probation supervision. The Court finds that it was.

3. PO Graham initiated the search because the Defendant was a high risk probationer requiring more supervision than most. He had moved residences twice within the three months between the time he was placed on probation and the date of the search. He had tested positive for illegal drug use and his probation officer had exercised her discretionary delegated authority to place him on an electronic monitor for a period of 30 days as a sanction.

4. The presence and participation of Kannapolis Police Officers and U.S. Marshals does not change the result. Their presence was at the request of the probation officers conducting the search and they were there to provide security and assistance to the probation officers. The search was not part of or in response to the initiative of law enforcement nor for the purpose of conducting an investigation.

5. The search was not random or conducted at the whim of the probation officer or done in conjunction with any law enforcement purpose. Its purpose was to supervise the probationer.

Defendant also challenges conclusions of law 2-5 as unsupported by the findings of fact. But "conclusion of law" 3 is actually a finding of fact and we address it as such. *See Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review.").

A. Standard of Review

"When reviewing a motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence. We review the trial court's conclusions of law *de novo*." *State v. Fields*, 195 N.C. App. 740, 742–43, 673 S.E.2d 765, 767 (2009) (citation omitted).

B. Competency of the Evidence

As to findings of fact 15 and 17, the trial court did not use consent as the basis of the search but concluded that "N.C.G.S. §15A-1413(b)(13)

provides that a probation officer may, at reasonable times, conduct warrantless searches of a probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision." Therefore, we need not address the superfluous findings. *See generally Fleming v. Fleming*, 49 N.C. App. 345, 348, 271 S.E.2d 584, 586 (1980) ("Defendant was not prejudiced by Judge Styles' superfluous jurisdictional findings because they were unnecessary to the issue before the court and were therefore of no effect upon the rights of the parties in the subsequent enforcement hearing.").

As to the remaining challenged findings of fact, defendant does not actually challenge the findings of fact as unsupported by the evidence but instead contends that one of the documents the State relied upon in the officers' testimony, the OTI, was not "competent evidence." Defendant's argument conflates an argument regarding admission of the State's exhibits with his argument regarding whether the trial court's findings of fact support its conclusions of law.

During Officer Welch's testimony, the State offered two exhibits. Exhibit 1 was the Conditions of Probation form and Exhibit 2 was the Risk Needs Assessment also referred to as an OTI. Defendant objected to the two exhibits but did not state any basis for the objection.[2] The trial court overruled the objection, and defendant's counsel then stated that she wished to be heard. The trial court responded, "Overruled. Admitted. Denied." The trial court's ruling was terse but its meaning is clear in the context of the transcript. The defendant's general objection to admission as evidence of State's Exhibits 1 and 2 was "[o]verruled." State's Exhibits 1 and 2 were "[a]dmitted." The trial court "[d]enied" defendant's request "to be heard" regarding the objection to admission of State's Exhibits 1 and 2. Defendant did not make any other objections to the probation officer's testimony regarding his risk level and made no further argument before the trial court regarding the admissibility or competency of the exhibits as evidence.[3] Defendant also did not make

2. The legal basis for defendant's evidentiary objection to State's Exhibits 1 and 2 is not apparent from the transcript or context of the hearing, nor does defendant argue on appeal about any particular reason this evidence should not have been admitted. It is difficult to imagine any legitimate basis for an evidentiary objection to State's Exhibit 1, the conditions of defendant's probation. State's Exhibits 1 and 2 were admitted when defendant's probation officer was testifying regarding defendant's probation supervision and the information they reviewed together regarding his high risk status and conditions of probation. Even without the exhibits, the probation officer's testimony alone supports the trial court's findings of fact.

3. Defendant's counsel made only two objections in the entire hearing. The first was the general objection to State's Exhibits 1 and 2; the second was an objection based upon hearsay later in the testimony regarding the search.

a proffer of additional evidence regarding the exhibits, particularly the OTI noting defendant was high risk – one of the bases upon which the probation officers determined his residence would be searched – though it was an available option even after the trial court overruled the objection to State's Exhibits 1 and 2.

Again, defendant does not argue that there was no evidence to support the findings that the OTI determined he was an "extreme high risk" probationer; that he had moved twice within three months; that he was suspected of being involved in a gang; and that he had tested positive for illegal drugs. Instead defendant contends that the OTI was crucial evidence used against him, and it was not competent evidence. Defendant argues that "[t]he complete OTI itself was not provided, simply a one-page synopsis of its purported results, which appears to be pre-populated, is entirely conclusory, and is non-specific to" defendant.[4] But defendant did not make any objections or requests for the complete OTI; as noted above, to the extent defendant attempts to present an evidentiary issue on appeal, he did not preserve any objection to State's Exhibits 1 and 2 in the trial court and did not argue plain error on appeal. The State's presentation of only the "synopsis" of the OTI may go to the weight of the evidence, but not its competency as evidence.

Defendant bases his argument regarding "competency" of the OTI primarily on cases regarding satellite-based monitoring ("SBM") of certain sex offenders. But defendant has conflated two entirely separate issues. The requirements for SBM are specific to monitoring of sex offenders and are not comparable to the requirements for random searches of a probationer's home in accord with the conditions of probation. Perhaps the OTI's use of the word "risk" has led defendant to attempt to equate the risk evaluation tool used in SBM cases, the STATIC-99, with the OTI, but there is no support in our statutes or case law for this argument. *See generally State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432–33 (2009) ("The procedure for SBM hearings is set forth in N.C. Gen. Stat. §§ 14–208.40A and 14–208.40B. N.C. Gen. Stat. § 14–208.40A applies in cases in which the district attorney has requested that the trial court consider SBM during the sentencing phase of an applicable conviction. N.C. Gen. Stat. § 14–208.40B applies in cases in which the offender has been convicted of an applicable conviction and the trial court has not previously determined whether the offender must be required to

4. Indeed, it would most likely be to defendant's disadvantage for the State to present further evidence regarding the OTI or defendant's risk level determination, as that evidence would most likely be *harmful* to defendant – good reason for his counsel not to pursue the objection any further.

enroll in SBM. . . . The hearing procedure set forth in N.C. Gen. Stat. § 14–208.40B has two phases; N.C. Gen. Stat. § 14–208.40B(c), for purposes of convenience and clarity, we will refer to these two phases as the qualification phase and *the risk assessment phase*." (emphasis added) (citations omitted)). Unlike SBM, *see id.*, no statute requires the probation officer to use the OTI or to establish a certain level of "risk" to justify a search incident to probation; the search must be "directly related to the probation supervision[.]" N.C. Gen. Stat. § 15A-1343(b)(13) (2015).[5] The statutes do not set out any particular method for the probation officer to decide to make a random search, as long as it is "directly related to the probation supervision[.]" *Id.*

The OTI is simply a tool used by the probation officer to assist in supervising a probationer and to advise the probationer of the areas in which he needs improvement. There is no statute requiring any particular result on an OTI to support a finding that the search is "directly related" to the probation supervision. The OTI was one of several pieces of information the officers relied upon in their supervision of defendant, along with defendant's other characteristics and behavior. The OTI noted that the information was provided to defendant "to help you understand the areas of your life that your officer will be discussing with you during supervision. You can use this information as a guide to help yourself be successful while under supervision." The assessment noted defendant had these characteristics:

> You tend to spend time with people who don't think that illegal behavior is a big deal and who sometimes influence you to do things that get you into trouble. It appears some of the people you hang around, spend most of your time with, or even consider your friends are increasing your risk of committing a new crime.
>
> It appears you sometimes don't think how your actions affect others and take risks that lead to trouble. If you reported you had conduct prior to the age of 15 and/or reckless behavior of poor impulse control, you are at a greater risk of committing new crime.
>
> You tend to make quick decisions instead of thinking things through. This sometimes gets you into trouble. It appears you have problems controlling your behaviors

5. Since amended. *See* N.C. Gen. Stat. § 15A-1343 Editor's Note (2017) (noting three amendments between 2016-2017).

> and tend not to think before acting which is increasing your risk of committing new crime.

The OTI also noted "Problem Life Area[s]" of "[e]mployment" and "[l]egal" and that defendant's level of "Interest in Improving (out of 10)" was zero. Defendant had signed the OTI acknowledging that his probation officer had gone over his level of supervision and results with him.

C. Search Directly Related to Probation Supervision

Defendant also relies on *State v. Powell*, ___ N.C. App. ___, 800 S.E.2d 745 (2017), and this case, while distinguishable, does address how to determine if a search is "directly related" to probation supervision. Defendant was subject to the regular conditions of probation:

> As one of the regular conditions of probation, a defendant must:
>
> (13) Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, *for purposes directly related to the probation supervision*, but the probationer may not be required to submit to any other search that would otherwise be unlawful.

N.C. Gen. Stat. § 15A-1343(b)(13) (emphasis added). In *Powell*, this Court first discussed the meaning of the phrase "directly related to the probation supervision," which was an amendment to North Carolina General Statute § 15A-1343 in 2009; previously the statute required a warrantless search to be "reasonably related" to the probation:

> The General Assembly did not define the phrase "directly related" in its 2009 amendment to N.C. Gen. Stat. § 15A-1343(b)(13). It is well established that where words contained in a statute are not defined therein, it is appropriate to examine the plain meaning of the words in question absent any indication that the legislature intended for a technical definition to be applied.
>
> The word "directly" has been defined as "in unmistakable terms." "Reasonable" is defined, in pertinent part, as "being or remaining within the bounds of reason." When the General Assembly amends a statute, the presumption is that the legislature intended to change the law. Thus, we infer that by amending subsection (b)(13) in this fashion, the General Assembly intended to impose a higher burden on the State in attempting to justify a warrantless

> search of a probationer's home than that existing under the former language of this statutory provision.

Id. at ___, 800 S.E.2d at 751 (citations and quotation marks omitted).

In *Powell*, the trial court "summarily denied Defendant's motion to suppress without making any findings of fact or conclusions of law." *Id.* at ___, 800 S.E.2d at 749. The search in *Powell* was part of "an ongoing operation of a U.S. Marshal's Service task force." *Id.* at ___, 800 S.E.2d at 753. The operation was initiated by the U.S. Marshal's Service for its own law enforcement purposes and the searches were conducted with the assistance of local law enforcement. *See id.* at ___, 800 S.E.2d at 745. The operation targeted defendants on probation because their conditions of probation allow warrantless searches. *See id.* The defendant's probation officer did not participate in the search, and there was "no suggestion in the record that Defendant's own probation officer was even notified—much less consulted—regarding the search of Defendant's home." *Id.* at ___ n.3, 800 S.E.2d at 753 n.3. Officer Lackey, who was not defendant's probation officer, testified that he had no particular reason for searching the defendant's home nor was he aware of "any complaints about [the defendant], and any illegal activity, contraband he might have had, any reason to have gone to his house other than just a random search[.]" *Id.* at ___, 800 S.E.2d at 749-50. Investigator Blackwood testified there was no "indication whatsoever" that the defendant was involved in any gang activity or that his probation officer had ever had "any suspicions of any kind of illegal activity, or anything contrary to his probation[.]" *Id.* at ___, 800 S.E.2d at 750-51. This Court ultimately determined that the State had "failed to meet its burden of demonstrating that the search of [the defendant's] residence was authorized" under the statute. *Id.* at ___, 800 S.E.2d at 754.

Thus, defendant's argument that "[t]his case is indistinguishable from *State v. Powell*" is not supported by *Powell*, since the situations are quite different. *Compare id.*, ___ N.C. App. at ___, 800 S.E.2d at 745. The purpose for the search, the reason for including defendant in the initiative, and the officers conducting the search are entirely different. Here, a Cabarrus County Probation Officer reviewed defendant's file and decided to include his residence in the searches for the purposes of his probation supervision. Defendant's assigned probation officer was aware that defendant's residence would be searched, although she did not participate in the search. The fact that the search was part of a joint initiative with other law enforcement agencies does not automatically mean the search was not "directly related" to the probation supervision. In *Powell*, the search was initiated by a separate law enforcement agency

for its own purposes. *Id.* Here, the trial court made findings of fact and conclusions of law, and those findings establish that defendant's probation officer had determined him to be an extreme high risk for reoffending based upon many factors, including that he had moved twice within three months, was suspected of being involved in a gang, and had tested positive for illegal drugs. A probation officer reviewed defendant's file to determine if he should be included in the searches based upon his history and risk level. Even with no consideration of the OTI, which defendant contends is not competent evidence, the other findings make this case entirely distinguishable from *Powell*. *Compare id.*

The only issue presented here under North Carolina General Statute § 15A-1343(b) is whether the search was "for purposes directly related to the probation supervision" as defendant does not dispute that the search was conducted at a "reasonable time" and that he was present. N.C. Gen. Stat. § 15A-1343(b)(13). All of the evidence, including the OTI, supported the probation officer's determination that a warrantless search of defendant's residence was "directly related" to his probation. *Id.* Here, the State met its burden "of demonstrating that the search of [the defendant's] residence was authorized" under the statute. *Powell*, ___ N.C. App. at ___, 800 S.E.2d at 754.

One of the conditions of defendant's probation was to "[n]ot use, possess, or control any illegal drug or controlled substance[.]" Defendant had already had a positive drug screen and was a "high risk" probationer. The reason for the search was to supervise defendant and to ensure his compliance with the conditions of his probation. This situation is entirely different from *Powell*, where a different law enforcement agency randomly selected the probationers to be searched and was admittedly conducting an entirely separate investigation, without even informing the defendant's probation officer. *See generally Powell*, ___ N.C. App. ___, 800 S.E.2d 745. Defendant's "high risk" status was important to his probation officer because "high risk" probationers logically require more supervision, and to provide that supervision, a probation officer may decide to conduct a warrantless search "directly" related to the supervision. *See* N.C. Gen. Stat. § 15A-1343(b)(13). This argument is overruled.

III. Conclusion

We affirm the trial court's order denying defendant's motion to suppress and conclude there was no error in the judgment.

AFFIRMED and NO ERROR.

Judge ZACHARY concurs.

Judge MURPHY dissents.

MURPHY, Judge, dissenting.

The trial court failed to provide Defendant a true opportunity to be heard on his argument to suppress the evidence recovered during the warrantless search of his home. I would vacate the trial court's order denying Defendant's motion to suppress and remand for further proceedings. I respectfully dissent.

A warrantless search of a probationer's residence is reasonable if it is "directly related to the probation supervision." N.C.G.S. § 15A-1343(b)(13) (2017). As the Majority notes, this statutory language was changed from "*reasonably* related" in 2009, but the General Assembly did not specifically define the phrase "*directly* related." In *Powell*, our only published case discussing this change, we held the State had not met its burden to prove a warrantless search was directly related to probation supervision where the purpose of the search in question was investigatory in nature rather than in furtherance of the supervisory goals of probation. *Powell*, 253 N.C. App. at 603-04, 800 S.E.2d at 752. We were also persuaded by the fact that "the search of [the] Defendant's home occurred as a part of an ongoing operation of a U.S. Marshal's Service task force." *Powell*, 253 N.C. App. at 604, 800 S.E.2d at 752. I agree with the distinction *Powell* draws between searches that are supervisory in nature, and are therefore directly related to probation supervision, and those that are investigatory in nature.

While reasonable minds can differ on this point, the search in this case was—with two exceptions—nearly identical to the search in *Powell*, which we held was not directly related to the defendant's probation supervision and therefore must be suppressed. First, unlike in *Powell*, although it involved U.S. Marshals and local police, the search of Defendant's residence was organized and effectuated primarily by probation officers. Second, the State argues Defendant's classification as a "high risk" probationer makes this case distinguishable from *Powell*, where the Defendant was randomly chosen to be searched without consideration of his risk level.

Admittedly, the fact that the search was executed by probation officers—rather than police or U.S. Marshals—suggests that the search was executed for the purpose of probation supervision. Yet, Probation Officer

Graham also testified Defendant was chosen to be searched partly due to previous positive drug screens, which suggests that Defendant's residence may have been searched due to the probation officer's desire to investigate the extent of Defendant's involvement in drugs through a warrantless search. Additionally, there is not a clear picture of why Defendant's "high risk" status is important to the State, probation officers, or the trial court's decision that the search in question was directly related to Defendant's probation supervision.

As Defendant's counsel noted during oral argument, "Not only did we object to the [results of the OTI report]. We asked for a hearing on it, we were shot down. The appellant wasn't allowed to argue about that[.]" *See Wilmington Sav. Fund v. IH6 Prop.*, 829 S.E.2d 235, 238 (N.C. Ct. App. 2019) (considering an argument raised at oral argument and noting our "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"). I would hold that the trial court failed to provide Defendant a meaningful opportunity to be heard as to whether the State could prove he was, in fact, a "high risk" probationer, and the impact of such a determination for the purposes of a warrantless search.

At the suppression hearing, Probation Officer Welch's testimony and Exhibit 2, Defendant's Risk Needs Assessment, were the only support for the State's contention that Defendant was, in fact, a "high risk" probationer.[1] When Defendant attempted to object to the entrance of such evidence, he was denied an opportunity to be heard by the trial court, which responded only that the objection was "Overruled. Admitted. Denied." The record does not provide any reason why the trial court would not allow Defendant's counsel to be heard on this matter, especially given its importance to Defendant's suppression motion.

A probationer must receive "full due process" before a court may revoke probation. *State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986). Indeed, a keystone of our judicial system is the basic premise that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie v. Connecticut*, 401 U.S 371, 379, 28 L. Ed. 2d. 113, 120 (1971). Here, Defendant was not afforded a meaningful opportunity to be heard on the issue of whether the State adequately proved he was a "high risk" probationer and what the impact of such a finding would be. Accordingly,

1. Indeed, the record lacks any information about what "high risk" entails or how it is calculated by a probation officer.

I would vacate the trial court's order denying Defendant's *Motion to Suppress* and remand for further proceedings consistent with this dissenting opinion.

STATE OF NORTH CAROLINA
v.
SHELTON ANDREA KIMBLE, DEFENDANT

No. COA18-1090

Filed 1 October 2019

Constitutional Law—due process—false witness testimony—materiality—use by State

Defendant received a fair trial in a first-degree murder prosecution even though a witness's testimony—that she gave prosecutors notice before trial that her recollection of the shooting had changed since her first statement to law enforcement—conflicted with notes the State provided to defense counsel of a pretrial meeting with the witness. The testimony was not material—not only did the State rely on other evidence to support a conviction, but the jury could consider the credibility of the witness after her inconsistent testimony was explored on cross-examination and the State's redirect. Further, there was no evidence that the State knowingly or intentionally used the false testimony where the record reflected the State was not aware of the inconsistent testimony, and defense counsel declined an opportunity to re-cross the witness.

Appeal by defendant from judgment entered 16 March 2018 by Judge Andrew Taube Heath in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General, Marc X. Sneed, for the State.

Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for defendant-appellant.

BERGER, Judge.

On March 16, 2018, Shelton Andrea Kimble ("Defendant") was convicted of first-degree murder for killing Tyrone Burch ("Burch"). On appeal, Defendant contends that the State violated his Fourteenth Amendment right to substantive due process by failing to correct false testimony given by witness Sharon Martin ("Martin"). We disagree.

Factual and Procedural Background

On January 3, 2016, Defendant shot and killed Burch in the parking lot of a dance club in Charlotte, North Carolina. Martin testified that earlier that night, between 10:30 and 11:00 p.m., she arrived alone at the dance club and noticed Defendant was sitting at the bar. Martin bought Defendant a drink and the two went to the dance floor and continued to talk. Subsequently, Burch arrived at the dance club and met Martin near the dance floor. Martin testified that Burch was her boyfriend at the time of the shooting and that she had previously dated Defendant for eight years.

Martin and Burch left to talk outside. Afterward, Defendant walked outside, and as he passed Martin and Burch, he said something, which prompted Burch to punch Defendant in the face. The two then fought for approximately 30-45 seconds. A bouncer and a patron of the dance club broke up the fight.

The facts are disputed as to the exact circumstances that followed, but on appeal both parties concede that Defendant fired a gun multiple times at Burch causing fatal injuries. The bouncer testified that he observed Defendant go to his vehicle and subsequently fire a gun at Burch while Defendant chased after him. Martin testified that she saw Defendant open the driver's side door of his vehicle and that Defendant typically kept his gun in a pocket on the driver's side door. After firing his gun, Defendant ran to his vehicle, dropping his gun in the process, and drove home. Later that same night, Defendant turned himself in to authorities, and he was charged with murdering Burch.

An autopsy of Burch's body showed multiple injuries consistent with gunshot wounds. One of the gunshot wounds was to the top back right side of his head, and the projectile traveled "almost straight down" through his head and lodged near the brain stem on the right side A second gunshot wound was to the right side of his neck, which had a similar trajectory as the projectile that entered near the top of Burch's head. This second projectile exited through the chest. Another gunshot wound was under his right underarm, and the projectile exited near his back shoulder. A fourth projectile entered near Burch's back left shoulder

blade and lodged in his chest. The fifth projectile entered the back of his left thigh and exited through the front of the same thigh. A firearms and toolmark expert testified that the five projectiles recovered from the scene and from Burch's body were fired from the same firearm.

Prior to trial, Martin met with prosecutors to prepare for her testimony. During the meeting, Martin was given the 35-page statement she had made to detectives on the day of the incident. Martin read the statement and informed the prosecutors that it reflected what had taken place on the night of the incident. In her statement, Martin told detectives that she did not see the shooting, but that she saw Defendant "holding a gun" and "running" towards Burch. After the meeting, prosecutors provided defense counsel a page and a half of notes that they had taken from the meeting with Martin.

However, at trial Martin testified that she saw Defendant shoot Burch, saw Burch fall to the ground, and saw Defendant stand over Burch and shoot him. When challenged about her failure to tell anyone about witnessing the shooting, Martin testified that she had told a prosecutor those same details during a pre-trial meeting.

Outside the presence of the jury, the State informed the trial court and defense counsel that during their pre-trial meeting, Martin had never told them that she had witnessed Defendant stand over Burch and shoot him. Defense counsel requested, in an attempt to correct any false evidence from Martin's testimony, that the State make a statement to the jury explaining that Martin had not informed the State that she had in fact witnessed Defendant stand over Burch and shoot him. The State replied that had they received new information, they would have turned it over to defense counsel in compliance with discovery rules and that any misunderstandings could be cured by cross-examination.

The trial court did not require the State to enter into any stipulation or make a statement to the jury. It reasoned that this was not a statutory violation, but rather a "discrepancy between what the witness believes she told the State and what the State has recorded in their notes." The trial court then provided defense counsel the opportunity to further cross-examine Martin, which it declined to do.

The jury found Defendant guilty of first-degree murder, and he was sentenced to life in prison. Defendant appeals, arguing that he was denied due process by the State's failure to correct Martin's false testimony. We disagree.

Analysis

> It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Further, with regard to the knowing use of perjured testimony, the Supreme Court has established a standard of materiality under which the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Thus, when a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial.

State v. Murrell, 362 N.C. 375, 403, 665 S.E.2d 61, 80 (2008) (citation, quotation marks, and brackets omitted).

"Evidence that affects the jury's ability to assess a witness' credibility may be material." *State v. Wilkerson*, 363 N.C. 382, 403, 683 S.E.2d 174, 187 (2009) (citation omitted). "To establish materiality, a defendant must show a reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Phillips*, 365 N.C. 103, 126, 711 S.E.2d 122, 140 (2011) (internal citation and quotation marks omitted). However, to the extent that a witness's testimony may have led jurors mistakenly to believe false evidence against the defendant, subsequent admissions during cross-examination may correct any misunderstandings elicited and allow the jury to assess a witness's credibility. *See Wilkerson*, 363 N.C. at 404-05, 683 S.E.2d at 188 (determining that "the State did not obtain defendant's conviction through the use of false testimony, nor did the State permit false testimony to go uncorrected" because "[t]o the extent that Mrs. Davis' testimony may have led jurors mistakenly to believe that she could not receive a benefit from her testimony against defendant, any misunderstanding was corrected by her subsequent admission during cross-examination that she hoped her sentence would be further reduced.").

In *State v. Phillips*, the defendant asserted that the witness's trial testimony was false and material because "it contradicted the notes made of her pretrial statements and that the State benefited in both the guilt-innocence and penalty portions of the trial." 365 N.C. at 126, 711

S.E.2d at 140. Our Supreme Court disagreed with the defendant's argument and reasoned as follows:

> Although Cooke's trial testimony is inconsistent with the notes taken by others during her pretrial interviews, the record does not establish whether Cooke's direct testimony was inaccurate, whether her pretrial interview statements were inaccurate, whether the notes of those interviews were inaccurate, or whether Cooke's recollection changed. At any rate, it is not apparent that Cooke testified falsely at trial or that her trial testimony conflicted in any material way with her pretrial statements. Moreover, any inconsistency was addressed in the presence of the jury by Cooke's subsequent cross-examination when she made the following pertinent clarification:
>
> > [Defense Counsel:] You testified that you do not recall [defendant] saying anything about I have nothing left to live for?
> >
> > [Cooke:] Not on those terms, no.
> >
> > [Defense Counsel:] Do you remember telling [Investigator] Kimbrell in this year that [defendant's] brother had been shot and he had nothing left to live for?
> >
> > [Cooke:] I don't think that I put it quite that way, but I might have, but that is not the way that [defendant] actually, you know, said it.

Id. at 126-27, 711 S.E.2d at 140.

In the present case, Martin testified on direct-examination that she saw Defendant stand over Burch and shoot him. On cross-examination, defense counsel used Martin's 35-page statement to refresh Martin's memory and to impeach her. The following exchange then occurred:

> [Defense Counsel:] Okay. Now, you did not see the shooting, did you?
>
> [Martin:] I seen him running with the gun shooting it.
>
> [Defense Counsel:] Now, but didn't you tell the police a few hours after this happened back on January 3rd, 2016, you did not see the shooting?

[Martin:] That was incorrect.

[Defense Counsel:] Okay. So what you told them after the – excuse me. What you told them on January 3rd right after everything happened, you're saying that part wasn't right?

[Martin:] I seen Mr. Kimble running with the gun (gesturing) shooting. That's what I seen.

[Defense Counsel:] And my question to you was: Do you recall telling the police on January 3rd you did not see the shooting?

[Martin:] I don't remember. I was traumatized after all of this. So what I said then, I don't remember.

[Defense Counsel:] Permission to approach the witness, Your Honor?

THE COURT: Granted.

[Defense Counsel:] All right. Ms. Martin, I'm showing you once again your 35-page statement that you gave the police. When you get a moment, please look over page 15, page 20, page 24, and page 25. Let me know when you finish. . . .

[Defense Counsel:] Now, Ms. Martin, now that you've had an opportunity to look over pages 15, 20, 24 and 25, does that refresh your memory as to what you told the police about whether or not you saw the shooting?

[Martin:] Yes.

[Defense Counsel:] Okay. And isn't it true, you told the police you did not see the shooting?

[Martin:] Yes.

[Defense Counsel:] Now, Ms. Martin, since January 3rd of 2016, have you had any interaction with the Burch family?

[Martin:] No.

[Defense Counsel:] Now, on direct, you testified that you saw Mr. Kimble walk up and shoot Mr. Burch while he was on the ground. Isn't that what you said?

[Martin:] Yes.

> [Defense Counsel:] But do you recall when you spoke to the police on January 3rd, 2016, they asked you that exact same question, didn't they?
>
> [Martin:] Yes.
>
> [Defense Counsel:] They said, did you see him walk up and shoot Mr. Burch on the ground? They asked you that; right?
>
> [Martin:] Yes.
>
> [Defense Counsel:] You said no, I didn't see that.
>
> [Martin:] Yes.

On re-direct of Martin, the State clarified that when Martin met with prosecutors two weeks prior to trial, she told them that the written statement was an accurate reflection of what happened.

> [The State:] Can you just flip through [the statement] and make sure it's complete, please?
>
> [Martin:] (Complies.)
>
> **[The State:] Is this the same transcript that you reviewed when you met with [the prosecutor] and I before trial?**
>
> **[Martin:] Uh-huh.**
>
> [The State:] If I could direct your attention to page 25. If you would read that for – to yourself, please.
>
> [Martin:] (Complies.)
>
> [The State:] Thank you, ma'am. Ms. Martin, after looking at your transcript, and specifically page 25, do you recall what you told the detectives that night about what you actually saw?
>
> [Martin:] Yes.
>
> [The State:] And what did you tell them?
>
> **[Martin:] I told them that I seen him shoot the gun and thought that he was firing and then –**
>
> **[Defense Counsel:] Objection. Speculation. What she thought.**

> [The State:] Your Honor, it's her own statement.
>
> [Defense Counsel:] Still speculation.
>
> THE COURT: Hang on a second. If y'all can approach.
>
> (Bench conference held.)
>
> THE COURT: Okay. For the record, that objection is sustained.
>
> [The State:] Your Honor, may I approach the witness?
>
> THE COURT: Yes.
>
> [The State:] Ms. Martin, I'm showing you page 25 of your transcript. Didn't you tell the detectives I saw him holding a gun and I seen him running?
>
> [Martin:] Yes.
>
> [The State:] Thank you. Nothing further, Your Honor.

(Emphasis added).

It is clear that defense counsel addressed the difference between Martin's prior statement to detectives and her testimony at trial during cross-examination. Moreover, the State, over defense counsel's objection, also addressed the discrepancy between Martin's testimony at trial and what they had discussed prior to trial. Both Martin's cross-examination by defense counsel and re-direct by the State occurred in the presence of the jury.

Then on re-cross by defense counsel, the following exchange occurred, which is what Defendant contends constituted false testimony:

> [Defense Counsel:] When you said you shared those additional facts before, who did you share them with?
>
> [Martin:] With the DA.
>
> [Defense Counsel:] Okay. So you told the DA these additional facts?
>
> [Martin:] Yes.
>
> [Defense Counsel:] All right. When did you tell the DA these additional facts?
>
> [Martin:] Two weeks ago.

> [Defense Counsel:] When you spoke to the DA two weeks ago, you told the DA that you saw Mr. Kimble walk up and shoot Mr. Burch while he was on the ground?
>
> [Martin:] Yes.
>
> [Defense Counsel:] All right. So if you said that, then – well, let me rephrase. Were you aware that any new information that you have, the DA turns over to me?
>
> [Martin:] Yes.
>
> [Defense Counsel:] Okay. So as being aware of that then, would you be surprised to know that that new information was not contained in anything that the DAs gave to me?
>
> [Martin:] No.
>
> [Defense Counsel:] Okay. You wouldn't be surprised by that?
>
> [Martin:] I wasn't aware.

On appeal, Defendant does not take issue with Martin's testimony regarding what she witnessed on the night of the murder. Rather, Defendant contends the State refused to correct Martin's testimony.[1] Even assuming, *arguendo*, that Martin falsely testified that she had informed the State of this inconsistent information prior to trial, Defendant has still failed to show *both* that (1) Martin's testimony that she had informed prosecutors was material, and (2) the State knowingly and intentionally used the false testimony to convict Defendant. *See State v. Sanders*, 327 N.C. 319, 337, 395 S.E.2d 412, 424 (1990).

In order to be material, the misleading testimony must have "contributed to defendant's conviction" and that, had the witness testified truthfully, "the trial's result would have been no different." *Id.* First, we note that the State did not rely exclusively on Martin's testimony to convict Defendant. The bouncer testified to similar facts, including witnessing the circumstances leading up to Defendant firing the gun at Burch. The bouncer further testified that he heard a total of at least three shots. Moreover, the five entry wounds found on Burch were determined to have come from the same .38 caliber firearm.

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1. Defendant's appellate counsel confirmed at oral argument that the false testimony Defendant was challenging was not that Martin witnessed Defendant shoot Burch, but rather Martin's testimony that she told the prosecutor she had witnessed Defendant shoot Burch.

More importantly, on appeal, Defendant does not take issue with *what* Martin saw. Instead, Defendant takes issue with *when* and *whether* Martin informed the State of what she had witnessed. This inconsistency goes only to Martin's credibility as a witness. The inconsistency is not material because the jury still had the opportunity to consider Martin's testimony in light of Defendant's cross-examination and the State's redirect, and also observe her demeanor and consider her credibility as she testified. *See Phillips*, 365 N.C. at 126, 711 S.E.2d at 140 (noting that the witness's testimony, although inconsistent with the notes taken by others during her pretrial interviews, was not entirely false and "any inconsistency was addressed in the presence of the jury"). Therefore, there is no reasonable likelihood the testimony concerning *when* and *whether* the information was provided to prosecutors by Martin affected the judgment of the jurors in light of the other evidence at trial. The jury was aware that Martin's recollection of what she previously told law enforcement about the events she witnessed differed from what law enforcement and prosecutors recorded. Thus, "[t]he jury heard conflicting evidence," *Sanders*, 327 N.C. at 337, 395 S.E.2d at 424, and "any inconsistency was addressed in the presence of the jury by [Martin]'s subsequent cross-examination." *Phillips*, 365 N.C. at 126, 711 S.E.2d at 140.

Furthermore, Defendant has presented no supporting evidence for his assertion that the State "knowingly or intentionally" allowed Martin to testify falsely. "There is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party." *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279 (2006) (brackets omitted). "Inconsistencies and contradictions in the State's evidence are a matter for the jury to consider and resolve," and "there is no prohibition against a prosecutor placing inconsistencies before a jury." *State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988).

The record reflects that the State did not know Martin would provide inconsistent testimony. Outside the presence of the jury, the State informed the trial court that Martin had not informed them of this information and the pre-trial notes provided to defense counsel reflect this. Also, when the trial court classified Martin's testimony as "a discrepancy between what the witness believes she told the State and what the State has recorded in their notes," and not a violation of statutory discovery rules, defense counsel responded in the affirmative. Moreover, during defense counsel's cross-examination of Martin, counsel was able to elicit

testimony that the State was not in fact aware of the inconsistent testimony and that the State's notes to defense counsel were not consistent with Martin's testimony. The jury heard this conflicting testimony and when defense counsel was provided the opportunity to re-cross Martin, counsel declined to do so.

Conclusion

Martin's inconsistent testimony was neither material nor was it knowingly and intentionally used by the State to obtain Defendant's conviction. Defendant's due process rights were not violated. Accordingly, we find no error.

NO ERROR.

Chief Judge McGEE and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
MICHAEL DENNIS MILLER

No. COA19-66

Filed 1 October 2019

Firearms and Other Weapons—discharging weapon into occupied vehicle—one shot fired—multiple convictions—judgment arrested

Where a jury found defendant guilty of discharging a weapon into an occupied vehicle in operation inflicting serious bodily injury (N.C.G.S. § 14-34.1(c)) and the lesser offense of discharging a weapon into an occupied vehicle in operation (N.C.G.S. § 14-34.1(b)), both based on defendant firing a single shot into a single occupied vehicle (albeit containing multiple occupants), the trial court was required to arrest judgment on the latter conviction. The number of convictions under section 14-34.1 are determined not by the number of occupants but by the existence of multiple shots or multiple occupied properties.

Appeal by Defendant from Judgments entered 13 September 2018 by Judge Angela B. Puckett in Wilkes County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason Caccamo, for the State.

Richard Croutharmel for defendant-appellant.

HAMPSON, Judge.

Facts and Procedural History

Michael Dennis Miller (Defendant) appeals from Judgments entered upon his convictions for Assault with a Deadly Weapon Inflicting Serious Injury, Possession of a Firearm by a Felon, Discharge of a Weapon into an Occupied Vehicle in Operation Inflicting Serious Bodily Injury, and Discharge of a Weapon into an Occupied Vehicle in Operation. On appeal to this Court, Defendant challenges only the trial court's imposition of judgment and sentencing on Discharging a Weapon into an Occupied Vehicle in Operation. The Record before us tends to show the following:

On 17 December 2016, Defendant, along with his girlfriend Jarrita Roark, Derek Osborne, and Jennifer Martin, attended a holiday party. On 18 December 2016, Defendant and Roark left the party around 1:30 A.M. and returned to Roark's house. Osborne and Martin arrived soon after. Defendant and Osborne remained outside on the porch. Roark and Martin entered the house. Shortly after, Defendant and Osborne began arguing. Defendant opened the door and yelled inside for Martin and Osborne to leave. A scuffle ensued between Defendant and Osborne. Martin and Roark came outside. Osborne and Martin began walking to Martin's car, while Defendant went inside. As Martin and Osborne reached Martin's car, Defendant returned to the porch with his gun and a fired a single shot into the air. Martin and Osborne got into the car. Martin, the driver, started the car and placed it in reverse. As Martin backed up, Defendant fired a second shot at the car. The shot entered the vehicle through the rear passenger window and struck Osborne in the neck. Martin applied pressure to the wound while 911 was called and the parties waited for first responders. Defendant was identified as the shooter and detained.

Later in the morning of 18 December 2016, Warrants issued for Defendant's arrest on one count of Felonious Assault with Deadly Weapon Intent to Kill Inflicting Serious Injury. The following day, 19 December 2016, Warrants issued charging Defendant with Felonious Possession of Firearm by a Felon, Felonious Discharge of a Firearm into an Occupied Vehicle in Operation Inflicting Serious Bodily Injury naming

Osborne as the victim, and Felonious Discharge of a Firearm into an Occupied Vehicle in Operation naming Martin as the victim. Defendant was indicted on all charges on 30 October 2017.

On 11 September 2018, Defendant was tried before a jury in Wilkes County Superior Court. On 13 September 2018, the jury returned verdicts finding Defendant guilty of: Discharging a Weapon into an Occupied Vehicle in Operation Inflicting Serious Bodily Injury; Discharging a Weapon into an Occupied Vehicle in Operation; Possession of a Firearm by a Felon; and Assault with a Deadly Weapon Inflicting Serious Injury.[1] The trial court entered judgment and sentenced in four separate Judgments. The trial court entered two Judgments in file number 16 CRS 53498 imposing two concurrent sentences: (1) Discharge of a Weapon into an Occupied Vehicle in Operation Inflicting Serious Bodily Injury, a Class C Felony, in which the trial court sentenced Defendant within the presumptive range to an active sentence of 83 to 112 months; and (2) Discharge of a Weapon into an Occupied Vehicle in Operation, a Class D Felony, in which the trial court sentenced Defendant within the presumptive range to a term of 73 to 100 months' imprisonment. In file number 16 CRS 53483, the trial court entered Judgment on Defendant's conviction for Assault with a Deadly Weapon Inflicting Serious Injury, a Class E Felony, imposing a suspended sentence in the presumptive range of 29 to 47 months and placing Defendant on supervised probation for 36 months to run upon Defendant's release from incarceration. In file number 17 CRS 436, the trial court entered judgment on the Possession of a Firearm by a Felon conviction, a Class G Felony, within the presumptive range, to a suspended sentence of 14 to 26 months and again placing Defendant on supervised probation for 36 months to run upon his release from incarceration. On 14 September 2018, Defendant timely filed notice of appeal.

Issue

The sole issue on appeal is whether a defendant may be sentenced for two convictions for Discharging a Weapon into an Occupied Vehicle under two separate subsections of N.C. Gen. Stat. § 14-34.1 when a single shot was fired into a single vehicle with two occupants and, therefore, whether the trial court erred by not arresting judgment on the lesser of the two charges for Discharging a Weapon into an Occupied Vehicle in Operation under N.C. Gen. Stat. § 14-34.1(b).

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1. This was submitted to the jury as a lesser included offense of the Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury.

Standard of Review

Defendant challenges his sentence on legal rather than factual grounds, asserting the trial court erred as a matter of law by sentencing him twice under different subsections of N.C. Gen. Stat. § 14-34.1 for a single act. Thus, the issue before the Court is a question of law reviewed *de novo*. *See*, *e.g.*, *State v. Hayes*, 248 N.C. App. 414, 415, 788 S.E.2d 651, 652 (2016) ("Issues of statutory construction are questions of law which we review *de novo* on appeal[.]" (citation omitted)).

Analysis

"A defendant properly preserves the issue of a sentencing error on appeal despite his failure to object during the sentencing hearing." *State v. Paul*, 231 N.C. App. 448, 449, 752 S.E.2d 252, 253 (2013). "Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . . The sentence imposed was unauthorized at the time imposed[.]" N.C. Gen. Stat. § 15A-1446(d)(18) (2017).

Defendant concedes he was properly indicted and tried on the two separate charges of Discharging a Weapon into an Occupied Vehicle. Rather, he appeals the imposition of judgment and his sentence under N.C. Gen. Stat. § 14-34.1(b) for Discharging a Weapon into an Occupied Vehicle in Operation. Specifically, he contends his act of firing a single shot into the vehicle occupied by Martin and Osborne only amounts to one violation of N.C. Gen. Stat. § 14-34.1, and therefore, the trial court should not have imposed judgment and sentenced him for both Discharging a Weapon into an Occupied Vehicle Inflicting Serious Bodily Injury under Section 14-34.1(c) and for Discharging a Weapon into an Occupied Vehicle in Operation under Section 14-34.1(b). Instead, he argues, the trial court was required to arrest judgment on the lesser offense once the jury found the Defendant guilty of both counts. We agree.

In relevant part, Section 14-34.1 provides:

> **Discharging certain barreled weapons or a firearm into occupied property.**
>
> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm . . . into any building, structure, vehicle, . . . or other enclosure while it is occupied is guilty of a Class E felony.

> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into an occupied vehicle . . . or other conveyance that is in operation is guilty of a Class D felony.
>
> (c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony.

N.C. Gen. Stat. § 14-34.1 (2017).

Section 14-34.1 is comprised of three subsections—(a), (b), and (c). Each subsection enumerates the class of felony constituted by a violation of Section 14-34.1, elevating the class when specific factors are satisfied. Subsection (a) lays out the initial Felony, a Class E. To elevate the offense enumerated in subsection (a) to that in subsection (b), a Class D Felony, the vehicle must be in operation. *See State v. Galloway*, 226 N.C. App. 100, 104, 738 S.E.2d 412, 414 (2013) (holding where the indictment failed to allege that the vehicle was in operation, as required under subsection (b) of Section 14-34.1, the defendant could not be charged with the "elevated offense" and therefore could only be charged under subsection (a)).

Subsection (c), a Class C Felony, provides the highest felony offense under Section 14-34.1. A violation of subsection (c) occurs when "a person violates this section and the violation results in serious bodily injury to any person[.]" N.C. Gen. Stat. § 14-34.1(c). Unlike subsection (b), which expressly refers to subsection (a), subsection (c) states "this section[,]" referring to Section 14-34.1 as a whole. A violation of Section 14-34.1 (a) or (b) may be elevated to a Class C Felony in accord with subsection (c) where serious bodily injury results to "*any* person[.]" *Id.* § 14-34.1(c) (emphasis added).

"The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1." *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973).

> [A] person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

Id. at 73, 199 S.E.2d at 412. "Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform the act which is forbidden by statute. It is a general intent crime." *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994). As such, the required elements of the crime are: "(1) the willful or wanton discharging (2) of a firearm (3) into any building [or vehicle] (4) while it is occupied." *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991). Thus, "[t]he crime of discharging a weapon into an occupied building is accomplished when the defendant shoots once into the structure [or vehicle]." *Id.* at 259, 409 S.E.2d at 326.

In the case *sub judice*, Defendant committed the elevated Class D Felony offense of Discharging a Weapon into an Occupied Vehicle in Operation when he fired a single shot into the car occupied by Martin and Osborne while it was backing up. Similar to this Court's reasoning in *Galloway*, subsection (c) again elevates this crime to a Class C Felony where the jury found a person suffered serious bodily injury as a result. *See* 226 N.C. App. at 104, 738 S.E.2d at 414. Thus, when the jury found Defendant guilty under Section 14-34.1(c), the trial court should have arrested judgment for his conviction for the lesser offense under Section 14-34.1(b) arising from the same shot into the same occupied vehicle.

The State, nevertheless, contends the statute should be read to support multiple punishments where there are multiple victims because it is designed to protect the occupants of a vehicle, and in the case *sub judice*, there was more than one occupant inside the car. However, as this Court articulated in *Jones*, "*any* person located in the target building is a victim of this offense." 104 N.C. App. at 259, 409 S.E.2d at 327 (emphasis added). Indeed, the plain language of the statute requires *only* that the building or vehicle be occupied; it does not consider the number of occupants. N.C. Gen. Stat. § 14-34.1; *see Williams*, 284 N.C. at 73, 199 S.E.2d at 412 (holding that the offense is committed when Defendant knows or has reasonable grounds to believe the building is "occupied by *one or more persons*").[2]

Further, the State conceded at oral arguments that there is no prior case where the number of occupants determined the number of convictions under Section 14-34.1. To the contrary, where our Courts have

2. Notably, while the relevant Warrant and Indictment in this case name Osborne as the victim in one count under Section 14-34.1(c) and Martin as the victim under Section 14-34.1(b), the trial court's jury instructions did not require the jury to find any particular victim to support either charge. Indeed, the trial court's jury instructions were consistent with our prior case law and with our analysis here.

upheld multiple convictions under Section 14-34.1 it has done so irrespective of the number of occupants. Instead, our Courts have relied on the existence of multiple shots or multiple occupied properties to support multiple convictions.

For example, in *State v. Rambert*, the defendant argued evidence "he fired three shots from one gun into occupied property within a short period of time would support a conviction and sentence on only one count, not three counts, of discharging a firearm into occupied property[.]" 341 N.C. 173, 174, 459 S.E.2d 510, 511 (1995). Our Supreme Court analyzed the defendant's double jeopardy claim and held that he was properly charged with "three separate and distinct acts" under Section 14-34.1. *Id.* at 176-77, 459 S.E.2d at 513. The Court reasoned: "Each shot . . . required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place." *Id.*

Similarly, in *State v. Nobles*, the victim's three young children were present in the vehicle when the defendant fired seven shots into the vehicle. 350 N.C. 483, 491, 515 S.E.2d 885, 890 (1999). Yet again, our Supreme Court concluded the seven distinct and separate shots were the basis for the defendant's seven convictions. *Id.* at 505, 515 S.E.2d at 899. Likewise, this Court upheld a defendant's four convictions under Section 14-34.1(b) because the evidence showed four separate bullet holes in the doorframe, even when at the time of the shooting the dwelling was occupied by two adults and a four-year-old child. *See State v. Kirkwood*, 229 N.C. App. 656, 658, 666-68, 747 S.E.2d 730, 732, 734 (2013).

In *State v. Ray*, this Court held a defendant's two convictions under Section 14-34.1 did not violate the defendant's right against double jeopardy where the defendant fired a single bullet that entered two apartments, constituting two separate occupied dwellings. 97 N.C. App. 621, 623-25, 389 S.E.2d 422, 423-24 (1990). Consistent with *Nobles* and *Kirkwood*, the defendant's multiple convictions in *Ray* were not related to the number of victims, as each apartment in *Ray* had multiple occupants. *See id.* None of these cases based the number of charges the defendant received under Section 14-34.1 by the number of victims in the occupied property. Instead, our Courts have consistently relied on multiple shots or multiple occupied properties in order to support multiple convictions under Section 14-34.1.

The State also argues the legislative intent behind Section 14-34.1 requires a defendant should face greater jeopardy where the risk of injury to multiple persons is increased. For example, the State posits

a firearm discharged into a vehicle in operation presents a greater danger to the public than one not in operation. We are persuaded that the General Assembly addressed this concern by elevating the offense to a Class D Felony when the vehicle is in operation, thereby providing greater punishment. N.C. Gen. Stat. § 14-34.1(b). Likewise, the State suggests where a driver of a vehicle is "shot or startled" this may result in a crash presenting a risk of serious bodily injury to the occupants or the public. Again, though, the General Assembly legislatively mandated where the discharge of the weapon into an occupied vehicle results in serious bodily injury to *any* person, the offense is elevated to the Class C Felony. *Id.* § 14-34.1(c). Thus, the State's concerns are directly addressed and remedied by the very structure of the Statute and its provisions for elevated punishments.

Consequently, based on our reading of the Statute and our existing case law, we hold: where Defendant fired a single shot into a single vehicle occupied by two people while the vehicle was in operation, resulting in serious bodily injury to one occupant, and where the jury returned verdicts finding Defendant guilty both under N.C. Gen. Stat. § 14-34.1(b) and § 14-34.1(c) based upon that single shot into a single occupied vehicle, the trial court was required to arrest judgment on the conviction under subsection (b) and impose judgment only upon the elevated Class C Felony under subsection (c) based on the resulting serious bodily injury. Accordingly, we arrest judgment on Defendant's conviction under Section 14-34.1(b).

Conclusion

On appeal, Defendant does not challenge his convictions for Assault with a Deadly Weapon Inflicting Serious Injury or Possession of a Firearm by a Felon. Therefore, we uphold those Judgments and hold there was no error in file numbers 16 CRS 53483 and 17 CRS 436. In file number 16 CRS 53498, we conclude there was no error in Defendant's conviction for the Class C Felony of Discharging a Weapon into an Occupied Vehicle in Operation Inflicting Serious Bodily Injury; we arrest Judgment on Defendant's conviction of the Class D Felony of Discharging a Weapon into an Occupied Vehicle in Operation. We do not remand for resentencing because the Judgments were entered separately and the active sentences run concurrently.

NO ERROR IN PART; JUDGMENT ARRESTED IN PART.

Judges INMAN and BROOK concur.

STATE OF NORTH CAROLINA
v.
DAVE ROBERT RIEGER

No. COA18-960

Filed 1 October 2019

Costs—N.C.G.S. § 7A-304—court costs in criminal case—meaning of "criminal case"

In a prosecution for possession of marijuana and possession of marijuana paraphernalia, where the State filed each charge in separate charging documents and the trial court entered separate judgments against defendant, the trial court erred by imposing the same court costs in both judgments under N.C.G.S. § 7A-304(a), which authorizes court costs "in every criminal case" in which someone is convicted. The legislature intended these costs not to serve as a punishment, but rather to reflect the actual financial burden that a defendant's interaction with the justice system created. Thus, where defendant's multiple criminal charges arose from the same underlying event or transaction and were adjudicated together in the same proceeding, they were part of a single "criminal case" for purposes of section 7A-304.

Appeal by defendant from judgments entered 12 October 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for the defendant.

DIETZ, Judge.

Dave Rieger got pulled over for following too closely. Law enforcement found marijuana and marijuana paraphernalia in Rieger's car and arrested him on two charges: possession of marijuana and possession of marijuana paraphernalia. Rieger took his case to trial and a jury convicted him of both charges.

To Rieger, this all seemed like one criminal case against him. But the State filed the two charges against him in two separate charging

documents and the trial court entered two separate judgments against him. In each of those judgments, the court assessed court costs, amounting to a total of nearly $800.

This appeal is about those court costs. The applicable statute authorizes court costs "in every criminal case" in which the defendant is convicted. N.C. Gen. Stat. § 7A-304(a). So the question is this: was what Rieger experienced one criminal case or two?

It is not an easy question to answer. Both Rieger and the State offer reasonable but conflicting interpretations of the plain language, the statute's history, and the spirit and intent underlying the imposition of court costs. Ultimately, we are guided by the General Assembly's intent that court costs reflect the costs that the justice system actually incurs. Court costs are not intended to be a fine or other form of punishment. With this in mind, we hold that when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single "criminal case" for purposes of the costs statute. Accordingly, we vacate the imposition of costs in one of the two judgments against Rieger.

Facts and Procedural History

In 2016, after law enforcement discovered various illegal drugs and drug paraphernalia in Dave Robert Rieger's car during a traffic stop, the State charged Rieger with driving while impaired, driving without an operator's license, and possession of clonazepam, hydrocodone, marijuana, and marijuana paraphernalia. The case then made its way through the justice system. Although the State brought each charge through a separate charging document, at each step in the criminal justice process these charges were heard together in the same court proceeding. Ultimately, in late 2017, after being found guilty on multiple charges in district court, Rieger appealed to superior court and his case went to trial. The jury found Rieger guilty of two charges: possession of marijuana and possession of marijuana paraphernalia.

After sentencing, the superior court entered two separate judgments, one for each conviction. In both judgments, the trial court imposed the court costs described in the statute addressing costs in criminal court. This amounted to nearly $800 in court costs. Rieger appealed, challenging the imposition of the same court costs in both judgments.

Analysis

Rieger argues that the trial court erred by assessing court costs as part of both the criminal judgments. The statute governing criminal costs requires costs "in every criminal case":

> In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected.

N.C. Gen. Stat. § 7A-304. Rieger contends that, although the court entered two separate judgments, one for each of the two separate charges, those judgments are part of the same criminal "case."

This is a question of statutory interpretation that we review *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Our task in statutory interpretation is to "determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, __ N.C. __, __, 821 S.E.2d 787, 792 (2018). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.*

We thus begin with the plain language of the statute and, in particular, the meaning of the word "case" in the phrase "in every criminal case." When examining the plain language of a statute, undefined words in a statute "must be given their common and ordinary meaning." *Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974). The word "case" is not defined in N.C. Gen. Stat. § 7A-304 and, thus, we use the ordinary and common meaning of that word.

Rieger and the State generally agree on the ordinary meaning of the word "case." Both parties point to various dictionaries that consistently define the word, in this context, as some sort of legal proceeding, action, suit, or controversy. *See, e.g.*, Merriam-Webster's Dictionary (11th ed. 2003); Black's Law Dictionary (11th ed. 2019).

Applying this ordinary meaning, Rieger contends that "case" as used in this statute means all criminal charges "disposed of together" in some legal proceeding. A criminal case, Rieger argues, "quite regularly involves more than one charge from more than one file number, and more than one conviction entered in more than one judgment." But if those charges are resolved in a single trial or hearing, they are a single "case" under the statute. As support, Rieger points to his own trial transcript, where the court explained to the jury that it had "called for trial *the case* entitled the State of North Carolina versus Dave Robert Rieger."

The State, by contrast, focuses on the word "case" as meaning a distinct legal action, suit, or proceeding. The State contends that

"each charging document is an action that can produce a conviction." That charging document yields its own case number and is managed separately within the court administrative system. Thus, the State argues, each separately charged offense with its own charging document and case number is a "case" under the ordinary meaning of that word.

These are both reasonable interpretations of the statute's plain text. And they both have their flaws. For example, what if Rieger had pleaded guilty and been sentenced on one of the charges shortly before beginning the trial on the second? Having not been disposed of together, Rieger's interpretation would treat these as two separate cases. But if they are two separate criminal cases shortly before the trial, why should they transform into one case if they are joined for trial but still result in two separate judgments? Nothing in the statute suggests the word "case" possesses this sort of fluidity.

The State's interpretation has similar problems. Suppose a defendant is charged with ten related offenses all stemming from the same underlying incident. After trial, the court enters a consolidated judgment. *See* N.C. Gen. Stat. § 15A-1340.15. Under the State's view, the court must assess ten sets of court costs in that judgment. This is so because each of those ten charges has its own charging document and separate case number. But there is a single judgment, stemming from charges all arising from the same underlying event, that moved through the justice process together since the outset. To say, in ordinary English usage, that this is ten criminal cases, rather than one, is quite a stretch.

When interpreting a word or phrase in a statute, we must also examine how it is used in other parts of the same statute. But again, this yields conflicting results. For example, the statute provides that "[n]o costs may be assessed when a case is dismissed" and "[w]hen a case is reversed on appeal, the defendant shall not be liable for costs." N.C. Gen. Stat. § 7A-304(a), (b). In our justice system, dismissals and reversals ordinarily are directed at specific charges or claims, not the entire proceeding collectively. This means some charges or claims can be dismissed, or reversed on appeal, while others remain. Indeed, this is routine in criminal proceedings. If the word "case" meant the entire proceeding collectively, the statute would fail to address how costs must be assessed in this common situation. This suggests that the General Assembly viewed the word "case" in this statute as meaning individual criminal charges, not all related charges collectively.

But the statute also provides that certain crime laboratory costs "shall be assessed only in cases in which [an] expert witness provides

testimony about the chemical analysis in the defendant's trial." *Id.* § 7A-304(a)(11)-(13). If the word "case" here meant each individual charge, it would mean that these crime lab costs must be assessed in a multi-count trial even for charges having nothing to do with the chemical analysis and expert testimony. It is far more likely that the word "case," used here, is intended to mean the collective criminal proceeding that led to a trial.

With this textual analysis failing to provide a ready answer, Supreme Court precedent next requires us to look beyond the plain text and to examine "the legislative history" of the statute. *Rankin*, __ N.C. at __, 821 S.E.2d at 792. There isn't much to go on. Our modern criminal costs statute was part of the Judicial Department Act of 1965, which reorganized the court system with the creation of the district courts. Act effective Jul. 1, 1965, ch. 310, 1965 N.C. Sess. Laws 310. The Act described the purpose of the newly created costs statutes (both criminal and civil) as "providing for the financial support of the judicial department, and for uniform costs and fees in the trial divisions of the General Court of Justice." *Id.* § 7A-2(6). The drafting history of the Act, and the accompanying report of the North Carolina Courts Commission, offers no other guidance on the statute's intent.

Nevertheless, the State contends that the act's original, stated purpose shows an intent to impose costs separately for each separate criminal case file opened by the court system. After all, the judicial department incurs costs to manage a criminal case file regardless of whether the underlying charge is tried separately or with others. Thus, imposing court costs for each separate case file best maximizes the "financial support of the judicial department."

But as Rieger points out, our justice system has long recognized that it costs less to conduct a single hearing or trial than multiple ones. *See, e.g.*, *State v. Toole*, 106 N.C. 736, 11 S.E. 168 (1890). By using a broad word such as "case" as opposed to a more specific word such as "charge" or "conviction," the General Assembly might have intended for court costs to more accurately reflect the actual costs (and costs savings) incurred as charges make their way through the court system—something that is best accomplished through Rieger's interpretation. Rieger's point is exemplified by provisions such as the "courtroom and related judicial facilities" charge. N.C. Gen. Stat. § 7A-304(a)(2). When the various pretrial hearings for a series of related charges (as well as the trial itself), take place together in the same courtroom facility, assessing multiple courtroom usage costs is needlessly duplicative.

Having exhausted our analysis of both the statute's text and history without resolving the ambiguity, we lastly turn to "the spirit of the act and what the act seeks to accomplish." *Rankin*, __ N.C. at __, 821 S.E.2d at 792. Of course, we know what the statute seeks to accomplish—as discussed above, the drafters included a statement of purpose. We also know a few other things about costs. First, court costs are not a criminal punishment and are not meant to be punitive. *State v. Arrington*, 215 N.C. App. 161, 168, 714 S.E.2d 777, 782 (2011). Second, despite this first point, criminal court costs can function like a punishment, particularly for low-income defendants.

For example, payment of these costs typically is a condition of a defendant's probation and willful failure to pay can result in revocation; similarly, defendants who fail to pay their court costs can lose their driver's license; and unpaid court costs can be converted into a civil judgment that becomes a lien on the defendant's property. *See* N.C. Gen. Stat. §§ 15A-1343, 20-24.1, 15A-1365. For many low-income individuals, paying hundreds of dollars in court costs (in this case the courts costs are nearly $800) is beyond their reach. The consequences—possible probation violations, lack of a driver's license, no access to credit—can lead to a cascade of crises that ultimately return even the most well-intentioned people back to the criminal justice system.

With this reality in mind, we believe the intent of the General Assembly when it chose to require court costs "in every criminal case" was to have those costs be proportional to the costs that this "criminal case" imposed on the court system. In other words, court costs are meant to reflect the financial burden that a defendant's interaction with the justice system creates. Were it otherwise—were costs designed solely to generate as much revenue as possible—they would be fines, which are a form of punishment. *Richmond County Bd. of Educ. v. Cowell*, 243 N.C. App. 116, 119, 776 S.E.2d 244, 246–47 (2015); *see also Gonzalez v. Sessions*, 894 F.3d 131, 141 (4th Cir. 2018) (discussing the differences between costs and fines under North Carolina law). And we can say with certainty that using court costs as another form of punishment is not the General Assembly's intent.

Thus, when criminal charges are separately adjudicated, court costs can be assessed in the judgment for each charge—even if the charges all stem from the same underlying event or transaction. This is so because adjudicating those charges independently creates separate costs and burdens on the justice system. But the rule is different in cases like this one. When multiple criminal charges arise from the same underlying

event or transaction and are adjudicated together in the same hearing or trial, they are part of a single "criminal case" for purposes of N.C. Gen. Stat. § 7A-304. In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments.

Having announced this rule, we apply it here and hold that Rieger's two criminal judgments were part of a single "criminal case" for purposes of N.C. Gen. Stat. § 7A-304. Thus, the statute permitted the trial court to assess the statutory court costs only once across those two judgments. Because the court assessed those costs twice, once in each judgment, we vacate the imposition of costs in the judgment in Case No. 16 CRS 2470.

Conclusion

We vacate the judgment in Case No. 16 CRS 2470 and remand for entry of a new judgment that does not include court costs.

VACATED AND REMANDED IN PART.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
CAROLYN D. "BONNIE" SIDES, DEFENDANT

No. COA18-1016

Filed 1 October 2019

1. Constitutional Law—due process—competency to stand trial—drug overdose resulting in absence from trial—waiver

Defendant's intentional drug overdose several days into her trial for embezzlement did not trigger the need for a competency hearing. Defendant waived her statutory rights for such a hearing (N.C.G.S. § 15A-1002(b)) by failing to raise the issue, and she waived the right to be present at trial by voluntarily absenting herself from court by ingesting drugs. Therefore, the trial court was not constitutionally required to hold a sua sponte competency hearing.

2. Judgments—amended ex parte—sentence unchanged—no error

Defendant was not required to be present when her judgment for embezzlement was amended to correct a clerical error regarding the dates of offense because the amendment did not substantively change the sentence imposed.

Judge STROUD dissenting.

Appeal by Defendant from judgments entered 11 November 2017 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Josh Stein, by Special Deputy Attorney General Keith Clayton, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts finding her guilty of three counts of felony embezzlement following trial in early November 2017. Defendant contends that the trial court erred by (1) failing to conduct a competency hearing before proceeding with the trial in her absence following her mid-trial ingestion of intoxicants, and (2) amending the judgments to reflect a different date for the commission of the relevant crimes in her absence. We discern no error.

I. Background

On 7 July 2015, Defendant was indicted by a Cabarrus County Grand Jury on four counts of felony embezzlement. On 30 November 2015, superseding indictments were issued. The State dismissed one of the counts on 4 May 2017, leaving Defendant charged with two Class C and one Class H counts of felony embezzlement.

Jury trial began on 6 November 2017. Defendant was present in the courtroom on that date, as well as on 7 and 8 November 2017, as the State presented its case-in-chief. During those first three days of the trial, Defendant conferred with her trial counsel on multiple occasions, and neither Defendant nor her counsel raised the issue of Defendant's competency to the trial court.

On the evening of 8 November 2017, Defendant ingested 60 one-milligram Xanax tablets in an apparent intentional overdose, and was

taken to the hospital for treatment. The trial court was made aware of this fact on the morning of 9 November 2017 before the trial resumed. The trial court told the jury there would be a delay and sent them to the jury room. The parties and the trial court then discussed the impact of Defendant's overdose on the proceedings with reference to a petition for involuntary commitment by which the treating physician sought to keep Defendant for observation and further evaluation. In the petition for involuntary commitment, the physician opined that Defendant was "mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness" and "ha[d] been experiencing worsening depression and increased thoughts of self-harm." The trial court asked the parties to draft an order for the release of Defendant's medical records and to research the legal import of a defendant's absence from trial under such circumstances, and recessed the proceedings.

When the proceedings resumed later that afternoon, the State's attorney stated that he had found case law that he believed allowed the trial to proceed in Defendant's absence, directing the trial court's attention to *State v. Minyard*, 231 N.C. App. 605, 753 S.E.2d 176 (2014), discussed below. But "in an abundance of caution," the State's attorney suggested continuing the proceedings until the beginning of the following week in case Defendant was able by that time to return to the courtroom. The trial court agreed, and released the jury. Later that afternoon, the trial court signed the order for the release of Defendant's medical records, revoked Defendant's bond, and issued an order for Defendant's arrest once she left the hospital.

When the proceedings resumed on 13 November 2017, Defendant was again absent from the courtroom and, according to her trial counsel, remained in the hospital undergoing evaluation and treatment. The trial court asked Defendant's trial counsel: "Up [until] the time that this matter occurred, Mr. Russell, you have not observed anything of [Defendant] that would indicate [Defendant] lacked competency to proceed in this trial, would that be a fair statement?" Defendant's trial counsel agreed. The trial court then ruled that the trial would proceed in Defendant's absence because Defendant "voluntarily by her own actions made herself absent from the trial[.]" Defendant's trial counsel noted an objection to the ruling on voluntary absence, but did not ask the trial court to conduct a competency hearing or object to the trial court's decision to proceed without conducting a competency hearing.

Before bringing the jury into the courtroom and proceeding with the trial, the trial court admitted Defendant's medical records (which it had

received over the weekend) and the petition for involuntary commitment, and noted for the record that it had considered this evidence in deciding to proceed. The trial court then brought the jury back into the courtroom, instructed the jurors not to consider Defendant's absence in weighing the evidence or determining guilt, and allowed the State to continue to present its case.

At the close of the State's evidence, Defendant moved to dismiss. Defendant argued that the State had presented insufficient evidence to convict, but did not argue for dismissal based upon either Defendant's absence from the trial or the fact that the trial court had not conducted a competency hearing before proceeding. The trial court denied Defendant's motion.

Defendant put on no evidence, rested, and renewed its motion to dismiss for insufficient evidence. Defendant again did not argue as bases for dismissal either Defendant's absence from the trial or the fact that the trial court had not conducted a competency hearing before proceeding. The trial court again denied Defendant's motion. The jury deliberated and ultimately found Defendant guilty of all three charges later that afternoon.

Defendant returned to the courtroom on 16 November 2017 for sentencing, and testified on her own behalf, providing a lengthy personal statement accepting responsibility for her actions and responding to the questions of her trial counsel and the State's attorney without difficulty. The trial court then entered judgment against Defendant: (1) imposing consecutive presumptive-range sentences of 60 to 84 months' imprisonment for the Class C felonies; (2) imposing a presumptive-range sentence of 6 to 17 months' imprisonment for the Class H felony, which the trial court suspended for 60 months of supervised probation; and (3) ordering Defendant to pay $364,194.43 in restitution.

Defendant filed a written notice of appeal on 28 November 2017. Sometime before 28 December 2017, the trial court entered amended judgments in response to a request for clarification from the Combined Records Section of the North Carolina Department of Public Safety, changing the "Offense Date[s]" on each of the judgments, and the Cabarrus County Clerk of Superior Court filed Combined Records' request with a response thereto noting that the trial court had committed "clerical error, only." Defendant was not present when the judgments were amended.

II. Discussion

Defendant contends that the trial court erred by (1) failing to conduct a competency hearing before proceeding with the trial in her absence following her overdose and (2) amending the judgments in her absence. We address each argument in turn.

a. Competency Hearing

[1] "It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." *Medina v. California*, 505 U.S. 437, 439 (1992); *see State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) ("a conviction cannot stand where defendant lacks capacity to defend himself"). A defendant is competent to stand trial when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (applying *Dusky*).

In North Carolina, a trial court has a statutory duty to hold a hearing to resolve questions of a defendant's competency if the issue is raised by any party. N.C. Gen. Stat. § 15A-1002(b) (2017). In this case, Defendant never asserted her statutory right to a competency hearing at trial, and therefore waived that right. *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 ("[T]he statutory right to a competency hearing is waived by the failure to assert that right at trial.").

Beyond the statutory duty, a "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (quotation marks, emphasis, and citation omitted); *see Godinez v. Moran*, 509 U.S. 389, 401 n.13 (1993) ("[A] competency determination is necessary only when a court has reason to doubt the defendant's competence."). Put another way, the trial court "is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654 (2005). The need for a competency hearing may arise at any point during the proceeding, "from the time of arraignment through the return of a verdict." *Moran*, 509 U.S. at 403 (Kennedy, J., concurring). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant" to the determination

of whether a hearing is required. *Drope v. Missouri*, 420 U.S. 162, 180 (1975). But "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed[.]" *Id.*

On appeal, Defendant argues that because of her history of mental illness and her overdose, the trial court had substantial evidence following the overdose that Defendant may have been incompetent to stand trial, and thus the trial court was constitutionally required to initiate a competency hearing *sua sponte* before proceeding, regardless of the fact that Defendant did not raise the issue. It is true that since the United States Constitution requires a trial court to institute a competency hearing *sua sponte* upon substantial evidence that the defendant may be mentally incompetent, *Young*, 291 N.C. at 568, 231 S.E.2d at 581, it follows that a defendant may not waive her constitutional right to a competency hearing (when required) by failing to raise the issue at trial.

We have held, however, that where a defendant waives their constitutional right to be present at a non-capital trial, a *sua sponte* competency hearing is not required. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188. A defendant waives the right to be present at trial by voluntarily absenting herself from the trial. *State v. Wilson*, 31 N.C. App. 323, 326-27, 229 S.E.2d 314, 317 (1976) (holding that a "defendant's voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present"); *see Diaz v. United States*, 223 U.S. 442, 455 (1912) ("[W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."). And this Court has held that a defendant's voluntary ingestion of intoxicants may result in voluntary absence and thus waiver of the constitutional right to be present such that a *sua sponte* competency hearing is not a prerequisite to proceeding with the trial. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188.

In *Minyard*, the defendant intentionally overdosed on tranquilizers and alcohol during jury deliberations, and "became lethargic and slumped over in the courtroom." *Id.* at 613, 753 S.E.2d at 183. The trial court asked the defendant to "do [his] very best to stay vertical, stay conscious, stay with us." *Id.* at 612, 753 S.E.2d at 183. But the defendant became "stuporous and non-responsive[,]" and the trial court had the sheriff escort the defendant from the courtroom to seek medical

attention. *Id.* at 613, 615, 753 S.E.2d at 183-84. The jury subsequently returned with a guilty verdict, and the defendant appealed. *Id.* at 614, 753 S.E.2d at 183.

On appeal, the *Minyard* defendant argued, *inter alia*, that the trial court committed reversible error by failing to institute a competency hearing *sua sponte* before proceeding once the defendant became non-responsive. *Id.* at 615, 753 S.E.2d at 184. The *Minyard* Court noted that the defendant's conduct "provide[d] ample evidence to raise a bona fide doubt whether [the d]efendant was competent to stand trial[,]" and that "[s]uch conduct would ordinarily necessitate a *sua sponte* [competency] hearing." *Id.* at 626, 753 S.E.2d at 190. The Court also noted, however, that the defendant "*voluntarily* ingested large quantities of intoxicants in a short period of time apparently with the intent of affecting his competency." *Id.* at 626, 753 S.E.2d at 191 (emphasis in original). Because the ingestion of the intoxicants was voluntary, the Court held that the defendant had "voluntarily waived his constitutional right to be present," accordingly "disagree[d] with [the d]efendant that a *sua sponte* competency hearing was required," and concluded that the trial court had not erred by proceeding without conducting such a hearing. *Id.* at 621, 753 S.E.2d at 188.

Minyard controls our analysis in this case. Like the *Minyard* defendant, Defendant here ingested a large quantity of intoxicants which rendered her unable to be present at her trial, and did so because she was concerned about the anticipated outcome of the trial. *Compare id.* at 612, 614, 753 S.E.2d at 183 (noting witness testimony that the defendant took 15 Klonopin because he was "worried about the outcome" of the trial), *with* Rule 9(d)(2) Ex. at 88 (attending physician's report that Defendant "took 60 mgs of Xanax in an attempt to kill herself to avoid going to jail for Embezzlement"). The question of whether Defendant's ingestion of the intoxicants was an attempted suicide rather than an attempt to render herself non-responsive does not distinguish *Minyard* from this case, because in both cases the defendants ingested a large quantity of intoxicants that rendered them unable to be present at their trials.[1] And following *Minyard*, unless the trial court erred

1. *See United States v. Crites*, 176 F.3d 1096, 1098 (8th Cir. 1999) (rejecting defendant's argument that "an attempted suicide does not constitute a voluntary absence from trial" for purposes of Federal Rule of Civil Procedure 43, because defendant "clearly expressed his desire to be absent by intentionally ingesting a potentially lethal mix of intoxicants and by leaving a suicide note"); *Finnegan v. State*, 764 N.W.2d 856, 862 (Minn. Ct. App. 2009) (holding that "a suicide attempt can constitute a voluntary and unjustified absence from trial constituting a waiver of the right to be present"); *Bottom v. State*, 860 S.W.2d 266, 267 (Tex. Ct. App. 1993) ("The competent evidence shows [defendant] was not

by concluding that Defendant *voluntarily* ingested the intoxicants that caused her absence, and thereby waived her right to be present at her trial, the failure to conduct a *sua sponte* hearing regarding the competency of the voluntarily-absent Defendant was not error. *Minyard*, 231 N.C. App. at 621, 753 S.E.2d at 188.

As such, the question is not whether there should have been a competency hearing, but whether the action resulting in the waiver of Defendant's right to be present was voluntary. *See id.* at 626, 753 S.E.2d at 191 ("Voluntary waiver of one's right to be present is a separate inquiry from competency, and in a non-capital case, a defendant may waive the right by their own actions, including actions taken to destroy competency."). We review the trial court's conclusion that Defendant voluntarily waived her constitutional right to be present *de novo*. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012) ("The standard of review for alleged violations of constitutional rights is *de novo*." (quotation marks and citation omitted)); *cf. State v. Ingram*, 242 N.C. App. 173, 184, 774 S.E.2d 433, 442 (2015) (reviewing voluntariness of waiver of *Miranda* rights *de novo*). Whether the action was voluntary "must be found from a consideration of the entire record[.]" *Ingram*, 242 N.C. App. at 184, 774 S.E.2d at 442 (quotation marks and citation omitted).

Defendant's arguments that she did not voluntarily waive her right to be present are not supported by the law and are belied by a holistic review of the record. In her brief, Defendant first argues that "any determination that a defendant waived the right to be present at trial is predicated on an antecedent determination that the defendant is competent to stand trial." But this argument contradicts the Supreme Court's guidance that "a competency determination is necessary *only when a court has reason to doubt the defendant's competence*." *Moran*, 509 U.S. at 401 n.13 (emphasis added); *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (a "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court indicating that the accused may be mentally incompetent*." (emphasis added)). This argument is therefore unavailing.

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absent because of some sudden unexpected medical emergency, but because he chose to ingest large quantities of aspirin and arthritis medication. Because [defendant] chose to act in this way, his absence was voluntary. . . . [The defendant] cannot avoid trial by intentionally disabling himself" (emphasis omitted)); *but see Peacock v. State*, 77 So. 3d 1285, 1289 (Fla. 4th Dist. Ct. App. 2012) (noting that "[t]he case law appears to be split on whether a suicide attempt constitutes a voluntary absence from a court proceeding[,]" and collecting cases).

Defendant also argues that her overdose was not a voluntary act, but rather the result of mental illness. There is evidence in the record that Defendant has had mental health issues in the past, including a "past medical history of retention" and a "history of a mood disorder[,]" and was diagnosed by the attending physician following the overdose with "[a]djustment disorders, [w]ith mixed anxietyand [sic] depressed mood" and "[u]nspecified anxiety disorder."

But a consideration of the entire record does not convince us that Defendant's overdose was the result of mental illness. The record reflects that Defendant reported to the attending physician at the hospital that, prior to the overdose, (1) she had not been receiving any outpatient mental health services other than getting prescriptions from her primary care doctor, (2) she had never before been psychiatrically hospitalized, and (3) she had never before tried to hurt herself. Defendant spent the three days she was present at her trial conferring with her trial counsel, who told the trial court that he had not observed anything causing him concern about Defendant's competency prior to the overdose. And after speaking with Defendant and her stepson following the overdose, the attending physician noted that Defendant (1) had "informed her family that she was not going to go to jail" and "planned to kill herself[,]" (2) wrote goodbye letters to her grandchildren, and then (3) ingested an overdose of a powerful intoxicant "trying to kill herself." The fact that Defendant was committed involuntarily subsequent to her overdose does not change our analysis, since Defendant's involuntary commitment was a direct result of her overdose. N.C. Gen. Stat. § 15A-1443(c) (2017) ("A defendant is not prejudiced by . . . error resulting from his own conduct.").

The foregoing facts convince us that Defendant's attempt to execute a purposeful plan to commit suicide by overdosing on powerful intoxicants to avoid jail was done voluntarily. As a result, Defendant voluntarily waived her right to be present at her trial, and following *Minyard*, we conclude that the trial court did not err by proceeding with Defendant's trial in her absence without first conducting a *sua sponte* competency hearing.

b. Amended Judgments

[2] Defendant also argues that the trial court erred by amending the judgments entered against her to reflect different "Offense Date[s]" in her absence.

A criminal defendant has a common-law right to be present at the time her sentence is imposed. *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d

126, 129 (1962) ("The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial."). That right includes the right to be present any time the sentence is substantively changed. *State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999) (vacating and remanding for new sentencing hearing where defendant was present when sentence was initially rendered but was not present for sentence's subsequent alteration because defendant was not afforded the opportunity to be heard on the change).

But where the trial court imposes a sentence in the defendant's presence and later amends the judgment *ex parte* to address a clerical error without changing the substance of the sentence, there is no error. *State v. Jarman*, 140 N.C. App. 198, 202-04, 535 S.E.2d 875, 878-79 (2000); *see State v. Willis*, 199 N.C. App. 309, 311, 680 S.E.2d 772, 774 (2009) ("It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record[.]" (citation omitted)). Clerical error has been defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *Willis*, 199 N.C. App. at 311, 680 S.E.2d at 774 (quotation marks and citation omitted). We review the question of whether a defendant was improperly sentenced outside his presence *de novo*. *State v. Briggs*, 249 N.C. App. 95, 97, 790 S.E.2d 671, 673 (2016).

Defendant points out that the original judgments reflected "Offense Date[s]" of 1 January 2011, dates which correspond to presumptive sentence ranges lower than the presumptive ranges imposed by the trial court. Defendant argues that the amendment of the judgments to reflect different "Offense Date[s]" therefore effected substantive changes to her sentences that mandate resentencing.

But the trial court's amendment of the written judgments to reflect different "Offense Date[s]" was merely the correction of clerical error. The only differences between the original and amended judgments are that the "Offense Date[s]" thereupon were changed to dates in 2014 which fall within the "Date Range Of Offense" listed in the superseding indictments. Defendant does not direct our attention to anything in the record or the transcript indicating that the jury or the trial court determined that the crimes took place on 1 January 2011 or any other specific date. Further, the amended judgments carry the same sentences entered via the original judgments entered at the sentencing hearing in Defendant's

presence, where the trial court announced that the sentences were "in the presumptive range[s]" for the two classes of felonies.

The facts that the trial court announced the sentences as "in the presumptive range[s]" and imposed the precise presumptive sentence ranges for the offenses available under the post-1 October 2013 sentencing regime—sentence ranges which would exceed the presumptive ranges for the crimes if committed on 1 January 2011, for which the pre-1 October 2013 regime would apply—indicate that the trial court intended to apply the post-1 October 2013 regime, and thus concluded at the sentencing hearing that Defendant's crimes took place on or after that date. Since (1) the "Date Range[s] of [the] Offense[s]" listed on the superseding indictments include the dates in 2014 listed on the amended judgments, (2) Defendant was present when the trial court imposed the "presumptive range" sentences applicable to crimes committed on those dates, and (3) the amended judgments did not change the sentences imposed, we conclude that the amendment of the dates in the amended judgments did not effect a substantive change to the sentences requiring Defendant's presence. *See State v. Arrington*, 215 N.C. App. 161, 168, 714 S.E.2d 777, 782 (2011) (holding no violation of right to be present when sentence imposed where amended sentence did not "constitute an additional or other punishment" and thus caused no substantive change to sentence). We accordingly reject Defendant's argument that she must be resentenced.

III. Conclusion

Because we conclude that Defendant voluntarily ingested the intoxicants that caused her absence from trial, we accordingly conclude that Defendant waived her right to be present at the trial and that the trial court did not err by proceeding with Defendant's trial in her absence without first conducting a *sua sponte* competency hearing. And because we conclude that the trial court's amendment of the judgments to reflect different "Offense Date[s]" did not substantively change the sentences imposed, we conclude that the trial did not err by effecting those amendments outside of Defendant's presence.

NO ERROR.

Judge BRYANT concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I respectfully dissent from the majority's opinion because the trial court, and the majority, overlooked the necessity for defendant *first* to be competent to stand trial before she can voluntarily waive her constitutional right to be present for trial. *See State v. Badgett*, 361 N.C. 234, 644 S.E.2d 206 (2007). "[I]f there is substantial evidence" that defendant "*may* be mentally incompetent[,]" the trial court has a duty to hold a hearing to determine the defendant's competency to stand trial *before* proceeding and *before* determining that defendant was voluntarily absent from the trial. *Id.* at 259, 644 S.E.2d at 221 (emphasis added). Medical professionals and a magistrate determined that defendant was mentally ill and dangerous to herself or others, to the extent that she was involuntarily committed during her trial, in November of 2017. At the very least, defendant's involuntary commitment was "substantial evidence" that defendant "may be mentally incompetent[,]" triggering the need for a hearing on the issue. *Id.* In addition, a defendant *involuntarily* committed under a valid court order cannot logically be *voluntarily* absent from her trial *during* her involuntary commitment. Involuntary commitment under North Carolina General Statute § 122C-251 *et. seq.*[1] does not necessarily mean that a defendant is incompetent to stand trial, but it does raise an issue of competency to stand trial. *See generally id.* Had the trial court held a hearing, it is possible it would have determined defendant was competent to stand trial, but no hearing was held. And had the trial court held a hearing and determined defendant to be competent, there is no dispute that she was involuntarily committed and could not physically be present in court again until she was released.

> [U]nder the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, a trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable

1. Involuntary commitment generally and on the basis of mental illness is addressed in North Carolina General Statutes § 122C-251 through § 122C-279, and much of this text has been substantially revised since 2017. *See* N.C. Gen. Stat. § 122C-251 *et. seq.* (Supp. 2018).

> degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

Id. (citations, quotation marks, brackets, and emphasis omitted).

A defendant has both a constitutional right, *see id.*, and a statutory right as to competency to stand trial:

> (a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

N.C. Gen. Stat. § 15A-1001 (2017).

Capacity to stand trial includes three separate requirements:

> This statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed. The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

State v. Mobley, ___ N.C. App. ___, ___, 795 S.E.2d 437, 439 (2017) (citations, quotation marks, and brackets omitted).

> A trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request. A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent.

Id. at ___, 795 S.E.2d at 439 (citations, quotation marks, and brackets omitted). The State argues, and the majority agrees, that "Defendant voluntarily waived her right to be present – through her own actions inducing the condition of her absence from the trial proceeding[.]" Defendant argues otherwise, and the record does include substantial discussion of defendant's mental health and competency, although the trial court

failed to determine her capacity to stand trial before determining that she voluntarily absented herself from trial by her suicide attempt.

On 9 November 2017, the trial court entered its order to obtain medical records, and it appeared the trial court would be considering the issue of capacity to stand trial after review of the records. But instead of conducting this review, the trial court merely asked defendant's counsel: "Up till the time that this matter occurred, [defense counsel], you have not observed anything of her that would indicate she lacked competency to proceed in this trial, and would that be a fair statement?" Defense counsel confirmed that he had not previously seen anything causing him to question Ms. Sides' competency. The trial court then ruled, over defendant's objection, that defendant was voluntarily absent from trial.

Defendant argues, and I agree, that she did raise her statutory right to a hearing as to her capacity to stand trial. If so, this Court should review the trial court's action *de novo*. *State v. Johnson*, ___ N.C. App. ___, ___, 801 S.E.2d 123, 128 (2017) ("When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. Defendant alleges a violation of a statutory mandate, and alleged statutory errors are questions of law and as such, are reviewed *de novo*." (citations, quotation marks, brackets omitted)).

But even if the statutory right was waived, defendant had a constitutional right for the trial court " 'to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent.' *Young*, 291 NC at 568, 231 S.E.2d at 581[.]" But the majority then skips over the question of the "substantial evidence" that the defendant may be mentally incompetent, as did the trial court, and moves on to voluntary waiver based upon defendant's "voluntary" overdose.

The majority notes that "the trial court's conclusion that Defendant voluntarily waived her constitutional right to be present" is reviewed "*de novo*." Our Supreme Court has held that we review constitutional issues *de novo*:

> It is equally well established, however, that, when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case.

State v. Searles, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). Therefore, I will consider whether the trial court erred as a matter of law in failing to conduct a hearing to determine if defendant was competent to stand trial as of 9 November 2017.

Even if the defendant does not raise the issue of competency, the trial court has both a statutory and constitutional duty to inquire if there is "substantial evidence . . . indicating the accused may be mentally incompetent[:]"

> The trial court has the power on its own motion to make inquiry at any time during a trial regarding defendant's capacity to proceed. General Statute 15A-1002(a) provides that this question may be raised at any time by the prosecutor, the defendant, the defense counsel, or the court on its own motion. Indeed, circumstances could exist where the trial court has a constitutional duty to make such an inquiry.
>
> > A conviction cannot stand where defendant lacks capacity to defend himself. A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent.

State v. Heptinstall, 309 N.C. 231, 235–36, 306 S.E.2d 109, 112 (1983) (citations, quotation marks, and brackets omitted).

Here, the trial court had a duty to hold a competency hearing upon defendant's involuntary commitment, as this alone is "substantial evidence" that she "*may* be mentally incompetent." *Id.* at 236, 306 S.E.2d at 112. After defendant was seen at the emergency department of Carolinas HealthCare System Dr. Kimberly Stover signed an "AFFIDAVIT AND PETITION FOR INVOLUNTARY COMMITMENT" for defendant, and it was filed in District Court, Cabarrus County.[2] Dr. Stover alleged that she had "sufficient knowledge to believe that the respondent is a proper subject for involuntary commitment and alleged defendant is "mentally ill and dangerous to self or others and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Dr. Stover alleged that defendant presented "after

2. The petition was filed under North Carolina General Statutes §§ 122C-261, -281.

overdosing intentionally on 60 mg of Xanax. She has been experiencing worsening depression and increased thoughts of self-harm. At this time [patient] is not stable and for her safety she will need further evaluation." A magistrate issued an order for defendant's involuntary commitment.

Under North Carolina General Statute § 122C-266(e), defendant would have had a second examination by a physician "not later than the following regular working day" after her initial commitment to determine if she still met the criteria for involuntary commitment. N.C. Gen. Stat. § 122C-266 (2017). If defendant did not meet the criteria, she should have been released. *See generally id.* Accordingly, on 9 November 2017, Dr. Rebecca Silver examined defendant and assessed her as follows:

> Patient presents to the emergency room after a suicide attempt by overdosing on a large number of Xanax tablets. She remains suicidal even today. She is not safe for treatment in the community and requires inpatient stabilization.

Defendant's "Legal Status" is noted as "[i]nvoluntary[.]" Dr. Silver's disposition was to "Admit for Inpatient" noting "[p]atient requires inpatient psychiatric care, a bed search has been started[.]"

On the morning of 9 November 2017, counsel advised the trial court of defendant's involuntary commitment the prior evening. The trial court and counsel then discussed how to proceed. The trial court reviewed the petition and commitment order and noted:

> It might be useful to have her record for the last two years or something from the hospital if she has a record of depression and treatment and all that, but that would probably—we'd get to some point where we start to need a medical expert to interpret –
>
> [DEFENSE COUNSEL]: Yeah.
>
> THE COURT: -- what all that means.

After further discussion, as noted above, the trial court entered an Order for Medical Records for release regarding "defendant's medical treatment for the admittance date of November 8 2017, and any days following this date for the continued treatment of Carolyn Sides." It is not clear why the trial court did not order release of her prior records as mentioned on the transcript, but the order required only records starting as of 8 November, 2017. The trial court entered the order to obtain the records based upon defendant's counsel's concern that the "hospital will not accept her husband's consent while she is not in a mental state to

release any -- it's going to take a court order saying you'll -- the hospital is ordered, but they're not going to accept his consent, just the liability in this situation." At that point, defendant's counsel was not sure when she would be released, although it was noted she could be released in as soon as 24 or 48 hours.

The trial court and counsel for both sides received the medical records, and when court resumed on Monday, 13 November 2017, defendant's counsel advised the court that defendant was still hospitalized and her family did not know when she would be released. Defendant was still receiving treatment under the terms of her involuntary commitment. The trial court then focused its attention on whether defendant's absence from court on Monday, 13 November 2017 was voluntary or involuntary and not whether she was competent to stand trial. Defendant's counsel argued defendant was attempting to end her life, not just her trial:

> I contend that it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial. [Defendant] . . . has quite a number of other factors in her life that are very pressing and from which certain personalities may find overwhelming. I would just contend, Your Honor, that this may be the straw that broke the camel's back, but I don't know that her efforts -- I think her efforts were to end her life, not to end her trial.
>
> And I would contend that we don't have evidence regarding whether or not she voluntarily absented herself from the trial. We know that she attempted to absent herself from life itself, but I would contend that there is some distinction of that, that she is in custody in a medical facility, and we have not investigated whether or not she chooses or would like to be here. And so we're making a leap by saying that she voluntarily absented herself from the trial, and we'd like to note our objection to that.

The State argued that defendant's overdose was voluntary, and thus defendant had waived her right to be present at her trial. The trial court ultimately ruled that defendant had "voluntarily by her own actions made herself absent from the trial at this point."

Defendant was not actually released during the remainder of her trial. After the jury returned its verdict, defendant's counsel noted that she was still hospitalized, and he had not seen her while in the hospital since "they have a one-hour period per day in which she may be visited."

Defense counsel requested that her sentencing be postponed until her release, but he was not certain of when she would be released. After a conference with counsel in chambers, the trial court announced:

> As far as this trial goes, what's going to happen next is we will not be doing anything the rest of the day on this particular case. But we will have – we'll have the record reflect, following a lengthy conference with both counsel in chambers and we'd spoken to some medical personnel, we will speak with medical personnel again in the morning at 10:30 to update . . . [defendant's] status, and then we will proceed from there.

The Court did not resume on the next day, but instead on Thursday, November 16, for sentencing, and defendant was present.

The State argues, based upon *State v. Minyard*, 231 N.C. App. 605, 753 S.E.2d 176 (2014), that defendant's overdose was voluntary, and thus defendant had waived her right to be present during the proceedings, and the trial court, and the majority of this Court, agree. But I disagree; one crucial distinction between this case and *Minyard is that defendant was involuntarily committed to a psychiatric facility based upon her suicide attempt*, and she remained involuntarily committed when her trial resumed, and thus defendant literally could not be present in court. *See id.* And there are other important distinctions between this case and *Minyard*. *See id.*

In *Minyard*, the defendant was on trial for several sexual offenses. *Id.* at 606, 753 S.E.2d at 179. The defendant was present for trial and testified, but after jury deliberations started, the defendant's attorney

> notified the court that Defendant was "having a little problem." Defendant was asked to "stay vertical" and the trial court told him:
>
> > [Defendant], you've been able to join us all the way through this. And let me suggest to you that you continue to do that. If you go out on us, I very likely will revoke your conditions of release. I'll order you arrested. We'll call emergency medical services; we'll let them examine you. If you're healthy, you'll be here laid out on a stretcher if need be. If you're not healthy, we will continue on without you, whether you're here or not. So do your very best to stay vertical, stay conscious, stay with us.

Before the jury returned, the trial court received a report that Defendant had "overdosed." One of Defendant's witnesses, Evelyn Gantt, told the court that Defendant consumed eight Xanax pills because "[h]e was just worried about the outcome and I don't know why he took the pills." Defendant's counsel and the State did not wish to be heard on the issue and Defendant's pretrial release was revoked. The sheriff was directed to have Defendant examined by emergency medical services ("EMS"), and Defendant was then escorted from the courtroom. The court then made findings of fact:

> The Court finds Defendant left the courtroom without his lawyer.
>
> The Court finds that while the jury was in deliberation -- the jury had a question concerning an issue in the case -- and prior to the jurors being returned to the courtroom for a determination of the question, the Court directed the Defendant to -- who was in the courtroom at that point -- to return to the Defendant's table with his counsel. Defendant refused, but remained in the courtroom. The Court permitted that.
>
> The Court noticed that after the question was resolved with the juror, that while the jury was out in deliberations working on Defendant's case, the Defendant took an overdose of Xanax. While he was here in the courtroom and while the jury was still out in deliberations, Defendant became lethargic and slumped over in the courtroom.
>
> . . . .
>
> The Court finds that outside of the jury's presence the Court noted that Defendant was stuporous and refused to cooperate with the Court and refused reasonable requests by bailiffs.
>
> . . . .
>
> The Court finds that Defendant's conduct on the occasion disrupted the proceedings of the Court and took substantial amount of time to resolve how the Court should proceed. The Court finally

> ordered that Defendant's conditions of pretrial release be revoked and ordered the Defendant into the custody of the sheriff, requesting the sheriff to get a medical evaluation of the Defendant.
>
> The Court finds that Defendant, by his own conduct, *voluntarily disrupted the proceedings in this matter by stopping the proceedings for a period of time so the Court might resolve the issue of his overdose.*
>
> The Court notes that the — with the consent of the State and Defendant's counsel that the jurors continued in deliberation and continued to review matters that were requested by them by way of question.
>
> The Court infers from Defendant's conduct on the occasion that it *was an attempt by him to garner sympathy from the jurors*. However, the Court notes that all of Defendant's conduct that was observable was outside of the jury's presence.
>
> The Court notes that both State and Defendant prefer that the Court not instruct jurors about Defendant's absence. And the Court made no reference to Defendant being absent when jurors came in with response to — or in response to question or questions that had been asked.
>
> After the jury entered its verdict, the trial court amended its statement after EMS indicated that Defendant consumed "fifteen Klonopin" and two 40–ounce alcoholic beverages, which the court inferred were from the "two beer cans . . . found in the back of his truck."

Id. at 612–14, 753 S.E.2d at 182–83 (emphasis added).

Minyard does not state exactly how long the defendant was absent from the trial when being treated by EMS, but it appears he was absent for no more than a few hours of jury deliberations. *See id.*, 231 N.C. App. 605, 753 S.E.2d 176. The jury was unaware of what had occurred since they were in deliberations during the incident, except for coming into the courtroom regarding questions during deliberations, and the defendant was back in the courtroom the next morning for the habitual felon phase of trial and sentencing. *See id.* at 613-25, 753 S.E.2d at 183-90. The

defendant in *Minyard* was not involuntarily committed based upon his overdose, nor did he have any additional medical treatment after he was evaluated by EMS. *See id.*, 231 N.C. App. 605, 753 S.E.2d 176.

Notably, there was no evidence the defendant in *Minyard* had any preexisting diagnosis or treatment for depression or other mental illness, as did defendant here, nor is there any indication that the overdose was a suicide attempt. *See id.* The defendant in *Minyard* simply took an overdose of drugs and alcohol *in court* which made him sufficiently unresponsive that emergency medical assistance was called, but he needed no further treatment. *See id.* at 613, 753 S.E.2d at 183. The trial court determined the defendant was seeking sympathy from the jurors and disrupting court proceedings. *See id.* Defendant did not take her overdose during court, and she did not disrupt court proceedings.

Neither the State nor the majority opinion has identified *any* case in which a defendant who has been *involuntarily* committed to a psychiatric facility has been treated as "voluntarily" absent from trial despite its reliance on both federal and state cases. Aside from *Minyard*, the majority relies upon *Diaz v. United States*, 223 U.S. 442, 445, 56 L. Ed. 500, 501 (1912), wherein the defendant "voluntarily absented himself from the trial, but consented that it should proceed in his absence, but in the presence of his counsel, which it did" and *State v. Wilson*, 31 N.C. App. 323, 326, 229 S.E.2d 314, 317 (1976), wherein one of two co-defendants was twice absent from trial: once when both defendants were not present "after the court had informed the jury that the defendants had a right not to be present, the codefendant came into the courtroom and the trial proceeded in the absence of defendant" and second when defendant "left for a period of about three minutes" because he had fallen asleep and the deputy sheriff told him "to go out and wash his face." Neither *Diaz* nor *Wilson* are applicable to the issue of a voluntary absence due to involuntary commitment. *See Diaz*, 223 U.S. 442, 56 L. Ed. 500; *Wilson*, 31 N.C. App. 323, 229 S.E.2d 314.

The majority notes some non-binding cases in a footnote from other jurisdictions where defendants who have attempted suicide during trial have been held to have voluntarily absented themselves from trial, but all are easily distinguished from this case, and one supports this dissent. In *Bottom v. State*, 860 S.W. 266 (Tex. Ct. App. 1993), the Texas Court of Appeals held the trial court did not err by determining the defendant had voluntarily absented himself from the trial by attempting suicide, *but first*, the trial court held a hearing regarding his competency to stand trial:

> After the State rested, defense counsel informed the court Bottom was not in the courtroom, but in the hospital, because he had attempted suicide, or some harm to himself. Defense counsel requested, and the court denied, a continuance. *The court did, however, order a competency hearing from which Bottom was found competent to stand trial.*

Id. at 267 (emphasis added). If the trial court here had done as the trial court in *Bottom* did and held a competency hearing in which the defendant was held competent to stand trial, I would agree that defendant voluntarily absented herself from the trial. *See id.* Suicide attempts present a difficult issue, since all suicides are "voluntary," in the sense that the person has intentionally taken action to end her own life, but if defendant was mentally ill, as both physicians determined defendant here was at the time of her inpatient treatment, the fact that she intentionally took pills to end her life does not necessarily mean she had the capacity to be "voluntarily" absent from trial. As defendant's counsel argued, "it is somewhat of a leap for us as lay people and not doctors to consider that her actions are for the purposes of avoiding jurisdiction of the court or avoiding trial."

The majority opinion also states that "a consideration of the entire record does not convince us that defendant's overdose was the result of mental illness[,]" but the lack of the proper record and consideration is the very issue at the heart of this case. Our record does not have sufficient information to make a determination regarding mental illness even if this Court were empowered to make the needed findings of fact, which it is not. *See generally State v. Chukwu*, 230 N.C. App. 553, 570, 749 S.E.2d 910, 922 (2013) (noting it is the *trial court's* duty to make findings of fact necessary to determine if a defendant has the mental capacity to stand trial). Because the trial court requested only a few days of defendant's medical records, and not a more extended period as the trial court actually noted may be needed, our record does not include information regarding defendant's history of depression noted by the physicians which had escalated into self-harm. This Court cannot determine defendant's capacity to stand trial, but the record does include "substantial evidence" that defendant "may be mentally incompetent[,]" so the trial court had a duty to hold a hearing to determine the defendant's competency to stand trial before determining that defendant was voluntarily absent from the trial. *Badgett*, 361 N.C. 234, 644 S.E.2d 206. Again, I do not speculate as to the result, but the hearing is required before defendant can be found voluntarily absent. *See id.*

The two potential remedies for the trial court's failure to hold a hearing regarding defendant's competency

> are either a new trial or a retrospective competency hearing. In some cases where we have determined that the trial court should have held a hearing on the defendant's competence, we have remanded for a determination of whether a retrospective assessment of the defendant's competence was possible, noting that the trial court is in the best position to determine whether it can make such a retrospective determination of defendant's competency,
>
> Nevertheless, retrospective assessments of competence are a disfavored alternative remedy to a new trial. In *McRae I*, we specifically noted that we were remanding to the trial court to determine whether a retrospective hearing could be held because that defendant was afforded several hearings before trial, and each time the trial court followed the determination made in the corresponding psychiatric evaluation. In this case, defendant's competence has never been assessed, let alone at a relevant time. Thus, it is clear that a retrospective determination of defendant's competence would not be possible here and we do not need to remand for the trial court to make such a determination.
>
> Because defendant's competence to stand trial has never been evaluated and given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here. Accordingly, we reverse defendant's convictions for assault on a person employed at a state detention facility and having attained habitual felon status and order a new trial.

State v. Ashe, 230 N.C. App. 38, 44, 748 S.E.2d 610, 615 (2013) (citations, quotation marks, and brackets omitted). Since defendant's competence to stand trial was never assessed "at a relevant time[,]" a "retrospective determination of defendant's competence would not be possible" in this case. I would therefore reverse and remand for a new trial.[3] Thus, I respectfully dissent.

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3. Although I would not reach the second issue addressed by the majority since I would grant a new trial, I would concur with the majority's holding that the trial court did not err by correcting a clerical error in the judgment.

STATE OF NORTH CAROLINA
v.
RODNEY McDONALD WILLIAMS

No. COA19-24

Filed 1 October 2019

Constitutional Law—due process—competency—prior determination of incompetency—resumption of trial

In a prosecution for murder and attempted murder, the trial court was not required to conduct a sua sponte competency hearing even though defendant had previously been found to be incompetent to stand trial and discussed his past delusions while giving testimony. At the time trial resumed—after several years of delay during which defendant received psychiatric care and medication—defendant's competency was supported by medical evidence and expert opinions, a joint motion by counsel, and defendant's own statements. Further, there was no indication defendant behaved inappropriately in court or was disruptive, and during a lengthy colloquy with the court regarding defendant's desire to testify as well as his understanding of the consequences of allowing his counsel to admit certain facts, defendant provided lucid and responsive answers.

Appeal by defendant from judgments entered 13 June 2018 by Judge Henry W. Hight Jr. in Vance County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M.A. Kelly Chambers, for the State.

Marilyn G. Ozer for defendant-appellant.

TYSON, Judge.

Rodney McDonald Williams ("Defendant") appeals from judgments entered after a jury's verdict found him guilty of first degree murder and guilty of attempted murder. We find no error.

I. Background

Ms. Shirley Venable ("Venable") was awakened to someone calling her name outside her home during the early morning of 27 February 2007. Venable testified she heard Defendant say "Ma, open the door."

Venable is Defendant's mother. When Venable opened her door, a friend, Leo Ziegler, Jr., ("Ziegler") ran inside her house. Defendant stood at the doorway and began firing a handgun. Venable was shot in her left side and Ziegler was shot in the chest.

Venable and Ziegler attempted to flee through the house, but Venable was shot again in her left hip and Ziegler was shot in the back of his head. Ziegler's head wound was fatal. After Venable was shot in her hip and fell to the floor, Defendant shot Venable a final time in her right leg. Venable was able to wrestle the gun from Defendant.

Defendant fled Venable's home. First responders arrived and found Venable covered in blood at her backdoor and Ziegler's body in the kitchen. Officers found Defendant hiding under a nearby automobile and arrested him.

On 1 March 2007, the trial court determined Defendant needed emergency medical care for mental illness and issued a safekeeping order. On 12 March 2007, Defendant was indicted on one count of first degree murder of Ziegler and one count of attempted murder of Venable.

A. Dr. Williams' Evaluation

Dr. Alton Williams ("Dr. Williams"), (no relation to Defendant), first interviewed Defendant on 3 July 2007. Dr. Williams conducted follow up interviews with Defendant on 7 January 2008 and 10 April 2008. In preparing his report, Dr. Williams also reviewed 190 documents related to Defendant. During these interviews, Defendant told Dr. Williams he considered deceased Ethiopian leader, Haile Selassie, to be a god and Defendant wanted to be his right-hand-man. Defendant insisted his deceased father had connections to rap music artists and producers. He also discussed his imaginary girlfriend, Champagne.

When Dr. Williams inquired about the pending charges, Defendant stated the worst outcome of his case would be the death penalty, but because of his pending tort claim he would not receive a death sentence because it was an act of Congress. Defendant explained the current charges were a prerequisite for him to prevail in the tort claim. Defendant stated he would be receiving his money from his tort claim any day and would be going home.

Dr. Williams reported Defendant began using marijuana at age 16, smoking six to seven "blunts" daily. Defendant "first used alcohol at seven or eight years old, but became a regular drinker when he was 16 years old." Defendant reported he would drink "four to five 40 ounce

beers a day." Defendant self-reported he used crack cocaine twice a week from 2005 through his arrest.

Defendant testified that while incarcerated for a prior conviction, he purchased a state tort claim for $5.00 from another inmate named Lock Jordan. Defendant asserted his tort claim was against the State, but required federal government assistance to succeed on his claim. Defendant also stated he received money from a rap music "record deal."

On 7 July 2008, Dr. Williams submitted a forensic psychiatric evaluation. Dr. Williams diagnosed Defendant with schizophrenia, paranoid type and substance dependence. Dr. Williams concluded that Defendant exhibited deficits, which impaired his ability to rationally and factually understand the trial process. Specifically, Defendant's delusion that his current criminal charges were related to a tort claim against the State. Dr. Williams further concluded Defendant "does not have the capacity to assist counsel in preparing and implementing a defense."

B. Dr. Vance's Evaluation

In September 2008, Defendant was evaluated by Dr. Charles Vance, M.D., PhD. ("Dr. Vance"). Defendant continued to assert his beliefs in his tort claim and added that other patients were "messing" with him and that he could hear whispered threats. Dr. Vance reported that on one occasion Defendant became violent with hospital staff. On 30 October 2008, Dr. Vance concluded Defendant was not malingering and he met the criteria for a diagnosis of paranoid schizophrenia. Dr. Vance further concluded Defendant's ability to participate meaningfully in trial "was substantially impaired by his ongoing mental illness."

On 22 December 2008, the court found and concluded Defendant did not have the legal capacity to assist counsel in preparing and implementing a defense to the pending charges. On 8 September 2009, the trial court issued an order finding Defendant incompetent to stand trial. The following day, Defendant's counsel and the State entered into a stipulation that Defendant was incompetent to proceed to trial.

C. Dr. Messer's Evaluation

In late September 2009, Defendant's competency to stand trial was reassessed. Dr. Julia Messer, Ph.D ("Dr. Messer") examined Defendant and prepared the report. Again, she diagnosed Defendant with paranoid schizophrenia. Defendant told the staff that strangers could "derail his lawsuit by standing too close to him and sneezing." Defendant further reported that former President George W. Bush, then President Barack

Obama, and talk show host, Oprah Winfrey, were aware of his situation. Defendant felt his mother may have been a "witch at various times in the past."

Defendant reported having the following hallucinations: seeing shadows that were always present, hearing his deceased father breathing heavily in his closet, and seeing a "big parrot made out of fog." Defendant also maintained his belief that in order to sue the State he had to kill somebody. On 7 October 2009, Dr. Messer found Defendant's test scores and behavior were consistent with paranoia, and not attempts to feign or exaggerate mental illness. She concluded Defendant was not competent to stand trial.

On 9 October 2009, the State dismissed the charges with leave, due to Defendant being incapable of proceeding to trial. On 10 March 2014, the State entered a Notice of Reinstatement of Charges.

D. Dr. Vance's Re-Evaluation

In October 2015, Defendant reported thoughts of hanging himself because purportedly "the devil told him to hurt himself." Defendant was prescribed olanzapine, an antipsychotic medication, which appeared to alleviate his psychotic symptoms. Dr. Vance re-evaluated Defendant. During this examination, Defendant did not raise his "tort claim" as a reason for his current legal situation. Defendant stated "it ain't related" to his current pending criminal charges.

Dr. Vance reported Defendant appeared embarrassed by and dismissive of his past claims. Dr. Vance found Defendant's "presentation during this current evaluation was wholly unexpected." Dr. Vance further found Defendant "completely disavows those previous psychotic beliefs and shows a very good orientation to the reality of the case, even though he is [presently] receiving lower dose of antipsychotic medication." Dr. Vance issued a report concluding Defendant was competent to proceed at trial on 4 November 2015. On 4 February 2016 the State entered another Notice of Reinstatement of Charges.

E. Dr. Blanks' Evaluation

On 21 July 2016, Dr. Richard Blanks, J.D., M.D., an Adult and Forensic Psychiatrist, ("Dr. Blanks") met with Defendant at the Craven Correctional Institution. Dr. Blanks sent a letter to Defendant's counsel stating that he had also found Defendant was competent to stand trial on 10 October 2016. Upon joint motions regarding Defendant's competency from Defendant's counsel and the State, the trial court issued an order finding Defendant competent to stand trial on 23 October 2016.

On 9 November 2016 Defendant was found in need of protective custody, due to being an escape risk with anger problems. As the Vance County jail did not have proper facilities to take care of him, a safekeeping order was issued. On 7 December 2017 a further safekeeping order was issued on the grounds that Defendant required mental health treatment, psychiatric care and medication. On 20 April 2018, another safekeeping order was issued due to Defendant's unpredictable outbursts including violent assaults.

Defendant was tried 13 June 2018 through 14 June 2018. Defendant testified and offered evidence at his trial. The jury returned a verdict and found Defendant guilty of first-degree murder and attempted murder. Defendant was sentenced to a mandatory life sentence without parole for the first-degree murder conviction of Ziegler, and not less than 480 months and not more than 585 months for attempted murder of Venable. Defendant gave oral notice of appeal from both judgments.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issue

Defendant's sole argument on appeal asserts the trial court erred by not *sua sponte* ordering a competency assessment to protect his constitutional rights to due process.

IV. Analysis

A. Standard of Review

"[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 112-113 (1975). "[T]he conviction of an accused person while he is legally incompetent violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citations omitted). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

B. Competency

Defendant asserts the trial court's failure to *sua sponte* order a competency evaluation violates his constitutional right to due process. N.C. Gen. Stat. § 15A-1001(a) (2017) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

"The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. N.C. Gen. Stat. § 15A-1002(a) (2017).

In *State v. Badgett* our Supreme Court held:

> under the Due Process Clause of the United States Constitution, a criminal defendant may not be tried unless he is competent. As a result, a trial court has a constitutional duty to institute, *sua sponte*, [a] competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent. In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him.

State v. Badgett, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (alteration in original) (citations and quotation marks omitted).

This Court has stated, "a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55 (2005) (citation omitted). "Failure of the trial court to protect a defendant's right not to be tried or convicted while mentally incompetent deprives him of his due process right to a fair trial." *State v. McRae*, 139 N.C. App. 387, 389, 533 S.E.2d 557, 559 (2000) (citations omitted). "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide [sic] doubt inquiry." *Id.* at 390, 533 S.E.2d at 559 (citation and quotation marks omitted).

The transcript and record indicate Defendant did not behave inappropriately or otherwise disrupt the trial court's proceedings. The facts and Defendant's conduct before, during, and after trial are contrary to this Court's holdings in *State v. Mobley*, *State v. Whitted*, and *State v. Ashe* cited by Defendant. In *Mobley*, the defendant was heavily medicated for

serious psychiatric and physical diseases, was unable to remain awake during trial, and was incapable of consulting with his attorney or participating in his defense. *State v. Mobley*, 251 N.C. App. 665, 795 S.E.2d 437 (2017). In *Whitted*, the defendant uttered strange outbursts during trial, did not want to come into the courtroom, had to be forcibly brought into court sessions, while reciting incoherent prayers. *State v. Whitted*, 209 N.C. App. 522, 705 S.E.2d 787 (2011).

In *Ashe*, this Court held the trial court erred when it failed to act *sua sponte* and order a competency hearing. *State v. Ashe*, 230 N.C. App. 38, 43-44, S.E.2d 610, 623 (2013). This Court held substantial evidence the defendant was incompetent due to defendant's extensive mental illness, the trial court's and defense counsel's concerns about the defendant's ability to control himself during the proceedings, and defendant's actual conduct during trial. *Id.*

In *McRae*, our Court considered the appeal of a defendant who suffered from schizophrenia and psychosis. *McRae*, 139 N.C. App. at 387, 533 S.E.2d at 587. The defendant underwent six or more psychiatric evaluations over a seventeen-month period with differing conclusions of whether the defendant was competent to stand trial. *Id.* at 390-91, 533 S.E.2d at 560. Following a mistrial, the court did not conduct another competency hearing and subsequently retried the charges five days later. *Id.* at 391, 533 S.E.2d at 560. The defendant was reported to have a high "risk of relapse." *Id.* at 390, 533 S.E.2d at 559. This Court noted the defendant's history of not taking his medication as prescribed. *Id.* at 392, 533 S.E.2d at 561.

Here, using the framework set forth in *McRae*, the trial court was presented with substantial medical evidence, a joint motion by counsel, and Defendant's own statements establishing that he was competent to stand trial at the time trial began. The trial court considered the independent opinions of two medical experts, who both had concluded Defendant was competent to stand trial. According to those records, Defendant had been diagnosed as a paranoid schizophrenic with substance abuse issues. Defendant had consistently been found incompetent to stand trial for over nine years.

Following significant changes in Defendant's behaviors, statements, two evaluations finding Defendant capable to stand trial, and joint motions attesting that Defendant was capable to stand trial, the trial court questioned Defendant and proceeded to trial. While Dr. Vance's competency evaluation noted he was surprised to see the changes in Defendant's condition, he made no mention of Defendant's risk to

relapse, only that he could not assure the court Defendant's "improved mental status will persist indefinitely."

Unlike *McRae*, where the defendant's competency was dependent upon medication to attain competency, Defendant was noted by Dr. Vance to be "receiving a lower dose of antipsychotic medication" when Defendant was found competent to stand trial. Here, Defendant, once found competent, was not further found to be incompetent.

In *State v. Chukwu* this Court found irrational beliefs and nonsensible positions were not grounds by themselves to raise a *bona fide* doubt about the defendant's competency. *State v. Chukwu*, 230 N.C. App. 553, 749 S.E.2d 910 (2013). The defendant held himself out to be a Nigerian diplomat and had refused to cooperate with his attorney believing she had a "hidden agenda." *Id.* at 563, 749 S.E.2d at 917. Here, Defendant participated in his own defense, made trial decisions regarding having Dr. Vance testify, and took the stand to testify on his own behalf after making a knowing and voluntary waiver of his right to not testify.

On the morning before the second day of trial, Dr. Vance spoke with Defendant before Dr. Vance testified at Defendant's request. Dr. Vance required Defendant's permission to testify about prior competency evaluations. Dr. Vance testified he believed Defendant was competent to provide informed consent to his testimony about Defendant's prior medical history.

Defendant argues his trial testimony describing his delusions, under which he conducted the murder, and the testimony of Venable concerning Defendant shows substantial evidence of his incapacity to proceed. Our examination of the record does not indicate Defendant still asserted these delusions nor was unable to assist his attorney at trial. "So long as a defendant can confer with his or her attorneys so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner." *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989). The transcript and record reflect Defendant responded to all inquiries and was an active, willing, and lucid participant in his trial.

Defendant further argues that his own testimony, Venable's testimony, and the testimony of the medical experts show substantial evidence of his incompetence. This Court has held a defendant, who had been diagnosed with dementia, and appeared to ramble on the stand through his testimony, did not show substantial evidence he was mentally incompetent at trial. *State v. Coley*, 193 N.C. App. 458, 464, 668 S.E.2d 46, 51 (2008).

Defendant asserts his own testimony was "jumbled and disorganized" and demonstrated at the time of trial he still believed the government involvement with the lawsuit was "somewhere around here now."

At trial, Defendant testified his father was deceased. Defendant testified Champagne was someone he saw modeling in a magazine and wrote letters to, but received no reciprocal attention from her nor had ever met her in person. In evaluating Defendant's testimony, we conclude when discussing his delusions at the time the murder occurred, Defendant speaks using the past tense and not the present tense.

With regard to the testifying medical experts, Drs. Vance and Messer, Defendant argues their testimony was substantial evidence demonstrating his incompetence. Both experts testified Defendant had suffered from schizophrenia. Both testified Defendant no longer believed that the purported civil lawsuit had impacted his criminal conduct or charges or that he was a famous rap musician.

Dr. Vance testified no cure exists for schizophrenia and that treatment needs to be continued for the patient's lifetime. Defendant continues to receive treatment, Defendant was found to be competent to stand trial by both doctors, and both doctors testified Defendant had not been "aggressive or agitated here in the courtroom." The record indicates neither expert testified Defendant was still incompetent prior to trial, during trial or at sentencing.

1. Venable's Testimony

Venable testified she had little contact with Defendant when he was incarcerated at Central Prison. Her only contact with Defendant came when he was housed at Dorothea Dix Hospital and later Central Regional Hospital. Venable further testified that she noticed a difference in Defendant's mental health after he had been to Central Regional Hospital, and believed his improvement occurred because he was no longer "drinking and drugging." Venable said that Defendant had gone "off the deep end" after being in solitary confinement. Venable further testified to the following:

> [Venable]: For real, now, yes. He's – he's saying he's got this big lawsuit, he's saying he's getting a lot of money. And nobody won't even tell him that he's not getting no money and stuff.
>
> That's why he taking this jury trial, because he been saying they just gonna let him get out so he can spend his money.

> He think he got all this money and stuff. He think he got record deals, he think he got money.
>
> [Prosecutor]: Now, how do you know that?
>
> [Venable]: He writes me. I talks to him. He called me yesterday on the phone.

Venable never stated that Defendant had told her recently or "yesterday" that he was still under these delusions. These delusions occurred in the past. Venable did not testify Defendant currently suffered these delusions. While Venable is a victim of one of the incidents Defendant was tried for, she is also Defendant's mother, who was testifying as a witness for her son, who had pleaded Not Guilty by Reason of Insanity to both the first degree murder of Ziegler and the attempted murder of her.

Venable further testified:

> [Prosecutor]: Had you every heard him talking about Champagne?
>
> [Venable]: All the time. He still talk about it right now. He write me about it.
>
> [Prosecutor]: What does he write you?
>
> [Venable]: Have I seen her. Is anybody taking care of her. They gonna get married.

Again, Venable did not state any time frame when these purported delusions had occurred or when the letters were written. Given her relationship with Defendant, his plea during this trial, and her limited contact with Defendant since his incarceration and institutionalization after his arrest, her testimony does not raise "substantial evidence" of Defendant's incompetence to stand for and participate at trial. *See Young*, 291 N.C. at 567, 231 S.E.2d at 581.

Our Court recently interpreted *State v. McRae* in the case of *State v. Hollars*. In finding evidence of a *bona fide* doubt of the defendant's competency to stand trial, this Court reviewed seven prior forensic evaluations with differing results opining to the defendant's competency. *State v. Hollars*, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____, 2019 WL 3558770, *5 (2019). The Court also looked at a forensic psychologist's report finding "It is also possible his condition may deteriorate with the stress of a trial so vigilance is suggested if his case proceeds in a trial." *Id*. at *2. Furthermore, in *Hollars* the defendant's competency hearing occurred five months after the defendant's last forensic examination.

Id. at *5. The Court noted there was no extended colloquy between the defendant and the trial court, and the defendant never testified in a manner to demonstrate he was competent to stand trial.

2. Defendant's Testimony

Here, and unlike the facts in *Hollars*, Defendant engaged in two lengthy colloquies with the trial court and later waived his right not to testify, took the stand and testified lucidly and at length on his own behalf. This last factor leads to the Court's analysis in *State v. Staten*.

We find the factors in *State v. Staten* to provide the most guidance. In *Staten*, the defendant wanted to testify on his own behalf. *Staten*, 172 N.C. App. at 679, 616 S.E.2d at 655. The trial court conducted the following colloquy to determine the voluntariness of the Staten's testimony and his understanding of possible outcomes:

> [The Court]: All right. Mr. Staten, you have talked to your attorney concerning the question of whether or not you should testify or not in this case?
>
> [Defendant]: Yes Sir.
>
> [The Court]: And you understand that if you do testify the State can ask you a lot of questions on cross-examination about your prior record and things of that nature?
>
> [Defendant]: Yes sir.
>
> [The Court]: And you understand that may sway the jury somewhat? Sometimes it does. And it could be that it doesn't work out to your advantage.
>
> [Defendant]: Yes sir.
>
> [The Court]: Are you telling me now that even though you understand the consequences of your decision to testify you still want to go through with it?
>
> [Defendant]: I want to testify and tell everybody like came [sic] behind me and testified after I already testified and say something about me and I want to testify again to clear up what they have said like we did the last time.

Id. at 679-80, 616 S.E.2d at 655.

The Court found "the defendant's replies were lucid and responsive, demonstrating his desire to testify and displaying his understanding of

the consequences of doing so." *Id.* at 680, 616 S.E.2d at 655. These factors demonstrated the defendant was competent to stand trial. *Id.*

Here, two similar colloquies between the trial court and Defendant occurred. The trial court inquired about Defendant's permission for his counsel to admit to the jury he had initiated and participated in the death of Ziegler and the injuries to Venable as a part of his insanity plea. The following colloquy occurred:

> [The Court]: Mr. Williams, if you'll stand, please, sir. I just want to talk to you about some things. You've entered a plea of not guilty by reason of insanity in this case, you understand that?
>
> [Defendant]: Yes, sir.
>
> [The Court]: Your attorney needs your permission if he's to admit to the jury that you, in fact, participated in the death of Mr. Ziegler and the wounding of your mother, Ms. Venable; do you understand that?
>
> [Defendant]: Yes, sir.
>
> [The Court]: In giving that permission, he's written down something that would—you will—you may, if you would want to, stipulate to – or, that is, stipulate to by giving him permission to argue to the jury or make this concession on your behalf.
>
> And that is, "Rodney McDonald Williams does hereby authorize his attorney, Larry Norman, to state that he fired the weapon that caused the death of Leo Zielger and wounded Shirley Venable on October 27, 2007." And you do authorize your attorney to state that on your behalf during your trial; do you understand that?
>
> [Defendant]: Yes, sir.
>
> [The Court]: Now, I want to go over one or two things with you. You understand that you're charged with First Degree Murder; do you understand that?
>
> [Defendant]: Yes, sir.
>
> [The Court]: And that the maximum penalty for that is life in prison, do you understand that?
>
> [Defendant]: Yes, sir.

[The Court]: And you're charged with Attempted First Degree Murder: do you understand that?

[Defendant]: Yes sir.

. . . .

[The Court]: The maximum sentence you could receive on that offense would be 483 months and – minimum, and a whole lot of other things, maximum; I haven't figured that out. Do you understand that?

[Defendant]: Yes, sir.

[The Court]: Now, knowing that, do you give your permission to your attorney to make these arguments to the jury that you and I went over – or make these admissions?

Defendant: Yes, sir.

[The Court]: Has anyone threatened you, promised you anything, coerced you in any way to get you to give your attorney these –

[Defendant]: No, sir.

[The Court]: – this authorization?

[Defendant]: No, sir.

[The Court]: And you find it to be in your best interest for your attorney to be able to make these admissions to the jury on your behalf; is that correct?

[The Defendant]: Yes, sir.

[The Court]: Do you have any questions you want to ask me about making – or giving your attorney the authorization to make those admissions on your behalf?

[The Defendant]: No, sir.

[The Court]: And as you stand right now, you're satisfied with your lawyer's legal services?

[Defendant]: Yes, sir.

[The Court]: And you and he have discussed the possible defenses you might have to these charges, and the insanity defense is one that you're comfortable with and you're satisfied with; is that correct?

[Defendant]: Yes, sir.

Later, the trial court inquired into Defendant's desire to testify:

> [The Court]: Mr. Williams, have you had a chance to talk to Mr. Norman about whether to testify or not?
>
> [Defendant]: Yes, sir.
>
> [The Court]: And have you come to a decision satisfactory to yourself, with nobody forcing you or promising you anything in any way was to what you think your best interest is?
>
> [Defendant]: Yes, sir.
>
> [The Court]: And what have you decided to do?
>
> [Defendant]: I'd like to go forward with the trial, sir.
>
> [The Court]: Well, we'll go forward with the trial, but the question is whether or not you want to testify or not?
>
> [Defendant]: Yes, sir, I want to testify.
>
> [The Court]: Okay. That's fine.

Like the exchanges in *Staten*, these colloquies and Defendant's answers to the trial court's questions also demonstrate and support Defendant's competence. Defendant engaged in a lengthy colloquy with the trial court, Defendant's responses were "lucid and responsive," and his testimony was rational concerning his present beliefs and desire to participate in and testify at his trial. *See Staten*, 172 N.C. App. at 679-84, 61 S.E.2d at 655-58. Defendant's arguments are overruled.

V. Conclusion

Defendant has failed to demonstrate substantial evidence tending to show Defendant's incompetence at any time during his trial. We hold the trial court did not err by not *sua sponte* ordering a further competency hearing.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges DIETZ and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 1 October 2019)

ALMASON v. SOUTHGATE ON FAIRVIEW CONDO. ASS'N, INC. No. 19-147	Mecklenburg (17CVS3714)	Affirmed
BAKER v. WARNER No. 19-186	Mecklenburg (17CVS19102)	REVERSED IN PART; AFFIRMED IN PART; REMANDED.
BURNS v. SKJONSBY No. 18-1094	Forsyth (15CVD7405)	Affirmed in part; Reversed and Remanded in part
EVANS v. POPKIN No. 19-223	Onslow (17CVS3270)	Affirmed
GLAIZE v. GLAIZE No. 19-292	Wake (13CVD31)	Dismissed
GLAIZE v. GLAIZE No. 19-293	Wake (13CVD31)	Dismissed
IN RE A.L.L. No. 19-41	Iredell (11JT30)	Affirmed
IN RE C.S. No. 18-1309	Robeson (11JT318) (12JT281) (16JT226)	Affirmed
IN RE FORECLOSURE OF MOOREHEAD I, LLC No. 19-69	Cabarrus (10SP1813)	Affirmed
IN RE J.D.H. No. 18-880	Guilford (15JT185) (15JT363)	Affirmed
IN RE J.V. No. 19-111	New Hanover (17JT114)	Affirmed in part, Reversed in part, and Remanded.
IN RE K.D. No. 18-1099	New Hanover (13JT296)	Affirmed
IN RE M.J.S. No. 18-1063	Gaston (18JT15)	Affirmed

LITTLE v. LITTLE No. 19-212	Union (09CVD1926)	Affirmed
RIOPELLE v. RIOPELLE No. 19-241	Cabarrus (13CVD179)	Affirmed
STATE v. BATCHELOR No. 19-172	Pitt (16CRS57539)	Dismissed
STATE v. CRAFT No. 19-53	Lincoln (16CRS54501) (16CRS54511)	No Error
STATE v. DAYE No. 18-1142	Vance (16CRS51333)	New Trial
STATE v. GRAHAM No. 19-137	Pasquotank (04CRS52919)	Affirmed
STATE v. HAMPTON No. 18-1119	Cleveland (17CRS53030)	Affirmed
STATE v. JACKSON No. 19-46	Cumberland (15CRS55152)	No Error
STATE v. LONG No. 19-81	New Hanover (17CRS52236)	No Error
STATE v. MASSEY No. 18-1068	Mecklenburg (16CRS244177)	No prejudicial error.
STATE v. McDONALD No. 19-182	Catawba (17CRS3137) (17CRS925-26)	No Error
STATE v. MURDOCK No. 19-107	Iredell (09CRS57228) (12CRS1086)	Affirmed
STATE v. MURRAY No. 19-106	Durham (17CRS57265)	No Error
STATE v. NORRIS No. 19-63	Caldwell (17CRS50227)	No Error
STATE v. PALACIOS No. 19-128	Mecklenburg (16CRS203347) (16CRS203354-55)	NO PREJUDICIAL ERROR

STATE v. TAYLOR No. 19-95	Surry (11CRS54490) (11CRS54495) (11CRS705020)	Reversed and Remanded
STATE v. THOMAS No. 18-976	Cabarrus (15CRS55742) (16CRS51886) (17CRS2000)	No Error
STATE v. THORNE No. 19-159	New Hanover (17CRS51278)	No Error
STATE v. TYRER No. 19-23	Onslow (16CRS54984)	No Error
STATE v. VORHEIS No. 18-1219	Buncombe (16CRS93264)	Affirmed
YIGZAW v. ASRES No. 19-12-2	Davidson (12CVD257)	VACATED AND REMANDED FOR FURTHER PROCEEDINGS

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CONSTITUTIONAL LAW—Continued

EVIDENCE—Continued

from an automotive parts business, the trial court did not commit plain error by admitting testimony from the detective on the case, who stated that an employee of another automotive parts company told him that defendant had sold several fuel injectors to the company. This testimony was not hearsay because it was offered to describe the detective's investigation rather than to prove the matter asserted (that defendant stole the fuel injectors). Moreover, based on other evidence of defendant's guilt, it was unlikely that the jury would have reached a different verdict had the testimony been excluded. **State v. Stephenson, 475.**

Impaired driving—expert testimony—drug recognition expert—impairing effects of drugs—In a prosecution for impaired driving, the trial court did not abuse its discretion by allowing testimony from an expert witness regarding the effects of drugs on defendant. A certified drug recognition expert's testimony comparing the signs and symptoms exhibited by defendant on the night of her traffic stop with the drug categories identified from defendant's blood sample was admissible pursuant to Evidence Rule 702(a1)(2), and the expert's testimony evaluating the results of a trooper's standardized field sobriety tests was not prejudicial, even if allowed in error, where the trooper's similar testimony about the test results was properly admitted under Rule 702(a1)(1). **State v. Neal, 442.**

Impaired driving—expert testimony—forensic toxicology—impairing effect of drugs—In a prosecution for impaired driving, the trial court did not abuse its discretion by allowing testimony from an expert on forensic toxicology that a substance found in defendant's blood was "active" and "having an effect on [defendant's] body." The expert explained that "active" means a substance that has an effect on the body and clarified that she could not affirmatively state whether the substance had an impairing effect on defendant. **State v. Neal, 442.**

Indecent liberties—expert testimony—references to victim's "disclosure" of allegations—In a prosecution for taking indecent liberties with a child in which no physical evidence was introduced, no plain error occurred by the admission of expert testimony using the terms "disclosure," "disclose," and "disclosed" to describe the victim's recounting of alleged incidents involving defendant. That terminology did not constitute an improper vouching of the victim's credibility, and the jury had the opportunity to assess the evidence and make an independent determination about the victim's credibility. **State v. Betts, 272.**

Indecent liberties—forensic interview with child victim—redacted report—credibility vouching—In a prosecution for taking indecent liberties with a child, where defense counsel approved a redacted version of an expert's report (which summarized a forensic interview the expert conducted with the victim) and did not renew an objection to the report, the report's admission did not constitute plain error. Although defendant argued the report impermissibly vouched for the victim's credibility by including the expert's impressions that the victim's demeanor appeared to be consistent with someone who was sexually abused and that the victim understood the difference between telling the truth versus a lie as well as a reference to defendant as the victim's "assailant," any error was invited. **State v. Betts, 272.**

Indecent liberties—past incidents of domestic violence—probative of victim's motivation—delay in reporting crimes—In a prosecution for taking indecent liberties with a child where the victim delayed reporting abuse, the trial court's admission of evidence relating defendant's past incidents of domestic violence against the victim and her mother did not constitute plain error. Pursuant to

SEARCH AND SEIZURE

WORKERS' COMPENSATION—Continued

and asbestosis, since the evidence was relevant to the issues in the case. **Hinson v. Cont'l Tire The Ams., 144.**

Evidence—asbestosis—non-medical expert testimony—In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission was free to consider and rely on non-medical expert testimony in addition to medical expert testimony on the issue of whether plaintiffs established a causal connection between their work and development of alleged asbestosis or related illnesses, and to determine what weight to give each piece of evidence. **Hinson v. Cont'l Tire The Ams., 144.**

Occupational diseases—asbestosis—burden of proof—causation—section 97-53 factors—In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission (IC) did not place an impermissible burden on plaintiffs by requiring them to establish their level of exposure to asbestos at work pursuant to the standard and factors stated in N.C.G.S. § 97-53 (even though that section was applicable to "chemicals herein mentioned," not asbestos). Plaintiffs were required to prove that their work at the factory was a significant causal factor in the development of their alleged asbestosis, which could be accomplished by showing they were exposed to asbestos in a certain form, quantity, and frequency over time. Further, the IC's unchallenged ultimate finding—that plaintiffs' failure to prove causation relieved the employer of liability—did not include the language to which plaintiffs objected. **Hinson v. Cont'l Tire The Ams., 144.**

Occupational diseases—colon cancer—tonsil cancer—ultimate findings—In a workers' compensation action in which numerous former employees of a tire factory alleged occupational asbestos exposure which led to illness, the Industrial Commission's ultimate findings of fact (resolving mixed questions of law and fact)—including those stating that plaintiffs failed to prove that either colon cancer or tonsil cancer were occupational diseases compensable under Chapter 97—were supported by competent evidence. **Hinson v. Cont'l Tire The Ams., 144.**